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

COURT OF APPEALS **STATE OF NEW YORK**

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

Appellants.

-against-

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

Respondents.

REPLY BRIEF FOR APPELLANTS

RACHEL MEEROPOL
DARIUS CHARNEY
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6432
(212) 614-6499 fax

JUAN CARTAGENA
COMMUNITY SERVICE SOCIETY
105 E.22nd Street
New York, NY 10010
(212) 614-5323

Attorneys for Appellants
Ivey Walton, Ramona Austin, Joann Harris, the Office of the Appellate Defender, and the New York State Defenders Association

Dated: August 18, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Other Authorities

PRELIMINARY STATEMENT

Appellants Ivey Walton, Ramona Austin, Joann Harris, Office of the Appellate Defender, and the New York State Defenders Association submit this reply memorandum of law in further support of their Appeal from the Appellate Division's dismissal of their Article 78 proceeding seeking declaratory and compensatory relief from an unlawful tax.

Understandably, Respondent Department of Correctional Services ("DOCS") seeks to defend its decades-long scheme to raise money off the family members, friends and advocates of prisoners, or at least keep the money. This it cannot do. Unlike rent or access fees, or the legitimate business expenses of regulated agencies, DOCS imposed a charge wholly without authorization or necessity. This fee burdened Appellants' ability to communicate with their clients and loved ones behind bars, and singled them out to finance the State prison system. For the reasons explained below, the Court should reverse the Appellate Division, and reinstate Appellants' four constitutional claims.

ARGUMENT

I. Appellants Have Adequately Pleaded a Claim for Unlawful Taxation

At the heart of this case is Appellants' challenge to an unauthorized revenue raising device. DOCS' primary defense to this claim can be

summarized as follows: our fee is not a tax, because it is like many other mechanisms, also not taxes, by which private parties pay money to the State. But rent payments and access fees are not compelled exactions. Moreover, agencies may not undertake such arrangements without legislative authorization. DOCS calls its fee a "legitimate business expense" but cites no standard to distinguish a "legitimate" expense from one that is "illegitimate." Nor do they explain why this description matters in the first place in the context of an unregulated agency's attempt to raise revenue.

Upon close examination, the DOCS charge cannot be explained away by analogy. The charge is unique in structure and genesis, but its function is clear. As a compelled exaction designed to raise revenue for the State, the DOCS charge is a tax. As it was not levied by the State legislature, it violates New York law, and must be struck down.

A. The DOCS Tax Cannot be Analogized to a Rent or Access Fee

First and foremost, the DOCS tax is distinguishable from leases or contracts between private parties and State agencies because it is a compelled exaction. ACLU of Tennessee v Bredesen explains this distinction well (441 F3d 370 [6th Cir. 2006]). DOCS cites Bredesen for the proposition that not all payments to the state need be analyzed as taxes or fees; some are simply contractual debts (DOCS Br. at 28-29). But in

Bredesen, the Sixth Circuit considered a challenge to specialty license plates for sale by the State (441 F3d at 372). Such a sale "creates contractual debts to pay but imposes no tax" because "instead of using its sovereign power to coerce sales, Tennessee induces willing purchases as would any ordinary market participant" and "confers all the same driving privileges on people who forgo specialty plates to buy standard-issue plates" (id at 374). Individuals who purchased the Tennessee specialty plates faced no governmental or situational coercion; one must assume they simply liked the plates. If the families who accepted collect-calls had many options for telephone service, and chose to pay extra for a deluxe package, perhaps this case would be on point. But they do not, and it is not.

Similarly, DOCS would rely on Lipscombe v Columbus Municipal Separate School District, but that case involved voluntary property leases between private citizens and the state of Mississippi (269 F3d 494, 498-99, 500 n.13 [5th Cir 2001]). The lessees were not coerced in any way; they could have rented land from private lessors as easily as they did from the government (id). A voluntary contractual arrangement, devoid of sovereign compulsion, is not subject to the test distinguishing fees from taxes because it is not a compelled exaction, and thus cannot be a tax.

The DOCS charge, on the other hand, is compelled, and thus must meet the requirements of a lawful fee. Unlike corporations that choose to lease land from the state, or citizens who purchase their goods at a price inflated by the cost of that corporation's rent, those subject to the DOCS tax have been placed, through no choice of their own, into a coercive situation. They have not chosen for their loved ones to be incarcerated. Once placed in that difficult situation, their choices are limited: if they want speak to their loved one on the telephone, they must pay the exorbitant rate.

To be sure, some element of choice remains. Respondent correctly points out that Appellants may chose not to speak to their loves ones by telephone. But Appellants are not free to telephone their loved ones by other means. The State has limited Appellants' ability to speak to their loved ones through imprisonment, and then created a system to reap financial benefit from this harsh reality. The resultant coercion is evidenced by the size of the DOCS commission, and the thousands of individuals who paid it nonetheless.

Respondent ignores the coercion inherent in Appellants' situation, relying instead on the Supreme Court of New Mexico's bald statement that prisoners' family members voluntarily accept collect call services (DOCS Br. at 23-24, citing Valdez v State of New Mexico, 132 NM 667, 673, 54

P3d 71, 77 [2002]). But the inquiry must not end there (e.g. Federal Land Bank v Crosland, 261 US 374, 377 [1923] (although plaintiff had option to not record mortgage, payment of recording fee was not truly optional, because Alabama makes recording a practical necessity)). Plaintiffs "ha[ve] a choice it is true, but so has one who acts under duress" (id. at 378). [1]

A true analogy to the DOCS scheme requires customers who are brought into the relevant context involuntarily. But DOCS cites no such examples, and Court approval of such a scheme is hard to imagine. Consider a Public Hospital's attempt to finance general operations through demanding 50% commissions from the corporation that provides cafeteria services, or a public school that raises money through inflating the price of school lunches.

---

[1] Valdez is unpersuasive authority for another reason as well: its analysis of the tax/fee distinction has been squarely rejected in New York. The Supreme Court of New Mexico rejected the unlawful tax claim in Valdez based on precedent that "a rate charged for a public utility service or product is not a tax, but a price at which and for which the public utility service or product is sold" (132 NM at 673, citing Apodaca v Wilson, 86 NM 516, 525 [1974]). In Apodaca, the Supreme Court of New Mexico rejected a challenge to sewer and water service charges despite the fact that the fees were levied to raise revenue for the City's general fund, and exceeded the costs of providing that service (86 NM at 524). That ruling cannot be reconciled with settled New York law (e.g. Matter of Torsoe Bros. Constr. Copr. v Board of Trustees of Inc. Vil. of Monroe, 49 AD2d 461, 465 [1975] (village may not use its tap-in fee schedule for the purpose of defraying a portion of the cost of maintaining and improving its water system)).

These schemes are difficult to imagine, not only because of the public outrage that would surely result if a state agency attempted to make an undue profit off children or the ill, but also because of the incentives involved. And as the Public Service Commission (PSC) explained in considering commission payments to premise owners by pay phone operators,

> it is true that once a [customer-owned currency operated telephone, or "COCOT"] is installed in a given location, the customers who use it are to some extent captive. The really competitive end of the business is in getting the phones sited in the first place. Undoubtedly, commissions offered to premises owners play a role in this competitive battle, but as some of the industry parties point out, there are other considerations that may weigh more heavily in a premises owner's decision, including reasonableness of charges and service to the public. The business owner surely does not want his patrons to feel "ripped off" or otherwise aggrieved by a payphone they use on his premises. One would think that the premises owner is more likely than the Commission to hear complaints of this kind, and one should expect premises owners, acting in their self-interest, to take up a certain share of the "policing" burden, making sure that the public is being well served by the COCOTs on their premises. Similarly, one might expect that a municipality choosing a COCOT operator would consider not just the commissions it receives but also the interests of the public to whom the municipality is responsible

(Matter of the Rules and Regulations of the Public Service Commission 16 NYCRR, Chapter VI, 1989 NY PUC LEXIS 45 at *9-*10 [Aug. 16, 1989]). DOCS warns the Court of the impact this case may have on other licensing and access arrangements (DOCS Br. at 31), but its slippery slope argument ignore the reality the PSC describes. The DOCS charge is unique because it

is levied upon a truly captive audience that is also relatively unpopular and marginalized.

Finally, the DOCS tax is further distinguishable from a rent or access fee because it was levied without any legislative authorization whatsoever. DOCS attempts to analogize its fee to a private party's contract to pay the government for the privilege of doing business on, or leasing, state property (see DOCS Br. at 24-25 (citing New York Public law authorizing lease of state land and space in public buildings and rest areas)). But each of the examples Respondent cites involves revenue raised pursuant to specific statutory authorization. The Office of General Services may raise revenue by leasing space in the Empire State Plaza, for example, because the Public Buildings law allows just that (Public Buildings Law § 3(13)). DOCS too, may raise money by leasing state institutions (Correction Law § 79). But the correction law does not authorize DOCS to raise revenue through implementation of the telephone system.

Respondent argues that DOCS' general authority to enter into contracts relating to operation of the prison system has some relevance here. But even if that general power could be understood to necessarily imply the power to enact a fee related to telephone service, "the limitation that the fees charged must be reasonably necessary to the accomplishment of the

statutory command must also be implied" (Jewish Reconstructionist Synagogue of N. Shore v Incorporated Vil. of Roslyn Harbor, 40 NY2d 158, 163 [1976]). The revenue DOCS raised through its tax was, of course, far more than was necessary to provide telephone service to prisoners.

B. Regulatory Law Does Not Support the DOCS tax

Contrary to Respondent's argument, regulatory law regarding "business expenses" is not only irrelevant, but also unhelpful to their defense. First and foremost, regulatory law is irrelevant because the regulatory body in question, the PSC, held in 2003 that it lacked jurisdiction over the subject matter of this lawsuit (R. 96-99). This is not surprising. Regulatory bodies are set up to police utilities, not the State or its agencies (cf Powell v Colorado Public Utilities Commission, 956 P2d 608, 614 [Colo 1998] (affirming determination by Public Utilities Commission that Colorado Department of Corrections is not a "telephone corporation," does not provide "telecommunications service" and thus is not subject to commission jurisdiction); Alexander v Cottey, 801 NE2d 651, 660 [Ind 2004] (holding the court, rather than the Indiana Utility Regulatory Commission was the appropriate body to review contract between Sheriff and utility regarding inmate telephone program)).

For this reason, Appellants fail to see how regulatory precedent regarding rates or policy could ever answer the substance of their claim that DOCS engaged in illegal taxation. After all, the question of whether MCI can pass on to consumers a given charge under the regulatory law is wholly distinct from the question of whether DOCS, as a state agency, may demand that charge under the State constitution.

Respondent's brief misses this point entirely. DOCS seeks to characterize its charge as a legitimate business expense, but to what end? Even if it is (and it is not) the question would remain: can DOCS utilize such a device to raise revenue? The answer is no (Matter of Cahill v Public Serv. Commn., 76 NY2d 102, 118 [1990] (Titone, J, concurring) (agency attempt to pass on cost of charitable contributions to rate-payers as operating expense results in illegal taxation)).

And even if regulatory law were relevant to the question at hand, there is simply no regulatory precedent legitimizing the type of commission at issue here. Respondent makes much of the PSC's and FCC's recognition that commissions exist (see DOCS Br. at 22-23). But neither body has directly ruled on the legality of this type of commission. Moreover, they have each recognized the problematic trend in corrections and other "locational monopolies" for commissions to come unhinged from costs, and

result in unusually high rates (e.g. Matter of the Rules and Regulations of the Public Service Commission 16 NYCRR, Chapter VI, 1989 N.Y. PUC LEXIS 45, at *9-*11, *59-*62 [Aug. 16, 1989];[2] Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1966, 17 FCC Rcd 3248, 3253, 3260 [2002]).

Strangely, DOCS urges the Court to rely on these regulatory cases and then fails to follow them. It argues its charge is legitimate because it represents the "fair market value" to MCI of the opportunity to provide telephone services to prisoners. But Appellants certainly do not "concede" that business expenses are legitimate when pegged to "fair market value" (DOCS Br. at 24), that phrase does not appear in our brief. To the contrary, under Matter of AT&T's Private Payphone Commission Plan, 3 FCC Rcd 5834, *15-*16 [1988], a case relied on by Respondent, a commission may be legitimate when it represents the cost to the premise owner of making a given location available to a utility provider.

---

[2] It is worth correcting an error by DOCS here: in Matter of the Rules and Regulations of the Public Service Commission 16 NYCRR, Chapter VI, 1989 N.Y. PUC LEXIS 45 at *60 [Aug. 16, 1989], the PSC noted that New York Telephone paid the City commissions on $78 million in gross revenue, not, as DOCS claimed, "$78 million in payphone commissions" (DOCS Br. at 22). While no citation is available, inquiry to the New York City Department of Information, Technology, and Telecommunications (DOITT), reveals that New York City has historically received commissions from New York Telephone amounting to 10% of gross receipts from public payphones.

As we explained at length in our opening brief, the value analysis urged by Respondent is contrary to regulatory law, and unworkable in the correctional context as a matter of public policy (Appeal Br. at 23-25).

> Inmate calling is economically different than other payphone services in two respects. First, inmates have none of the alternatives available to non-incarcerated payphone customers. Inmates only have access to payphones, not cell phones, and inmates lack dial-around capacity. Therefore, neither the inmates who initiate the call nor the individuals who bear the cost of inmate calls—most often the inmates' families—have a choice among providers. Second, the competition that does exist—among ICS providers in the bidding process—does not exert downward pressure on rates for consumers. Instead, perversely, because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates.

(17 FCC Rcd at 3253; see also Gasparo v City of New York, 16 F Supp 2d 198, 220 n 9 [EDNY 1998] ("Plaintiffs argue that City officials' characterization of the revenues from the plan as 'rent' for the use of the public property means those revenues could not have been intended as 'taxes.' This contention does not assist the analysis. Rent is payment for the use of property, presumably based on the market value of such use. The fact that its value is set by the market does not affect the analysis of whether it is properly viewed as either a 'tax' or a 'regulatory fee'")).

In conclusion, Respondent cannot escape liability here by alternately referring to the DOCS fee as rent, or an access fee, or a legitimate business expense. Labels do not determine substance (American Ins. Assn. v Lewis,

50 NY2d 617, 623 [1980]). The central question here is function (Gasparo, 16 F Supp 2d at 218), was the DOCS charge levied to raise revenue?

Despite this clear guidance, Respondent argues that even if the DOCS charge functions as a tax, the law should not recognize it as such, because Appellants are legally liable to MCI rather than the State. But the manner in which a charge is collected does not determine its substance. "The form of the collection of taxes is left to the discretion of the taxing power" (New Jersey v Anderson, 203 US 483, 493 [1906]). The method chosen to collect taxes "cannot change their character" (id. at 492).

The one case DOCS cites for this argument is inapposite. In Sprik v Regents of the University of Michigan, the court considered a university's decision to fund a voluntary payment to the Ann Arbor School District by raising rent on married student housing (43 Mich App 178, 182-83 [1972]). First, there is no indication that the student plaintiffs were coerced into leasing from the University, as opposed to a private landlord, and thus the tax / fee cases are inapplicable. Moreover, the "crucial" factor (DOCS Br. at 28), was not that the School District could not enforce payment directly from the students, but that payment was not enforceable at all. As the court explained, "the Regents have merely exercised their power over university funds to make a donation they believe will be beneficial to the university.

The university has no legal obligation to make this payment and the Ann Arbor School district has no power to enforce it in the future" (id. at 189-90). Here, Appellants are liable to MCI, and MCI is liable to DOCS.

C. As a Tax, the DOCS Charge is Unlawful

Once it is established that the charge is a tax, Appellants must prevail. DOCS' backup arguments—that the PSC "authorized" the tax by directing MCI to list it on the tariff, or the Legislature authorized it through annual appropriation bills—are wholly without merit.

First, Respondent's argument that the PSC "authorized" the DOCS commission (DOCS Br. 32), is flatly contradicted by the factual record currently before this Court (R. 96-99).

Moreover, even if PSC action or legislative appropriation were to function as approval; they are each far from the detailed authorization required for a tax. In New York "the exclusive power of taxation is lodged in the State Legislature" (Castle Oil Corp. v City of New York, 89 NY2d 334, 338 [1996] (citing N.Y. Const., Art. XVI, §1)). While the taxing power may be delegated to "legislative bodies of municipalities and quasi-municipal corporations . . . [t]he power to tax may not . . . be delegated to administrative agencies or other governmental departments" (Greater Poughkeepsie Lib. Dist. v Town of Poughkeepsie, 81 NY2d 574, 580 [1993]

(internal citations omitted)). "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 of New York, 131 AD2d 565, 566 [1987]). DOCS can neither point to a law delegating to it general taxing authority nor show that the Legislature has provided it with specific authority to levy taxes upon prisoners' families as a means of raising revenue for the State's general operations. Therefore, its taxing activities here are *ultra vires* and an unconstitutional usurpation of legislative authority under Article XVI, §1.

Strict control of the power to tax is not a matter of mere form or procedure; it is essential to the nature of democratic governance. Taxation "is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare" (Meriwether v Garrett, 102 US 472, 515 [1880]).

As the recent sea-change in DOCS telephone policy has demonstrated, one can make a strong policy argument against the Department's revenue-raising scheme as anathema to protection of family integrity and public safety. Our constitutional system jealously guards the power of taxation to ensure that such public policy considerations are heard and considered prior to imposing a tax burden.

Contrary to Respondent's argument, Arsberry v State of Illinois, provides no support for the proposition that PSC "approval" satisfies New York State constitutional requirements (DOCS Br. at 32-33, citing 244 F3d 558, 565 [7th Cir 2001]). Indeed, the case is more helpful to Appellants' argument, as Judge Posner characterized the Illinois fee as a tax when analyzing the plaintiffs' impairment of contract and equal protection claims (Arsberry, 244 F3d at 565 ("in any event a tax, which is what the allegedly exorbitant component of the questioned telephone rates functionally is, is not an impairment of contracts...")).

Although recognizing that the telephone commission functions as a tax, the Arsberry court declined to consider the constitutional implications of that tax (id.). Instead, because the Illinois Commerce Commission (quite unlike the PSC) had reviewed and approved the telephone fee at issue, that court held that plaintiffs' equal protection claim fell within the agency's primary jurisdiction, and thus should be dismissed under the filed rate doctrine (id. at 561, 565). While Judge Posner's recognition of the Illinois telephone charge as a "tax" is instructive, the outcome in that case was based on a different regulatory scheme and administrative determination, rendering it unpersuasive here.

D. Appellants and Putative Class Members have Fulfilled the Requirements of Protest

DOCS' final argument is that Appellants and potential class members may not collect refunds of all the unlawful taxes, because they failed to pay "under protest." Respondent acknowledges that the requirement of formal protest is waived where the anticipated consequences of non-payment of a tax or fee constitutes duress or coercion. But DOCS disputes that such duress occurred here (DOCS Br. at 35). DOCS cites no cases to support its conclusion that the need to speak to a loved one or client does not satisfy this standard.

As Appellants explained in our opening brief, duress or coercion exists where nonpayment threatens (1) "liberty of person" or (2) "immediate possession of needful goods" (Mercury Mach. Importing Corp v City of New York, 3 NY2d 418, 425 [1957]). This exception requires consequences "more than business or economic inconvenience" (Video Aid Corp v Town of Wallkill, 85 NY2d 663, 670 [1995]).

The consequences of not accepting collect calls from friends and family members incarcerated in New York State prisons (or not paying for the calls once accepted) are severe. Just as "[t]he right to earn one's living and to engage in business is fundamental and its protection is necessary to

the interests of society" (Five Boro Elec. Contrs. Assn. v City of New York, 12 NY2d 146, 150 [1962]), the United States Supreme Court has recognized that it "is through the family that we inculcate and pass down many of our most cherished values" (Moore v City of East Cleveland, 431 US 494, 503-504 [1977]). For this reason, States are required to protect the integrity of the family unit (Stanley v Illinois, 405 US 645, 651 [1972]; People v Rodriguez, 159 Misc 2d 1065, 1070 [1993] (collecting Supreme Court cases)).

Moreover, where a challenged tax or fee is imposed upon the purchase of necessities, like telephone service, a plaintiff need not show any actual threat or coercion (Mercury Mach. Importing Corp, 3 NY2d at 424). Once Appellants accept a phone call, failure to pay the charge may result in a block on their phone, thus barring an attorney or family member from speaking to a prisoner in an emergency (R. 57-58, Complaint at ¶¶ 58, 60; see Getto v Chicago, 426 NE2d 844, 850-51 [Ill 1981] (protest not required where failure to pay portion of phone bill might lead to interference with telephone service)).

Second, even if the Court declines to find that Appellants paid their bills under duress, commencement of this action serves as protest with respect to all payments made after February 25, 2004. Respondent

acknowledges this point for Appellants, but disputes its applicability to the claims of absent class members.

The objective of the protest requirement is to provide notice to a defendant that it may be required to refund the challenged taxes, and thus allow it to prepare for that contingency (Video Aid Corp., 85 NY2d at 667). This Court has not yet confronted the question of whether the commencement of a legal proceeding suffices as protest by all class members. Appellants submit that it does, as the filing of a class action puts the government on notice of the potential breadth of the challenge and dissuades other taxpayers from bringing individual suits (cf State v Carlson, 65 P3d 851, 871 [Alaska 2003] (filing class action gives State sufficient notice every member may be due a refund); Barnes v City of Atlanta, 637 SE2d 4, 6-7 [Ga 2006] (administrative exhaustion by named plaintiffs in refund case satisfies requirement for all class members]; BHA Invs., Inc. v City of Boise, 108 P3d 315, 323 [Idaho 2006] (protest requirement only applies to imposition that is, on its face, a tax; requirement is not applicable to an unlawful tax masquerading as a fee)).

Indeed, authorities here were more than adequately alerted to the potential need to refund the tax, given the state-wide movement against the DOCS charge that existed prior to the filing of the complaint, and led to its

ultimate demise (R. 49-50, 52, Complaint at ¶¶ 34-35, 40; see also Clyde Haberman, Condemned To Get Stuck With the Bill, N.Y. Times, Nov. 23, 2004, at B1; Errol Lewis, Pols Must Ring in on Jail Call Ripoff, DAILY NEWS, Feb. 14, 2006; Nicholas Confessore, Spitzer Orders Sharp Cuts in Cost of Prisoner Phone Calls, N.Y. TIMES, Jan. 8, 2007).

DOCS relies on a handful of lower court cases that have addressed the sufficiency of protest in class actions, but the facts of many of those cases differ from the case at bar in significant ways. Lower courts that have considered the issue of class protest have largely done so in the context of plaintiffs seeking retrospective relief for taxes paid prior to the filing of a complaint. In City of Buffalo v Wysocki, for example, the court denied the request of the plaintiff class for retroactive refunds of property taxes paid between 1974 and 1978 (112 Misc 2d 543, 544 [1982]). Similarly, in Neama v Town of Babylon, Commercial Garbage Dist. No. 2, the court rejected a class claim for refunds of a one-time special tax assessment paid without protest prior to the filing of the suit (18 AD3d 836, 838 [2005]; see also Duffy v Wetzler, 260 AD2d 596, 597 [1999] (denying retrospective relief for class seeking refunds of taxes paid without formal protest)).

It is unclear from the public record whether the other lower court cases relied on by DOCS, Conklin v Town of Southampton, 141 AD2d 596,

598 [1988], and Gandolfi v City of Yonkers, 101 AD2d 188 [1984], involved class actions to recover taxes paid before or after the commencement of the action. If it is the latter, then these lower court cases do provide some support for DOCS' position, but Appellants submit they should not be adopted by this Court where, as here, DOCS had real notice of significant and widespread public outcry regarding its unlawful tax.

II. Appellants Have Adequately Pleaded a Claim for Unlawful Taking

Respondent fails to respond to any of Appellants' arguments in favor of reinstating their takings claim (Appeal Br. at 28-30), and instead relies exclusively on the proposition that voluntary payments cannot work a taking (DOCS Br. at 36). To support this proposition, Respondent cites only one case, McGuire v Ameritech Services, Inc., 253 F Supp 2d 988, 1004 [SD Ohio 2003]. As Appellants distinguished McGuire in their appeal brief, no further reply is necessary.

III. Appellants Have Adequately Pleaded a Claim for Violation of Equal Protection

DOCS objects to Appellants' equal protection claim on two grounds: first, DOCS argues that Appellants are not similarly situated to recipients of non-inmate calls; and second, DOCS argues that Appellants have not been singled out for different treatment. Neither argument is convincing.

First, Respondent states that Appellants are different from individuals who do not accept collect calls from prisoners, because they receive a "direct and special benefit" from the Inmate Call Home Program and the Family Benefit Fund (DOCS Br. at 39). DOCS has not provided a record cite for this factual proposition, probably because nothing in the record supports the unlikely allegation that Appellants, who are not prisoners, received any direct benefit from provision of AIDS medication, cable TV, medical parole and other prison programs financed through their forced contributions (R. 103-107, 111).

DOCS would avoid this problem by relying on cases, like Daleure and Gilmore, in which courts have assumed that prisoners and their family members are differently situated from others because their calls present unique security concerns (see DOCS Br. at 37; Daleure v Commonwealth of Kentucky, 119 F Supp 2d 683, 691 [WD Ky 2000]; Gilmore v County of Douglas, 406 F3d 935, 939 [8th Cir 2005]). But the record in this case establishes that the DOCS charge bears no relationship to prison telephone security (R at 103-107, 111 (approximately 98.5% of the DOCS tax imposed upon Appellants used to fund programs unrelated to the prison telephone system or security needs associated with that system)). Without a relationship between the DOCS tax and the security or functioning of the

prison telephone system, no rational justification exists to place the burden of the surcharge solely on individuals who accept collect calls from prisoners (Byrd v Goord, No. 00 Civ 2135, 2005 US Dist LEXIS 18544 *31-32 [SDNY Aug. 29, 2005]).

DOCS also argues that Appellants are not treated differently from any other group, because AT&T charges recipients of non-prisoner collect calls rates similar to those charged by DOCS and MCI for prisoner collect calls (DOCS Br. at 37-38). This comparison is utterly irrelevant: Appellants challenge DOCS' decision to single out Appellants, among all citizens who benefit from the functioning of the prison system, to bear a disproportionate burden of funding that system. Because Appellants bring an equal protection claim against DOCS, rather than AT&T or MCI, it is DOCS' differential treatment that is at issue.

Finally, while the DOCS charge cannot pass rational basis review, it is worth restating that strict scrutiny is the appropriate test for this Court to use. DOCS disagrees, arguing that no fundamental right is at issue (DOCS Br. at 37), but does not cite a single case to explain why freedom of speech and association are not fundamental rights. Appellants' equal protection claim should thus be reinstated.

IV. Appellants Have Adequately Pleaded a Claim Under Freedom of Speech and Association

Prisoners and their family members use the telephone to communicate; that communication cannot be burdened or otherwise infringed upon arbitrarily. DOCS defends against this claim by arguing that prisoners' (and by extension Appellants') telephone use does not implicate freedom of speech or association at all, because prisoners have no right to any particular means of communication (DOCS Br. at 40). But this conclusion does not follow from the premise.

Even if family members of prisoners have no *per se* right to communicate with their loved ones via telephone, they are still exercising their right to communicate and associate when they speak via the telephone (Almahdi v Ashcroft, 310 Fed Appx 519, 522 [3d Cir 2009] (prisoners have a right to communicate with people outside the prison, and the telephone provides a means to exercise that right); Valdez v Rosenthal, 302 F3d 1039, 1048 [9th Cir 2002] (same)). Thus in Cline v Fox, 319 F Supp 2d 685 [ND Wv 2004] the court found that a prison's purge of sexually explicit books from the prison library required First Amendment balancing even though prisoners have no constitutional right to a library. The Court explained that prisoners have a right to receive information, and they exercise that right

when they read books from the prison library, thus a selective removal of books restricts a prisoner's First Amendment rights (id. at 690-91).

To hold otherwise proves too much; if free speech is not implicated at all by prison telephone communication, than DOCS could decide to block only those calls in which family members communicated with their incarcerated loved ones to engage in conversations critical of the Government or lawyers communicated with prisoners regarding civil actions against DOCS.

DOCS incorrectly argues that Appellants ask this Court to recognize a constitutional right to low cost telephone service. Rather, we ask the Court to follow the clear dictate of the Supreme Court and hold that DOCS may not impose a fee on speech and association that bears no relationship to regulatory costs (see Appeal Br. at 37-39, citing Cox v New Hampshire, 312 US 569, 577 [1941]; Murdock v Pennsylvania, 319 US 105, 113-14 [1943]). Respondent ignores these cases completely. But it is this precedent that answers DOCS' question of what telephone rate would be constitutionally permissible (DOCS Br. at 43). DOCS may levy a fee on telephone use to recoup the costs associated with providing for and regulating prison telephone service. No more.

If the court declines to utilize this standard, the DOCS charge must still pass scrutiny under the Turner standard.[3] (Turner v Safley, 482 US 78, 89 [1987]) (upholding prison regulations which infringe freedom of speech and association and are "reasonably related to legitimate penological interests). Contrary to DOCS' claim, the vast majority of courts considering restrictions on prisoner telephone access have recognized that speech and association interests are involved, and thus have applied Turner balancing (e.g. Almahdi, 310 Fed Appx at 521-22; Saenz v McGinnis, No. 98-2022, 1999 US App LEXIS 23246, *6 [6th Cir Sept 17, 1999]; Boriboune v Litscher, 91 Fed Appx 498, 500 [7th Cir 2003]; Benzel v Grammer, 869 F2d 1105, 1108-9 [8th Cir 1989]; Keenan v Hall, 83 F3d 1083, 1092 [9th Cir

[3] There is a strong argument for the inapplicability of the Turner standard here. In Thornburgh v Abbott, 490 US 401, 409-14 [1989], the United States Supreme Court distinguished regulations involving incoming and outgoing prison mail: the former is likely to affect institutional security, and thus is subject to Turner balancing; the latter is not. Thus a regulation that reflects "general budgetary and policy choices," and not security concerns, is properly evaluated under the traditional standards established by the courts for challenges outside the prison context (Pitts v Thornburgh, 866 F2d 1450, 1454 [DC Cir 1989] (Turner not applied to equal protection challenge to conditions for women prisoners created by "political" choices not to build a new women's facility)). As the Byrd court explained, the DOCS charge "does not involve matters of security or safety, which have traditionally been held to the Turner standard. Receiving an alleged "kickback" from an additional fee added to the reasonable rate for collect calls made by inmates to family members and those individuals providing counseling and professional services, is neither a rule nor regulation related to the functioning of a prison" (2005 US Dist. LEXIS 18544 at *31).

1996]; Young-Bey v Swanson, 3 Fed Appx 929, 931 [10th Cir 2001]; Pope v Hightower, 101 F3d 1382, 1385 [11th Cir 1996]).

Under Turner, Appellants' speech and association claim must be reinstated, as DOCS has not yet provided a legitimate penological purpose for its imposition of the tax (see Appeal Br. at 39-42). Indeed, the purpose alleged by DOCS' counsel—incentivizing DOCS to provide telephone service (DOCS Br. at 44)—is not part of the factual record, and moreover, is not credible. The revenue raised by the DOCS charge might very well function to incentivize the prison to allow telephone communication, but it does not follow that creating the incentive was the purpose of the tax. More likely, the purpose was simply raising revenue. And while raising revenue from prisoners can sometimes be a legitimate penological objective (see Allen v Cuomo, 100 F3d 253, 261 [2d Cir 1996]), raising revenue from their families and other outsiders, who have not been found guilty of any crime, is not.

DOCS falls back on the argument that even if Appellants have some right to communicate via telephone with their incarcerated loved ones, that right is only violated when a plaintiff is rendered completely unable to speak to their loved one by telephone. This bald statement finds no support in Turner or any other precedent. Indeed, not even the cases DOCS cites

support this argument (see Byrd, 2005 US Dist LEXIS 18544, at *26 n 9.) (referring to allegations by the mother of a prisoner who limited the duration of her son's calls to reduce the phone bill, as the type of facts, if proven, that would establish a freedom of speech claim); McGuire v Ameritech Srvs, Inc., 253 F Supp 2d 988, 1002 [SD Ohio 2003] (declining to dismiss first amendment challenge to prison telephone system on pleadings, as plaintiffs might be able to show, through discovery, that their rights have been infringed)).

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

V. Appellants' Claims are not Barred by the Filed Rate Doctrine

Finally, Respondent's argument that the filed rate doctrine bars Appellants' constitutional claims (DOCS Br. at 11-21) is little more than a distraction from the merits of this case. As the Appellate Division explained, "[i]nasmuch as the PSC expressly determined that it lacked jurisdiction to review the challenged portion of the rate, and, thus declined to consider whether that portion of the rate was just and reasonable, the filed rate doctrine cannot bar the claims advanced herein" (R. 8).

The filed rate doctrine bars damage actions against regulated utilities that challenge the rates charged by that utility (Wegoland Ltd. v NYNEX

Corp., 27 F3d 17, 18 [2d Cir 1994]). Under the doctrine, "any 'filed rate' – that is, one approved by the governing regulatory agency – is per se reasonable and unassailable in judicial proceedings brought by ratepayers" (id., emphasis added). The doctrine is animated by two policy goals: first, preserving the exclusive role of agencies in setting reasonable rates; and second, preventing carriers from discriminating between ratepayers (Marcus v AT&T Corp, 138 F3d 46, 58 [2d Cir 1998]).

Respondent relies heavily on Bullard v State, 307 AD2d 676 [2003], and Smith v State, Claim No. 101720, Motion No. M-64458, July 8, 2002 (Read, P.J.) (see DOCS Addendum, A. 5-6), two prior challenges to the New York State prison telephone system. But there is a significant distinction between those cases and the case at hand.

After MCI was first awarded the contract to provide telephone services in New York State prisons, it filed the appropriate tariffs with the PSC (R. 51, Complaint at ¶ 38). When the PSC reviewed that filing in 1998, it approved the entire rate as reasonable, without considering its jurisdiction over the DOCS charge (see Ordinary Tariff Filing of MCI Telecommunications Corporation to Introduce a General Service Description and Rates for MCI's Maximum Security Rate Plan for the New York Department of Corrections, No. 98-C-1765, 1998 NY PUC LEXIS 693

[Dec. 17, 1998]). Both Smith and Bullard were brought prior to the PSC's 2003 order, and thus involve the distinct question of application of the filed rate doctrine to rates reviewed and approved by the PSC. They are thus irrelevant to the case at hand.

As the Appellate Court recognized, the filed rate doctrine cannot apply here because (1) this is not a damage action against a utility, (2) this is not a suit about a utility rate, and (3) the charge at issue in this suit was not approved by the PSC.

First, the filed rate doctrine applies only to claims for damages against a member of a regulated industry (e.g. Purcell v New York Cent. R.R. Co., 268 NY 164, 171 [1935] (regarding rights as between regulated body and rate-payer), Porr v NYNEX Corp., 230 AD2d 564, 568-69 [1997]) (same)). Thus in Smith v SBC Communications Inc., 839 A2d 850, 857-59 [NJ 2004] the Supreme Court of New Jersey considered and rejected application of the filed rate doctrine to a claim for damages against a telecommunications retailer on the grounds that the retailer was not a carrier subject to FCC regulation, and thus the policies behind the doctrine did not apply (see also Tenore v AT&T Wireless Servs., 962 P2d 104, 109-10 [Wash 1998] (filed rate doctrine does not bar claims for damages against cellular telephone service providers exempted from tariff filing requirements by the FCC)).

Appellants seek refunds only from DOCS, not from MCI. The Department of Correctional Services is not a utility subject to regulation by the Public Service Commission (R. 97). Thus, the filed rate doctrine cannot bar Appellants' request for refunds.

Second, because DOCS is not a regulated utility, its charge is not a utility rate (R. 97). The PSC made this clear in 2003, when it exercised its jurisdiction to review and approve the 42.5% rate charged by MCI for inmate calling services, but did not review or approve the DOCS charge (R. 98).

Finally, the filed rate doctrine only bars suits that challenge the reasonableness of utility rates approved by a governing regulatory agency (Arkansas Louisiana Gas Co. v Hall, 453 US 571, 577 [1981]; Matter of Concord Assoc. v Public Serv. Commn. of State of N.Y., 301 AD2d 828, 831 [2003] (filed rate doctrine insulates from suit utility rates "the PSC has previously determined to be just and reasonable"); Beller v William Penn Life Ins. Co. of N.Y., 8 AD3d 310, 313 [2001] (questioning applicability of filed rate doctrine where evidence failed to show the subject policy had actually been approved by the relevant regulatory body)). Here, because the PSC unambiguously held that it lacked jurisdiction to review or authorize

the DOCS tax (R. 96-99), the tax cannot be insulated from judicial review by the filed rate doctrine.

Respondent's entire argument to the contrary rests on the fact that the PSC directed MCI to file a new tariff reflecting the two separate charges, and through this direction, somehow silently "authorized" the DOCS charge. But as the PSC Order explicitly states,

> The Commission will direct MCI to file new tariffs that identify the bifurcation of the total rate as a jurisdictional rate and DOCS' commission. This will indicate that the Commission has reviewed and approved the jurisdictional portion of the rate . . . The bifurcation of the rates signifies that the Commission does not have jurisdiction over DOCS, a government agency, or the manner in which it enters into contracts with providers. . . . Therefore, the identification in the tariff of the jurisdictional rate and DOCS' commission will reflect the jurisdictional boundaries of each agency for their portion of the charge.

(R. 98-99). Far from authorizing MCI to charge the total rate, the PSC authorized MCI's rate, and explained that only DOCS, not the PSC, had the authority to review and authorize the DOCS charge.

Respondent quotes Porr for the proposition that the filed rate doctrine bars suits challenging any "rate on file with a regulatory commission," presumably to imply that the doctrine protects anything written on a piece of paper and given to the PSC, even if it is not a telephone rate approved by the PSC (DOCS Br. at 14 (quoting Porr v NYNEX Corp., 230 AD2d 564, 568

[1997])). However, neither the filed rate doctrine nor the Porr decision itself requires such an absurd result.

As applied in New York, the filed rate doctrine is based on judicial recognition that the PSC is the body specifically designated by New York's legislature to oversee telephone rates, and that only an entity with the PSC's expertise can determine the reasonableness of a telephone rate (see Porr, 230 AD2d at 569-70 ("Where the legislature has conferred power upon an administrative agency to determine the reasonableness of a rate, the ratepayer can claim no rate as a legal right that is other than the filed rate") (internal citations omitted)). However, when the PSC performed its legislatively mandated function in the present case, it bifurcated the proposed collect call rate, finding the MCI "jurisdictional" portion of the total charge just and reasonable but the DOCS commission portion to be outside its jurisdiction (R. 96-99). Because the filed rate doctrine is predicated on deference to the administrative body's expertise, disavowal of expertise by the agency itself must end the inquiry.

The filed rate doctrine presents no bar to a plaintiff's action for refund of an unauthorized fee levied by an unregulated agency. Refunds in this case would be simple, and could not "enmesh courts in the rate-making process" (Wegoland, 27 F3d at 19). The DOCS tax need only be refunded;

this change would have no impact on the income of any regulated utility (see, Matter of Leftkowitz v Public Serv. Commn., 40 NY2d 1047, 1049 [1976]). The PSC has already found the remaining 42.5% jurisdictional rate to be just and reasonable (R. 97-98). Refunds will not result in consumer price discrimination because the refund is not a portion of a utility rate, rather it is a fee unlawfully taken by DOCS, an unregulated entity.

In its struggle to avoid this obvious result, DOCS refuses to acknowledge that the PSC could not have authorized a charge it has no jurisdiction over. Instead, DOCS claims that respect for the PSC's exclusive rate-setting authority requires the Court to understand the PSC's clear denial of jurisdiction as an order "approving the reasonableness of the total rate" (DOCS Br. at 19). This double-speak not only directly contradicts what the PSC actually held, but is based on nothing more than DOCS' own comparison of rates for inmate and non-inmate station-to-station collect calls (id.). The Court need not defer to the "rate-setting expertise" of Respondent's counsel.

DOCS' final argument regarding the filed rate doctrine betrays the conflict at the heart of their position. According to Respondent, this Court has no authority to order refunds of the DOCS charge, because Appellants

should have sued the PSC, and the PSC would have been powerless to order the refunds (DOCS Br. at 20). DOCS is wrong for several reasons.

First, and most fundamentally, Appellants did not sue the PSC because we have no quarrel with the PSC; to the contrary, we agree with the PSC's determination that the DOCS charge is not a just and reasonable part of the utility rate. As we had no reason to sue the PSC, the PSC's authority to order refunds is wholly irrelevant. It is this Court's power that is relevant, and that power is well established: in an Article 78 proceeding, the court reviewing the challenged actions of a state agency has the power to award restitution or damages that are incidental to the primary relief sought by the petitioner, which, in this case is a declaration of unconstitutionality (see CPLR § 7806; Matter of Gross v Perales, 72 NY2d 231, 235 [1988]; Walton v New York State Dept. of Correctional Srvs., 8 NY3d 186, 199 [2007] (Read, J. dissenting) (citing Gross)).

Indeed, Respondent's argument can only be understood as arising from the implicit presumption that the PSC erred in holding it lacked jurisdiction over the DOCS tax. While neither party has explicitly endorsed this argument at any time, the trial court found just that (R. 26). Appellants argued successfully to the Appellate Division that this holding violated the well settled rule that "the construction given statutes and regulations by the

agency responsible for their administration, if not irrational or unreasonable, should be upheld" (Matter of Bernstein v Toia, 43 NY2d 437, 448 [1977], quoting Matter of Howard v Wyman, 28 NY2d 434, 438 [1971]); People v County Transp. Co. Inc., 278 AD2d 472, 474 [1951] ("Unless the statute clearly prohibits it, the interpretation uniformly adopted and enforced by the agency charged with the administration thereof, should be sustained")). The PSC's determination that it lacked jurisdiction over the DOCS charge was neither irrational nor unreasonable, and must be accorded deference by State courts (e.g. Matter of New York State Cable Tel. Assn. v Public Serv. Commn., 87 AD2d 288, 289 [1982] (conducting rational basis review of determination by PSC that it lacked jurisdiction to regulate rates charged by private company); Powell v Colorado PUC, 956 P2d 608, 613 [Colo 1998] (court should defer to PUC's finding that it lacked jurisdiction over Colorado Department of Corrections' collection of surcharge for inmate calls); Alexander v Cottey, 801 NE2d 651, 660 [Ind 2004] (holding the court, rather than the Indiana Utility Regulatory Commission was the appropriate body to review contract between Sheriff and utility regarding inmate telephone program)).

Moreover, even if the PSC should have reviewed the entire rate, the fact remains that it did not. Were this Court to hold that the PSC erred, or

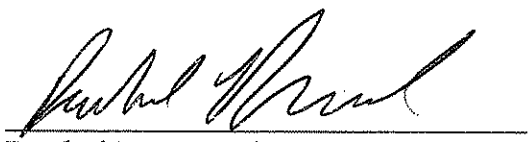
that the filed rate doctrine bars Appellants' claims, the holding would insulate DOCS' actions from any form of judicial or regulatory review through no fault of Appellants. That result cannot be countenanced with this Court's mandate to do justice (cf Belt Line R. Corp. v Newton, 273 F 272, 275 [SDNY 1921] aff'd sub nomine Banton v Belt Line R. Corp., 268 US 413 [1925] (court must review claims of a confiscatory rate where the Public Service Commission "by reason of neglect or refusal" has failed to render a decision on the issue); Driscoll v New York Tel. Co, 70 Misc 2d 377, 381 [1972] (where PSC failed to act on customer complaint, court must provide a forum)).

CONCLUSION

Appellants brought this case over five years ago to challenge an unlegislated and unjust scheme to place the costs of corrections in New York on the backs of family members, friends, and counselors of New York State prisoners. Since then, both the Executive and the Legislature have signaled disapproval of that policy. But in the end, only this Court can determine whether the scheme was lawful, and allow for compensation of the victims. For all of the foregoing reasons, Appellants respectfully request that this Court reverse the judgment of the Appellate Division and direct that a trial be held as soon as possible.

Dated: August 18, 2009
New York, NY

Respectfully Submitted,



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

Juan Cartegena
COMMUNITY SERVICE SOCIETY
105 E. 22nd Street
New York, NY 10010
(212) 614-5323

Attorneys for Appellants