COURT OF APPEALS
STATE OF NEW YORK

IVEY WALTON, et al.	:	
	:	
Appellants,	:	
	:	A.D, Third Dept. Docket
-against-	:	# 98700
	:	
NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, et al.	:	
	:	
Respondents.	:	

BRIEF OF PROPOSED AMICUS CURIE, THE INNOCENCE PROJECT, INC., AND THE INCARCERATED MOTHERS PROGRAM

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STATEMENT OF INTEREST

Amici, The Innocence Project, Inc., is a nonprofit legal clinic and criminal justice resource center. Founded by Prof. Barry Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law in 1992, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing can provide conclusive proof of innocence. The Project pioneered the litigation model that has to date exonerated 187 innocent persons by post-conviction DNA testing and served as counsel in the majority of those cases. As such the Project has represented innocent members of society affected by the New York State Department of Correctional Services' (hereinafter "NYSDOCS" or "DOCS") 'surcharge' levied against family members who pay for the collect calls their loved ones make from prison. These family members have made deep financial and personal sacrifices to maintain telephone contact with incarcerated relatives ultimately proven innocent by DNA evidence. The Project currently represents clients in New York State Correctional facilities, who have maintained their innocence (some for decades), and are trying to obtain biological evidence that may exonerate them.

Amici also include The Incarcerated Mothers Program (hereinafter "IMP"). IMP is a program of Edwin Gould Services for Children and

Families, which has 65 years of experience, and is currently one of the largest minority administered foster care agencies in New York City. Edwin Gould also provides permanency services, post-adoption services, residential services, intermediate care services, health and mental care, preventive services, domestic violence services, job readiness training and supportive services for families affected by maternal incarceration.[1] IMP joins this brief as an organization that advocates on behalf of the children of current incarcerees and their caretakers, who pay for the collect phone calls that enable these children to preserve a relationship with their incarcerated mothers and fathers.

Both organizations maintain extensive relationships with the incarcerated and their families and thought it necessary to address some of the legal issues raised in the Courts below. *Amici* hope that their real world experiences will enable the court to understand the human issues underlying the legal analyses and to comprehend the severity of the actual injuries the DOCS 'surcharge' causes to the families of prisoners. Significantly, the First Amendment and Taxations issues involved in the current phone policies will likely be repeated in subsequent phone contracts, should those concerns not be addressed by this court. We write then to detail the drastic

[1] *See* "Incarcerated Mothers Program Objectives and Descriptions" (hereinafter, "IMP Objectives and Descriptions" at 1. Submitted herewith as Attachment A.

effects the current contract has had on the ability of families to communicate with loved ones who are incarcerated.

INTRODUCTION AND SUMMARY OF ARGUMENT

Incarcerated individuals comprise a particularly vulnerable population that faces obvious barriers to maintaining connections with family members in the community. Maintaining these connections, however, is absolutely essential to ensuring the integrity of the family unit for the obvious benefit of the inmate, family, as well as society. Indeed, numerous studies have shown that close family ties help reduce inmate recidivism. Because other avenues of communication in prison are greatly limited, the telephone provides inmates and their *families* with the most effective means of maintaining their relationships. *Amici* overwhelmingly attest to the direct, positive correlation between telephone usage and subsequent quality and quantity of familial relations. It is clear from *amici's* experiences that MCI WorldCom Telecommunications, Inc.'s (hereinafter "MCI") exorbitant fee hike in 2003 represented an unconstitutional restriction on the ability of incarcerees and their families to communicate by imposing a financial burden so great as to render reasonably regular telephone contact impossible for many inmates. The subsequent adverse effects of this illegal tax on the quality of familial relationships and transitions post-release are easily

evident. Furthermore, it is clear that the DOCS 'surcharge' is actually an illegal tax, making the fact that it violates the family members' First Amendment rights even more unacceptable. For these reasons, *amici* respectfully urge this Court to reverse the Appellate Division's decision.

STATEMENT OF THE CASE

We incorporate by reference the statement of facts and procedural history set forth in Appellant's brief.

ARGUMENT

I. The Constitution Provides for the Preservation of Familial Relationships During Incarceration.

a. Despite Some Limitations, First Amendment Protections of Inmate-Family Communication Exist and Work to Preserve the Integrity of the Family Unit.

It is widely recognized that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 [1987]. Rather, courts have found that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system," *Pell v. Procunier*, 417 U.S. 817, 822 [1974], including *the right to communicate with family and friends*. *See Morgan v. LaVallee*, 526 F.2d 221, 225 [2nd Cir. 1975]. Commensurate with an inmate's freedom

to maintain contact with "family and friends," the courts protect free citizens' abilities to "exercis[e] their own constitutional rights by reaching out to those on the 'inside.'" *Thornburgh v. Abbott*, 490 U.S. 401, 407 [1989]. This doctrine is of particular importance in the instant case, as the First Amendment rights implicated by the DOCS tax are not just those belonging to prisoners, but, more importantly, those of the *non-incarcerated* family members of inmates to communicate with their loved ones in jail.

This right to communication, limited only when in conflict with legitimate governmental concerns, helps to preserve familial relationships both for the sake of the prisoners and their family members. The Supreme Court has long recognized that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs []." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 [1984]. Moreover, "the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others." *Id.* at 619. For inmates, the circumstances of their incarceration naturally limit their ability to maintain these "close ties" with family members, and serve to make the connections that they are able to preserve all the more precious. The most dramatic evidence arises in the medical literature on prison suicides: inmates

incur a greater risk of suicide than the general population, and in one recent study of over 3,000 inmates, a perceived lack of social support significantly increased an inmate's likelihood of attempting suicide by more than thirty-fold.[2]

Communication with loved ones not only mitigates the unnecessary suffering experienced during incarceration, but also lends itself to improved re-assimilation of the former inmate back into the family and community at large upon release. There is little, if any, disagreement that the "[p]reservation of the family unit is important to the reintegration of the confined person and decreases the possibility of recidivism upon release []. [V]isitation has demonstrated positive effects on a confined person's ability to adjust to life while confined as well as his ability to adjust to life upon release...." *Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454, 468 [1989](Marshall, J. dissenting), *citing* National Conference of Commissioners on Uniform State Laws, Model Sentencing and Corrections Act § 4-115, Comment (1979). *See also, id. citing* National Sheriffs' Association, *Inmates' Legal Rights* 67 (rev. ed. 1987) (visits "with family, friends and others [are] important if the inmate is to retain his ties to the

[2] *See* R. Jenkins, D. Bhugra, H. Meltzer, N. Singleton, P. Bebbington, T. Brugha, J. Coid, M. Farrell, G. Lewis & J. Paton, "Psychiatric and social aspects of suicidal behavior in prisons." 35 *Psychological Medicine* at 257-69 (2005).

community and his knowledge of what the free society is like"); U.S. Dept. of Justice, *Federal Standards for Prisons and Jails*, Standard 12.12, Discussion (1980) ("Visiting is an important element in maintaining inmates' contact with outside society."); ABA Standards for Criminal Justice 23-6.2, Commentary (2d ed. 1980) ("Because almost all inmates ultimately will be returned to the community at the expiration of their terms, it is important to preserve, wherever possible, family and community ties."); National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 2.17, Commentary (1973) ("Strained ties with family and friends increase the difficulty of making the eventual transition back to the community."); *Thornburgh v. Abbott*, 490 U.S. at 407 ("Access [to prisons] is essential ... to families and friends of prisoners who seek to sustain relationships with them...."). *See also* K. Casey-Acevedo & T. Bakken, "Visiting women in prison: Who visits and who cares?" 34 *Journal of Offender Rehabilitation* at 67-86 (2002) (noting visitation can help foster prison adjustment and lead to better societal adjustment after prison). "Consistent with this view, numerous governmental and private organizations which deal closely with correctional institutions have promulgated standards designed to maximize contact between family members and inmates." *Kentucky*, 490 U.S. at 469.

The effect of a mother's incarceration on her children is particularly devastating. Beyond the immense damage to children's emotional and physical well-being that can result from instability and long-term separation lies a pronounced risk of losing these children to the criminal justice system and substance abuse.[3] Research has shown that children of incarcerated parents are seven times more likely to become involved in the juvenile and adult criminal justice systems.[4] However, research has also demonstrated that preserving the parent-child relationship through continued contact *while the parent is incarcerated* can be truly helpful to a children's development. It allows them to feel loved rather than abandoned or rejected.[5] Furthermore, a positive parent-child relationship has been definitively shown to contribute to inmates' rehabilitation.[6] Therefore, it is undeniable that extensive contact is optimal not only for the benefit of the inmates and their children, but also society at large so that the cycle of incarceration does not continue.

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[3] IMP Objectives and Descriptions at 3, *supra* note 1.
[4] *Id. citing* US Department of Health & Human Services Program Announcement No. ACYF/FYSB 2003-02), "What are the effects of incarceration on the child?" at 4.
[5] *Id.* at 2 *citing* Lois E. Wright and Cynthia B, Seymour. "Working With Children and Families Separated by Incarceration" 60-61, CWLA Press, Washington, DC (2000).
[6] *Id.*

II. Prisoners Have a First Amendment Right to Make Telephone Calls; Exorbitant Rates May Not Be Charged so as to Deprive Access by Prisoners.

a. Telephone Calls are an Incomparable Method of Communication Between Family Members and Inmates and Essential to Preserving the Family Unit

Several federal circuits agree that "there is no legitimate governmental purpose to be attained by not allowing reasonable access to the telephone [by prisoners], and [] such use is protected by the First Amendment." *Johnson v. Galli*, 596 F.Supp.135, 138 [D.Nev.1984]. *See also Washington v. Reno*, 35 F.3d 1093, 1100 [6th Cir. 1994]; *Johnson v. California*, 207 F.3d 650,656 [9th Cir. 2000]; *Strandberg v. City of Helena*, 791 F.2d 744, 747 [9th Cir. 1986]; *Hutchings v. Corum*, 501 F.Supp. 1276, 1296 [W.D.Mo.1980]; *Moore v. Janing,* 427 F.Supp. 567, 576 [D. Neb.1976]. The reasoning behind specifically preserving a prisoner's right to exercise his First Amendment right to telephone use is abundantly clear: while letter-writing and visitation also allow for meaningful emotional connections between inmates and family members, the unique nature of a telephone call offers an unparalleled opportunity to preserve the integrity of the family unit while in prison.

First, it is impossible to recreate the instantaneous nature of telephone communication; while letter-writing and visits provide family news and offer personal interaction, for prisoners they are intermittent and in some instances, non-existent. *Amici* who are exonerees personally recall how important it was during times of sadness, stress or excitement to be able to reach out *at that moment* to their family members by phone, instead of waiting weeks for a letter to arrive or for a proscribed visiting day.

For those *amici* who are younger children – approximately 13,000 New York children currently have a mother in jail or prison and 58% of these children are under the age of ten[7]– letter writing is nearly impossible. If such children need to communicate with a parent by mail, they must have an intermediary write their thoughts for them and read to them any response. Needless to say, such communication completely destroys the confidentiality and quality of parent-child communication. For infants and toddlers who do not have a full grasp of language, this limited form of communication by letter is truly unavailable. However, even the youngest child can still communicate with their parent by phone – *amici* are aware of examples of incarcerated mothers who call every evening to sing to their babies the same

[7] *Id* at 2 *citing* Julie Kowitz & The Women in Prison Project of the Correctional Association, (forthcoming 2003) "The Collision of Child Welfare and the Incarceration of Women in New York"

lullaby, and to say goodnight to older children. It is impossible to minimize the impact of such constant vocal contact at a young age, and it is unquestionably the kind that cannot be duplicated by a letter. For older children, *amici* aver that being able to deal with *real issues in real time* is imperative for the preservation of the parent-child role: if a child has a disciplinary issue at school, or any other problem that requires parental attention, by the time a letter reaches the incarcerated parent and he/she authors a response, the issue has become stale or may have worsened.

Furthermore, while telephones were readily accessible to *amici*, there were often serious limitations on family members' ability to physically visit an incarcerated relative. Many family members reported living a *considerable distance* from the correctional institution, which either prohibited them from visiting on a regular basis, or in some cases, at all. In New York State, for example, the physical distance between most prisoners and family members means that in order to maintain communication, phone calls are a necessity: more than 80% of the state's prisoners come from poor New York City neighborhoods, while two-thirds of prison facilities are located *three hours or more* from New York City.[8] This distance demands

[8] *See* Claudio Cabrera, "Punishing Phone Call Tax For Families of Incarcerated," *Amsterdam News,* February 8, 2006. Available at

that many relatives of inmates plan for an entire day's absence from normal routines to make the six hour round trip, taking time off of work, finding childcare, and paying for transportation, food, and lodging.[9] Given these dramatic hurdles to physical visitation, it is unsurprising that New York prisoners reportedly completed nearly seven million collect phone calls between September 2001 and August 2002, totaling more than 124 million minutes of talk time.[10] Furthermore, it is extremely unlikely that the caregiver of a child with an incarcerated parent will facilitate visitations to the prisons or jails. Indeed, approximately one-half of all incarcerated parents receive no visits from their children, and others receive only infrequent visits.[11]

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http://www.indypressny.org/article.php3?ArticleID=2489 (last visited November 29, 2006).

[9] *See* Johnna Christian, "Riding the Bus: Barriers to Prison Visitation and Family Management Strategies," 21 *Journal of Contemporary Criminal Justice*, No. 1 at 31-48 (February 2005) ("The costs associated with one visit are a minimum of $80 and could easily be twice that amount. This is assuming that there is only one family member visiting and does not include other expenses such as childcare. In addition to these monetary costs, the journey to a visit is extremely tiring and time consuming. [] Buses to the farthest facilities leave New York around 9:00 PM to arrive in time for visiting hours at 9:00 AM the next morning.)

[10] *See* New York State Department of Correctional Services Position Paper "Inmate Pay Phone Access Fosters Family Ties, Enhances Security For All," at 1 (August 2003) *available at* http://www.docs.state.ny.us/PressRel/phoneinfo.pdf (last visited November 29, 2006) (hereinafter "DOCS Position Paper").

[11] IMP Objectives and Descriptions at 2, *citing* Lois E. Wright and Cynthia B, Seymour. "Working With Children and Families Separated by Incarceration" 60-61, CWLA Press, Washington, DC (2000).

Ironically, DOCS agrees with *amici* that telephone access for inmates is a crucial aspect of maintaining family connections. In their 2003 press release entitled, "Inmate pay phone access fosters family ties, enhances security for all,[12] " DOCS asserts: "At first blush, one would be hard pressed to identify the debate [on controls on phones and commissions]: since studies have shown maintenance of family ties reduces recidivism, it would seem allowing inmates such a privilege [use of telephones] would benefit all New Yorkers."[13]

b. The Imposition of DOCS' Unlawful Tax Violated the First Amendment Rights of Members of *Amici* By Deterring Telephone Communication, and Through the Imposition of Financial Hardship on the Families of Exonerees

Members of *amici* who are exonerees and relatives of those incarcerated in New York State on or after November 2003, have collectively experienced the unlawful burdening of their rights to familial association through the imposition of the DOCS tax. This tax had the practical effect of impeding communication concerning constitutionally sacred issues such as health care, parenting and other critical family issues. *Amici* wholeheartedly agree with appellants that the DOCS tax violates the free speech and associational rights guaranteed by the New York State

[12] DOCS Position Paper at 1.
[13] *Id.*

Constitution Art I §8 because it: (i) has no association with any legitimate security concerns; (ii) imposes an excessive fee on Appellants' expressive activity that bears no relationship to regulatory costs, and (iii) burdens the ability of inmates and their family members to maintain contact without implicating safety concerns. *See* Appellants' Brief (hereinafter "Ap. Br.") at 44. Furthermore, *amici* assert that because there are no equivalent means of communication available to inmates that can preserve familial relationships in the way that the telephone can, the imposition of the DOCS' tax on telephone calls creates a unique burden on prisoners and their families.

i. The Appropriate Standard for Review is Traditional First Amendment Analysis.

As noted above in Section I(a), *supra*, it is the First Amendment rights of the family members who choose to accept the collect calls and subsequently pay for them that are truly implicated by the imposition of the illegal DOCS tax. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 414 [1974](requiring a challenged regulation be no more than "generally necessary" to a legitimate governmental interest) *See also Thornburgh,* 490 U.S. at 412 (n.10) *citing Houchins v. KQED, Inc.,* 438 U.S. 1, 12 [1978] (plurality opinion)(distinguishing *Martinez* as dealing with outsiders' right to *receive* communications from inside the prison, as opposed to outsiders' right to prison access).

This assertion by no means seeks to obfuscate the reality that these affected individuals are in communication with incarcerated individuals and that some deference to the security and management needs of correctional authorities is warranted. The rub in the instant case is that *no security concerns are implicated by the DOCS tax.* The tax in this case should, therefore, not be analyzed under the more deferential *Turner* standard, in which the court found the standard for review of prison regulations to be one in which "the regulation is valid if it is reasonably related to legitimate penological interests" because "such a standard is necessary if 'prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations.'" *Turner,* 482 U.S at 89.

DOCS would have this Court believe that the fact that Appellants are not inmates should be of absolutely no consequence to the deference level applied to the instant case. *See* Respondent's Reply Memorandum of Law (hereinafter "Res. Mem. of Law") at 4. In defense of this position, DOCS cites three cases where courts apply the *Turner* standard to prison regulations, despite the claims having been brought by some one other than an inmate. *See Thornburgh,* 490 U.S. at 401; *See also, Overton v. Bazzetta,* 539 US 126 [2003]; *Hernandez v. McGinnis,* 272 F. Supp.2d 223 [W.D.N.Y. 2003].

The *Thornburgh* decision, however, is inapposite. While that case overruled the *Martinez* standard to the extent that it applied to incoming mail, it did not do so concerning outgoing mail. *See Thornburgh,* 490 U.S. at 414. Present in the former are security concerns which require deference to prison officials. *Id.* at 408–10. Those concerns are not as acute concerning outgoing mail, and for those correspondences the heightened scrutiny in *Martinez* went unchallenged.

The deference standard applied in *Thornburgh* is not afforded to prison officials simply for the asking. Rather, it is rooted in concerns peculiar to institutional security. *Thornburgh* involved the Court's review of prison regulations that, pursuant to specified criteria, "authorized wardens to reject an incoming publication if it is found to be detrimental to [] security." *Id.* at 401. In its decision, the Court maintained that the rule enunciated in *Turner* was founded in a prison's security interest and in a warden's expertise within that peculiar context: "we have been sensitive to the delicate balance that prison administrators must strike between order and security of the internal prison environment and the legitimate demands of those on the 'outside' who seek to enter that environment, in person or through written word." *Id.* at 407. Deference was rooted in the concern "that certain proposed interactions, though seemingly innocuous to laymen, have

potential significant implications for the order and security of prison." *Id.* at 408. Noting the "difficult and delicate problems of prison management," the Court ceded deference to prison officials "who, **in the interest of security**, regulate the relations between prisoners and the outside world." *Id.* (emphasis added). Security concerns were at issue in *Thornburgh* because the publications received from the outside could be circulated within the prisons: "The problem is not ... the individual reading the materials in most cases. The problem is the material getting into the prison." *Id.* at 413. The Court made clear that such deference was not to be extended beyond its moorings in the security interests of prisons, and parsed out a distinction between incoming and outgoing communications, which did not pose such a threat:

> Furthermore, we acknowledge today that the logic of our analyses in *Martinez* and *Turner* requires that *Martinez* be limited to regulations concerning outgoing correspondence. As we have observed, outgoing correspondence was central to our focus in *Martinez*. The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials. *Id.* at 414.

Both *Overton v. Bazetta,* and *Hernandez v. McGinnis*, like *Thornburgh*, are cases that apply the *Turner* standard to security concerns and, like *Thornburgh*, have no application to the concerns before this Court. Rather, the danger posed here is not the phone communications between

loved ones and inmates, but Respondent's expansive reading of the government's power to restrict protected speech. The restriction placed on First Amendment speech here is a surcharge (or, as put less politely by the *Byrd* Court, "a kickback," *Byrd v. Goord*, 2005 WL 2086321 at *9) imposed so that DOCS may generate revenue for its Family Benefit Fund. It does not set out to restrict speech that threatens the prison environment, but arbitrarily constricts all speech for which an exorbitant fee is not paid. While security concerns may be within the purview of wardens, raising funds from society is not. Matters of raising revenues or taxing the public must be done with a particularized concern for which segment of the citizenry is to pay the surcharge or tax. Such concerns are particularly acute when they limit First Amendment expression and, consequently, lend little room for deference when unelected government officials, inexperienced in such matters, are levying the fee.

The restrictions on such expression here are nearly bottomless. They are the product of an exclusive contract with MCI. The fees are not tied to the phone rate. The Public Service Corporation (hereinafter "PSC"), which found only 42.5% of the total charge to be reasonable, lacks the jurisdiction to review the other 57.5%. Untied to the costs of services, subsequent contracts and kickbacks can endlessly tighten the noose on First Amendment

speech, tying surcharges for phone use to ever-expanding, yet uncanalized, claims for general prison funds. Importantly, the officials who set these fees are not answerable to the PSC or the electorate.

Simply put, the principles of taxation and equitable burdening of the citizenry are far beyond the scope of the prison authority's experience. Rather, it is the legislature and the Court's domain to determine what constitutes a fair tax. As there are no security concerns associated with the DOCS tax,[14] this Court should be advised by cases such as *Pitts v. Thornburgh*, 866 F.2d 1450 [DC Cir. 1989]. There, the D.C. Circuit found that *Turner* applied only "to cases involving regulations that govern the day-to-day operation of prisons and that restrict the exercise of prisoners' individual rights within prisons." *Id.* at 1453. Similar to the instant case, the regulation in *Pitts v. Thornburgh* "challenge[d] general budgetary and policy choices," not security concerns, and the court found it appropriate to apply traditional intermediate scrutiny in analyzing the validity of the regulation. *Id.* at 1454. *See also Beauchamp v. Murphy*, 37 F.3d 700, 704 [1st Cir. 1994]; *Jordan v. Gardner*, 986 F.2d 1521, 1530 [9th Cir. 1993].

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[14] DOCS attempts a weak connection between some inmates' use of telephones for criminal enterprises and the need for DOCS to address such security concerns. Res. Mem. of Law at 5. But, the contract, purely a revenue raising devise, simply does not address these concerns. Because it cannot justify the connection between the tax, which applies to every phone call, and any criminal use of telephones their arguments for a lesser standard must fail.

The 57.5% surcharge, or unlawful tax, simply cannot withstand scrutiny. The surcharge itself unduly restricts protected speech and is unrelated to the cost of the phone service. *Amici* are thus arbitrarily denied access to loved ones who are in prison (and who may well be in pursuit of their liberty through our court system, *supra* at 33 to 49) based on fees that are imposed at the whim of unelected government officials negotiating an exclusive contract. As Appellant's Brief (Ap. Br. at 45) makes plain, "while government may assess a fee to recoup the costs incurred in regulating expressive activity, *Cox v. New Hampshire*, 312 US 569, 577 [1941], it may not impose a fee that bears no relationship to those cost." (*See Murdock v. Pennsylvania*, 319 U.S. 105 [1943]."

ii. Even though Turner is The Incorrect Standard, and More Permissive to Correctional Authorities, the DOCS' Tax *Still* Fails to Survive its Deferential Analysis

Even if the Court believes that the applicable standard is that articulated in *Turner v. Safley*, the DOCS' tax still cannot survive its deferential analysis. Specifically, the *Turner* standard asks: (i) whether there is a rational connection between the regulation and the government interest; (ii) whether there are alternative means available to the prisoner of exercising the affected right; (iii) the impact accommodation of the

constitutional right will have on guards and other inmates; and (iv) that the absence of ready alternatives is evidence of a regulation's reasonableness. *Johnson v. Wilkinson,* No. 94-3016, 1994 U.S. App. LEXIS 33844, at *9 [6th Cir. Nov. 30, 1994] (*quoting Turner*, 482 U.S. at 89-91). First, as Appellants correctly assert, the court need not engage in extensive analysis or balancing as the DOCS tax does not relate to the functioning of a prison. Ap. Br. at 48. Indeed, this issue was already correctly resolved by the court in *Byrd v. Goord* which found, when examining *precisely the same tax* at issue in the present case that:

> Although under *Turner*, prison regulations are upheld, despite their infringing character, if they are "reasonably related to legitimate penological interests," 482 U.S. at 89, the 58.5% commission here is not such a prison regulation. [] 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.
> *Byrd*, 2005 WL 2086321 at *9.

Secondly, as demonstrated in Section II, *supra*, and by the case examples below, the telephone is an irreplaceable means of communication and was often the only method whereby *amici* were able to maintain familial relationships. It is irrefutable that we live in a telephone-oriented society. The overwhelming prevalence, usage and affordability of cell phones, pay phones, and land lines, make it impossible to underestimate the importance

of phone contact to modern communication. Although one might plead that letter writing still exists as an alternative to telephone communication, it is simply not an excessive statement to say that as a society we simply no longer use the post for primary communication, as the quality of telephone communication – encompassing both verbal and auditory information exchanged in real time – dwarfs that of letter-writing.[15] Furthermore, relying on letter writing to communicate effectively is not an option for inmates or family members who suffer from any one of a host of common medical conditions that would complicate or preclude writing: physically limiting conditions like arthritis, peripheral neuropathy (commonly associated with diabetes), carpal tunnel syndrome, parkinsonism, tremor, and stroke; conditions that limit visual acuity such as macular degeneration and cataracts; or other conditions such as dyslexia or mental retardation. In addition, educational deficiencies, such as illiteracy, would greatly limit the ability to communicate with the same fluency as by telephone. Finally, as outlined in Section II, *supra*, visiting is often impossible for many of the relatives of prisoners. Therefore, because there was no other way for family members to communicate with inmates by telephone except via the

[15] The United States Postal Service has reported sharp declines in revenue and First Class Mail volume, which it expects to continue because of the substitution of electronic technologies for traditional mail. *See* http://www.usps.com/financials/_pdf/Q12004QtrlyReport.pdf. (last visited November 29, 2006)

MCI/DOCS system, there truly are no legitimate alternative means of exercising those rights.

There would be no adverse impact related to the suspension of the tax on either the guards or the inmates as there *are absolutely no identifiable security or safety concerns* associated with its imposition. *See Byrd,* 2005 WL 2086321 at *9 (finding that the same tax "does not involve matters of security or safety, which have traditionally been held to the *Turner* standard"). Rather, one can only envision the positive benefits associated with eliminating the tax, such as fewer inmate grievances regarding the cost of phone calls and thus less anger at the correctional institution, as well as less tension between family and inmates. The Court's elimination of the tax would maximize the ability of inmates to use telephones to contact their relatives, increasing the value of phone privileges to inmates. Since both *amici* and the DOC already believe that "the possibility of losing phone privileges [seems] to aid in fostering positive inmate behavior and maintaining prison security,"[16] eliminating the tax and increasing the desirability of that privilege would actually make the prison safer for both correctional officers and inmates.

[16] *See* DOCS Position Paper, note 4 *supra,* at 1.

Furthermore, it is impossible to underestimate the importance of phone privileges in reducing recidivistic behavior. As noted above in section I, *supra*, numerous studies have shown that constant contact between inmates and family is integral to keeping a former prisoner from re-offending. *Amici,* who work with inmates who are also parents, are particularly aware of the power this connection can have in determining whether an inmate will return to prison. *Amici* aver that former inmates convicted for drug offenses who have children will often cite their family as a reason to make sure they stay out of trouble. *Amici* believe that those inmates who best preserve the parent-child relationship while in prison, who speak to their children by telephone constantly and stay present in their lives, are the ones post-release, who stay clean and rehabilitate most successfully.

A*mici* also agree with Appellants that there are easy alternatives to the current system engaged in by the DOCS – most obviously, the same system with the same security measures, but minus the DOCS tax. Ap. Br. at 49. Appellants also offer several other plausible alternatives, such as a debit card system (currently utilized by the Federal Bureau of Prisons), which would also satisfy the security concerns addressed by the collect call system. *Id.* at 49–50.

Finally, it should be of particular concern to the Court that the impact on Appellants' First Amendment rights is directly correlative with their financial affluence. While more wealthy families will be able to absorb the cost of the tax and ostensibly enjoy unfettered phone communication with their incarcerated relatives, the poor, who compose the majority of the inmate population, are disproportionately affected by this tax. This systematic discrimination against efforts by the relatively disadvantaged to communicate with their families cannot be abided. In the past, the Supreme Court has taken such considerations into account in adjudicating the First Amendment rights of the financially deprived. *See, e.g., Martin v. Struthers*, 319 U.S. 141, 146 [1943] (striking down ban on door-to-door distribution of circulars in part because the mode of distribution was "essential to the poorly financed causes of [the speakers]"); *Marsh v. Alabama,* 326 U.S. 501 [1946].

c. The Imposition of the DOCS' Backdoor Tax Used To Fund Other Government Programs is a Violation of the Separation of Power Doctrine and Due Process Rights.

The impermissible restrictions on the First Amendment described above become even more indefensible when coupled with the reality that the DOCS surcharge is actually a backdoor tax. Indeed, given the DOCS' belief in the importance of family in successful rehabilitation, and their recognition of the "legitimate needs of the inmates and their loved ones [to