SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

IVEY WALTON; RAMONA AUSTIN; JOANN HARRIS; the OFFICE OF THE APPELLATE DEFENDER; and the NEW YORK STATE DEFENDERS ASSOCIATION, Petitioners-Plaintiffs, - against - THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; and MCI WORLDCOM COMMUNICATIONS, INC., Respondents-Defendants.	Index No. 04-1048 **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS DEPARTMENT OF CORRECTIONAL SERVICES' AND MCI WORLDCOM COMMUNICATIONS' MOTIONS TO DISMISS THE VERIFIED PETITION AND COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs-Petitioners Ivey Walton, Ramona Austin, Joann Harris, Office of the Appellate Defender, and the New York State Defenders Association ("Plaintiffs") are the family members and advocates of prisoners incarcerated in various New York State correctional institutions. They bring this combined Article 78/declaratory judgment proceeding seeking relief from the imposition of an unlawful tax. Plaintiffs challenge this tax (the "DOCS tax" or "surcharge") collected by Defendant-Respondent MCI WorldCom Communications ("MCI") and paid to the New York State Department of Correctional Services (the "State," "Department" or "DOCS") as a surcharge imposed upon them when they receive telephone calls from prisoners.[1] The DOCS tax is a charge imposed over and above the telephone rate filed by MCI which was deemed "just and reasonable" by the New York State Public Service Commission ("PSC"). Plaintiffs seek relief from the unlawful DOCS tax by means of: (1) an order that MCI and DOCS cease collecting and assessing the unlawful tax; (2) a refund of the taxes unlawfully assessed upon them during the six years proceeding initiation of this action; 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' right 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. See Plaintiffs' Verified Petition and Complaint, dated February 25, 2004 ("Complaint").

[1] MCI and DOCS will be referred to collectively as "Defendants."

On May 6, 2004, Defendants moved to dismiss the Complaint on several grounds, alleging jurisdictional defects and the failure to state a claim for relief. See Memorandum of Law in Support of Respondent Department of Correctional Services' Motion to Dismiss the Verified Petition and Complaint, ("DOCS Br."), see also Memorandum of Law in Support of Motion to Dismiss, ("MCI Br."). Plaintiffs oppose these motions on the following grounds:

1) Plaintiffs' claims are not moot;

2) Plaintiffs' claims were all timely commenced within the applicable statute of limitations;

3) Plaintiffs' claims are not barred by either the filed rate doctrine or the doctrine of primary jurisdiction;

4) Plaintiffs' have adequately stated a claim for enforcement of the PSC October 30, 2003 order;

5) Plaintiffs have adequately stated a claim for a declaration that the DOCS tax constitutes: (a) an unconstitutional tax; (b) a taking of Plainitffs property without due process of law; (c) a violation of Plaintiffs' rights to equal protection under the law; and (d) a violation of Plaintiffs' speech and association rights;

6) Plaintiffs have adequately stated a claim under New York General Business Law Section 349;

7) Plaintiffs are entitled to an accounting to determine the extent of damages; and

8) Class action certification is appropriate in this action.

For the reasons set forth above, Defendants' motions to dismiss the Complaint should be denied in their entirety.

STATEMENT OF FACTS

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. Complaint at ¶48. Pursuant to a contract between MCI and DOCS (the "Contract"), MCI is the exclusive provider of telephone services to the New York State Department of Correctional Services. Id. at ¶¶5, 6. Under the Contract, MCI remits to DOCS as a "commission" 57.7 percent of the gross annual revenue garnered from its operation of the telephone system. Id. at ¶6. To finance the State's 57.5 percent tax, MCI charges recipients of prisoners' collect calls a surcharge of $3.00 for every call accepted. Id. at ¶7. A copy of the Contract is attached to the Affirmation of Rachel Meeropol ("Meeropol Aff.") as Exhibit 1.

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 Plaintiffs and putative class members provided the State with revenues totaling approximately $109 million. Complaint at ¶44. The 57.5 percent DOCS tax is paid by Plaintiffs and tendered by MCI to the State, which deposits it into the general fund. Id. at ¶45. The proceeds are then appropriated and earmarked for deposit into DOCS' "Family Benefit Fund." Id. at ¶12. 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. Id. 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. Id. at ¶45. The high cost of collect calls from New York State prisoners is a direct result of the DOCS tax. Id. at ¶7. The DOCS tax places a substantial financial burden on Plaintiffs and putative class members and limits the duration and numbers of calls that they can accept from New York State prisoners. Id. at ¶¶52 - 66.

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. Complaint at ¶14. 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. Id. at ¶39. Family member, friends, lawyers, and other recipients of prisoner collect calls (including Plaintiffs Austin and Office of the Appellate Defender and counsel for Plaintiffs) filed comments on the proposed tariff amendments in a timely manner. Id. at ¶40; Complaint Ex. E. In their comments, Plaintiffs and putative class members requested a hearing on the entire MCI rate, and directed the PSC's attention to the constitutional and legal infirmities of certain aspects of the prison telephone system. Id.

By order effective October 30, 2003 ("PSC Order"), the PSC held that it did not have jurisdiction over the DOCS tax. Complaint at ¶42, Ex. A at 23. The PSC reasoned that because DOCS is not a telephone corporation subject to the Public Service Laws, the agency does not have jurisdiction over either the Department or the tax charged by it. Complaint Ex. A at 23. The PSC called the non-jurisdictional portion of the total charge the "DOCS commission" and referred to the other portion of the rate, the 42.5 percent retained by MCI, as the "jurisdictional rate." Id. The PSC reviewed the jurisdictional portion of the MCI rate by comparing it to rates MCI charges for analogous services. Id. Based upon this comparison and other factors, the PSC approved the jurisdictional rate as "just and reasonable." Id. at 24. The PSC did not undertake *any* review of the reasonableness of the DOCS tax or of the entire rate. Id. The PSC directed MCI to file a new tariff reflecting the two separate charges: the DOCS tax and MCI's filed rate. Id. See also, MCI's tariff November 20, 2003 tariff filing, a copy of which is attached to the Affirmation of Rachel Meeropol as Exhibit B. 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.

ARGUMENT

I. PLAINTIFFS' CLAIMS FOR MONEY DAMAGES AND INJUNCTIVE RELIEF ARE NOT MOOT

Defendants argue that because a portion of Plaintiffs' claims reach wrongdoing under a contract that is no longer operative,[2] "all claims prior to April 1, 2001 should be dismissed as moot." DOCS Br. at 6. While Defendants are correct that Plaintiffs are entitled to declaratory relief only with respect to the current contract and not with respect to prior contracts, Defendants' argument ignores the fact that Plaintiffs' claims based on Defendants' actions under the prior contract are for money damages only. Complaint at ¶¶77-117. This Court has made clear that claims for money damages are not mooted by the expiration of a contract. See Schulz v. Warren County Bd. of Supervisors, 581 N.Y.S.2d 885, 887 (3d Dept. 1992) (holding that a claim for recovery of money paid under a contract remains viable after the contract has expired).

II. PLAINTIFFS' CLAIMS II THROUGH VII ARE TIMELY

Plaintiffs' claims[3] are timely because they were commenced within the applicable six-year statute of limitations. Because Plaintiffs seek relief that is unavailable through an Article 78 proceeding, their suit is governed by the six-year catch-all statute of limitations set out in CPLR

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[2] The first contract between MCI and DOCS was effective from April 1, 1996 through March 31, 2001. MCI entered into the current contract with DOCS on April 1, 2001. This new contract runs through March 31, 2006. Complaint at ¶ 5 (Plaintiffs mistakenly alleged that the new contract became effective on August 1, 2001. Plaintiffs have since learned that the contract actually became effective on *April* 1, 2001).

[3] Defendants concede that Plaintiffs' first claim is timely as it was commenced within four months of the PSC's October 30, 2003 order. DOCS Br. at 10 n.6.

§213(1) or, in the alternative, the six-year statute of limitations applicable to plenary actions for money had and received under CPLR §213 (2).[4] N.Y.C.P.L.R. §§213(1) and (2) (McKinneys 2003). Defendants have been unlawfully assessing the State's unauthorized DOCS tax upon Plaintiffs every month for over a decade and their illegal charges continue to this day. For this reason, Plaintiffs' claims accrue anew with each successive monthly telephone bill that includes collect calls from New York State prisoners. Plaintiffs' claims have been timely filed, and they are entitled to a refund of the unlawful taxes paid during the six-year period prior to the filing of this lawsuit.

A. Plaintiffs' Claims II Through V Are Governed By the Six-Year Statute of Limitations Set Out in CPRL §§213(1) or (2) Not the Four-Month Statute of Limitations Applicable to Article 78 Proceedings.

While Article 78 proceedings are subject to a four-month statute of limitations, declaratory judgment actions have no express statutory limitations period, and when they are not subject to another period, they are controlled by the six-year catch-all limitations period set out in CPLR §213(1). Solnick v. Whalen, 401 N.E.2d 190, 194 (1980). In any action for a declaratory judgment, "it is the responsibility of the court in the first instance to determine the true nature of [the] case in order to discover whether the six-year Statute of Limitations for declaratory judgment actions or the much shorter four-month Statute of Limitations for CPLR Article 78 proceedings applies." Llana v. Pittstown, 651 N.Y.S.2d 675, 676 (3d Dept. 1996).

[4] The only exception is Plaintiffs' sixth claim. The three-year statute of limitations for statutory causes of action under C.P.L.R. 214(2) applies to New York cases brought pursuant to GBL § 349. Gaidon v. Guardian Life Ins. Co., 725 N.E.2d 598 (2001); Busbee v. Ken-Rob Co., 720 N.Y.S.2d 785 (1st Dept. 2001); Wender v. Gilberg Agency, 716 N.Y.S.2d 40 (1st Dept. 2000). However, under the continuing harm doctrine, explained below, Plaintiffs' GBL § 349 claim accrued anew each time Defendants unlawfully charged the DOCS tax. As a result, Plaintiffs' sixth claim for relief is not time barred.

See also, Litz v. Town Bd., 602 N.Y.S.2d 966, 969 n.4 (3d Dept. 1993) (applying six-year catch-all statute of limitations to mixed Article 78 and declaratory judgment action).

To determine which statute of limitations applies, the court's inquiry must focus on the nature of the relief Plaintiffs seek, and then determine whether that relief is available in an Article 78 proceeding. Solnick, 401 N.E.2d at 193 (1980). As the Court of Appeals stated in Solnick:

> It is the nature of the relief sought...rather than its substance, which gives the action its identity....If that examination reveals that the rights of the parties sought to be stabilized in the action for declaratory relief are...open to resolution through a form of proceeding for which a specific limitation period is statutorily provided, then that period limits the time for commencement of the declaratory judgment action.

Id.

Plaintiffs seek relief in this case that would be unavailable to them in an Article 78 proceeding. Under the CPLR, Article 78 proceedings provide for only four very limited types of review:

1. whether the body or officer failed to perform a duty enjoined upon it by law;
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.

N.Y.C.P.L.R. §7803 (McKinneys 2003). Plaintiffs' second through sixth causes of action would not be adequately addressed through any of these four discrete categories because Plaintiffs do not seek to challenge any procedure utilized by any agency, attack any agency determination, or prohibit agency action taken in excess of jurisdiction.

In its Order, the PSC determined that it did not have jurisdiction over the DOCS tax.[5] This means there is no action that the PSC can take to review the legality of the tax. Because the DOCS surcharge is not a telephone rate, and is not subject to PSC review, it is up to this Court to decide the constitutionality of this tax. Plaintiffs have only this Court to turn to for a declaration that the DOCS surcharge is an unlawful tax, levied without legislative approval in violation of the New York State Constitution.

Defendants' insistence upon the suitability of an Article 78 proceeding is not supported by the case law. An Article 78 proceeding, as opposed to an action for a declaratory judgment, provides only for review of an individual determination affecting one's rights or an agency action taken in violation of the agency's own procedures or applicable law. See, e.g., New York City Health & Hosp. Corp. v. McBarnette, 639 N.E.2d 740, 744 (1994) ("[W]here a quasi-legislative act by an administrative agency such as a rate determination is challenged on the ground that it was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion a proceeding in the form prescribed by Article 78 can be maintained.") (internal citations omitted); McCarthy v. Zoning Bd. of Appeals, 724 N.Y.S.2d 798, 799 (3d Dept. 2001) (holding Article 78 proceeding is appropriate to challenge the procedures followed in enacting a local law, but not the substance of that law); Llana, 651 N.Y.S.2d at 677 (Even though all of the petitioners claims could have been raised in an Article 78 proceeding, because "*each* of petitioners' causes of action concern matters of procedure only, eschewing any intrusion into the substance of the matter voted on the four month statute of limitations is appropriate") (emphasis added, internal citations omitted); Dimiero v. Livingston-Steuben-Wyoming, 606 N.Y.S.2d 92, 94 (3d Dept. 1993) ("Because plaintiffs seek only to

[5] Complaint, Ex. A at 23.

challenge discrete, ad hoc determinations regarding their employment benefits, CPLR Article 78 review is proper."); Bitondo v. New York, 582 N.Y.S.2d 819, 822 (3rd Dept. 1992) ("Because plaintiff is seeking ... a declaration that the aforementioned practices violated only *his* constitutional rights in this particular instance (as opposed to an across-the-board declaration), these claims likewise could have been resolved in a proceeding pursuant to CPLR 7803 (3)") (emphasis in original).

The law is clear that an Article 78 proceeding is *not* the appropriate vehicle for a constitutional challenge to the substance of a continuing and generally applicable policy or law. See Allen v. Blum, 447 N.E.2d 68, 68 (1983) ("[B]ecause the action seeks review of a continuing policy, a declaratory judgment class action rather than individual Article 78 proceedings is proper"); Zuckerman v. Bd. of Educ., 376 N.E.2d 1297, 1301 (1978) (holding Article 78 relief is inadequate and inappropriate when "[p]etitioners seek more than just a review of a single determination of the respondents; they seek review of the continuing policy"); McCarthy, 724 N.Y.S.2d at 799 (holding six-year statute of limitations for declaratory judgments applies to a cause of action directed at the substance of an ordinance, rather than the procedures followed in its enactment); Brookhaven v. New York, 535 N.Y.S.2d 773, 774-75 (3d Dept. 1988) (holding declaratory judgment action, rather than Article 78 proceeding, is the proper vehicle to challenge the constitutionality of a legislative enactment); DeLuca v. Kirby, 441 N.Y.S.2d 1005, 1006 (2d Dept. 1981) (same).

In Counts II through VI, Plaintiffs request a declaration from the Court that the DOCS tax 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; (4) a violation of Plaintiffs' 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. Not one of these claims could have been brought in an Article 78 proceeding because such a proceeding cannot provide the declaratory and equitable relief Plaintiffs seek. Plaintiffs do not seek review of unreasonable, unlawful, or *ultra vires* agency determinations or actions; they take issue instead with the collection and assessment of the DOCS tax.

Defendants have proffered no precedent to the contrary. Indeed, the only case Defendants cite for the proposition that Plaintiffs could bring their claims in an Article 78 proceeding is Bullard v. New York, 763 N.Y.S.2d 371 (3d Dept. 2003). But that case was decided *before* Plaintiffs submitted comments to the PSC and the PSC determined that it lacked jurisdiction over both the Department and its tax. Had the PSC actually reviewed and approved the DOCS tax as part of MCI's filed rate, Plaintiffs would admittedly be in a very different situation. But that did not happen.

Contrary to Defendants' arguments, the only other action that would conceivably provide Plaintiffs with the relief they seek is an action for money had and received. Such actions are subject to the six-year statute of limitations for contract challenges under CPLR § 213(2). First Nat'l City Bank v. New York Finance Admin., 324 N.E.2d 861 (1975). For example, in Scarborough School Corp. v. Assessor of Ossining, 467 N.Y.S.2d 674 (2d Dept. 1983), petitioners challenged the Town Assessor's actions in placing on the assessment rolls real property that had previously been tax exempt. The petitioners sought to recover the back taxes paid. Id. The court held that "[a]lthough petitioners have cast this matter as an Article 78 proceeding, an examination of the allegations in the petition reveals that the petitioners claims

for a refund of taxes paid under protest is in the nature of a plenary action for moneys had and received...[s]uch an action is based, in theory, upon a contractual obligation or liability, express or implied in law or fact and is controlled by a six-year Statute of Limitations." Id. at 674-75 (internal citations omitted). See also CKC v. Kleiman, 679 N.Y.S.2d 637 (2d Dept. 1998) (applying six-year statute of limitations in a challenge by property owners to a tax levy based on a contract between the village and the owners); Riverdale County Sch. v. New York, 213 N.Y.S.2d 543, 545 (1st Dept. 1961) ("As a general proposition it is clear that an action to recover back taxes paid is an action for money had and received, and the six-year statute has application.").

An action for money had and received is "an obligation which the law creates...when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another.... It lies when taxes have been collected without jurisdiction or in violation of constitutional authority, and the taxpayer paid the tax under formal written protest or duress." Emunim v. Fallsburg, 607 N.Y.S.2d 858, 860-61 (Sup. Ct. 1993) (internal citations omitted). This type of plenary action is most frequently used in the context of overpaid taxes, but it is available for other forms of unlawful payment. In Eichacker v. New York Telephone Company, 14 N.Y.S.2d 17, 20 (Mun. Ct. 1939), for example, a doctor sued his telephone provider for charging him in excess of the tariff on file with the Public Service Commission. The court found that the action was "essentially one to recover back money which the defendant received from the plaintiff, but had no legal right to withhold from him" and as such, was subject to the six-year statute of limitations applicable to contract actions. Id. at 24.

Plaintiffs' claims II through V are closely related to an action for money had and received, and for this reason, they are subject to the six-year statute of limitations set out in

CPLR §213(2). If the Court finds that this limitations period is inapplicable, then Plaintiffs claims are subject to the catch-all provision of §213(1) because they seek relief unavailable in any other act, including an Article 78 proceeding.

B. Plaintiffs' Claims Accrued Anew Each Time MCI Collected and DOCS Retained the Unlawful Tax.

Plaintiffs' claims are timely because they accrued within the applicable six-year limitations period. When, as here, wrongful conduct is continuous in nature, the accrual period of a claim is extended until such conduct ceases. Boland v. New York, 284 N.E.2d 569, 571 (1972); Mahoney v. Temp. Comm'n of Investigation, 565 N.Y.S.2d 870, 875 (3d Dept. 1991) ("a continuous course of conduct extends the accrual period until such conduct terminates").

New York courts have consistently applied this doctrine to repeated billings or withholding of monies owed. In Barash v. Estate of Sperlin, 706 N.Y.S.2d 439, 440 (2d Dept. 2000), for example, the plaintiffs challenged the defendant's continued collection of income and profits from property that was allegedly co-owned. At the time of each improper collection, the defendant allegedly failed to turn over the proper percentage of the profits to plaintiffs. Id. The court explained that "the plaintiff's claims of withheld profits, etc., constitute a continuing wrong which accrued anew each time the defendants collected income and profits ...". See also, Butler v. Gibbons, 569 N.Y.S.2d 722, 723 (1st Dept. 1991) ("Plaintiff's allegations clearly make out a continuing wrong, i.e., [Defendants'] repeated and continuing failure to account and turn over proceeds earned from renting the properties since 1979. Thus ... a new cause of action accrued each time defendant collected the rents and kept them to himself."); Cash v. Bates, 93 N.E.2d 835, 836 (1950) (continuing violation of constitutional rights); Orville v. Newski, 547 N.Y.S.2d 913, 914 (3d Dept. 1989) (Breach of contract claim accrued each year in which the defendant failed to make the minimum payment); Cahill v. Public Service Commission, 498 N.Y.S.2d 499,

502 (3d Dept. 1986) (continuing violation of petitioner's free speech rights); Stalis v. Sugar Creek Stores, Inc., 744 N.Y.S.2d 586, 587 (4th Dept. 2002) (when contract provides for continuous performance over a period of time, "each breach may begin the running of the statute anew such that accrual occurs continuously").

Because a new cause of action accrued here each time Plaintiffs were billed for and paid the unlawful DOCS tax, their claims for prospective relief are not time-barred, and they are entitled to all proceeds unlawfully taken by Defendants in the six years preceding the commencement of this action.[6] See Stalis, 744 N.Y.S.2d at 588; Barash, 706 N.Y.S.2d at 440; Butler, 569 N.Y.S.2d at 723. The continuing harm doctrine thus also protects Plaintiffs' claims from being time barred in the event that the Court disagrees with Plaintiff's argument and imposes the four-month statute of limitations applicable to Article 78 proceedings.

If, as Plaintiffs allege, their claims are subject to a six-year statute of limitations, than they are entitled to damages dating back six years from the filing of this action, February 25, 1998.[7] However, at the very least, even under the Defendants' theory, Plaintiffs are entitled to restitution of the DOCS taxes paid in the four months previous to the filing of this action.

III. PLAINTIFFS' CLAIMS ARE NOT BARRED BY EITHER THE FILED RATE OR PRIMARY JURISDICTION DOCTRINES

A. The Filed Rate Doctrine Has No Applicability in This Case

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[6] Even if the Court rejects Plaintiffs' argument that their claims have accrued anew with each billing, claims II through V are still timely. In the absence of the continuing violation doctrine, Plaintiffs' claim would have accrued, at the earliest, on the effective date of the current MCI / DOCS contract. See DOCS Br. at 11. The effective date of that contract is April 1, 2001, well with in the six-year limitations period. Thus, if Plaintiffs prove their claims, they are entitled, at the very least, to damages dating back to 2001.

[7] Plaintiffs concede that they are not entitled to damages for the harms they suffered under the first two years of the MCI / DOCS contract, before February 25, 1998.

Defendants DOCS and MCI claim the protection of the filed rate doctrine in urging this Court to dismiss Plaintiffs' claims. However, because the DOCS tax was not approved by the PSC the filed rate doctrine has no applicability in this case.

When applicable, the filed rate doctrine bars suits against regulated utilities that challenge the rates charged by that utility. Keogh v. Chicago & Northwestern Ry., 260 U.S. 156 (1922). "Simply stated, the doctrine holds that any 'filed rate' – that is, one *approved* by the governing regulatory agency – is per se reasonable and unassailable in judicial proceedings brought by ratepayers." Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994) (emphasis added).

Quite simply, the filed rate doctrine does not bar Plaintiffs' clams because Plaintiffs do not challenge the reasonableness of a filed rate; rather, they challenge DOCS' authority to charge and retain an *un-filed and unauthorized* surcharge and MCI's authority to collect such a surcharge. The DOCS tax challenged in this action was not approved by the PSC.[8] In its October 30, 2003, the PSC determined that it lacked jurisdiction over the DOCS tax because DOCS is not a telephone corporation pursuant to the Public Service Law. Complaint, Ex. A at 23. The PSC determined that it would "review only the jurisdictional portion of the rate that reflects what MCI retains from the provision of the inmate calling service" or 42.5 percent of the rate charged to recipients of prisoner collect calls. Id. The PSC then examined the 42.5 percent

[8] Plaintiffs submit that because the PSC does not have jurisdiction over the DOCS tax, and did not review that tax, that surcharge is not a "filed rate" within the meaning of the Public Service Law. See Point IV, infra. However, even if the commission were deemed part of MCI's filed rate, the PSC's failure to affirmatively approve that portion of the rate bars invocation of the filed rate doctrine. See Wileman Bros. & Elliott, Inc. v. Giannini 909 F.2d 332, 337-338 (9th Cir. 1990) (The mere fact of failure to disapprove ...does not legitimize otherwise anticompetitive conduct....[Non-disapproval] does not guarantee any level of review whatsoever....There is no affirmative process of non-disapproval which can be relied upon fairly to evaluate a committee's regulations.... [N]on-disapproval is equally consistent with lack of knowledge or neglect as it is with assent).

portion of the rate, and after comparing it to other rates charged by MCI for analogous services, determined that "the jurisdictional portion of the rate ... is just and reasonable." Id. at 24. The PSC effectively separated MCI's telephone charges into two legally distinct portions: 1) the jurisdictional rate charged by MCI, retained by MCI, approved by the PSC, and filed pursuant to the Public Service Law, and 2) the non-jurisdictional DOCS tax charged by MCI, retained by DOCS, un-reviewed by the PSC, and not filed within the meaning of the Public Service Law.

Since the PSC only reviewed and approved the jurisdictional portion of the rate, or 42.5 percent of the total charges to Plaintiffs and putative class members, it is only that portion of the rate which is insulated from attack by the filed rate doctrine. See Concord Assocs., L.P., v. Public Service Commission, 754 N.Y.S.2d 93, 95 (3d Dept. 2003) (filed rate doctrine applies when a petitioner is challenging "a rate the PSC has previously determined to be just and reasonable"); Wegoland Ltd., 27 F.3d at 20 ("the [filed rate] doctrine is designed to insulate from challenge the filed rate deemed reasonable by the regulatory agency"). Cf. Brown v. Ticor Title Ins. Co., 982 F.2d 386, 394 (9th Cir. 1992) (If the rates "were not subjected to meaningful review by the state, then the fact that they were filed does not render them immune from challenge.") Plaintiffs do not challenge the reasonableness of any filed rate, so the filed rate doctrine cannot bar Plaintiffs' claims.

The inapplicability of the filed rate doctrine in this instance is further demonstrated by the policy justifications behind the doctrine. Since the doctrine was first established by Justice Brandeis in the Keogh opinion, courts have identified two primary interests served by the doctrine. The first concern includes elements of justiciability -- that agencies are designed by the legislature for the "specific purpose of setting uniform rates" and the "agencies' experience and investigative capacity make them well-equipped to discern ... what rates are reasonable" while

the courts are "not institutionally well suited to engage in retroactive rate setting." Wegoland, 27 F.3d at 19. Thus, the filed rate doctrine guards against courts becoming enmeshed in the rate-making process, and thereby subverting the authority of the regulating agency. Id. at 19, 21. The filed rate doctrine is designed to avoid a situation where, to properly discern damages, the court itself would be forced to determine a just and reasonable rate. Id. at 21; Porr v. NYNEX Corp., 660 N.Y.S.2d 440, 443 (2d Dept. 2997).

The second concern relates to potential discrimination -- the doctrine protects against the rate disparity that might result were nonparty subscribers to the same service forced to pay a higher rate then those who successfully challenged a rate in court. Porr, 660 N.Y.S.2d at 444, 446. Awarding retroactive damages to an individual plaintiff would result in "unequal rates being charged to members of the same class of ratepayers" Wegoland, Ltd. v. NYNEX Corp., 806 F. Supp. 1112, 1114 (S.D.N.Y. 1992), aff'd, 27 F.3d 17 (2d Cir. 1994). However, uniform treatment would result where all potential claimants sued and the courts awarded each of them the same measure of relief. See Keogh v. Chicago & N. R. Co., 260 U.S. 156, 163 (1922) (stating that uniform treatment would only result if all rate-payers sued and received the same relief); Wegoland, 27 F.3d at 22 ("[T]he concerns for discrimination are substantially alleviated in [a] putative class action.").

Neither of these concerns warrants application of the filed rate doctrine in this case. The PSC has determined that because DOCS is not a telephone company, and the DOCS tax is not a telephone rate, it has no jurisdiction over either. Despite Defendants claims to the contrary, DOCS Br. at 14, there is no need for the Court to engage in its own determination of a reasonable rate in this instance; the PSC has already exercised its expertise and Plaintiffs do not challenge that determination, or MCI's resulting filed rate. By ordering MCI to collect and

retain the filed rate, and the filed rate alone, this Court would protect, rather than subvert, the PSC's exercise of its discretion. No judicial determination of fair market value is required. And because Plaintiffs style this action as a class action, no discrimination will result.

In this unique context, where Plaintiffs challenge only a portion of the total charge billed to consumers as a telephone charge that was never approved by the PSC, the filed rate doctrine can only protect the filed rate portion of the total charge deemed "just and reasonable." The unreviewed DOCS tax has no claim to such protection.

B. The Doctrine of Primary Jurisdiction Does Not Bar This Court From Considering The Merits Of The Complaint

In this case, Plaintiffs seek redress for the constitutional injuries suffered when the State collects an unlegislated tax from them generated by prisoners' collect telephone calls. Plaintiffs' constitutional challenges are premised on the following two conditions: (a) the State's use of the prison telephone system as a means to raise revenue to cover the operating costs of its correctional system – a public cost that should be borne by the State as a whole; and (b) the prison telephone system's infringement upon people's right to communicate with their family members. These are the unlawful conditions that lie at the heart of Plaintiffs' claims before this Court.

Contrary to the State's characterization of the case, Plaintiffs' references to the structure of the prison telephone system – *i.e.*, the fact that the State has aggregated all correctional facilities in order to let the contract out to a single provider and it has required the use of the collect-call-only mechanism – are included solely to advise the Court of the means by which the State has sought to justify the egregiously high rates attributed to the DOCS tax and charged under the system. Plaintiffs seek no adjudication from this Court regarding the propriety of the structure of the system; they seek only to notify the Court that, in addition to the DOCS tax,

which significantly raises the cost of prisoners' telephone calls, the State also requires other structural mechanisms that further inflate the cost of such calls.[9]

The State's desperate effort to evade adjudication of the DOCS tax by this Court could not be plainer. Rather than address the PSC's determination that it has no jurisdiction over DOCS, the Department's actions challenged here, or the portion of the prison telephone system charges attributable its surcharge, the State merely seeks to divert the Court's attention to a secondary and non-dispositive issue by raising – yet again – the flag of primary jurisdiction.[10] See DOCS Br. at 15-17. This effort is flawed for five reasons.

First, Plaintiffs have already brought their case to PSC for its adjudication of the issues raised in this case and have received the agency's determination on those issues. See PSC Order, Complaint, Ex. A at 23 - 24 (holding that the PSC lacks jurisdiction over the DOCS tax, but that the MCI filed rate is just and reasonable).

Second, referral back to the PSC for a second review would constitute a request for a determination on matters that are plainly beyond the agency's jurisdiction. The principle is well established under New York law that the PSC has only those powers specifically conferred upon it by statute, together with such implied powers as are necessary to carry out the specific grant. See, e.g., New York v. Public Service Comm'n, 385 N.Y.S.2d 634, 635 (3d Dept. 1976), aff'd, 366 N.E.2d 1359 (1977); New York Tel. Co. v. Public Service Comm'n, 684 N.Y.S.2d 829, 834

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[9] To the extent that any allegation in the Complaint gives the impression that Plaintiffs here are challenging the structure of the prison telephone system, Plaintiffs wish to make clear that no such claim was intended.

[10] The doctrine of primary jurisdiction permits a court to refer claims requiring special expertise to the appropriate administrative agency for an initial determination. Reiter v. Cooper, 507 U.S. 258, 268 (1993). The doctrine is principally invoked in those limited situations in which a judicially cognizable claim is initially presented to a federal court, but "the issue involves technical questions of fact uniquely within the expertise and experience of an [administrative] agency." Nader v. Alleghany Airlines Inc., 426 U.S. 290, 304 (1976).

(Sup. Ct. 1998); Ceracche Television Corp. v. Public Service Comm'n, 267 N.Y.S.2d 969, 972 (Sup. Ct. Sp. Term 1960); Kovarsky v. Brooklyn Union Gas Co., 3 N.Y.S.2d 581 (2d Dept. 1938), aff'd, 18 N.E.2d 287 (1938). When a party seeks to challenge a telephone company practice falling within those powers enumerated at §90-101(a) of the Public Service Law, the PSC has primary jurisdiction over the matter. Thus, if Plaintiffs here were challenging the reasonableness of MCI's filed rate or the adequacy of its service, for instance – technical matters within the agency's particular competence – the PSC would indeed provide the appropriate forum for resolution of the complaints. See, e.g., Capital Tel. Co. v. Patterson Tel. Co., 436 N.E.2d 461, 466 (1982).

However, in cases involving questions of law beyond the PSC's administrative expertise and outside its statutory authority, the courts have refused to confer primary jurisdiction on the Commission. See, e.g., Rochester Gas & Electric Corp. v. Greece Park Realty Corp., 600 N.Y.S.2d 985, 987 (4th Dept. 1993) (primary jurisdiction doctrine inappropriate in "the absence of technical administrative questions"); MCI Telecommunications Corp. v. Public Service Comm'n, 572 N.Y.S.2d 469 (3d Dept. 1991) (PSC has no authority to permit "special arrangements" in derogation of legislative directives); Warren v. New York Telephone Co., 335 N.Y.S.2d 25, 29 (Civ. Ct. 1972) ("[a]lthough the courts may not pass upon the adequacy of service generally, they do have original jurisdiction to remedy a case of gross negligence or willful misconduct, as applied to the individual subscriber"); F.H. Von Damm, Inc. v. New York Tel. Co., 303 N.Y.S.2d 763 (Civ. Ct. Tr. Term 1969), quoting Kovarsky v. Brooklyn Union Gas Co., 3 N.Y.S.2d 581, aff'd, 18 N.E.2d 287 (1938) ("[i]t seems equally evident that it is not the function of the Commission to determine questions of law. The Commission has no judicial functions to discharge") (internal citations omitted); State v. McBride Transp., Inc., 288

N.Y.S.2d 170, 175 (Sup. Ct. Sp. Term 1968) (PSC's primary jurisdiction over discrete matters did not "furnish an umbrella under which defendants may with impunity engage in the additional activities [including Donnelly Act violations] of which the plaintiff complains"); Ceracche Television Corp. 267 N.Y.S.2d at 972-73 (jurisdiction of PSC does not extend to "nonutility activity of a telephone company" that is "not part of the public service performed by [NYTel] in the business of telephonic communication"). The PSC ruled that it has no jurisdiction over the Department because the Department is not a telephone corporation. Thus, the PSC itself has determined that it has no authority to rule on the claims raised by Plaintiffs in this case.

Furthermore, the Court of Appeals has specifically ruled that the PSC has no jurisdiction over claims based on other agencies' actions such as those made by Plaintiffs in this case. See New York v. Public Service Comm'n, 366 N.E.2d 1359, aff'g, 385 N.Y.S.2d 634 (3d Dept. 1976). Because Plaintiffs' constitutional claims challenge DOCS' actions, an agency that is not regulated by the PSC, these claims are beyond the PSC's jurisdictional reach. See, e.g., Matter of Ceracche Television Corp., 267 N.Y.S.2d at 972-973. See also Public Service Law §94.

Fourth, this case presents precisely the type of claims that the courts have deemed improper for resolution by the PSC. First, the heart of the constitutional claim here requires that a determination be made regarding the State's authority to levy a tax on those seeking to speak with prisoners, as well as an assessment of the burdens placed on family members' speech and association rights by the telephone system mandated by the contract between the State and MCI. These issues do not involve any technical considerations within the PSC's particular field of expertise. See National Communications Ass'n, Inc. v. AT&T, 813 F. Supp. 259, 262-63 (S.D.N.Y. 1993), aff'd, 46 F.3d 220, 223 (2d Cir. 1995); RCA Global Communications, Inc. v. Western Union Tel. Co., 521 F. Supp. 998, 1006 (S.D.N.Y. 1981). Indeed, the constitutional

issues Plaintiffs raise here are far afield from the statutory mandates of the PSC.[11] See, e.g., Spiegel, Inc. v. F.T.C., 540 F.2d 287, 294 (7th Cir. 1976); New York v. Public Serv. Comm'n, 385 N.Y.S.2d at 635; cf. Benton v. Belt Lind Ry. C., 268 U.S. 413, 417-418 (1925). When a "matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility" to adjudicate the matter. MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1104 (3d Cir. 1995). In this regard, the courts have noted that resolution of constitutional questions is a quintessential judicial function. See, e.g., Califano v. Sanders, 430 U.S. 99, 109 (1977); Gete v. I.N.S., 121 F.3d 1285 (9th Cir. 1997); Environmental Tech. Council v. Sierra Club, 98 F.3d 774, 789 (4th Cir. 1996).

Finally, referral to the PSC would greatly prejudice Plaintiffs. In deciding whether to refer a matter to an agency, courts "must consider how long an administrative process will run before its work is done," Rohr Indus., Inc. v. WMATA, 720 F.2d 1319, 1326 (D.C. Cir. 1983), and "must take care that its deferral not unfairly disadvantage either party." Johnson v. Nyack Hosp., 86 F.3d 8, 11 (2d Cir. 1996). Courts also consider whether adequate remedies are available in the administrative forum to prevent irreparable injury. Roberts v. Chemlawn Corp., 716 F. Supp. 364, 368-69 (N.D. Ill. 1989). Each factor weighs heavily against invoking the primary jurisdiction doctrine in this case. Faced with a potential lengthy delay for agency decision-making many courts have declined to invoke the primary jurisdiction doctrine. See, e.g., National Communications Ass'n, 46 F.3d at 225 (citing 2 Kenneth C. Davis *et al.*, Administrative Law Treatise § 12.1, at 211 (3d ed. 1994); Goya Foods, Inc. v. Tropicana

[11] The PSC has no authority to enforce, invalidate, or evaluate the terms and conditions of the contract at issue. Cf. Fulton Cogeneration v. Niagara Mohawk Power, 84 F.3d 91, 97 (2d Cir. 1996).

Products, Inc., 846 F.2d 848, 853-54 (2d Cir. 1988). Unquestionably, referral will substantially delay adjudication of Plaintiffs' claims. See, e.g., Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1446 (D.C. Cir. 1985). Since the claims concern constitutional and civil rights issues, the interest in prompt adjudication is paramount. See Goya, 846 F.2d at 854. In this case, referral to the PSC for yet another determination will not address the substance of Plaintiffs' constitutional claims. The principle is well-established that where "the prescribed administrative procedure . . . [is] shown to be inadequate to prevent irreparable injury, courts should decline to require exhaustion," Roberts v. Chemlawn Corp., 716 F. Supp. at 368-69,[12] and referral is inappropriate. Ryan v. Chemlawn Corp., 935 F.2d 129, 131 (7th Cir. 1991). Moreover, the PSC would not be able to grant the required monetary relief. See Niagara Mohawk Power Corp. v. Public Service Comm'n, 507 N.E.2d 287, 291-92 (1987) (noting that the courts have consistently rejected the PSC's efforts to assert the power to order refunds paid to ratepayers). Certainly, under these circumstances, referral to the PSC for adjudication of Plaintiffs' constitutional claims would be unjust.

IV. PLAINTIFFS HAVE ADEQUATELY STATED A CLAIM FOR ENFORCEMENT OF THE PSC ORDER

Defendants urge this Court to dismiss Plaintiffs' first claim seeking enforcement of the PSC Order for failure to state a claim. Defendants base this argument on their allegation that "nothing in [the PSC] order compelled DOCS to take any action," and that nothing in the order required either MCI or DOCS to stop collecting the DOCS tax. DOCS Br. at 18-19; MCI Br. at 2-3. Plaintiffs' first claim for relief, however, cannot rest on the PSC's failure to recite certain

[12] See Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128, 1138 (3d Cir. 1979); see, e.g., United States v. Elrod, 627 F.2d 813, 818 (7th Cir. 1980); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1287 (7th Cir. 1977).

magic words or spell out every consequence of its order.[13] The PSC's expert determination that it lacks jurisdiction over the DOCS tax has clear implications. Because the DOCS tax is not a filed rate, and has not been approved as just and reasonable by the PSC, it is the responsibility of this Court to enforce the PSC's finding, and order DOCS to cease imposing its unlawful tax and MCI to cease collecting it from Plaintiffs.

Under the Public Service Law, MCI is prohibited from charging a rate that is not on file with the PSC and has not been determined "just and reasonable." This conclusion is compelled by the plain language of the Public Service Laws themselves. New York Public Service Law §91(1) states:

> 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.

Defendants cannot dispute that the DOCS tax is a charge imposed over and above the "jurisdictional rate" reviewed and declared just and reasonable by PSC; nor is this rate validated by any other law. Complaint, Ex. A at 23-24.

Because the DOCS tax is in excess of the approved rate, MCI may not continue to collect it from Plaintiffs and other consumers nor may it continue to remit the surcharge to DOCS.

> No 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....

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[13] Cf. Rochester Tel. Corp. v. Public Service Comm'n, 60 N.E.2d 1112, 1118 (1995) ("Although it would have been preferable for the PSC to explicitly state that RTC acted imprudently, we find no reason to require the incantation of certain 'magic' words when PSC's opinion clearly contains, through the use of other words, a finding of imprudence.").

N.Y. Pub. Ser. §92(2)(d). Any surcharges that increase the rate a customer pays over the tariffed rate are invalid. For example, in People ex rel. Public Service Commission v. New York Tel Co., 29 N.Y.S.2d 513, 514 (3d Dept. 1941), aff'd, 40 N.E.2d 1020 (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 515. 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 516-17. See also, United States v. AT&T, 57 F. Supp. 451 (S.D.N.Y. 1944), aff'd sub nom, Hotel Astor v. United States, 325 U.S. 837 (1945) (per curiam) (hotel surcharge which raises cost of call over tariffed rate is invalid and should be enjoined).

The fact that MCI filed a bifurcated rate pursuant to the PSC Order does not in any way legitimize the DOCS tax. See Meeropol Aff., Ex. B. Although the DOCS tax is physically listed on MCI's tariff, it is not actually a "filed rate" within the meaning of the Public Service Law. The DOCS tax *cannot* logically be on file because the PSC, according to its own ruling, does not have jurisdiction over that portion of the total telephone charge, and under the Public Service Law, the PSC has jurisdiction to review any rate or charge that has been "filed" with the Commission. N.Y. Pub. Ser. §92(2)(e). Since the PSC does not have jurisdiction over the DOCS tax, the DOCS tax cannot be a part of MCI's "filed rate" as defined by the Public Service Law.

MCI has a duty to cease collecting the DOCS tax because it is in excess of the rate determined "just and reasonable" by the PSC. "[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." N.Y. Pub. Ser. §97(2) (emphasis added). As a telephone company, MCI may not continue to bill consumers in excess of its filed rate.

And just as the Court must order MCI to cease collecting and remitting the tax to DOCS, it must also order DOCS to cease demanding and accepting the tax from MCI.[14] As demonstrated below, DOCS has no right to continue to assess its unauthorized tax. See infra, Point V. Sections A – E. When an agency acts in violation of a clear legal duty, this Court has the power to order compliance with the law through mandamus, and to declare the agency's actions unlawful. See, e.g. Huff v. C.K. Sanitary Sys. Inc., 688 N.Y.S.2d 801, 806 (3d Dept. 1999) (holding that court properly enjoined town sewage system's operator from charging additional fees without town's approval for statutorily mandated duty to maintain the pumps); Bloom v. Mayor of New York, 312 N.Y.S.2d 912 (2d Dept. 1970), aff'd, 971 N.E.2d 919 (1971) (complaint seeking declaration that the tax levy of defendant-city is invalid stated a claim for relief).

By its Order, the PSC determined that it lacks jurisdiction over the DOCS tax.[15] This tax has not been approved by the PSC, and is not a filed rate under the Public Service Law. Instead, it is an unauthorized charge, assessed upon Plaintiffs and putative class members without any basis in the law. Plaintiffs seek an order from this Court enforcing the PSC's determination, and prohibiting MCI and DOCS from continuing to collect this tax.

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[14] Under the current contract between MCI and DOCS, MCI must continue to remit to the State the DOCS tax, see Meeropol Aff., Ex. A at 2 ("Contractor is obligated to make commission payments to DOCS in strict accordance with [the terms of the contract]").

[15] Even if this Court were to decide that the PSC erred in ruling that it lacked jurisdiction over the DOCS tax, the PSC could not have found the DOCS tax just and reasonable, as it is not a valid commission, as discussed in Point V. Section A, infra.

V. PLAINTIFFS HAVE ADEQUATELY STATED CLAIMS FOR RELIEF FROM THE VIOLATION OF THEIR RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AND FREEDOM OF SPEECH AND ASSOCIATION

In addition to seeking an order that MCI and DOCS cease collecting and retaining the DOCS tax, Plaintiffs also seek relief from past and future payments of the DOCS surcharge under the theory that it is an unlawful and discriminatory tax.[16]

A. The DOCS Charge is an Unlawful Tax, Not a User Fee or a Telephone Commission

The DOCS tax is so disproportionate to the Department's actual costs in providing prison telephone services that it must be considered a tax and not a user fee. Defendants correctly state that user fees and taxes are distinguishable in that fees are intended to defray the cost of a particular service, while taxes defray the cost of services to which they are not attached. DOCS Br. at 20. However, Defendants do not – and cannot – show that the DOCS tax is used to defray the costs of operating the prison telephone service.

The amount of a user fee must be reasonably close to the *necessary* cost of the particular service to which the fee is attached. Jewish Reconstructionist Synagogue, Inc. v. Roslyn Harbor, 352 N.E.2d 115, 118 (1976). Reasonable user fees are those that are "estimated on the basis of reliable factual studies or statistics." Id. The burden is on the agency charging the user fee to show that the costs are necessary. Id. at 119-120. Defendants offer no evidence to show that the 57.5 percent of the revenue from each telephone call that is paid to DOCS is based on any reasonable estimate of the cost of a telephone call. Nor could they; in 2003, for example, the State estimated that it would receive $23.4 million from the DOCS tax. Of that sum, only $330,000 was earmarked for operation of the prison telephone system. Complaint, Ex. B.

[16] Defendant MCI correctly points out that Count I is the only claim against them. MCI Br. at 1. Plaintiffs concur that they have no right to seek money damages from MCI in this action.

Defendants point out that "a portion of the commissions received by DOCS are expended...for maintenance of the Call Home Program," DOCS Br. at 20, but they fail to inform this Court that that portion is approximately 1.5 percent of the revenue DOCS receives. [17] Id. The tiny portion of the DOCS tax used to finance the actual cost of the prison telephone system simply cannot justify the huge surcharge.[18]

Fees must also be paid by those to whom the service benefit accrues. Fees are by definition "a visitation of the costs of special services upon *the one who derives a benefit from them.*" Jewish Reconstructionist Synagogue, 352 N.E.2d at 117 (emphasis added). While the Family Benefit Fund does in (very small) part benefit those who wish to receive collect calls from prisoners, the vast majority of the money taken from prisoners' advocates and families through the DOCS tax is used to benefit programs unrelated to telephone service. Complaint, Ex. B. Defendants argue that these separate services, such as prison medical care, also benefit prisoners' families because the call recipients probably want their loved ones to receive proper treatment. DOCS Br. at 21-22. While this is of course true, a family member's desire for the loved one to be treated humanely *cannot* justify charging that family for services the state is obligated by law to fund and which are already paid for by Plaintiffs and others through their taxes.

Along with benefiting the actual rate-payers, fees must be also used to finance the *same* services to which they are attached, not merely services which may indirectly benefit some of the same people that pay the fee. See, e.g., Jewish Reconstructionist Synagogue, 352 N.E.2d at 119

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[17] Under the MCI / DOCS contract, all maintenance on the telephone equipment and wiring will be provided by MCI at no cost to DOCS. Meeropol Aff., Ex. A at 31.

[18] Plaintiffs understand that DOCS must finance the telephone system somehow, and Plaintiffs do not oppose including a proportional commission (amounting to around $300,000 a year) payable to DOCS as a valid business expense to be included in MCI's filed rate.

(finding zoning application fee must be used only to pay an expert to review the document, and cannot go to cover related costs like renting an auditorium for the zoning hearing, making extra copies of the application and paying a lawyer for advice on how to conduct the process); Albany Area Builders Ass'n v. Guilderland, 534 N.Y.S.2d 791, 794-95 (3d Dept. 1988), aff'd on other grounds, 546 N.E.2d 920 (1989) (holding property owners cannot be charged a building fee that supports general highway maintenance, even when their property is adjacent to, and benefits from, a highway). Accord Indiana Waste Systems, Inc. v. County of Porter, 787 F. Supp. 859 (N.D. Ind. 1992) (revenue from landfill oversight fee was tax rather than fee, because it was used to fund recycling programs).[19]

More than two-thirds of the DOCS tax revenue is spent to finance medical care for prisoners. Complaint, Ex. B at 4. This is care that the State *must* provide for prisoners under state and federal law.[20] These services would otherwise be paid for out of the general budget. See Complaint, Ex. B at 4 ("[W]hile [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.") The families and friends of prisoners pay for medical services, visiting programs, and family service programs not in any reasonable relation to their usage of these services, but solely in proportion to their usage of the telephone. Under the logical consequences

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[19] Defendants rely for support on the holding in Joslin v. Regan, 406 N.Y.S.2d 938 (4th Dept. 1978), that a filing fee could be merged with a larger budget for the court system; but the court's justification for that ruling was that it was impossible to isolate the cost of filing services from the rest of the system's costs, and so filing could not be considered a separate service. Id. at 941-42. In contrast, in this case, it is possible to isolate and determine the cost of the prison telephone system.

[20] See Estelle v. Gamble, 429 U.S. 97 (1976) (holding the Eighth Amendment prohibition of cruel and unusual punishment requires the state to provide prisoners with adequate medical care); Kagan v. State, 646 N.Y.S.2d 336, 337 (2d Dept. 1996); N.Y. Comp. Codes R. & Regs. Tit. 9, §7010.2(h) (1990) ("[A]dequate heath service and medical records shall be maintained.").

of Defendants' argument, there would be no legal barrier to DOCS declaring that *all* prison services – food, bedding, heat, sanitation – are part of the same "fund" that benefits prisoners and therefore can be charged to families in proportion to their use of the telephone. While DOCS has not yet gone so far, its current use of disproportionate charges – whether labeled a "user fee" or a "commission" – has already gone beyond the bounds of legitimacy. The Court cannot find that this is a reasonable user fee for a service.

The law is equally clear that a fee which exceeds any reasonable relationship to the cost of its service is an unauthorized tax. "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." Torsoe Bros. Constr. Corp. v. Bd. of Trustees, 375 N.Y.S.2d 612, 616-17 (2d Dept. 1975) (water tap-in fee was a tax because it was used to fund other municipal services besides water); New York Tel. Co. v. City of Amsterdam, 613 N.Y.S.2d 993, 995-96 (3d Dept. 1994) ($13/sq. ft. excavation permit fee was a tax because it went far beyond the cost to the city of processing the permit); State University of New York v. Patterson, 346 N.Y.S.2d 888, 891 (3d Dept. 1973) (water fees could cover the quantity of water used, but if used to cover related equipment costs they became a tax); Hanson v. Griffiths, 124 N.Y.S.2d 473 (Sup. Ct. 1953), aff'd, 127 N.Y.S.2d 819 (1954). Accord Indiana Waste Systems, Inc., 787 F. Supp. at 865. Because the DOCS surcharge is not proportional to DOCS' cost of providing the prison telephone service, and does not proportionally and directly benefit the recipients of prisoner collect calls, it is an unlawful tax, rather than a lawful fee.

This distinction is important; what is at stake in the difference between user fees and taxes is not simply the amount of the charge, but whether there will be any accountability with regard to DOCS' power to draw money from prisoners' friends and families. "Without the

safeguard of a requirement that fees bear a relation to average costs, a board would be free to incur . . . not only necessary costs but also any which it, in its untrammeled discretion, might think desirable or convenient, no matter how oppressive or discouraging . . ." Jewish Reconstructionist Synagogue, 352 N.E.2d at 118. The authority to set user fees is granted more easily to non-legislative bodies in part because it is constrained by the scope of the actual costs of the services to which the fees attach. Id.; New York Tel. Co., 613 N.Y.S.2d at 995. Defendants' attempt to reclassify the DOCS tax as a user fee is an attempt to escape this limit on their power to exact money. They seek to have their cake and eat it too: to call on their authority to charge user fees while at the same time avoiding its limitations. DOCS' use of "fees" to shift its general operating costs onto low-income families is exactly the kind of abuse of which courts have warned.[21] See Jewish Reconstructionist Synagogue, 352 N.E.2d at 118-19 ("At stake are the terms upon which citizens may have access to a governmental function and their right to have those terms, whether or not they are in the form of fees, fixed by standards which lend assurance that they are not 'unreasonable, discriminatory nor oppressive.'") (internal citation omitted); Albany Area Builders Ass'n, 534 N.Y.S.2d at 796 (using fees for taxation would "create a fund of money subject to limited accountability, not subject to statutory requirements...").

It is equally clear that the DOCS tax is not a "commission" under the applicable law. In the context of telephone services, a "commission" is a charge included in a filed rate that compensates the owner of premises on which telephones are placed for his/her expenses in making telephone service available to its guests. AT&T's Private Payphone Comm'n Plan, 3

[21] Nor is DOCS deserving of such deference as was granted by the court in Joslin v. Regan, 406 N.Y.S.2d 938 (4th Dept. 1978), on which Defendants rely. In that case, the charges in question had been enacted by the legislature, which is the proper body to levy taxes. The authority to tax was not at issue in that case, but only the fairness of a particular rate.

F.C.C.R. 5834, 20 (1988). In this way, the "commission" is merely one of many business expenses incurred to allow the telephone company to provide telephone service. Id. at 20. As a business expense, the "commission" must be included in the tariffed rate, such that it does not alter in any way the rate paid by the telephone user. Id.; see also, International Telecharge, Inc. v. AT&T, 8 F.C.C.R. 7403, 14 (1993); National Tel. Servs., Inc., 8 F.C.C.R. 654, 9-10 (1993). These FCC cases cited by Defendants, DOCS Br. at 20, do not legitimize the DOCS tax, they merely stand for the proposition that a commission may be valid -- despite the fact that the actual remittance is not explicitly noted on the tariff filing – as long as it meets the two criteria explained above.

These cases cannot provide support for the DOCS tax, because it changes the tariffed rate paid by the customer *and* cannot be explained as a necessary business expense. Commissions which increase the rate a customer pays over the tariffed rate are invalid. People ex rel. Public Serv. Comm'n v. New York Tel. Co., 29 N.Y.S.2d 513, 514 (3d Dept. 1941), aff'd, 40 N.E. 2d 1020 (1942) (hotel can not impose surcharge over filed rate); United States v. AT&T, 57 F. Supp. 451 (S.D.N.Y. 1944), aff'd sub nom, Hotel Astor v. United States, 325 U.S. 837 (1945) (per curiam) (hotel surcharge which raises cost of call over tariffed rate is invalid and should be enjoined).

Moreover, if the DOCS tax were a "commission" the PSC would have jurisdiction to review the rate and ensure that it is just and reasonable, as a valid business expense.[22] This proposition has been repeatedly affirmed in the analogous context of hotels which provide

[22] The fact that the DOCS tax is mandated by contract does not explain the PSC's lack of jurisdiction over it. The PSC has jurisdiction to review all rates including those prescribed by contract. New York Tel. Co. v. New York Div. of State Police, 445 N.Y.S.2d 609 (3d Dept. 1981), aff'd., 444 N.E.2d 983 (1982) (holding PSC is statutorily authorized to grant an increase in rates where the situation warrants, even when the current rate is prescribed by contract).

telephone service to their guests for a fee. People ex rel. Public Serv. Comm'n v. New York Tel. Co., 29 N.Y.S.2d at 516; Connolly v. Burleson, P.U.R. 1920, C-243[23] (holding the PSC has jurisdiction over the commission taken by hotels for telephone service), Hotel Pfister v. Wisconsin Tel. Co., 233 N.W. 617 (1930) (same), In re Hotel Marion Co., P.U.R. 1920, D-466[24] (same); Jefferson Hotel Co. v. Southwestern Bell Tel. Co., 15 P.U.R. [N.S.] 265[25] (same).

Indeed, PSC jurisdiction over commissions is necessary to protect consumers:

> We think it is supported by logic and practical necessity if the purposes of the Public Service Law are to be effectuated. A telephone within a hotel, used to furnish service in connection with outside calls, must be considered an extension of the telephone company's general system and subject to regulation; otherwise the public will be subjected to a variety of rates concocted under the guise of hotel service and completely unregulated. To avoid such an evil is one of the main purposes of the statute.

People ex rel. Public Serv. Comm'n v. New York Tel. Co., 29 N.Y.S.2d at 516. See also, Hotel Pfister, 233 N.W. at 619 (holding hotel commissions must be subject to regulation so that the public is not "obliged to pay more for such service than could be demanded if the [telephone] company performed it directly and entirely by means of its own facilities. If such practice were permitted, it would open the door to discrimination, and thereby afford a means of evading one of the most important provisions of the statute and render it impotent to accomplish the purpose of its enactment").

For the above reasons, the PSC correctly determined that it lacked jurisdiction over the DOCS tax because it is not a "commission" subject to the PSC's regulation. Nor can the DOCS tax be legitimized as a user fee. Instead, it is an unlegislated, and therefore unconstitutional, tax.

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[23] A copy of this opinion is included in the appendix as Exhibit 1.

[24] A copy of this opinion is included in the appendix as Exhibit 2.

[25] A copy of this opinion is included in the appendix as Exhibit 3.

B. The DOCS Tax Violates Plaintiffs' Rights to Substantive Due Process

To state a substantive due process claim, a plaintiff must allege a constitutionally protected liberty or property interest, and then must show that the defendant acted in an arbitrary or irrational manner to deprive them of that interest.[26] See Walz v. Town of Smithtown, 46 F.3d 162, 169 (2d Cir. 1995). Plaintiffs have met these requirements. It is well-established principle that "[t]axes, or more specifically, the monies used to pay taxes, are a type of 'property' of which a citizen cannot be deprived without due process of law." Weissinger v. Boswell, 330 F. Supp. 615, 624 (M.D. Ala. 1971) (three-judge constitutional panel); Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352-53 (1918). Accordingly, Plaintiffs have properly pled the existence of their constitutionally protected liberty and property interests. As demonstrated below, Plaintiffs have also met the requirements for establishing the State's arbitrary deprivation of these interests.[27]

The courts long ago established the parameters for evaluating substantive due process challenges to government taxation schemes:

> Taxes are enforced contributions, levied by the State upon the property of individuals, by virtue of its sovereignty, for the support of government, and for the public needs. The

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[26] In Remley v. State of New York, 665 N.Y.S.2d 1005, 1009 (1997), the court expressly noted that "the due process provision in Article I, Section 6 is self-executing in that it defines a judicially enforceable right and provides for a basis for relief against the State if the right is violated." Furthermore, Plaintiffs' claim is properly interposed as a due process claim here. See, e.g., Radio Common Carriers v. State, 601 N.Y.S.2d 513 (Sup. Ct. 1993) (challenging regulatory "fee" on due process grounds); Rego Properties Corp. v. Finance Adm'r of New York, 424 N.Y.S.2d 621, 625-26 (Sup. Ct. 1980) (same).

[27] Like the many cases decided by New York courts over the years, Plaintiffs allege that DOCS has unlawfully imposed a tax upon them by means of the prison telephone system in contravention of the New York Constitution which reserves such authority exclusively to the Legislature. See, e.g., Cimato Bros., Inc. v. Town of Pendleton, 654 N.Y.S.2d 888 (4th Dept. 1997); New York Tel. Co. v. City of Amsterdam, 613 N.Y.S.2d 993, 995 (3d Dept. 1994); Torsoe Bros. Constr. Co. v. Bd. of Trustees, 375 N.Y.S.2d 612 (2d Dept. 1975).

> money thus taken, until taken, is . . . property within the meaning of the Constitution of the United States.
> . . . .
> Due process of law, as applied to the cases under consideration, is the authorized procedure whereby the property of the individual can be taken by the State; it includes *the initial authority to levy taxes*; *the purpose to which the money thus raised is to be devoted*; and *the instrumentalities that distribute the burden upon the citizens.*
> . . . .
> *Any substantial departure, therefore, in the collection of taxes, from the law, either as to the authority for a tax, for its purpose, or the provisions for the just distribution of its burdens, is a departure from due process of law*; and the enforced collection of taxes, in the laying and distributing of which there is a substantial departure from law, is the depriving of a citizen of his property without due process of law.

Chicago Union Traction Co. v. State Bd. of Equalization, 114 F. 557, 565-66 (C.C.S.D. Ill. 1902) (emphasis supplied), aff'd sub nom., Raymond v. Chicago Union Traction Co., 207 U.S. 20, 40 (1907). Pursuant to this framework, this Court must examine: (i) DOCS' authority to impose this special tax on those seeking to communicate with prisoners in its facilities; (ii) the instrumentality used by DOCS to achieve its objective; and (iii) the distribution of this tax burden upon the State's citizens. See Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie, 618 N.E.2d 127 (1993). See also Unity Real Estate Co. v. Hudson, 178 F.3d 649, 659-60 (3d Cir. 1999). Even a cursory evaluation of these aspects of the tax levied by means of the Department's prison telephone system compels the conclusion that the scheme violates the Due Process Clause of the State Constitution.

i. The Department has no authority to impose its prison telephone system tax upon Plaintiffs.

In examining whether a governmental entity has the authority to impose taxes, courts look at both the state and federal constitutions and the laws governing the power to tax.[28] In this

[28] See, e.g., Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 345 (1989). See also, Long Island Lighting Co. v. Assessor of Brookhaven, 552 N.Y.S.2d 336 (2d Dept. 1990); Radio Common Carriers v. State, 601 N.Y.S.2d 513 (Sup. Ct. 1993); Rego Prop. Corp. v. Finance Adm'r of New York, 424 N.Y.S.2d 621,625-26 (Sup. Ct. 1980).

regard, DOCS' activities must first be tested against the principle that "the exclusive power of taxation is lodged in the State Legislature." Castle Oil Corp. v. City of New York, 675 N.E.2d 840 (1996) (citing N.Y. Const., art. XVI, § 1).[29] The law in New York is eminently clear that 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., 618 N.E.2d 127, 130 (emphasis added); see also Gautier v. Ditmar, 97 N.E. 464, 467 (1912). "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, 516 N.Y.S.2d 283, 284 (2d Dept. 1987) (emphasis supplied); cf. Greater Poughkeepsie Library Dist., 618 N.E.2d at 129 (noting that the "[d]elegation of purely administrative functions is constitutionally permissible"). Under these principles, to constitutionally confer this limited assessment and collection authority upon an administrative agency, the State Legislature must make the delegation "in express terms by enabling legislation." Castle Oil, 675 N.E.2d at 842.

Plainly, DOCS' revenue raising scheme does not comport with these constitutional requirements. The Department can point to *no* legislative enactment which broadly delegates taxing authority to it; nor can it show that the New York State Legislature has provided it with the specific authority to levy taxes upon prisoners' families through the prison telephone system as a means of raising revenue for the State's or DOCS' general operations.[30] The Department's

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[29] Accord United States Steel Corp. v. Gerosa, 166 N.E.2d 489 (1960).

[30] The portion of The Appropriations Act of May 14, 2003, ch. 50, Laws of New York 2003 attached as Ex. A to Defendant DOCS' Affidavit of Gerry J. Rock is, of course, just that – an act appropriating money. It cannot be construed as enabling legislation, much less a grant with

taxing activities have been exercised without any legislative authority whatsoever, and are therefore *ultra vires* and unconstitutional. Id., United States Steel v. Gerosa, 166 N.E.2d at 491 (holding that a tax "must be within the expressed limitations [of the enabling legislation] and, unless authorized, a tax so levied is constitutionally invalid"). See also Tze Chun Liao v. New York State Banking Dept., 548 N.E.2d 911, 913 (1989) (stating that "[a]dministrative agencies, as creatures of the legislature within the executive branch, can act only to implement their charter as it is written. . .[they] cannot create rules, through [their] own interstitial declaration, that were not contemplated or authorized by the Legislature...").[31] Given these circumstances, the Court need go no further in its due process analysis because "[a] citizen is deprived of due process of law where. . .there is a substantial departure from the law as to the authority for a tax." Rego Properties, 424 N.Y.S.2d at 625 (citing Chicago Union Traction Co. v. State Bd. of Equalization, 114 F. 557 (C.C.S.D. Ill. 1902)).[32] See Castle Oil, 67 N.E.2d at 842.

ii. The tax scheme implemented by DOCS violates core due process requirements.

Even if the State could point to legislation granting DOCS the authority to impose this tax upon Plaintiffs, 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. The

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"express terms" and "strict guidelines." Castle Oil, 675 N.E.2d at 842; Yonkers Racing, 516 N.Y.S.2d at 284.

[31] In addition, DOCS' tax scheme also violates the constitutional requirement of separation of powers by encroaching on this uniquely legislative function. See, e.g., Yonkers Racing Corp., 516 N.Y.S.2d at 284 (New York State's Racing and Wagering Board's action imposing tax without authority constitutes usurpation of a legislative function). Cf. Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 220-21 (1989).

[32] See also Weissinger v. Boswell, 330 F. Supp. 615 (M.D. Ala. 1971).

courts in New York have made clear that the legislative delegation of power to an agency to assess and collect a tax on a particular activity "must be accompanied by proper guidelines set by the Legislature." Yonkers Racing, 516 N.Y.S.2d at 284. Furthermore, any tax imposed pursuant to such a limited delegation, "must be within the expressed limitations [of the enabling legislation] . . . ." Castle Oil, 67 N.E.2d at 842 (citations omitted). "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." Rego Properties, 424 N.Y.S.2d at 625 (quoting Weissinger v. Boswell, 330 F. Supp. at 625). See also Greater Poughkeepsie Library Dist., 618 N.E.2d at130.

In the instant case, DOCS has given itself the unlimited discretion to embed a tax in the charge structure of the prison telephone system. It has arbitrarily selected the amount to be raised annually – its annual surcharge from the MCI Contract – and thus the tax burden to be imposed upon Plaintiffs. Given that the prison telephone system 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 the tax to be levied. The courts have consistently concluded that such circumstances violate due process requirements. See, e.g., Rego Properties, 424 N.Y.S.2d at 625 (statute which gave assessors unlimited discretion in fixing the rate of assessment offended due process); Cimato Bros., Inc. v. Town of Pendleton, 654 N.Y.S.2d 888 (4th Dept. 1997) (ordinance permitting town engineer to set permit fee to cover town's cost of inspecting public improvements in absence of standards to control discretion held unconstitutional); Yonkers Racing, 516 N.Y.S.2d at 283. "[A] system of assessment under which the State [agency] is left without guidelines for determining the major

types of property [to be assessed], and the assessor is empowered at his discretion, to select the ratios at which the different categories may be assessed . . . constitutes an unconstitutional delegation of a basic legislative function . . . and necessarily results in the deprivation of due process and the equal protection of the laws to property owners." Slewett & Farber v. Bd. of Assessors, 412 N.Y.S.2d 292, 300 (Sup. Ct. 1978), aff'd as modified, 438 N.Y.S.2d 544 (2d Dept. 1981), aff'd as modified, 430 N.E.2d 1294 (1982).

In essence, the Department's taxation scheme fails in this regard because it contains the same structural flaws as the statute challenged in Greater Poughkeepsie Library District. In that case, the Court of Appeals found unconstitutional a statute creating a library district with the power to fix the amount of tax revenue to be raised and appropriated by the town to fund the library. Analyzing the statutory scheme, the Court noted that the Library District set its own budget, estimated the amount of funds that would be available to it from other sources, and was not subject to any standards including a fixed cap on the tax rate. In this manner, the Court held, the Library District set the tax rate for the town. Greater Poughkeepsie Library Dist., 618 N.E.2d at 129. The Department's taxation scheme suffers from precisely the same deficiencies; DOCS has arrogated to itself the power to determine whether a tax should be levied, at what rate, upon what property, and up to what ceiling. Such a scheme is flatly unconstitutional. Id. at 130; Gautier, 204 N.Y. at 467-68.

iii. **The imposition of the prison telephone system tax solely on Plaintiffs violates due process principles as well.**

Contrary to the State's urging, DOCS Br. at 21, the Department's telephone taxation scheme fares no better under an evaluation of whether sufficient evidence exists to support DOCS' implicit decision that prisoners' families and friends can justly be charged in order to fund its general operations, or whether it was a rational solution for DOCS to augment its budget

through the levying of fees on the recipients of prisoners' telephone calls. See Unity Real Estate Co., 178 F.3d at 660. Beyond DOCS' *ultra vires* actions in exercising taxing power that clearly exceeds its jurisdictional mandate, it has also violated the well-established principle of substantive due process that "although money raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit . . . so called assessments for public improvements laid upon [specific individuals] are ordinarily constitutional only if based on benefits received by them." HBP Assocs. v. Marsh, 893 F. Supp. 271, 278-279 (S.D.N.Y. 1995) (quoting Nashville, C. and St. L. Ry. v. Walters, 294 U.S. 405, 430 (1935)).[33]

The situation in the instant case could not present a clearer violation of these principles. The tax monies paid by Plaintiffs under DOCS' scheme are added to the general State fisc; they compensate for what otherwise would be funded by general tax dollars or would be a budgetary shortfall. Consequently, such monies must be deemed a "levy made for the purpose of raising revenues for a general governmental purpose" and are therefore taxes. Radio Common Carriers, 601 N.Y.S.2d at 575. Plaintiffs' payments are not made in satisfaction of any regulatory fee; no such fees have been enacted as "an integral part of the regulation of an activity" or "to cover the cost of regulation." Id. Nor are these payments properly designated "user fees" in as much as the amounts paid by each individual bear no relationship whatsoever to the costs of operating the prison telephone system. See Point V, Section A., supra. The record here reveals that the fees imposed by DOCS: (i) are being exacted for revenue purposes; (ii) are disproportionate to the costs associated with the operation of the prison telephone system; and (iii) are appropriated for use in covering the general operating costs of the Department. Plaintiffs' surcharge payments,

[33] See also Norwood v. Baker, 172 U.S. 269, 279 (1898); Aldeus, Inc. v. Tully, 416 N.Y.S.2d 425, 427 (3d Dept. 1979); Board of Ed. v. Alexander, 92 N.Y.S.2d 471, 477-78 (Sup. Ct. 1949).

therefore, are taxes imposed pursuant to an unauthorized scheme. See New York Tel. Co. v. City of Amsterdam, 613 N.Y.S.2d 993, 995 (3d Dept. 1994); Torsoe Bros. Constr. Co. v. Bd. of Trustees, 375 N.Y.S.2d at 616.

Moreover, the tax imposed bears no relationship to Plaintiffs as a group. The distinction drawn between Plaintiffs and other State taxpayers for the purpose of serving the Department's general revenue raising objective is thus unconstitutionally baseless and irrational. See Foss v. City of Rochester, 480 N.E.2d 717, 722 (1985). See also County of Sacramento v. Lewis, 523 U.S. 833 (1998).

Finally, the Department's revenue raising scheme also violates the prohibition against double taxation by imposing a tax on Plaintiffs 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, 601 N.Y.S.2d at 517 (citing Sage Realty Corp. v. O'Cleireacain, 586 N.Y.S.2d 118 (1st Dept. 1992)). As the Supreme Court observed in Tennessee v. Whitworth, 117 U.S. 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, Plaintiffs have established their substantive due process and unauthorized taxation claims. They have identified the specific constitutional rights at stake, including their liberty interest in maintaining their associational rights, and their property interests in the monies collected as taxes.[34] They have demonstrated that the "state action . . . was arbitrary in a constitutional sense and therefore violative of substantive due process." Lowrance v. Achtyl, 20

[34] See Collins v. City of Harker Heights, 503 U.S. 115, 127 (1992).

F.3d 529, 537 (2d Cir. 1994).[35] Plaintiffs have shown that DOCS' revenue raising scheme violates substantive due process mandates at each step of the analysis: from implementation, to the distribution of the burden, and finally to the collection of the tax.

C. The DOCS Tax Works an Unconstitutional Taking of Plaintiffs' Property

Plaintiffs have also stated a claim for an unlawful taking. The Takings Clause of Article 1 § 7(a) of the New York State Constitution prohibits the taking of private property for public use without just compensation. To establish a takings claim under 42 U.S.C. § 1983, Plaintiffs must show "(1) a property interest; (2) that has been taken under color of state law; (3) without just compensation." HBP Assocs. v. Marsh, 893 F. Supp. 271, 277 (S.D.N.Y. 1995).[36]

Here, DOCS imposed an assessment that confiscates Plaintiffs' property in violation of their rights to substantive due process under Article 1 of the New York Constitution. More specifically, Plaintiffs allege that the Department's operation of the prison telephone system: (1) works a taking of their property – the fees they pay to cover that portion of the costs imposed by the DOCS tax;[37] (2) for a public purpose – funding of a portion of the cost of the general operation of DOCS;[38] and (3) without just compensation.[39]

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[35] Accord Foucha v. Louisiana, 504 U.S. 71, 80 (1992); Daniels v. Williams, 474 U.S. 327, 331 (1986).

[36] See also, Frooks v. Town of Cortlandt, 997 F. Supp. 438, 452-53, aff'd without opinion, 182 F. 3d 899 (2d Cir. 1999); Port Chester Yacht Club v. Iasillo, 614 F. Supp. 318, 321 (S.D.N.Y. 1985) (citing Parratt v. Taylor, 451 U.S. 527, 535-37 (1981)).

[37] See Complaint at ¶¶18 - 22 (specifying costs imposed on each named Plaintiff); ¶ 7 (delineating how the costs of prisoners' telephone calls incorporates the State's commission into the rate structure); ¶¶10, 44 (specifying revenue paid to the State pursuant to the MCI contract).

[38] See Complaint at ¶¶44 - 45 (alleging that the prison telephone system was intended to be a source of revenue for DOCS, and that its tax is not used to fund the prison telephone system).

The State apparently misapprehends the law on takings. See DOCS Br. at 22-23. Plaintiffs unequivocally possess a constitutionally protected property interest. There can be no doubt that the sums paid by Plaintiffs attributable to the DOCS tax constitute their personal property. The United States Supreme Court has made clear that the Takings Clause of the U.S. Constitution applies to such monetary interests. See, e.g., Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998); Webb's Fabulous Pharms. v. Beckwith, 449 U.S. 155, 160 (1980).[40] And the Court of Appeals of New York followed, ruling that Article 1 § 7 of the New York State Constitution applies to monetary interests. Alliance of Am. Insurers v. Chu, 571 N.E.2d 672 (1991).

Plaintiffs have plainly alleged that their property has been taken by the State. Complaint at ¶ 92 ("The States' operation of this system constitutes a confiscation of Plaintiffs' property"). Plaintiffs have further alleged that the monies they have paid which are attributable to the DOCS tax are used for a public purpose -- to subsidize the cost of DOCS' general operations. Complaint at ¶ 12. Indeed, the Department itself has admitted this fact. DOCS Br. at 4. Therefore, DOCS cannot contest that the use to which it has put Plaintiffs' monies constitutes a "public use."[41]

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[39] See Complaint at ¶¶12-14, 85 (alleging that the fees imposed are illegal and intended to subsidize governmental functions and that Plaintiffs have been singled out to be directly responsible for the burden of subsidizing the DOCS system); ¶ 12 (alleging that Plaintiffs are subject to tax that bears no relation to the actual administrative and enforcement costs incurred in facilitating prison telephone service).

[40] See also Armstrong v. United States, 364 U.S. 40, 44 (1960); Louisville Joint Stock Land Bank v. Radford, 296 U.S. 661(1935).

[41] See Byrne v. New York State Office of Parks, Recreation & Historic Preservation, 476 N.Y.S.2d 42, 42 (4th Dept. 1984) (holding that the term "public purpose" is "broadly defined to encompass any use which contributes to the health, safety, general welfare, convenience or prosperity of the community").

Finally, Plaintiffs have alleged that the deprivation they have suffered has occurred without due process of law, see Complaint at ¶93, and that they have received no compensation for the taking. Because New York does not provide a procedure for seeking just compensation of claims such as those alleged by Plaintiffs in this case, Plaintiffs have adequately pled their takings claim.[42] See New York Em. Dom. Proc. Law §104 ("The eminent domain procedure law shall be uniformly applied to any and all acquisitions by eminent domain of *real property* within the state of New York) (emphasis supplied).[43]

Following the Supreme Court's directives in Dolan v. City of Tigard, 512 U.S. 374, 384 (1994), and Nolan v. California Coastal Commission, 483 U.S. 825, 834 (1987), the New York Court of Appeals has held that a "burden-shifting regulation" constitutes a taking: "(1) if it denies an owner economically viable use of his [or her] property, *or* (2) if it does not substantially advance legitimate State interests." See also Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 482 (1994) (quoting Seawall Assocs. v. City of New York, 542 N.E.2d 1059 (1989)), cert. denied sub nom. Wilkerson v. Seawall Assocs., 493 U.S. 976 (1992). The Court of Appeals also reiterated its determination that "the substantial State purpose for such legislation must be bound by a 'close causal nexus' to survive scrutiny." Manocherian, 643 N.E.2d at 482 (citing Dolan v. United States, 512 U.S. 374 (1994)).

While the limitations placed on the operation of the prison telephone system – including those such as call monitoring – undoubtedly serve legitimate governmental purposes, no causal nexus exists between these regulatory requirements and the additional monetary burdens placed

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[42] In the absence of any delineated procedure, Plaintiffs sought relief directly from Defendants to no avail. See Meeropol Aff.

[43] See also Kohlasch v. New York State Thruway Auth., 482 F. Supp. 721, 723-24 (S.D.N.Y. 1980).

on Plaintiffs by the DOCS tax. The Department does not contest the fact that the revenues generated by the system are used to fund myriad operating costs of DOCS. DOCS Br. at 4. Indeed, DOCS has not even attempted to demonstrate the required relationship between the significant burden placed on Plaintiffs and their use of the prison telephone system – *i.e.*, how the costs to DOCS associated with its operation of the prison telephone system – which are *de minimis* at most, see Complaint, Ex. B at 4 – reasonably relate to its requirement of a system to provide more than $25 million per year. Given the complete absence of this constitutionally required nexus, the DOCS' failure to confront this issue is not surprising.

Despite DOCS' intimation, its use of the DOCS tax to subsidize other governmental operations does not provide any constitutional cover for its unlawful conduct. The Court of Appeals of New York has followed the U.S. Supreme Court in making it clear that while government may permissibly "adjust[] the benefits and burdens of economic life to promote the common good," Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), it may not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" Manocherian, 84 N.Y.2d at 391 (quoting Penn Cent. Transp. Co., 438 U.S. at 123). See also Armstrong, 364 U.S. at 49. Here, DOCS deliberately singled out Plaintiffs to bear alone a public burden – operation of the state correctional system – a burden which they had no role in creating. See Eastern Enterprises v. Apfel, 524 U.S. 498, 537 (1998) (plurality opinion); Eastern Minerals Int'l, Inc. v. Cane Tenn., Inc., 713 N.Y.S.2d 29, 32 (1st Dept. 2000)

In Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 164-65 (1980), the Supreme Court struck down a Florida statute that was intended to accomplish a similar objective by permitting Seminole County to retain the interest earned on interpleader funds deposited with the

county clerk. Noting that a separate statute prescribed a fee for the clerk's services rendered in receiving monies into the fund and noting them in the court's registry, the Court expressly rejected the defendants' claim that the retention of interest constituted a reasonable "user's fee". Id. at 162. Rather, it held that "the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts."[44] Id. at 163. See also Blumberg v. Pinellas County, 836 F. Supp. 839, 845 (M.D. Fla. 1993); Alliance of Am. Insurers v. Chu, 571 N.E.2d 672 (1991)

In sum, the State has exacted two tolls from Plaintiffs through its operation of the prison telephone system, the first in the form of payment of the customary cost of telephone calls, and the second in the form of the additional monetary burden resulting from the surcharge demanded by DOCS. No discernible justification exists for the imposition of these additional charges "other than the bare transfer of private property to the [State]." United States v. Sperry Corp., 493 U.S. 52, 62 (1989) (discussing the Court's decision in Webb's Fabulous Pharmacies). Such a "confiscatory regulation" is plainly violative of the Takings Clause. See Webb's Fabulous Pharms., 449 U.S. at 163-64.

For the above reasons, Plaintiffs have adequately stated a claim for an unlawful taking under the New York State Constitution.

D. Plaintiffs Have Properly Alleged Claims Based On the Violation of Their Free Speech and Associational Rights

In order to construct their argument that Plaintiffs have failed to state a cause of action for violation of their free speech and associational rights, Defendants mischaracterize Plaintiff's claim as one "based on a purported right to communicate inexpensively via telephone." DOCS

[44] Moreover, here, as in Webb's Fabulous Pharmacies, "[n]o police power justification is offered for the deprivations" visited upon Plaintiffs. 449 U.S. at 163.

Br. at 30. This inaccurate representation of the allegations lays the foundation for the Department's facile and unsupported statements that "no such right can credibly be found in the constitution" and that "seeking to save money does not implicate fundamental speech rights." Id. Plaintiffs of course assert no such right; rather they complain of: (1) the State's imposition of a fee on their expressive activity that bears no relationship to related regulatory costs; (2) the burden the DOCS tax places on their ability to maintain contact with incarcerated family member, Complaint at ¶¶52-63; and (3) the attenuated relationship between the State's surcharge and the penological objective purportedly served.

The prison telephone system clearly implicates Plaintiffs' rights to freedom of speech and association under the State Constitution. While incarceration – for prisoners and non-prisoners alike – of course 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 U.S. 401, 407 (1989). Our free speech guarantees protect Plaintiffs' communication with their friends and family not only by mail, but also by telephone. See, e.g., Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir. 1994) (recognizing that non-inmates' rights may be implicated by prison telephone regulations).

To the extent they restrict Plaintiffs' ability to communicate with family members in prison, DOCS' policies also burden Plaintiffs' rights to familial and marital association protected by the New York Constitution. 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 U.S. 494, 503-504 (1977), the states are required to protect the "[i]ntegrity of the family unit." Stanley v.

Illinois, 405 U.S. 645, 651 (1972).[45] Plaintiffs' right to familial association survives incarceration of their loved ones, see Turner v. Safley, 482 U.S. 78, 95-97 (1987), because attributes of the family relationship – expressions of emotional support, decisionmaking regarding family obligations and child-rearing, and expectations of the prisoner's reentry into the family – exist despite the fact of imprisonment. See id. at 95-96.

These rights, to be sure, are not absolute. Defendants cite cases illustrating the principle that prison rules needed to maintain security of a correctional facility may reasonably burden the constitutional rights of both prisoners and non-prisoners.[46] DOCS Br. 32. They ignore, however, just how dramatically different the policies challenged here – most notably, the imposition of a surcharge unrelated to the cost of providing the prison telephone system – are from the prison rules in those cases. As a result, Defendants fail to apply the appropriate level of scrutiny to Plaintiffs' claims. For this and other reasons, Defendants have not shown that Plaintiffs' constitutional claims should be dismissed.

The State effectively concedes that but for the 57.5 percent commission which MCI must pay DOCS under its contract, the charges to Plaintiffs for communicating with their family and loved ones would be much lower. DOCS Br. at 3. It nonetheless argues that DOCS may appropriately raise revenues by imposing the DOCS tax on prisoners' telephone calls because the

[45] See also Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (recognizing right to marry); Adler v. Pataki, 185 F.3d 35, 44 (2d Cir. 1999) (recognizing First Amendment right of intimate marital association); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (recognizing rights of parents and children to maintain emotional attachment).

[46] The Department relies upon numerous unsuccessful constitutional challenges to prison telephone system features to show that Plaintiffs' claims are foreclosed. See DOCS Br. at 32-33. However, not one of these cases involved a justiciable free speech claim by a non-prisoner containing factual allegations sufficient to demonstrate that the telephone system imposes a surcharge above and beyond the cost of the service.

revenues are earmarked for a legitimate penological objective -- the programs supported by the Family Benefit Fund. Id. at 3-4. That is simply not so.

i. The *Turner* standard is inapplicable to Defendants' surcharge policy.

Contrary to the State's assertion, DOCS Br. at 31-32, the constitutionality of the Defendants' imposition and collection of the DOCS tax is not governed by the deferential standard adopted by the Supreme Court in Turner. There the Supreme Court limited judicial scrutiny of the "day-to-day" decisions of prison administrators and official efforts to address "security problems," 482 U.S. at 89. The Supreme Court applied this reasoning to prison rules regulating "the order and security of the internal prison environment" in Thornburgh v. Abbott, 490 U.S. at 407.

Courts have expressly declined to apply Turner to prison policies that do not implicate such concerns. Thus, in Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989), the D.C. Circuit applied traditional intermediate scrutiny to the District of Columbia's decision to incarcerate long-term female offenders in federal prisons far from the city while similarly situated male offenders were incarcerated nearby. Id. at 1453. 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." 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 inapposite. Id. at 1454.[47]

[47] See also Beauchamp v. Murphy, 37 F.3d 700, 704 (1st Cir. 1994) (refusing to apply Turner deference to inmates' challenge to correctional authorities' 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 F.2d

Like the policy decision in Pitts, DOCS' imposition of the surcharge reflects a purely "budgetary" choice that does not implicate prison security, control of prisoners' behavior, or the internal prison environment and regime. As such, it is subject to the level of scrutiny "traditionally applied" to challenges to fees that burden free speech rights. Pitts, 866 F.2d at 1453.

ii. The surcharge fails to survive the scrutiny applied to challenges to fees that burden free speech rights.

As noted above, while government may assess a fee to recoup the costs incurred in regulating expressive activity, Cox v. New Hampshire, 312 U.S. 569, 576-77 (1941), it may not impose a fee that bears no relationship to those regulatory costs. Murdock v. Pennsylvania, 319 U.S. 105 (1943). 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 tax levied and collected as a condition to the pursuit of activities whose enjoyment is protected by the First Amendment." Id. at 113-14.

Since Murdock, courts have consistently applied its simple rule -- defraying costs is permissible, taxing speech is not -- in striking down similar measures.[48] Similarly here, because

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1521, 1530 (9th Cir. 1993) (declining to apply Turner standard to inmates' Eighth Amendment challenge to cross-gender clothed body searches).

[48] See, e.g., Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 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 F.2d 1189, 1205 (11th Cir. 1991) ("[t]he government may not profit by imposing license or permit fees on the exercise of first amendment rights, ... and is prohibited from raising revenue under the guise of defraying its administrative costs"); see also, Fernandes v. Limmer, 663 F.2d 619, 633 (5th Cir. 1981) (striking down license fee for distribution of literature at Dallas/Fort Worth airport, in part because defendants had failed to show that fee matched regulatory costs

the surcharge imposed on inmate telephone calls bears minimal relationship to the regulatory costs incurred by DOCS in connection with the prison telephone service, Complaint ¶ 12, it is, in effect, "a flat tax imposed on [prisoners'] exercise of [their free speech rights.]" Murdock, 319 U.S. at 113. As such, it must be struck down.

iii. The surcharge fails to survive scrutiny under the *Forsyth* analysis.

The surcharge at issue here also fails traditional free speech scrutiny because it is not narrowly tailored to achieve a legitimate governmental interest and leaves Plaintiffs without ample alternative channels of communication.[49] There are obviously less speech-restrictive ways to fund the Family Benefit Program, for example, appropriating monies from the General Treasury.

Moreover, Plaintiffs have made extensive allegations describing the "undu[e] burden" Defendants' surcharges place on their speech. Complaint at ¶¶ 52-63. Natl. Awareness, 50 F.3d at 1165. While Defendants may dispute these claims, DOCS Br. at 30, whether the alternatives available to Plaintiffs provide a constitutionally adequate substitute for telephone communication presents a question of fact not properly determined by the Court at this early stage.[50]

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incurred); Baldwin v. Redwood City, 540 F.2d 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") (citations omitted).

[49] National Awareness Found. v. Abrams, 50 F.3d 1159, 1165 (2d Cir. 1995); accord Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992).

[50] Cf. Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (noting that alternatives to physical presence of foreign intellectual would not necessarily "extinguish[] altogether any constitutional interest in this particular form of access" to his ideas); accord Baldwin, 540 F.2d at 1368 (stating that existence of alternatives to postering was "not alone enough to justify any regulation [Defendants] may desire to impose on this means of expression").

iv. The surcharge fails scrutiny even under the *Turner* standard.

Finally, even assuming the Turner standard were deemed applicable here, the motion to dismiss still must be denied.[51] To begin, Defendants have failed to articulate a satisfactory penological justification for the DOCS tax. While raising revenues from *prisoners* can sometimes be a legitimate penological objective, Allen v. Cuomo, 100 F.3d 253, 261 (2d Cir. 1996) (disciplinary surcharge), raising revenue from *their families and other outsiders*, who have not been found guilty of any crime, can not.

To be sure, the State claims that the revenues derived from the surcharge are earmarked for the Family Benefit Fund. This fund, however, is spent on correctional programs that have no relation to the prison telephone system.[52] Defendants' asserted penological justifications, and the nature of their relationship to the various aspects of the prison telephone system, must be proven at trial.[53]

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[51] Turner requires an analysis of (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest set forth to justify it; (2) whether alternative means of exercising the right remain open; (3) what impact accommodation of the right will have on guards and other inmates, and on the allocation of prison resources generally; and (4) whether easy alternatives to the regulation exist. Turner, 482 U.S. at 89-90. Furthermore, the Turner Court noted that "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimize 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.

[52] Complaint at ¶12, Ex. B at 4. Nor do these expenditures have any relationship to the rehabilitation of inmates incarcerated in the State's facilities. Cf. Shimer v. Washington, 100 F.3d 506, 510 (7th Cir. 1996) (reversing grant of summary judgment in favor of prison officials, noting that "evidence . . . to establish a connection between prison administrator's unsubstantiated justifications and its policy . . . should be at the heart of the Turner analysis"); Allen v. Coughlin, 64 F.3d 77, 80 (2d Cir. 1995) (defendant prison's "[c]onclusory assertions in affidavits" supported by only one concrete example are insufficient to establish that publisher-only news clipping rule is rationally related to security).

[53] See Swift v. Lewis, 901 F.2d 730, 731 (9th Cir. 1990) (state must provide evidence that the interests asserted are the actual bases for the policy).

In any event, even if a portion of the monies deposited into the Family Benefit Fund is spent on programs aimed at rehabilitation, the attenuated relationship between the surcharge and the objective purportedly served does not support DOCS' argument here for several incontrovertible reasons. First, 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.[54] Second, it is far from clear whether any of the intended benefits accrue to those who are paying for them. Third, the State's articulated objective fails to provide a complete justification for the surcharge in as much as only a portion of the surcharge monies collected from Plaintiffs is used for the rehabilitative purpose asserted. See Complaint at ¶12, Ex. B at 4.

Plaintiffs 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). Complaint at ¶¶52, 53, 58. See Allen v. Coughlin, 64 F.3d at 80. Plaintiffs also have pled the existence of an "obvious, easy alternative[]" policy, Turner, 482 U.S. at 90, -- a debit card system like that utilized by the Federal Bureau of Prisons -- that meets the security concerns allegedly addressed by the current system. Complaint at ¶¶64-66. Such an alternative will have no deleterious "ripple effect" for prison administration, making the accommodation of Plaintiffs' constitutional rights readily attainable. Turner, 482 U.S. at 90.

Defendants make no attempt to show that the burdens on Plaintiffs' free speech and associational rights are narrowly tailored to serve a significant governmental interest and leave open "ample alternatives" for communication. See Forsyth County, 505 U.S. at 130. Indeed, had they even attempted to do so, this Court would nevertheless be constrained to find that

[54] See Shimer, 100 F. 3d at 510 (noting apparent inconsistency of prison policies and need for argument and evidence on point).

Plaintiffs' claims survive their motions to dismiss given that Defendants cannot articulate any applicable governmental interest here. For this reason, Defendants' motions must fail.

While DOCS proffers penological justifications for its general limitations on prison telephone service, none of these justifications are relevant to Plaintiffs' specific challenge here to the DOCS tax. Rather, Defendants merely assert that there are legitimate penological objectives served by other features of the system -- such as the limitation on the number of people on a prisoner's calling list, DOCS Br. at 32 – and in doing so, merely reinforce Plaintiffs' allegations that the surcharge aspect of the system serves purely economic ends.

Indeed, Defendants do not identify a *single* penological justification for the imposition of the surcharge. Plaintiffs contend there is no such justification. Given the unequivocal burden on Plaintiffs' free speech and associational rights, Plaintiffs have stated a constitutional challenge to the system.

E. Plaintiffs Have Stated a Valid Equal Protection Claim

Plaintiffs claim that Defendants' prison telephone system violates their right to equal protection under the State Constitution, Article I, §11. The system imposes a tax on collect telephone calls Plaintiffs receive from New York State inmates that is not imposed on any other group of New York State taxpayers. That burden in turn directly affects Plaintiffs' ability to communicate and associate with their loved ones, a fundamental right protected by the free speech clause of the State Constitution Article I, § 8. Defendants cannot offer any legitimate governmental interest, let alone a compelling or important one, that can justify this unequal treatment.

i. Plaintiffs are treated differently than other New York taxpayers.

Under the New York State Constitution, equal protection rights are implicated

whenever a group of persons is treated differently from others who are similarly situated. Matter of K.L, 806 N.E.2d 480 (2004). Here, Plaintiffs are New York State residents who receive collect calls from prisoner incarcerated in Defendants' correctional facilities. Except for being subject to the DOCS tax, they are similarly situated to other New York State taxpayers.

As alleged in the Complaint, Defendants' system exacts a considerable and unlawful tax by imposing a surcharge on the collect calls received by inmates families, friends and counselors. Complaint at ¶6. Only about 1.5 percent of the surcharge is used to cover State costs of operating the prison telephone system, as most of those costs are borne entirely by MCI. Complaint, Ex. A at 4; Meeropol Aff., Ex A at 31. Defendants acknowledge that revenue from the DOCS tax is used to pay for a variety of DOCS correctional system operations – such as medical personnel, supplies and pharmaceuticals - that are in no way connected to the prison telephone system.[55]

The costs of general operations cannot lawfully be imposed on a particular group of taxpayers. "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 v. County Comm'n, 488 U.S. 336, 345 (1989) (citation omitted). In Allegheny Pittsburgh Coal, the Court held that only 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, 642 N.Y.S.2d 420 (3d Dept. 1996) (equal protection violated when property taxes arbitrarily increased subject to "welcome neighbor" policy). By implementing the challenged system, the State has created two distinct classes of taxpayers, and has arbitrarily imposed upon

[55] The State is obligated to operate and fund such services. Estelle v. Gamble, 429 U.S. 97, 103 (1976); Kagan v. State, 646 N.Y.S.2d 336, 337 (2d Dept. 1996).

one – Plaintiffs and putative class members – an additional tax burden that is not only unauthorized by the legislature, but also cannot be justified by any legitimate state interest.

Defendants attempt to mislead the Court first by misrepresenting Plaintiffs' claim, then by arguing that the claim is inadequate. DOCS Br. at 25. Plaintiffs do not claim here that they are similarly situated to recipients of collect calls that are not from prisoners and so Defendants' citation to the decisional authority on that issue is misplaced. Rather, Plaintiffs claims that they are taxpayers who are treated differently from other New York taxpayers who are not required to pay an additional tax to fund the state correctional system.

ii. Because Defendants' prison telephone system burdens Plaintiffs' fundamental rights to freedom of speech and association, the system is subject to strict scrutiny.

When a challenged provision establishes a classification that burdens fundamental rights, "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, 564 N.E.2d 611, 613-14 (1990). Here – as explained in Point V, Section D, supra - Defendants' imposition of the commission surcharge unreasonably burdens Plaintiffs' ability to freely speak and associate with their loved ones and clients who are inmates. The Court of Appeal recognizes that speech and association are among the fundamental rights that, when burdened by a governmental act, trigger strict scrutiny of that act. Golden, 564 N.E.2d at 616; Roth v. Cuevas, 624 N.E.2d 689 (1993).[56]

Defendants mistakenly cast Plaintiffs' claim as a purely economic classification because the burden imposed is financial. But that is not the law. In determining the level of scrutiny to

[56] Indeed, *all* courts recognize these rights as fundamental within the equal protection context. Zablocki v. Redhail, 434 U.S. 374, 388 (1978); National Awareness Foundation v. Abrams, 50 F.3d 1159, 1167 (2d Cir. 1994) (quoting Police Dept. of Chicago v. Mosely, 408 U.S. 92, 101 (1972)).

apply to the challenged action, courts look to the nature of the interest burdened, rather than the nature of the burden. Golden, 564 N.E.2d at 616; ("analysis starts by examining whether the challenged provision significantly burdens rights protected by the State Constitution."); Montgomery v. Daniels, 340 N.E.2d 444, 455 (1975) (same). Under Defendants' construction of equal protection jurisprudence, the invidious discrimination imposed by poll taxes, for example, would be subject to only a rational basis review. DOCS Br. at 25. The Supreme Court, of course, found that the fundamental right to vote was entitled to considerably more vigorous protection. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

Here, the rights of speech and association burdened by Defendants' actions are entitled to a similarly high level of protection. New York courts recognize both that "the creation and sustenance of a family" is a constitutionally protected associational right, and that freedom of speech protects individuals who attempt to seek redress of grievances. People v. Rodriguez, 608 N.Y.S.2d 594, 597 (Sup. Ct. 1993) (citing Roberts v. Jaycees, 468 U.S. 609 (1984)). Plaintiffs here are burdened in their efforts to maintain constitutionally protected familial associations and consult with legal counsel in order to seek redress of inmate grievances. Because Defendants have imposed a burden on Plaintiffs' fundamental rights this Court should apply the strict scrutiny standard to its review of Defendants' actions.

iii. Defendants' have offered no sufficient justification for treating Plaintiffs differently than other taxpayers.

Under the strict scrutiny level of review, Defendants must show that its discriminatory treatment of Plaintiffs is warranted by a compelling state interest and that the method chosen to achieve that goal is narrowly tailored to achieve that purpose. Golden v.

Clark, 564 N.E.2d at 614. Tellingly, Defendants here do not attempt to offer any justification under this standard.

Even if the lowest standard of review could be applied to Plaintiffs' equal protection claim, Defendants have advanced no theory under which its differential treatment of the Plaintiffs may be justified. Defendants argue that because the DOCS tax is used to fund legitimate State corrections programs the Court's inquiry should end there. However, because the method Defendants imposed to fund these programs is improper, it cannot be rationally related to any legitimate State interest. Metropolitan Life Insurance Co. v. Ward, 470 U.S. 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.)

Plaintiffs agree that the services funded by the DOCS tax are legitimate programs that the State must provide. However, the burden of supporting a general public welfare program cannot be imposed disproportionately on particular individuals. Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 484 (1995). In Manocherian, the court examined a New York law that required certain landlords to provide renewal leases based on the status of the non-profit hospital's employee-subtenant, rather than the tenancy status of the tenant of record.[57] Id. at 479-80. The affected landlords challenged the law as an unconstitutional taking. Id. at 480. The court held that, "the legislation suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest." Id. The court reasoned that, "the fact that the State has acted under the 'landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public into mere 'economic regulation,' which can

[57] Chapter 940 of the Laws of 1984 operated as an amendment to the New York Rent Stabilization Laws, and was codified as Administrative Code of the City of New York §26-504.

disproportionately burden particular individuals." Id. at 484, (quoting Pennell v. San Jose, 485 U.S. 1, 22 (1988) (Scalia, J., dissenting)).

Here, Defendants attempt the same constitutional sleight-of-hand prohibited by the Manocherian court. Under the guise of advancing the State's interest in providing mandated correctional services - which must be supported by all of the public - DOCS imposed the burden of providing those services on a select group of taxpayers: the families, friends and counselors of inmates.[58] Because Defendants attempt to advance an otherwise legitimate state interest by impermissibly discriminatory means, there is no rational relationship between the two.

Defendants' attempt to justify imposing the telephone system commission under equal protection analysis related to taxation is equally unconvincing. Defendants here have no lawful authority to levy a tax upon *any person anywhere*,[59] let alone a tax that unlawfully burdens a particular class of taxpayers. Therefore, while Defendants accurately quote the Supreme Court that "the power to tax is the power to discriminate in taxation," Leathers v. Medlock, 499 U.S. 439, 451 (1991), they miss a critical factor: they do not have such power.

Moreover, the DOCS tax could not be constitutionally imposed by the State legislature, let alone an administrative agency. Like the taxes found unconstitutional in Allegheny Pittsburgh Coal, Corvetti, and Metropolitan Life, the DOCS tax imposes the public welfare burden of providing mandated correctional services – a burden that must be supported by all the public - disproportionately upon the Plaintiffs. Under such precedent, therefore, the Defendants' action must be found unlawful.

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[58] This burden is not a valid user fee. See Point V, Section A, supra.

[59] See Point V, Section B, supra.

The Supreme Court and New York State cases cited here authoritatively hold that government may not arbitrarily choose a classification of person to bear undue burdens. Therefore, the Defendants' use of the prison telephone system to impose a financial burden upon Plaintiffs to raise revenue for correctional services is unjustifiable. If DOCS requires additional funds in order to provide mandatory services, the legislature must allot them, and allot them fairly.

VI. PLAINTIFFS HAVE STATED A CLAIM UNDER GENERAL BUSINESS LAW SECTION 349

Plaintiffs' deceptive business practices claim meets the statutory requirements under New York General Business Law Section 349(a) ("GBL §349").[60] A prima facie case of deceptive practices requires a showing that: 1) Defendants' acts are directed to consumers; 2) Defendants' acts are deceptive or misleading in a material way; and 3) Plaintiffs have been injured by Defendants' acts. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 744 (1995). Defendants have charged for the prison telephone service while they concomitantly fail to disclose the DOCS tax, make false representations regarding the penological need for the surcharge and profit from the illegal tax. These allegations constitute a prima facie case under GBL § 349.

A. The Prison Telephone System Constitutes a Consumer-Oriented Practice[61]

[60] Section 349 of the General Business Law provides, "[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." N.Y. Gen. Bus. Law § 349 (Consol. 2004).

[61] DOCS does not appear to dispute that Plaintiffs are consumers or that the prison telephone system is a consumer-oriented practice. See DOCS Br. at 34 ("It is MCI alone that actually provides that phone service to consumers such as petitioners. [DOCS is not] in the position of providing any services to consumers."). Rather, DOCS disputes responsibility for violations pursuant to the system.

Contrary to Defendants' contention, Plaintiffs have shown that DOCS has engaged in consumer-oriented practices. The provision of telephone service is clearly a consumer-oriented practice. Practices that "have a broad[] impact on consumers at large" Oswego, 647 N.E.2d at 744, or "affect[] numerous consumers," Drizin v. Sprint Corp., 771 N.Y.S.2d 82, 84 (1st Dept. 2004), meet the threshold "consumer-oriented" requirement. The courts have held that Section 349 "appl[ies] to virtually all economic activity," including an "editing business, wedding singer, clothing retailer, automobile dealer, and magazine subscription seller." Karlin v. IVF Am., Inc., 712 N.E.2d 622, 665 (Sup. Ct. 1999) (collecting cases); see also McKinnon v. Int'l. Fidelity Ins. Co., 704 N.Y.S.2d 774, 778 (Sup. Ct. 1999) (selling bail bonds is a consumer activity). Defendants' provision of telephone service is consumer-oriented because it affects numerous people and it is available to any individual in the state of New York whom a prisoner calls.[62]

The Department cannot escape liability by claiming that MCI alone provides telephone services to Plaintiffs; it is a clear participant in the prison telephone services scheme. It established the criteria for operation of the system through its Request for Proposals, and it required the provider to pay a substantial "commission" to the State. Meeropol Aff., Ex. A. Moreover, DOCS receives 57.5% percent of the proceeds from Plaintiffs' calls. Complaint at ¶3. Defendants even argue in their Motion to Dismiss that the DOCS tax is justified as a "fee which helps defray the cost of the [telephone] service" provided by DOCS. DOCS Br. at 20. Why would DOCS be entitled to this fee if it were not the entity supplying the service?

The fact that DOCS has contracted with MCI to assist them in providing telephone service to Plaintiffs and putative class members does not limit DOCS' liability under the General

[62] Disputes pursuant to telephone services are clearly "consumer-oriented." See, e.g, Drizin v. Sprint Corp., 771 N.Y.S.2d 82, 84 (1st Dept. 2004); Naevus International, Inc., v. AT&T, 13 N.Y.S.2d 642, 646 (Sup. Ct. 2000).

Business Law. Private contracts cannot form the basis for for litigation under GBL §349 when they involve disputes "unique to these parties, not conduct which affects the consuming public at large," New York University v. Continental Ins. Co., 662 N.E.2d 763, 771 (1995), or represent a "single shot" transaction, rather than a recurring deceptive practice. Quail Ridge Assoc. v. Chemical Bank, 558 N.Y.S.2d 655, 658 (3d Dept. 1990). The private contract exception has no application in a case where the services contracted for affects the public at large. See Akgul v. Prime Time Transp., Inc., 741 N.Y.S.2d 533 (2d Dept. 2002) The telephone service provided by MCI and DOCS in the instant case cannot be construed as emanating from a private contract. The service contracted for affects the public at large; it impacts the rates applied to all persons in New York who accept collect calls from a prison. Finally, Plaintiffs' and other consumers' transactions with Defendants cannot be characterized as "single shot transactions" since the services and the tax are ongoing.

B. Defendant's Actions Constitute "Deceptive Acts or Practices"

Plaintiffs 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, 647 N.E.2d at 745. Excessive charges and misrepresentations in billing practices constitute "deceptive acts and practices." See Naevus International, Inc. v. AT&T, 713 N.Y.S.2d 642, 645 (Sup. Ct. 2000).

Here, several of DOCS' actions constitute "deceptive acts or practices" under GBL § 349:

(1) DOCS failed to disclose to the public and Plaintiffs 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 surcharge and other aspects of the prison telephone system are necessary to meet security and penological concerns; and

(3) DOCS has wrongfully profited from the taxes imposed on Plaintiffs and putative class members even after the PSC failed to take jurisdiction over and approve the surcharge as part of the filed rate.

Complaint at ¶115 (a)-(c). Each of these allegations, if proven, would constitute a deceptive act or practice under New York law. See McKinnon, 704 N.Y.S.2d at 778 (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); Kinkopf v. Triborough Bridge & Tunnel Authority, 764 N.Y.S.2d 549, 558-59 (Civ. Ct. 2003) (Misrepresentations about which entity a consumer is actually transacting with may also amount to "deceptive acts or practices.").

The Department's practices are similar to those of the McKinnon bail-bondsman who made false representations as to the "amounts defendant was authorized to charge" and "falsely represented expenses which had no relation to actual expenses." 704 N.Y.S.2d at 778. Here, Defendants falsely represented the high rates charged as necessary to support a system that meets security concerns despite the blatant disparity between the DOCS tax and the costs to the Department of the prison telephone system. Complaint ¶¶7, 8, Ex. B. The Department also failed to disclose in its standard recording or billing statements that it charges and takes the DOCS tax, and failed to cease demanding that tax despite the PSC Order. See Point IV, infra.

Defendants also misrepresented the parties profiting from the prison telephone system. Like the deceptive acts in Kinkopf, Plaintiffs were led to believe that MCI was the only entity

involved with the transaction. DOCS' involvement was not disclosed until August 2003.[63] To date, the Department still does not inform recipients of prisoners' telephone calls that DOCS will receive a 57.5 percent surcharge. Nor is such information available on a call recipient's monthly statement.

The Department incorrectly argues that their practices are not "deceptive" under GBL §349 because: (1) Plaintiffs have not pled a claim for fraud; (2) DOCS' press release and the rate filing with the PSC informed the public of the DOCS tax; (3) security justifications for the prison telephone system are "not an appropriate subject of review" under the General Business Law; and (4) DOCS' profit-making by means of the tax is not actionable. DOCS Br. at 35-36. The Department is mistaken for four reasons.

First, precedent establishes that GBL §349 "contemplates actionable conduct that does not necessarily rise to the level of fraud." Gaidon v. Guardian Life Ins. Co. of Am. 725 N.E.2d 598, 603 (2001). See also Genesco Entm't v. Koch, 593 F.Supp. 743, 751 (S.D.N.Y. 1983) ("[a]llegations of fraud are not required" for GBL §349 claim).

Second, neither the August 2003 press release, nor MCI's tariff filing constitute disclosure of the DOCS tax. The late disclosure through the August 2003 press release cannot erase the many prior years of deception. Nor does the PSC's bifurcation of the rate bar Plaintiffs' claim for material deception related to "revenue generated from inmate initiated telephone calls from April 1, 1996 through October 30, 2003." Complaint at ¶115(b). Prior to

[63] The *extent* of DOCS' involvement was not divulged until October of 2003.

MCI's filing in November 2003, see Meeropol Aff. Ex. F, the DOCS tax was charged to Plaintiffs and putative class members without any official public record.[64]

Third, Plaintiffs' claim that DOCS falsely represented the penological necessity for the cost structure of the prison telephone system is an appropriate claim under GBL §349. Plaintiffs have pled that the prison telephone system is not justified by penological necessity and is not actually financed by the DOCS tax. Complaint at ¶¶8, 12, 64-66, Ex. E at 2-3. Defendants cannot dispute the fact that DOCS uses only about 1.5 percent of the money it makes from the DOCS tax on the telephone system. Complaint, Ex. B at 4. As for the deference due to prison officials, such deference does not divest the judiciary of the ability to review the actions of prison officials to determine whether they are reasonably related to a legitimate penological need. Turner v. Safley, 482 U.S. 78, 89-90 (1987) (a regulation "cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational"). Moreover, Plaintiffs' GBL §349 claim is not based on the overbroad assertion that no aspect of the prison telephone system serves a valid penological purpose, but rather on the fact that Defendants have misrepresented the necessity for the surcharge imposed by the system. Deference to prison administrators cannot bar judicial review of affirmative acts of deception.

Finally, Plaintiffs' counts I – V, see Points VI and VII, properly allege that the DOCS' tax violates various state laws and constitutional provisions.

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[64] Porr v. NYNEX, 660 N.Y.S.2d 440 (2d Dept. 1997) does not provide support for DOCS' proposition that rate filing with the PSC precludes a GBL §349 claim. In Porr, the court analyzed a GBL §349 claim based on defendants practice of charging telephone users by rounding up in whole minute increments. Id. at 442. This practice however, had been publicly disclosed at various rate-setting hearings and explicitly endorsed by the FCC. Id. at 447-48. DOCS, on the other hand, failed to disclose the existence of the its tax until August 2003 at the earliest, and never corrected its misrepresentation about the purpose of the tax, or the PSC's failure to approve the rate.

For the above reasons, Plaintiffs have properly pled a violation of GBL §349.[65]

VII. PLAINTIFFS ARE ENTITLED TO AN EQUITABLE ACCOUNTING

Plaintiffs are entitled to an accounting to aid them in determining the amount of damages owed them by Defendant DOCS. Contrary to Defendants' argument, this form of relief does not require a fiduciary or confidential relationship. Leveraged Leasing Admin. Corp., v. PacifiCorp Capital, Inc., 87 F.3d 44, 49 (S.D.N.Y. 1996). Where, as here, "a party seeks an accounting, but the primary demand is for monetary damages, 'the accounting is merely a method to determine the amount of the monetary damages.'" Arrow Communications Labs. v. Pico Prods. Inc., 632 N.Y.S.2d 903, 905 (4th Dept. 1995) (quoting Cadwalader Wickersham & Taft v. Spinale, 576 N.Y.S.2d 24, 25 (1st Dept. 1991).

VIII. CLASS ACTION CERTIFICATION IS APPROPRIATE IN THIS ACTION

The governmental operations rule does not bar class certification in this action. This rule militates against certification against government bodies when *stare decisis* would afford adequate protection to the present and future members of a proposed class. Oak Beach v. Babylon, 474 N.Y.S.2d 818, 819 (2d Dept. 1984). However, "[t]he governmental operations rule is no [absolute] bar to class certification," N.Y.C. Coalition to End Lead Poisoning v. Giuliani, 668 N.Y.S.2d 90, 90 (1st Dept. 1997); and "it remains within the court's discretion to grant class certification in proper instances," Goodwin v. Gleidman, 463 N.Y.S.2d 693, 698 (Sup. Ct. 1983).

The governmental operations rule is inapplicable when damages are sought and there is a large, readily definable class, with questions of law and fact virtually identical as to each member. Brodsky v. Selden Sanitary Corp., 444 N.Y.S.2d 949, 952 (2d Dept. 1981). In

[65] Defendants do not dispute that Plaintiffs have been injured by the Defendant's deceptive actions.

Brodsky, the plaintiffs sought a declaration that sewer rates were illegal, an injunction restraining the defendant from collecting the illegal rates, and restitution of the illegal rates paid. The court reasoned that a class was the superior method of adjudication to avoid "a plethora of actions" brought "for identical relief, with the consequent delay and added expense associated with multiple actions." Id. See also Dudley v. Kerwick, 444 N.Y.S.2d 965, 967 (3d Dept. 1981) ("since petitioners seek money damages, i.e., the recoupment of excess taxes paid because of the allegedly illegal exemptions, and questions of law and fact are presented which are virtually identical for all members of the proposed class, recognition of a petitioner class of nonexempt property owners would provide a method of recovery far superior to individual proceedings by each nonexempt owner even though governmental operations are involved in this case"); Holcomb v. O'Rourke, 679 N.Y.S.2d 698, 699 (2d Dept. 1998) (government operation rules does not apply where petitioners are a "large, readily definable class seeking relatively small sums of damages"); Ammon v. Suffolk Co., 413 N.Y.S.2d 469, 470 (2d Dept. 1979) (same); Beekman v. City of N.Y., 411 N.Y.S.2d 620, 621 (1st Dept. 1979) (same).

Moreover, where the recovery amount is relatively small, "it is plausible, if not probable, that many potential plaintiffs ... will find the prospects of individual litigation economically unappealing." Brodsky, 444 N.Y.S.2d at 952. Thus, there is a strong policy justification in favor of certifying classes where "members of the putative class are not likely to seek help or gain access to the courts because of socioeconomic factors." Davis v. Perales, 520 N.Y.S.2d 925, 929 (Sup. Ct. 1987); see also Tindell v. Koch 565 N.Y.S.2d 789, 792 (1st Dept. 1991) (court certified a class of indigent elderly individuals in an action for small monthly benefits because bringing individual claims would be "oppressively burdensome" for them).

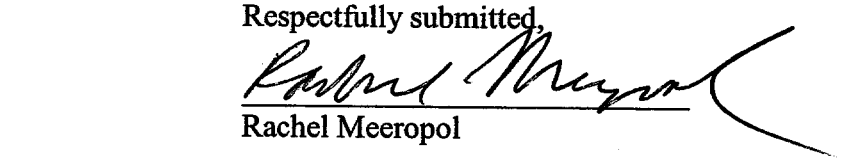
The government operations rule does not bar class certification here because the proposed class in (the attorneys, family, and friends of prisoners in the DOCS system) is a large, readily defined group, seeking monetary damages among other relief. Denying class certification here would require each Plaintiff to individually file for damages, and would be oppressively burdensome for putative class members who lack financial resources. Moreover, the relatively small recovery due each class member would likely cause some potential litigants to forego their rights to a judicial remedy.

Conclusion

For all of the foregoing reasons, the Court should deny Defendants' Motions to Dismiss in their entirety.

Dated: New York, New York
June 17, 2004

Respectfully submitted,



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