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

COURT OF APPEALS **STATE OF NEW YORK**

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

Appellants.

-against-

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

Respondents.

BRIEF FOR APPELLANTS

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Dated: September 18, 2006

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I. STATEMENT OF JURIDICTION

This action was commenced in the Supreme Court, Albany County, by Verified Petition and Complaint ("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 the Court of Appeals, 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 Complaint 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. (R. 438 – 442.) 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. 443 – 444.) Appellants moved the Court of Appeals for leave to appeal on May 4, 2006. That motion was granted on July 5, 2006. (R. 437.)

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. (R. 438 – 442.)

II. STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether, when a state agency and a private corporation unlawfully impose a surcharge on telephone customers to fund the agency's general operations, each unlawful billing 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; 441.)

2. Whether, when a state agency and a private corporation unlawfully impose a surcharge on telephone customers to fund the agency's general operations, and the telephone customers seek: (a) a declaration that the tax violates various provisions of the New York State Constitution; (b) an order enjoining continued collection of the tax; and (c) an order to return money unlawfully collected, all such 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; 439 – 440.)

3. Whether, when a state agency and a private corporation agree upon a new structure to unlawfully impose a surcharge on telephone customers to fund the agency's general operations, and the telephone customers may only seek relief through Article 78, their claims accrue before the rate is approved by the Public Service Commission ("PSC") and charged to collect-call recipients? The Supreme Court and the Appellate Division answered this question in the affirmative. (R. 24 – 25; 440 – 441.)

4. Whether, when the PSC finds the portion of a telephone rate filed by a private telephone company that is attributable to a state agency's demand for a tax to fund its general operations is not a part of the just and reasonable telephone rate, and that portion of the rate is billed and collected from private telephone customers despite that finding, telephone customers can seek enforcement of the PSC finding in the form of relief from the continued billing and collection of the tax by the state agency and the private company? The Supreme Court answered this question in the negative, and the Appellate Division affirmed. (R. 24 – 25; 441.)

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' rights to due process, freedom of speech and association, equal protection and the General Business Law? 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; 441 – 442.)

Appellants respectfully seek reversal on each of these questions.

III. NATURE OF THE CASE & RELEVANT FACTS

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 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 fee is: (a) an illegal and unlegislated tax in violation of Articles I, III, and XVI of the New York State Constitution; (b) a taking of Appellants' property without due process of law in violation of Article I §§ 6 and 8 of the State Constitution; (c) a violation of Appellants' rights to equal protection guaranteed by Article I § 11 of the State

Constitution; (d) a violation of Appellants' 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. (R. 47.) Pursuant to contracts between MCI and DOCS signed on April 1, 1996 and August 1, 2001, MCI is the exclusive provider of telephone services to the New York State Department of Correctional Services. (R. 33; 220 – 431.) The 2001 contract ran through March 31, 2006, with the option of two, one-year renewals. (R. 228.) Upon information and belief, NYSDOCS has exercised this option and renewed the contract for an additional one-year term. 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 was the subject of a PSC 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 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 number 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 a 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 portion of the entire telephone charge. (R. 88.) The PSC reasoned that because DOCS is not a telephone corporation subject to the Public Service Law, the PSC does not have jurisdiction over either the Department or the tax it charges. (R. 88.) The PSC called the non-jurisdictional portion of the total charge the "DOCS commission," and referred to the other portion of the rate, the 42.5 percent retained by MCI, as the "jurisdictional rate." (R. 88.) The PSC reviewed the jurisdictional 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 Service Law. (R. 89.) The PSC did not undertake *any* review of the reasonableness of the DOCS tax or of the entire combined rate. (R. 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 jurisdictional rate that the PSC approved as a just and reasonable telephone rate, and the unapproved 57.5 percent "DOCS commission." (R. 32.)

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 and punitive 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.) In response, Appellants filed this action in the Supreme Court, Albany County.

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.) By Decision and Order decided and entered on

January 19, 2006, the Appellate Division, Third Department affirmed the decision of the court below. (R. 438 – 442.) For the reasons explained below, each of Appellants' claims is timely, and properly states a claim for relief. Appellants respectfully request that this Court reverse the Appellate Division's decision and hold that on the facts alleged, Appellants have properly stated a claim for violation of their rights under the Constitution and laws of the State of New York.

IV. ARGUMENT

The Appellate Court dismissed Counts II – VI of the Complaint as untimely, and dismissed Counts I and VII for failure to state a claim. (R. 441 – 442.) To affirm the lower court's dismissal of Appellants' statutory and constitutional claims, the Appellate Division held that (1) the 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; rather than on October 30, 2003, the effective date of the PSC Order reviewing and implementing the new rate; and (3) that the continuing violation doctrine does not apply. (R. 440 – 441.) The Appellate Division went on to find nothing to enforce in the PSC's order, no cause of action under the General Business Law, and that Appellants were not entitled to an accounting. (R. 441.)

These errors 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. Each claim is not only timely, but also states a valid claim for relief under New York law. Each point of error requires this Court to reverse the Appellate Division's decision, and reinstate Appellants' claims.

A. THE COURTS BELOW ERRED IN DISMISSING COUNTS II – VI AS TIME BARRED.

Each of the Appellate Division's statute of limitations' holdings is in error, and requires reversal. First, Appellants' claims are timely no matter what statute of limitations applies, as they challenge continuing illegal acts by Respondents. Second, since Appellants seek relief unavailable through an Article 78 proceeding, Counts II - V are subject to the six year catch-all statute of limitations applicable to actions for a declaratory judgment.[1] For this reason, Appellants are entitled to seek damages for Respondents' actions over the past six years. Finally, even if this Court determines that Appellants' claims are properly subject to the four month statute of limitations applicable to Article 78 proceedings, it should find that Respondents' actions did not become final and

[1] Claim VI, brought under the General Business Law, is subject to a three year statute of limitations. (See Gaigon v. Guardian Life Ins. Co. of Am., 96 NY2d 201, 208 – 210 [2001].)

binding for Article 78 purposes until October 30, 2003, less than four months prior to the commencement of this action.

1. The Appellate Division Erred in Failing to Recognize the Applicability of the Continuing Violation Doctrine.

In Counts II – V of the Petition, Appellants seek a declaration that Respondents' continuing collection and retention of the DOCS tax violates their rights under the Constitution of the State of New York. As Appellants argued to the lower courts (R. 24, 441), they are forced to pay this tax each time they are billed for collect calls from DOCS prisoners, and thus their constitutional challenge accrues each month, and cannot be time-barred.

Under New York law, the statute of limitations begins to run at the time the cause of action accrues. (CPLR 203(a).) 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 FSupp 977, 982 [SDNY 1996]) (internal citations omitted).) In a challenge to a continuing wrong, the statute of limitations may bar recovery outside the statutory period, but it will not render the case untimely. (See e.g. Colrick v. Swinburne, 105 NY 503, 507 [1887] (in challenge to wrongful diversion of water over more than six years, plaintiff could recover all damages that accrued in the six years prior to commencement of the action); General Precision, Inc. v. Ametek, Inc., 20 NY2d 898 [1967] (in challenge to breach of contract regarding

use of confidential information, cause of action arose on each occasion of alleged failure to perform such that the operative six year statute of limitations barred only those causes of actions that arose prior to six years before commencement of the action).)

The continuing violation doctrine was first developed in the context of physical trespass on land (see e.g. Uline v. New York Central and Hudson River R.R. Co., 101 NY 98 [1886]) but has since been recognized by this Court in myriad situations. (See Covington v. Walker, 3 NY3d 287, 289 [2004] (incarceration for a period of three years is a continuing ground for divorce); Burke v. Sugarman, 35 NY2d 39, 45 [1974] (failure to comply with constitutional requirements for making appointments to competitive positions is a continuing and constitutional wrong); Hacker v. State Liquor Authority, 19 NY2d 177, 184 [1967] (unauthorized use of liquor license is a continuing violation).)

In each context, every unlawful act gives "rise to a separate cause of action.... the loss through lapse of time of the remedy for one wrong has ...no effect upon the remedy for the others." (Green v. Petersen, 218 NY 280, 281 [1916]; see also Hacker, 19 NY2d at 184 ("If the illegal conduct continued in 1961 and 1962, and even into 1967, without question it 'occurred' in each of those periods. It is inconceivable that, merely because a violation commenced in 1961, it did not 'occur' in 1962...").)

Respondents' monthly billing, collection, and retention of the DOCS tax are discrete and affirmative measures, each of which gives rise to a new cause of action. If, as the lower courts held, the correct statute of limitations to apply to this case is four months (R. 23 – 24, 440), Appellants may only recover damages for the billings that occurred in the four months prior to commencement of this action. If on the other hand, the Court agrees with Appellants that the six year statute of limitations for declaratory judgments applies, Appellants may recover for all billings made in the six years prior to commencement of this action. In either case, the lower court erred in dismissing the action as untimely.

The Appellate Division made this error in reliance upon its decision in Bullard v. State (307 AD2d 676 [2003]), involving a Court of Claims challenge to an earlier incarnation of the same taxation scheme. Both the Bullard and Walton courts erroneously failed to apply 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 harm" rather than continuing unlawful conduct. (Bullard, 307 AD2d at 678; R. 441) As both cases are in error, this Court should reverse Walton and overrule Bullard.

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].) While Commack and Selkirk support the well-established proposition that the continuing harm doctrine requires continuing unlawful acts, not just the continuing effect of earlier unlawful conduct, (see Commack Self-Service Kosher Meats, Inc., 270 AD2d at 688; Selkirk, 249 AD2d at 819), these cases do not support the Appellate Division's erroneous classification of repeated unlawful acts caused by an identifiable triggering event as mere "continuing harm."

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 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 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.)

In distinguishing between mere continuing harm and a continuing violation, "the primary consideration must be what the plaintiff claims the defendant did." (Sporn v. MCA Records, Inc., 58 NY2d 482, 488 [1983].) For example,

> [i]f defendant hits plaintiff's horse repeatedly, plaintiff has a new cause of action upon each striking; but if defendant destroys plaintiff's horse, or takes it and claims it as its own, plaintiff's right accrues immediately and he must sue within the period of limitation measured from that date – or never.

(Id. at 487.)

Bullard and Walton involve a continuing serious of unlawful acts by Respondents. (R. 32.) That they flow from one identifiable cause – the making of a contract – does not change the analysis. Prior to the Bullard and Walton decisions, New York courts, including the Court of Appeals, have consistently

applied the continuing wrong 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. (See e.g. Grossman v. Rankin, 43 NY2d 493 [1977].) Indeed, such application is consistent with the doctrine's origin in trespass cases, in which the alleged wrongful conduct generally begins with a single identifiable act of construction. In 509 Sixth Avenue Corp., v. New York City Transit Authority (15 NY2d 48, 50 [1964]), for example, the plaintiff brought an action in 1960 to recover for trespass involving an underground encroachment belonging to the Sixth Avenue Subway, completed in 1939. Although the encroachment was a permanent structure created long outside the three year statute of limitations period, the trespass on plaintiff's property continued, and gave rise to successive causes of action. (Id. at 52.)

This Court has since applied the doctrine in cases that are indistinguishable from Walton. In Grossman v. Rankin (43 NY2d 493 [1977]), for example, the plaintiffs challenged 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 Appellate Division's Bullard / Walton analysis is wholly inconsistent with this Court's application of the continuing violation doctrine in Grossman, as it would require characterization of the attorneys' continued employment as the mere effect of one earlier unlawful action.

Bullard and Walton also conflict with earlier decisions within the Appellate Division, Third Department. In Cahill v. Public Service Commission (113 AD2d 603 [3d Dept 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 Yonkers judges. (159 AD2d 163, 166-67

[3d Dept 1990].) The State conceded 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).)

Here, the lower courts' flawed reasoning is apparent in the profound injustice of the result: under the holdings 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 without the opportunity for judicial review. Unless this court reverses the Appellate

Division's holding, thousands of bill-payers who never had an opportunity to challenge the contract's formation will be forced to wait until that contract and the two one-year extensions expire in spring of 2008 to challenge their monthly billings.

2. The Appellate Division Erred in Finding that Appellants Seek Relief Available through an Article 78 Proceeding.

Appellants' claims are timely even if the Court does not apply the continuing violation doctrine. As Appellants argued to the courts below, their claims are subject to the six year catch-all statute of limitations applicable to actions for a declaratory judgment. (CPLR 213; R. 11, 439.) Those courts rejected Appellants' argument, and instead held that each count of the Complaint, can be resolved through Article 78 review, and is thus subject to Article 78's four month statute of limitations. (R. 4 – 6; 440.)[2]

Assessing the proper statute of limitations for a combined Article 78 / declaratory judgment action requires the Court to

> examine the substance of that action to identify the relationship out of which the claim arises and the relief sought -- If that examination reveals that the rights of the parties sought to be stabilized in the action for declaratory relief are, or have been, open to resolution through a form of proceeding for which a specific limitation period is statutorily provided,

[2] Appellants urge the Court to reach the issue of which statute of limitations applies regardless of its analysis of the applicability of the continuing violation doctrine, as the operative statute of limitations period will determine how far back Appellants may claim damages. (Colrick, 105 NY at 507.)

then that period limits the time for commencement of the declaratory judgment action.

(Solnick v. Whalen, 49 NY2d 224, 229 – 230 [1980] (internal citations and quotation marks omitted).)

Appellants seek relief that is not available through an Article 78 proceeding. In Counts II through V, Appellants request a declaration from the Court that the DOCS surcharge is: (1) an illegal and unlegislated tax in violation of Articles I, III, and XVI of the State Constitution; (2) a taking of Plaintiffs' property without due process of law, in violation of Article I §§ 6 and 8 of the State Constitution; (3) a violation of Plaintiffs' right to equal protection guaranteed by Article I § 11 of the State Constitution; and (4) a violation of Plaintiffs' speech and association rights guaranteed by Article I § 8 of the State Constitution. (R. 56 – 62.)

Under CPLR 7803, Article 78 proceedings provide for four limited types of review:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

Counts II through V cannot be adequately addressed through any of these four discrete categories because Appellants do not seek certiorari review of any procedure utilized by DOCS, MCI or the PSC, or any determination made by DOCS, MCI or the PSC; nor can they seek mandamus review to prohibit action taken by DOCS, MCI or the PSC in excess of jurisdiction.

This Court's decision in Saratoga County Chamber of Commerce, Inc., v. Pataki (100 NY2d 801 [2003]), is instructive. In Saratoga County plaintiffs challenged Governor Pataki's authority to enter into agreements with Indian tribes to permit casinos on reservations without legislative authorization. (Id. at 808.) The plaintiffs sought a declaration that the agreement violated separation of powers and an injunction against its implementation. (Id. at 815.) In deciding whether Article 78 could provide plaintiffs their remedy, the Court compared the relief sought by plaintiffs to an Article 78 writ of prohibition, where an official is proceeding "without or in excess of jurisdiction." (Id.) As such a writ is not available under Article 78 against executive officials, the Court held that Article 78's four month statute of limitations could not apply. (Id.)

Similarly, Appellants seek a declaration that Respondents acted outside their authority in levying an unauthorized and prejudicial tax that violates Appellants' constitutional rights. Contrary to the Appellate Division's opinion, Appellants could not gain the requested relief by a determination that the

"provision of the 2001 contract providing for the commission" was "affected by error of law" under Article 78, question 3 (R. 440) because contracting to collect and retain the DOCS commission was not a legitimate agency action.

The nature and availability of Article 78 review depends on the type of agency action being challenged. (See generally Lakeland Water District v. Onondaga County Water Authority, 24 NY2d 400 [1969]; Solnick v. Whalen, 49 NY2d 224 [1980]; New York Health and Hospitals Corporation v. McBarnette, (84 NY2d 194 [1995].)

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. (Solnick, 49 NY2d at 230 – 32.) The Court

of Appeals explained that, contrary to certain precedent, 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.)

Finally, in New York City Health and Hospitals Corporation v. McBarnette, this Court shed considerable light on the issue by abandoning the prior syllogism that quasi-legislative acts are *necessarily* unsuitable for Article 78 review. (84 NY2d at 203 – 204.) The Court explained that quasi-legislative acts are not *true* legislative acts by legislative bodies, and thus may conceivably be challenged through an Article 78 proceeding without running afoul of separation of powers doctrine. (Id.) Despite this break from prior precedent, the Court affirmed the Solnick principle that most generally applicable quasi-legislative actions by administrative bodies, especially those made without notice and hearing, are not subject to Article 78 review. (Id.) At the same time, it 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." (Id. at 204 – 205.)

In Walton, the Appellate Division interpreted the Court's 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. (R. 440.) 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 such 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 of the constitutionality of the agency's action. (See e.g. Save the Pine Bush v. 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); Matter of Jones v. Amicone, 27 AD3d 465, 470 [2006] (action to prevent City from acting outside the scope of its authority in violation of the public trust doctrine is not open to resolution under Article 78); Martin Goldman, LLC v. Yonkers Indus. Dev. Agency, 12 AD3d 646, 648 [2004] (Article 78 proceeding is not the proper vehicle for complaint that defendant agency acted outside the scope of its authority); 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).)

Appellants seek relief for constitutional claims unavailable through an Article 78 proceeding, and thus their claims are subject to the six year statute of limitations applicable to actions for declaratory judgment. As such, this Court

should reverse the Appellate Divisions' ruling, and hold that Appellants may seek damages for Respondents' unlawful acts in the six years prior to commencement of this action.

3. The Appellate Division Erred in Holding that Appellants' Claims Accrued, at the latest, on July 25, 2003.

Contrary to the lower courts' holdings, Appellants have stated a timely challenge to the *current* rate structure even if their challenge to the *earlier* rate structure is barred. As explained in detail in the Complaint, MCI and DOCS have acted in concert to impose the DOCS tax on Appellants and putative class members since 1996. (R. 33.) The Contract that currently controls this relationship was signed in 2001, and was renewed, upon information and belief, in 2006. (Id.) On August 15, 2003, MCI filed revised tariffs setting out the new rate to be charged to the recipients of prisoners' collect calls. (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.) By order effective October 30, 2003, the PSC held that it did not have jurisdiction over the DOCS tax and approved only 42.5% of the total amount charged to Appellants as a "just and reasonable" telephone rate. (R. 88 – 89.)

After construing Appellants' claims as properly brought under Article 78, the court below went on to find that Appellants' claims accrued when the contract amendment setting out the current rates was approved by the Comptroller, on July 25, 2003. (R. 441.) If this Court disagrees with Appellants, and finds that Appellants seek relief available through Article 78, the Appellate Division's decision should still be reversed. Appellants' claims should be reinstated because the proper accrual date for any Article 78 claim fairly raised by the Complaint is October 30, 2003, the effective date of the PSC's ruling on the new rate structure. (R. 67.)

The CPLR provides that "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." (CPLR 217 (2)(b); see also Martin v. Ronan, 44 NY2d 374, 380 [1978].) This Court has identified two requirements for determining when agency action is "final and binding." (Best Payphones, Inc. v. Dep't of Info. Tech. and Telecomms., 5 NY3d 30, 34 [2005].) The agency must first have reached a definitive position on the issue that inflicts actual, concrete injury, and second "the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." (Id.)

If the challenged agency action may be corrected by a successful administrative challenge, it is not yet an actual, concrete injury. In Matter of Eadie v. Town Bd. of N. Greenbush, for example, the Court considered a challenge to land rezoning to permit retail development. (2006 NY Slip Op 5236 [U], 2006 NY LEXIS 1833, *1.) The Court held that petitioners did not suffer a concrete injury, and thus the cause of action did not accrue, until the Town Board approved the rezoning. (Id. at *12.) The Court disregarded the date of the alleged violations, and the date in which a Findings Statement was issued. (Id. at *10 – 11.) Until the final Town Board decision, petitioners' injury was merely "contingent; [petitioners] would have suffered no injury at all if they had succeeded in defeating the rezoning through a valid protest petition, or by persuading one more member of the Town Board to vote their way." (Id. at *12; see also Matter of City of New York , 6 NY3d 540, 548 [2006] (City Planning Commission resolution regarding condemnation of property was not final until expiration of 20-day period during which petitioner could have requested substantive review by the City Council); Essex County v. Zagata, 91 NY2d 447, 453 [1998] ("an agency's position will not be considered final if it is tentative, provisional, or contingent, subject to recall, revision, or reconsideration") (citations and internal quotations omitted).)

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 exercised their option under the Public Service Law and filed comments criticizing the new rate scheme before the body that regulates intrastate telephone rates. (R. 124 – 153.) 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 implication of 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], affd 34 NY2d 904 [1974].) Had Appellants gone directly to the Supreme Court before the PSC reviewed the elements of the new proposed rate and determined that it lacked jurisdiction over the DOCS Commission portion of the rate, the case would likely have been dismissed as un-ripe for judicial review. (See e.g. Church of St. Paul & St. Andrew v. Barwick, 67 NY2d 510, 522 [1986] (holding church's claim that landmarks law is unconstitutional un-ripe for judicial review because petitioner had not yet sought and been denied approval of rebuilding plans).)

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. (R. 441.) 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. Because further agency proceedings might have "render[ed] the disputed issue moot or academic," the agency position could not yet be considered "'definitive' or the injury 'actual' or 'concrete.'" (Essex County, 91 NY2d at 454.) Had the PSC asserted jurisdiction over the entire rate charged to recipients of prisoners' collect calls and approved that rate as just and reasonable, Appellants would certainly have challenged that determination through a timely Article 78 proceeding against the PSC. When the PSC instead determined that the DOCS surcharge was not a part of the lawful telephone rate, an Article 78 challenge to the continuing collection of the unlawful tax in the State Courts became ripe.

Finally, it is unclear why the lower court dismissed as untimely Count VI, seeking a declaration that DOCS' actions constitute deceptive business practices under the General Business Law. (R. 62 – 63, 441.) General Business Law claims are subject to a three year statute of limitations. Gaigon v. Guardian Life Ins. Co. of Am., 96 NY2d 201, 208-210 [2001]. Even accepting the Appellate

Division's holding that Appellants' claims accrued on July 25, 2003, Count VI, brought on February 25, 2004, is clearly timely.

B. THE COURTS BELOW ERRED IN DISMISSING COUNT I, SEEKING ENFORCEMENT OF THE PSC ORDER.

In Count I of the Petition, Appellants seek a declaration that Respondents' collection and retention of the DOCS tax is unlawful, and an order restraining Respondents from collecting *any* charges or fees for prisoners' collect calls over the jurisdictional rate filed by MCI and approved by the PSC. (R. 55.) The courts below acknowledged the timeliness of Count I, but dismissed it by reasoning there is "nothing to enforce" as Respondents have "fully complied with the PSC's order." (R. 13, 441.) The lower courts erred in this reasoning.

As explained in detail above, Appellants commenced this action after unsuccessfully petitioning the PSC to review the new rate structure set by contract amendment dated July 25, 2003. (Supra, Sect. III.) After considering Appellants' comments, the PSC issued an order explaining that it lacked jurisdiction over the DOCS tax portion of the entire telephone charge, and ordering MCI to file a bifurcated rate. (Id.)

By Count I, Appellants seek the Court's recognition that the DOCS tax was not approved as "just and reasonable" by the PSC, and thus is not a valid telephone rate, and cannot be collected and retained by Respondents in exchange for telephone services.

The New York Public Service Law creates a comprehensive scheme for fixing rates that telephone providers may charge their customers. (NY Pub Ser § 90, et seq. [2006].) Each telephone service provider must file all rates and proposed rate changes with the PSC. (Id. at § 92.) Under the Public Service Law, providers may not charge or collect a rate that is not "just and reasonable."

> All charges made or demanded by any telegraph corporation or telephone corporation for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order of the commission. Every unjust or unreasonable charge made or demanded for any such service or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited and declared to be unlawful."

(Id. at § 91(1).) It cannot be disputed that the DOCS tax is a fee charged and collected "in connection" to telephone service that is over and above the "jurisdictional rate" declared just and reasonable by the PSC. (See, R. 20 – 25.) As such, it unlawful, and should be enjoined.

While the PSC did not explicitly order this result, the law requires that telephone providers "do everything necessary or proper in order to secure compliance with and observance of every [PSC] order…*according to its true intent and meaning*." (NY Pub. Ser. § 97(2) (emphasis added).) Enjoining collection of the DOCS commission is required by a fair reading of the Order in the context of the Public Service Law, under which "[n]o utility shall charge, demand, collect or receive a different compensation for any service rendered or

to be rendered than the charge applicable as specified in its schedule on file and in effect. Nor shall any utility refund or remit directly or indirectly any portion of the rate or charge so specified...except such as are specified in its schedule filed and in effect...." (NY Pub. Ser. §92(2)(d).)

Read in the context of the Public Service Law cited above, the PSC's finding that only the "jurisdictional portion" of the prison telephone rate is just and reasonable necessarily implies that Respondents are prohibited from collecting any amount beyond this jurisdictional rate. (Id.) State and federal decisional authority also support this conclusion, as a surcharge that increases the rate a customer pays over the tariffed rate is invalid. For example, in People ex rel. Public Service Commission v. New York Telephone Co., (262 AD 440, 441 [3d Dept. 1941], affd, 287 NY 803 [1942]), the court considered whether hotels may charge guests for telephone service in excess of the rate specified in the tariff schedules. The hotels attempted to justify the practice as a charge for hotel services only, not subject to regulation by the PSC. (Id. at 442.) The court held that because the hotel was primarily providing telephone service their rates could not exceed the filed rate held just and reasonable by the PSC. (Id. at 443 – 444; see also, United States v. AT&T, 57 FSupp 451 [SDNY 1944], affd sub nom, Hotel Astor v. United States, 325 US 837 [1945] (per curiam) (hotel surcharge which raises cost of call over tariffed rate is invalid and should be enjoined).)

These cases are directly analogous to the one at hand: because DOCS' surcharge raises the cost of inmate calls above the rate approved by the PSC, it is unlawful. (NY Pub. Ser. § 91(1).)

The mere fact that MCI filed the bifurcated rate pursuant to the PSC Order does not legitimize the DOCS tax. (R. 433 – 434.) The PSC has jurisdiction to review any rate or charge that has been "filed" with the Commission. (NY Pub. Ser. §92(2)(e).) Although the DOCS tax is identified on MCI's tariff, it cannot be a "filed rate" within the meaning of the Public Service Law because the PSC, by its own admission, lacks jurisdiction over that portion of the MCI billing and the manner by which it came about. (R. 89 – 90.) Since the PSC does not have jurisdiction over the DOCS tax, the DOCS tax is not truly part of MCI's "filed rate" as defined by the Public Service Law and Respondents must cease billing, collecting, and retaining it.

In conclusion, Count I seeks "enforcement" of the PSC order because Respondents have not complied with the Order "according to its true intent and meaning." (NY Pub. Ser. §97(2).) The DOCS tax has not been approved by the legislature or the PSC and is not a "filed rate" under the Public Service Law. It is an unauthorized charge assessed upon Appellants and putative class members with no basis in law. For this reason, Appellants seek an order from this Court reversing the lower courts' dismissal of Count I, declaring the DOCS tax

unlawful, prohibiting MCI and DOCS from continuing to collect it, and requiring Respondents to return all of the unlawfully collected tax.

C. THE LOWER COURTS ERRED IN FAILING TO ASSESS APPELLANTS' PROPERLY PLED AND SUPPORTED CLAIMS.

In Counts II through VI of their Complaint, Plaintiffs allege that the DOCS telephone tax is: (1) an unlegislated tax imposed in violation of Articles I, III, and XVI of the State Constitution; (2) a taking of Appellants' property without due process of law in violation of Article I, §§ 6 and 8 of the State Constitution; (3) a violation of Appellants' right to equal protection guaranteed by Article I, § 11 of the State Constitution; (4) a violation of Appellants' speech and association rights guaranteed by Article I, § 8 of the State Constitution; and (5) a deceptive act or practice in violation of General Business Law § 349. (R. 56 – 65.) The court below dismissed each claim as untimely. As shown above, (supra, Section IV.A), dismissal on statute of limitations grounds was erroneous. As shown below, each count adequately states a claim for relief and should be reinstated by this Court.

1. The DOCS Surcharge is an Unlawful Tax in Violation of Separation of Powers, and Appellants' Due Process Rights.

In Count II of the petition, Appellants seek a declaration that the DOCS surcharge is an unlawful tax, levied by the State in violation of separation of powers, and substantive due process. While the PSC could only say what the

DOCS surcharge is *not* – a telephone rate – this Court can state what it *is*: an unauthorized tax unlawfully levied against a discrete group of New York State residents for the use of the general public good. In support of this claim, Appellants have alleged that (a) MCI remits to DOCS a "commission" of 57.5 percent of its gross annual revenue from operating the prison telephone system (R. 33); (b) to finance this "commission," MCI charges recipients of prisoners' collect calls a surcharge of $3.00 for every call accepted (R. 33); (c) the surcharge is paid by Appellants to MCI, tendered by MCI to the State, and deposited by the State into the general fund (R. 46); (d) these funds are then earmarked and appropriated to DOCS for its "Family Benefit Fund" (R. 35); (e) the Family Benefit Fund monies are used to cover the costs of Departmental operations wholly unrelated to the maintenance of the prison telephone system (R. 35); and (f) the DOCS telephone tax has neither been authorized by the State Legislature nor approved as a legitimate component of MCI's filed telephone rate by the PSC. (R. 36). No more is necessary to adequately plead the imposition of an unlawful tax.

i. The DOCS charge is properly analyzed as a "tax" rather than a "user fee" or "commission."

In categorizing charges, the New York Courts are clear that any fee which is levied to raise revenue and exceeds a reasonable relationship to the cost of its service is a tax. (See American Ins. Assn. v. Lewis, 50 NY2d 617, 622-23 [1980]

(holding "capping provision" a tax, rather than a fee, when it bears no relation to the cost to the State of administering the program); Torsoe Bros. Constr. Corp. v. Bd. of Trustees, 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"); 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).)

Valid user fees, as distinguished from taxes, are intended to defray the costs of the services to which they are attached. (Jewish Reconstructionist Synagogue, Inc. v. 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 Builders Assn. v. County of Suffolk, 46 NY2d 613 [1979].) In addition to the required connection between a user fee and the actual cost of the service provided, user fees must -- by definition -- represent "a visitation of the costs of special services upon *the one who derives a benefit from them,*" (Jewish Reconstructionist Synagogue, 40 NY2d at 162 (emphasis added)) and must be used to finance the *same service* to which they are pegged, not merely any

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

The DOCS tax fails each of these requirements. DOCS uses only 1.5 percent of the revenue it receives from the surcharge to cover the costs of operating the prison telephone system. (R. 102.) While the Family Benefit Fund does in (very small) part benefit Appellants and others who receive collect calls from prisoners, almost all of the money levied through the DOCS tax pays for unrelated services which would otherwise be paid for out of the State's or DOCS' general budget. (R. 94-103.) 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. 102.) Because the DOCS surcharge is not reasonably related to the necessary costs to DOCS of providing prison telephone service, and the monies Appellants pay fund unrelated programs that are beneficial to all New Yorkers, the surcharge is an unlawful tax and not a legitimate user fee.

Similarly, the DOCS surcharge cannot be explained away as a valid telephone service "commission." Valid commissions are specifically based on expenses incurred by telephone companies to gain access to property in order to be able to provide services there, (In re AT&T's Private Payphone Comm'n Plan, 3 F.C.C.R. 5834, ¶ 20 [1988]), and must be included in the tariffed rate. (Id.)

Not only does the DOCS tax far exceed any cost related to gaining access to the prisons, but it cannot be a valid commission because it is not claimed as an expense by MCI included in its filed rate.

Furthermore, the decisional authority make clear that "commissions" that increase the rate a customer pays over the tariffed rate are invalid. (NY Pub. Ser. §91(1); see also People ex rel. Public Serv. Comm'n v. New York Tel. Co., 262 AD2d 440, 444 [1941], affd, 287 NY 803 [1942] (hotel cannot impose surcharge over filed rate); United States v. AT&T, 57 FSupp 451 [SDNY 1944], affd sub nom, Hotel Astor v. United States, 325 US 837 [1945] (per curiam) (hotel surcharge which raises cost of call over tariffed rate is invalid and should be enjoined).)

ii. The DOCS Tax Violates Separation of Powers and Appellants' Right to Due Process of Law

As a tax, the DOCS surcharge is unauthorized by the legislature, and thus illegal. The law in New York is eminently clear that "the exclusive power of taxation is lodged in the State Legislature." (Castle Oil Corp. v. City of New York, 89 NY2d 334, 338 [1996] (citing N.Y. Const., Art. XVI, §1).) While the taxing power may be delegated to "legislative bodies of municipalities and quasi-municipal corporations . . . [t]he power to tax *may not . . . be delegated to administrative agencies or other governmental departments*." (Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie, 81 NY2d 574, 580 [1993]

(internal citations omitted, emphasis added).) "Only after the Legislature has, by clear statutory mandate, levied a tax on a particular activity, and has set the rate of that tax, may it delegate the power to assess and collect the tax to an agency." (Yonkers Racing Corp. v. State, 131 AD2d 565, 566 [1987].) DOCS can neither point to a law delegating to it general taxing authority nor show that the Legislature has provided it with specific authority to levy taxes upon prisoners' families as a means of raising revenue for the State's general operations. Therefore, its taxing activities here are *ultra vires* and an unconstitutional usurpation of legislative authority under Article XVI, §1. (Yonkers Racing Corp., 131 AD2d at 567.)

Even if the State could point to legislation granting DOCS the authority to impose this tax upon Appellants, in the absence of specific legislative guidelines designating the property to be taxed and delineating the tax rate as well as the proportionate share of the tax to be raised from different groups, any exercise of such authority by DOCS would still be unconstitutional. Appellants have properly alleged that the unauthorized DOCS tax also violates Appellants' due process rights due to its unfettered nature and discriminatory application. (R. 56 – 57.)

Given that the prison telephone tax is wholly unauthorized, it follows that there is not now – nor has there ever been – any delineation of the appropriate tax

rate or any guidelines governing the parameters of any tax to be levied. The courts have consistently concluded that such schemes violate due process requirements. (See Yonkers Racing Corp., 131 AD2d at 566 (holding that any tax imposed pursuant to a limited agency delegation, "must be accompanied by proper guidelines set by the legislature"); Rego Properties Corp. v. Finance Adm'r of New York, 102 Misc2d 641, 647 [1980] ("Delegating to an administrative agency the power to fix the ratio of assessment, without formulating a definite and intelligible standard to guide the agency in making its determination, constitutes an unconstitutional delegation of legislative power") (internal quotation omitted).)

Beyond DOCS' *ultra vires* exercise of taxing power and its unfounded claim to the power to levy taxes in any amount it sees fit, it has also violated the well-established substantive due process principle that "assessments for public improvements laid upon [specific individuals] are ordinarily constitutional only if based on benefits received by them." (HBP Assocs. v. Marsh, 893 FSupp 271, 278 – 279 [SDNY 1995]; see also Norwood v. Baker, 172 US 269, 279 (1898); Aldens, Inc. v. Tully, 70 AD2d 720, 721 [1979] ("In determining whether a tax falls within the confines of the due process clause, we must inquire as to whether the State gives anything for which it can ask a return"); Board of Ed. v. Village of Alexander, 197 Misc 814, 820 [1949] (a special assessment is based upon the

theory that it represents a payment for special benefits accruing to the property as a result of the local improvement and, unless a benefit can be found, no special assessment may be sustained).)

The tax monies Appellants pay under DOCS' scheme are added to the general State fund to cover DOCS' overall operating costs, compensating for what otherwise would be funded by general tax dollars or would result in a budgetary shortfall. (R. 102.) Appellants receive no particular benefit from the operations of the State Correctional System funded by the tax; they merely benefit as do all State residents. Therefore, the distinction drawn by the tax scheme between Appellants and other State taxpayers for the purpose of serving the Department's general revenue raising objective is unconstitutionally baseless and irrational. (See Foss v. City of Rochester, 65 NY2d 247, 256 – 257 [1985] (Holding unconstitutional a property tax scheme to tax properties differently based on geography, without justification).)

The Department's revenue raising scheme also violates the prohibition against double taxation by imposing a tax on Appellants in addition to the state taxes they already pay that are apportioned through the budgetary process to DOCS. "Double taxation is prohibited unless specifically authorized by the legislature." (Radio Common Carriers v. State, 158 Misc2d 695, 701 [1993]

(citing Sage Realty Corp. v. O'Cleireacain, 185 AD2d 188 [1992]).) As the Supreme Court observed in Tennessee v. Whitworth, (117 US 129, 137 [1886]):

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

In sum, Appellants have properly alleged their substantive due process and unauthorized taxation claims.

2. The DOCS Tax is an Unlawful Taking.

In Count III of the Petition, Appellants seek a declaration that the DOCS tax is an unlawful taking of their property. (R. 58 – 59.) The Takings Clause of Article I, § 7(a) of the New York State Constitution prohibits the taking of private property for public use without just compensation. Specifically, Appellants allege that the prison telephone tax system: (1) works a taking of their property – the fees they pay to cover the costs imposed by the DOCS tax (R. 33, 34 – 35, 37 – 39, 46); (2) for a public purpose – funding a portion of the Department's general operating costs (R. 46); and (3) without just compensation.

The sums Appellants are required to pay DOCS through its tax upon their communication with New York prison inmates constitute personal property. The United States Supreme Court has stated that the Takings Clause of the Constitution applies to such monetary interests. (See e.g. Phillips v. Washington

Legal Found., 524 US 156, 172 [1998]; Webb's Fabulous Pharms. v. Beckwith, 449 US 155, 160 [1980].) This Court has followed suit, ruling that Article 1 § 7 of the State Constitution applies to monetary interests as well. (See Alliance of Am. Insurers v. Chu, 77 NY2d 573, 584 – 585 [1991].) Appellants receive nothing of proportional value in compensation for this taking. Because DOCS is without lawful authority of any kind to take Appellants property without just compensation, Appellants have properly stated a takings claim.

3. The DOCS Telephone Tax Violates Appellants' Right to Free Speech and Association.

In Count V of the Petition, Appellants allege that the DOCS tax violates the free speech and associational rights secured by the New York State Constitution, Article I, §8 because it: (1) imposes a fee on Appellants' expressive activity that bears no relationship to related regulatory costs (R. 35), and (2) burdens their ability to maintain contact with incarcerated family members without legitimate penological purpose. (R. 35, 48 – 52, 75 – 76, 85.)

Although Appellants communicate with imprisoned persons, it is critical to bear in mind that they are not subject to the same degree of regulation as are prisoners. Moreover, while incarceration – for prisoners and non-prisoners alike – necessarily limits the complete enjoyment of some constitutional freedoms, it does not "bar free citizens from exercising their [First Amendment] rights" to contact family and friends who are in prison. (Thornburgh v. Abbott, 490 US

401, 407 [1989].) Indeed, "'(I)nmates do not lose all First Amendment protections once they enter the prison gates, and ... prisoners are entitled to reasonable telephone access.' Moreover, non-inmates lose *none* of their First Amendment protections." (Byrd v. Goord, 2005 U.S. Dist. LEXIS 18544, at *25 – 26 [SDNY Aug. 29, 2005] (quoting McGuire v. Ameritech Servs., 253 FSupp 2d 988, 1002 [SD Ohio 2003] (emphasis added).)

First, the DOCS tax violates Appellants speech and association rights by placing an arbitrary financial burden on protected speech. The state's power to impose burdens and limitations on a citizen's free speech and association rights is limited, "not by mere rationality of purpose but by a more stringent requirement of real necessity." (People v. Taub, 37 NY2d 530, 532 [1975] (citing Cox v. Louisiana, 379 US 536, 550 – 558 [1965].) Therefore, while government may assess a fee to recoup the costs incurred in regulating expressive activity (Cox v. New Hampshire, 312 US 569, 577 [1941]), it may not impose a fee that bears no relationship to those regulatory costs. (See Murdock v. Pennsylvania, 319 US 105 [1943]; cf. 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); Children of Bedford, Inc. v.

Petromelis, 77 NY2d 713, 725 [1991], vacated on other grounds, 502 US 1025 [1992] (financial burden on speech posed by New York's "Son of Sam Law" requires a compelling state interest and must be narrowly tailored).)

Thus, 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 -- in striking down similar measures.[3] Here, the record is clear that the DOCS surcharge imposed on inmate collect calls bears minimal relationship to the regulatory costs DOCS incurs in providing the prison telephone service. (R. 35.) Therefore, it is an impermissible "flat tax imposed on exercise of [free speech rights]." (Murdock, 319 US at 113.)

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[3] See 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").

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

Prison regulations may lawfully infringe on freedom of speech and association only when "reasonably related to legitimate penological interests." (Id. at 89.) Under the Turner[4] standard the Court must explore: (1) whether there

[4] It is important to note that some courts have expressly declined to apply the Turner standard to prison policies that do not implicate security concerns. Thus, in Pitts v. Thornburgh (866 F2d 1450 [DC Cir 1989]), the D.C. Circuit applied traditional intermediate scrutiny to the District of Columbia's decision to incarcerate female offenders in federal prisons far from the city while similarly situated male offenders were incarcerated nearby. The D.C. Circuit reasoned that Turner was applicable only to cases involving "regulations that govern the day-to-day operation of prisons and that restrict the exercise of prisoners' individual rights within prisons." (Id. at 1453.) Because the District's policy was the result of "general budgetary and policy choices" that "[did] not directly implicate either prison security or control of inmate behavior, [or] go to the prison environment and regime," the Court concluded Turner was

is a rational connection between the regulation and the legitimate governmental interest set forth to justify it; (2) whether inmates will have alternative means of exercising the right infringed upon; (3) the impact of recognition of the right on corrections officers, other inmates and the allocation of prison resources; and (4) whether alternative means of regulation exists. (Lucas v. Scully, 71 NY2d 399, 406 [1988].) Under this standard courts balance the importance of the constitutional right being infringed against any institutional objectives intended to be served by the regulation. (Rivera v. Smith, 63 NY2d 501, 511 [1984].) This Court need not engage in extensive analysis or balancing, as the DOCS tax does not serve *any* legitimate penological purpose.

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

> it does not involve matters of security or safety, which have traditionally been held to the Turner standard. Receiving an alleged "kickback" from an additional fee added to the reasonable rate for collect calls made by

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inapposite. (Id. at 1454; See also Beauchamp v. Murphy, 37 F3d 700, 704 [1st Cir 1994] (refusing to apply Turner deference to challenge to denial of sentencing credit because considerations of discipline and security are "greatly diluted when the issue is the calculation of a sentence, a task performed by an administrator with a pencil"); Jordan v. Gardner, 986 F2d 1521, 1530 [9th Cir 1993] (declining to apply Turner standard to inmates' Eighth Amendment challenge to cross-gender clothed body searches).) Like the policy decision in Pitts, DOCS' tax reflects a purely "budgetary" choice that does not implicate prison security, control of prisoners' behavior, or the internal prison environment. As such, is should be subject to the level of scrutiny traditionally applied to challenges to fees that burden free speech rights. (Pitts, 866 F2d at 1453-54.) The Court need not address this issue however, as the DOCS surcharge cannot even withstand the deferential standard set forth in Turner.

> inmates to family members and those individuals providing counseling and professional services, is neither a rule nor regulation related to the functioning of a prison.

(2005 U.S. Dist. LEXIS 18544, at *31.) While raising revenues from *prisoners* can sometimes be deemed a legitimate penological objective, (see Allen v. Cuomo, 100 F3d 253, 261 [2d Cir 1996]), raising revenue from *their families and other outsiders*, who have not been found guilty of any crime, is not. And while the revenue derived from the surcharge is earmarked for the Family Benefit Fund, this money is spent on correctional programs unrelated to the prison telephone system. (R. 94 – 103.) Most troubling, however, is that the immediate effect of the surcharge is to deter the families and friends of inmates from communicating with them – a goal precisely contrary to the rehabilitative justification asserted by DOCS. (R. 85.)

Appellants have alleged that those among them who are elderly, impoverished, and/or disabled have limited access to other alternative avenues of communication (letter writing and visitation). (R. 48, 50; see Allen v. Coughlin, 64 F3d 77, 80 [2d Cir 1995].) They have also pled the existence of an "obvious, easy alternative[]" policy (Turner, 482 US at 90), as Respondents could provide the same security measures under the current system without charging the DOCS tax, or could use a debit card system like that utilized by the Federal Bureau of Prisons, that also meets the security concerns allegedly addressed by the current

system. (R. 52 – 53.) These alternatives would have no deleterious "ripple effect" for prison administration, making the accommodation of Plaintiffs' constitutional rights readily attainable. (Turner, 482 US at 90.) "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." (Id. at 90 – 91.)

For the above reasons, Appellants have properly stated a claim for relief based on Respondents' violation of their right to freedom of speech and association under the New York State Constitution.

4. The DOCS Telephone Tax Violates Appellants' Right to Equal Protection Under the Law.

In Count IV of the Petition, Appellants allege that, as New York State taxpayers who are arbitrarily treated differently than other New York State taxpayers, the DOCS tax violates their right to equal protection under the law. (See Huckaby v. New York State Div. of Tax Appeals, 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 [1992].)

The equal protection clause "protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." (Allegheny Pittsburgh Coal Co. v. County Comm'r, 488 US 336, 345 [1989] (re-valuing property for purposes of setting tax assessment at the time of recent sales violated equal protection because there was no justification for not also re-valuing similar property); see also 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); Chasalow v. Board of Assessors, 202 AD2d 499, 501 [1994].) Here, DOCS has identified two classes of taxpayers and has arbitrarily imposed upon one an additional tax burden that is not only unauthorized by the Legislature, but also cannot be justified by any legitimate state interest.

When a governmental classification that burdens fundamental rights is challenged on equal protection grounds, "it must withstand strict scrutiny and is void unless necessary to promote a compelling State interest and narrowly tailored to achieve that purpose." (Golden v. Clark, 76 NY2d 618, 623 [1990].) Here, as fully explained above (see supra, Section IV.B.3), the telephone tax unreasonably burdens Appellants' ability to freely speak and associate with their loved ones and clients. (R. 48 – 52.) This Court has recognized that speech and association are among the fundamental rights that, when burdened by a

governmental act, trigger strict scrutiny of that act. (Golden, 76 NY2d at 627 – 628; Roth v. Cuevas, 82 NY2d 791 [1993].) New York courts also recognize that "the creation and sustenance of a family" is a constitutionally protected associational right. (Sinhogar, 53 NY2d at 443; People v. Rodriguez, 159 Misc2d 1065, 1070 [1993] (citing series of U.S. Supreme Court cases).)

DOCS has advanced no theory under which its differential treatment of Appellants can be justified. While the DOCS telephone tax appears to be used for legitimate corrections programs, the method DOCS employs to fund these programs is improper and unrelated to any legitimate State interest. (See Metropolitan Life Ins. Co. v. Ward, 470 US 869, 881 [1985] (state law which sought to promote domestic business by discriminating against nonresident competitors could not be said to advance a legitimate state purpose).) The burden of supporting a general public welfare program cannot be imposed disproportionately on particular individuals. (See Manocherian v. Lenox Hill Hosp., 84 NY2d 385, 396 – 97 [1994]; 19th Street Assn. v. State, 79 NY2d 434, 443 [1992].)

Finally, in Byrd, the District Court denied a motion to dismiss plaintiffs' virtually identical equal protection claims, because it found "no rational basis to justify placing the burden of this additional commission solely on the [plaintiffs] thereby charging them more per call than similarly situated collect call

recipients." (2005 U.S. Dist. LEXIS 18544, at *31.) The Byrd court flatly rejected the validity of the State acting upon that distinction, and squarely held that the DOCS surcharge "does not involve matters of security or safety" such that the distinction between the two groups of collect call recipients could not be used to justify imposition of the extra charge. (Id.) This Court should similarly uphold Appellants' equal protection claims and reverse the lower courts.

5. The DOCS Telephone Tax is a Deceptive Business Practice Under General Business Law § 349.

The court below erred in affirming the dismissal of Appellants' deceptive business practices claim under New York General Business Law section 349(a), under which "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." (NY Gen. Bus. Law § 349.) A prima facie case of deceptive practices requires a showing that: 1) the defendant's acts are directed to consumers; 2) the defendant's acts are deceptive or misleading in a material way; and 3) the plaintiff has been injured by the defendant's acts. (Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 NY2d 20, 25 [1995].) Appellees' provision of telephone service while failing to disclose the DOCS tax, making false representations regarding purported penological justifications for the tax, and profiting from the illegal tax constitutes a prima facie case under GBL § 349.

The provision of telephone service is a consumer-oriented practice. (See e.g Drizin v. Sprint Corp., 3 AD3d 388, 389 [2004]; Naevus Int'l, Inc., v. AT&T, 185 Misc2d 655, 659 [2000], affd, 283 AD2d 171 [2001].) "Practices that have a broad[] impact on consumers at large" (Oswego, 85 NY2d at 25), or "affect[] numerous consumers" (Drizin, 3 AD3d 388 at 389), meet the threshold "consumer-oriented" requirement. The Department's provision of telephone service is consumer-oriented because it affects numerous people and is available to any individual in New York called by a prisoner.

Nor can DOCS escape liability by claiming that MCI alone provides telephone services to Appellants, because it is a clear participant in the prison telephone taxation scheme. DOCS arranged for prisoners in its facilities to be able to place collect calls and established the criteria for the prison telephone system through its Request for Proposals. (R. 220 – 431.) Moreover, DOCS demands and receives 57.5 percent of the proceeds from Plaintiffs' calls. (R. 32.)

Appellants have also adequately pled that DOCS engaged in acts that are "deceptive or misleading in a material way" such that they are "likely to mislead a reasonable consumer acting reasonably under the circumstances." (Oswego, 85 NY2d at 25.) Excessive charges and misrepresentations in billing practices may constitute "deceptive acts and practices." (Naevus Int'l, Inc., 185 Misc2d at 658.) Several of DOCS' actions constitute "deceptive acts or practices" under

GBL § 349 including, among others, that: (1) DOCS failed to disclose to Appellants that it was receiving surcharges amounting to nearly 60 percent of the revenue generated from prison initiated telephone calls from April 1, 1996 through October 30, 2003; (2) DOCS represented falsely that the prison telephone system was necessary to meet security and penological concerns (R. 85); and (3) DOCS has wrongfully profited from the taxes imposed on Appellants even after the PSC failed to approve that portion of the rate. (R. 62-63.) Each of these allegations, if proven, would amount to a deceptive act or practice under New York law. (See e.g. McKinnon v. Int'l Fidelity Ins. Co., 182 Misc2d 517, 521 [1999] (holding false representations "as to the amounts defendant was authorized to charge for bail premiums, which exceeded the statutory maximum" and false representation of expenses "which had no relation to actual expenses" established a prima facie case of "deceptive acts and practices" under GBL § 349).) Finally, Appellants have clearly alleged financial, emotional, and constitutional injury by these practices. (R. 48 – 53, 55 – 63.)

The court below dismissed Count VI as untimely, but also opined that GBL §349 "does not apply to a state administrative agency performing governmental functions, such as DOCS here." (R. 441). Nothing in the statute, however, indicates that GBL § 349 should not apply when a state agency engages in a consumer-oriented practice. Indeed, at least one court has found that § 349

applied to the deceptive consumer-oriented practices of a public authority. (See Kinkopf v. Triborough Bridge & Tunnel Authority, 1 Misc3d 417 [2003], revd on other grounds, 6 Misc3d 73 [2004].) In Kinkopf, the court found that plaintiffs stated a valid § 349 claim because the Authority's contracts with consumers failed to clearly identify the entity responsible for upholding the contract provisions. (1 Misc3d at 430) ("this statute is applicable to the situation since the claimant is a "consumer" and E-Z Pass, *whether a private entity or a governmental activity*, is engaged in the business of toll collection") (emphasis added).) Moreover, the scope of the deceptive business practices statute is "intentionally broad, applying to virtually all economic activity." (Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc., 3 NY3d 200, 205 [2004].)

For the above reasons, this Court should hold that Appellants have properly stated a claim for deceptive business practices under GBL §349.

6. Appellants Properly Seek an Accounting.

Finally, in Count VII, Appellants seek an accounting. The court below incorrectly held that Appellants are not entitled to an accounting of funds because there is no fiduciary relationship between the parties. (R. 441.) An accounting, however, is also available merely as "a method to determine the amount of the monetary damages...The action therefore sounds in law and not in equity."

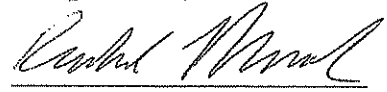
(Arrow Communications Labs. v. Pico Prods. Inc., 219 AD2d 859, 860 – 861 [1995] (citations omitted); see also Leveraged Leasing Admin. Corp. ex rel Dweck, v. PacifiCorp Capital, Inc., 87 F3d 44, 49 [2d Cir 1996] (same).) Because Appellants here seek monetary damages, this Court should construe this claim as one in law, rather than equity, and find that they are entitled to an accounting.

CONCLUSION

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

Dated: September 18, 2006
New York, NY

Respectfully Submitted,



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