To Be Argued By:
KANNON K. SHANMUGAM
(*pro hac* admission pending)

New York County Clerk's Index No. 103917/2011

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, by Eric T. Schneiderman, Attorney General for the State of New York, and STATE OF NEW YORK, ex rel. EMPIRE STATE VENTURES, LLC,

Plaintiffs-Respondents,

—against—

SPRINT NEXTEL CORP., SPRINT SPECTRUM L.P., NEXTEL OF NEW YORK, INC., and NEXTEL PARTNERS OF UPSTATE NEW YORK, INC.,

Defendants-Appellants.

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MISCELLANEOUS

PRELIMINARY STATEMENT

In this case, the Attorney General seeks to impose liability on Sprint Nextel Corporation and several of its subsidiaries for Sprint's alleged failure to collect certain sales taxes from its customers.[1] In particular, the Attorney General claims that Sprint should have collected sales tax on the interstate portion of its flat-rate monthly wireless plans. Interstate mobile voice services, however, are not taxable under the plain terms of the New York Tax Law. Not content to seek recovery of the amount of tax that Sprint's customers allegedly owed—an amount that, according to the Attorney General, runs to around $100 million—the Attorney General is also pursuing treble damages and penalties under the New York False Claims Act (FCA). He does so on the theory that Sprint's tax returns constituted knowingly false statements, even though Sprint's interpretation of the Tax Law was objectively reasonable and no court had ever construed the Tax Law to the contrary.

The Supreme Court denied Sprint's motion to dismiss in relevant part and permitted the Attorney General's FCA and tax claims to go forward. That decision was erroneous for three primary reasons.

[1] In this brief, we refer to defendants collectively as "Sprint." Defendant Sprint Nextel Corporation is now known as Sprint Communications, Inc.

First, section 1105(b)(1)(B) of the Tax Law categorically excludes interstate telephone services from taxation. The Attorney General contends that another provision, section 1105(b)(2), requires mobile telecommunications providers to collect sales tax on the amount of a flat-rate plan attributable to interstate voice services. Yet that provision expressly incorporates section 1105(b)(1)(B)—with the result that only intrastate services that would be taxable under section 1105(b)(1)(B), and not interstate services, may be taxed when sold as part of a fixed monthly charge. At the very least, the statutory language is ambiguous and must be construed in the taxpayer's favor. The Attorney General's contrary interpretation violates numerous principles of statutory construction. And even if it were correct, it would directly conflict with, and therefore be preempted by, the federal Mobile Telecommunications Sourcing Act (MTSA); that law prohibits a State from requiring mobile telecommunications providers to collect tax on a service that would not otherwise be taxable simply because it is aggregated with, and not separately stated from, taxable services. *See* 4 U.S.C. § 123(b).

Second, Sprint did not violate the FCA because its interpretation of the Tax Law, even if incorrect, was objectively reasonable. The FCA punishes only knowingly false statements. As a matter of law, a statement is not false, much less knowingly so, if it is based on a reasonable interpretation of unsettled law.

Third, the Ex Post Facto Clause of the federal Constitution bars application of the FCA to statements made before August 13, 2010, when the statute took effect. Although a civil statute, the FCA is punitive in both purpose and effect and therefore implicates the Ex Post Facto Clause.

In denying Sprint's motion to dismiss, the Supreme Court gave short shrift to these arguments and engaged in faulty reasoning that led to erroneous legal conclusions. The court's order should be reversed, and the action dismissed in its entirety.

QUESTIONS PRESENTED

1. a. Whether the New York Tax Law imposes sales tax on interstate voice service sold by a mobile provider with other services for a fixed monthly charge.

The Supreme Court erroneously answered yes.

b. Whether, if the New York Tax Law were interpreted to impose sales tax on interstate voice service sold by a mobile provider with other services for a fixed monthly charge (when the provider has not separately stated the charge for interstate voice service), that interpretation would be preempted by the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. § 123(b).

The Supreme Court erroneously answered no.

2. Whether a plaintiff fails to state a claim under the New York False Claims Act when the allegedly false statement constitutes an objectively reasonable interpretation of a statute.

The Supreme Court erroneously answered no.

3. Whether the Ex Post Facto Clause of the federal Constitution prohibits a plaintiff from pursuing claims under the New York False Claims Act based on allegedly false tax returns submitted before August 13, 2010, when the Act took effect.

The Supreme Court erroneously answered no.

STATEMENT OF FACTS

A. Background

1. Factual Background

As alleged in the Attorney General's complaint, Sprint is a wireless telecommunications service provider that does business in New York. R63 (¶¶ 15-18). Sprint sells wireless calling plans, including "flat-rate" plans that include a certain number of minutes of talk time for a fixed fee; for example, Sprint offers 450 minutes of talk time for $39.99 per month. R60 (¶ 4); R64 (¶ 20). In 2005, Sprint began disaggregating its flat-rate plans for purposes of collecting sales tax in certain jurisdictions, including New York. R70 (¶ 44). Specifically, Sprint disaggregated the portion of the flat-rate fee that was attributable to intrastate calls (*i.e.*, calls made between persons or

phones within the same state) from the portion attributable to interstate calls (*i.e.*, calls made between persons or phones in different states). R64 (¶ 21); R70 (¶ 44). Sprint then collected sales tax only on the portion of the fee attributable to intrastate calls. R70 (¶ 44). That portion constituted a majority of the fee for wireless voice services; for the tax years at issue, the percentage of the fee on which Sprint collected sales tax ranged from 71.5% to 86.3%. R78-79 (¶ 81). Sprint did not separately state on a customer's bill the charges for interstate voice services. R65 (¶¶ 27-28).

The complaint alleges that Sprint's decision to disaggregate its flat-rate plans for tax purposes "was driven by its desire to gain an advantage over its competitors by reducing the amount of sales taxes it collected from its customers and, thereby, appearing to be a low-cost carrier." R70-71 (¶ 47). At the same time, however, the complaint contradicts this allegation by acknowledging that Sprint did not "communicat[e] with [its] customers about the fact that [it] was unbundling" and did "not educate[] [its] customers on how [it was] de-bundling transactions for their tax relief." R84-85 (¶¶ 108-109).

2. Statutory Background

Section 1105(b) of the New York Tax Law governs the imposition of sales tax on telecommunications services. In relevant part, section 1105(b) (referred to in the statute as "subdivision" (b)), provides as follows:

> [T]here is hereby imposed and there shall be paid a tax of four percent upon:
>
> . . . .
>
> (b)(1) The receipts from every sale, other than sales for resale, of the following: . . . (B) telephony and telegraphy and telephone and telegraph service of whatever nature *except interstate and international telephony and telegraphy and telephone and telegraph service* and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision; . . . .
>
> (2) The receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, *that are voice services, or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision, sold for a fixed periodic charge (not separately stated)*, whether or not sold with other services.
>
> (3) The tax imposed pursuant to this subdivision is imposed on receipts from charges for *intrastate mobile telecommunications service* of whatever nature in any state if the mobile telecommunications customer's place of primary use is in this state.

N.Y. Tax Law § 1105(b).[2] As the italicized language illustrates, section 1105(b)(1)(B) excludes interstate telephone service from taxation. Section 1105(b)(2), in turn, imposes sales tax only on those services that are both taxable under section 1105(b)(1)(B) and sold for a fixed periodic charge. Section 1105(b)(3), which explicitly addresses the tax imposed by section 1105(b) in its entirety, confirms that only intrastate, and not interstate, mobile telecommunications service is taxable.

[2] All emphases are added unless otherwise indicated.

One other section of the Tax Law warrants mention. Section 1111 of the Tax Law concerns the taxation of "debundled" services. As to mobile telecommunications providers, section 1111(*l*) provides that, with respect to certain enumerated services that do not include interstate voice service, a "home service provider shall collect and pay over tax, and a mobile telecommunications customer shall pay such tax, on receipts from any charge that is aggregated with and not separately stated from other charges for mobile telecommunications service." N.Y. Tax Law § 1111(*l*)(2). With respect to the enumerated non-voice services, if the provider "uses an objective, reasonable and verifiable standard for identifying each of the components of the charge for mobile telecommunications service," the provider "may separately account for and quantify the amount of each such component charge," and such charges will not be subject to tax. *Id.*[3]

Finally, the federal MTSA provides that a state may not subject mobile telecommunications providers to tax consequences for failing separately to state charges within bundles. In relevant part, the MTSA provides as follows:

---

[3] The Attorney General acknowledged below that section 1111(*l*) only applies to non-voice services. R69 (¶ 42) ("Under [section 1111(*l*)], wireless providers are permitted to treat separately for sales tax purposes certain components of a bundled charge for mobile telecommunications services, so long as the charges are *not* for voice services . . . ." (emphasis in original)).

> If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business.

4 U.S.C. § 123(b).

B. Proceedings Below

1. On March 31, 2011, Empire State Ventures, LLC filed suit under seal against Sprint under the New York False Claims Act, N.Y. State Fin. Law § 189. R62 (¶ 10). On April 19, 2012, the Attorney General filed a superseding complaint, which converted the relator's action into a civil-enforcement action by the Attorney General. *See* R62 (¶ 11).

The Attorney General's complaint alleges that section 1105(b)(2) "requires the payment of sales taxes on the *full amount* of fixed periodic charges for wireless voice services sold by companies like Sprint to New York customers," and further alleges that section 1111(*l*) permits wireless providers to "treat separately for sales tax purposes certain components of a bundled charge for mobile telecommunications services, so long as the charges are *not* for voice services." R66 (¶ 33); R69 (¶ 42) (emphases in original). The complaint does not mention section 1105(b)(1)(B), the provision that categorically excludes interstate telephone service from

taxation. The complaint asserts that Sprint violated the Tax Law by failing to collect sales tax on the portion of its flat-rate fee that was attributable to interstate voice service. R78 (¶¶ 79-80).

The complaint includes four causes of action, all of which are based on the same underlying claim that Sprint violated the Tax Law. In the first cause of action, the Attorney General alleges a violation of the New York False Claims Act, N.Y. State Fin. Law § 189(1)(g). R85 (¶¶ 111-113). Specifically, he alleges that Sprint knowingly submitted false statements each time it filed tax forms that "purported to spell out the amount of sales taxes due to be paid by Sprint to the New York State and local governments" but understated the amount of sales tax due. R82 (¶ 96). The complaint seeks treble damages and penalties of between $6,000 and $12,000 for each violation of the FCA. R87.

In the second cause of action, the Attorney General alleges that the defendants conspired to commit violations of the FCA. R85-86 (¶¶ 114-116).

In the third cause of action, the Attorney General alleges that Sprint violated section 63(12) of the Executive Law when it "repeatedly engaged in the fraudulent and illegal acts of failing to collect and pay sales taxes due and owing and submitting false sales tax filings to the New York Department of Taxation & Finance in violation of [section] 1105." R86 (¶ 119).

Finally, in the fourth cause of action, the Attorney General alleges that Sprint violated Article 28 of the Tax Law when it "failed to collect and pay over sales taxes, penalties and interest imposed by said Article." R87 (¶ 121).

2. Sprint moved to dismiss the complaint. As is relevant here, Sprint made three primary arguments. *First*, Sprint argued that the Attorney General had failed to allege a violation of the Tax Law because, properly interpreted, section 1105(b) does not require the collection of sales tax on interstate voice service, even when it is sold by a mobile provider as part of a fixed monthly charge. *See* R38-47. Sprint explained that section 1105(b)(1)(B) categorically excludes interstate telephone services from taxation and that section 1105(b)(2) expressly incorporates that exclusion. R39-40. Sprint also argued that, to the extent the Tax Law were interpreted to prohibit the disaggregation of mobile interstate voice service for sales-tax purposes, it would conflict with the MTSA and thus would be preempted by federal law. *See* R47-49. Sprint sought dismissal of all four causes of action on these bases. *See* R38-47; R56.

Second, Sprint sought dismissal of the FCA claims on the ground that a defendant cannot be held liable under the FCA based on a reasonable interpretation of a statute—and its interpretation of section 1105(b), even if incorrect, was objectively reasonable. *See* R50-51.

Third, Sprint contended that, to the extent that the FCA claims sought to impose treble damages and penalties for allegedly false statements made before August 13, 2010, when the FCA took effect, the claims violated the Ex Post Facto Clause of the federal Constitution. *See* R53-55.

3. The Supreme Court denied Sprint's motion to dismiss in relevant part.[4] *See* R9-24. With respect to the Tax Law, the court reasoned that section 1105(b)(2) imposes sales tax "on receipts from every sale of mobile telecommunications services . . . that are voice services sold for a fixed periodic charge." R14. The court briefly considered sections 1105(b)(1)(B) and 1105(b)(3), but summarily concluded that "nothing in [those provisions] addresses plaintiff's allegations that Sprint knowingly avoided New York sales taxes on the sale of mobile telecommunications services for a fixed monthly recurring access charge." *Id.* Without addressing the potential preemption of section 1105(b), the court then held that section 1111(*l*) was not preempted by the MTSA because "[t]here is no apparent conflict between" the two laws. *Id.* In so holding, the court construed the MTSA as applying only to taxing jurisdictions "that do not otherwise subject *aggregat-*

[4] The Supreme Court dismissed the second cause of action on the ground that a corporation cannot conspire with its subsidiaries, *see* R21, and it dismissed the third and fourth causes of action to the extent that they apply to periods before March 31, 2008, on the ground that the limitations period for those claims is only three years, *see id.* The Attorney General does not cross-appeal from either of those rulings.

ed mobile telecommunications services to taxation." *Id.* The court concluded that section 1105(b) subjects aggregated mobile telecommunications services to taxation and, based on that conclusion, reasoned that there was no conflict between the two statutes. *Id.*

The court proceeded to reject Sprint's argument that it could not be held liable under the FCA because its interpretation of the Tax Law was a reasonable one. *See* R16-17. But rather than addressing the objective reasonableness of Sprint's interpretation—a pure question of law—the court summarily concluded that "[t]he criterion on a motion to dismiss is whether the proponent of the pleading has a cause of action." *Id.*

Finally, the court also rejected Sprint's argument that the imposition of liability under the FCA for allegedly false statements made before August 13, 2010 would violate the Ex Post Facto Clause of the federal Constitution. *See* R21. The court concluded that the FCA "is not sufficiently punitive in nature" to trigger the Ex Post Facto Clause. *Id.*

Sprint filed a timely notice of appeal, and the Supreme Court stayed further proceedings pending resolution of the appeal. *See* Stay Order, Dkt. 43 (Aug. 21, 2013).

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED IN ITS ENTIRETY BECAUSE IT FAILS TO ALLEGE A VIOLATION OF THE NEW YORK TAX LAW

It is undisputed that all of the causes of action in the complaint are based on the same underlying claim: namely, that Sprint violated the Tax Law by failing to collect sales tax from its customers on the portion of its flat-rate fee that was attributable to interstate voice service. For two independent reasons, that claim fails as a matter of law. *First*, properly interpreted, section 1105(b) does not tax interstate voice services, even when they are sold together with other services for a fixed monthly charge. *Second*, to the extent that the Tax Law were interpreted to prohibit the disaggregation of interstate voice services, it would flatly conflict with, and therefore be preempted by, the federal MTSA. Because the complaint fails to allege a violation of the Tax Law, the Supreme Court should have dismissed the complaint in its entirety, and its failure to do so warrants reversal.

A. New York Law Excludes All Interstate Telecommunications Service From Taxation, Including Interstate Voice Service Sold By Mobile Providers With Other Services For A Fixed Monthly Charge

The central issue in this appeal concerns the interpretation of section 1105(b), the subsection of the New York Tax Law that governs the imposition of sales tax on "telephony and telegraphy," including mobile telecommunica-

tions services. In the Attorney General's view, one provision of that subsection, section 1105(b)(2), requires mobile telecommunications providers to collect sales tax on the amount of a flat-rate plan attributable to interstate voice services. The better reading of section 1105(b), however, is that interstate voice service is excluded from taxation, even when it is bundled with other services and sold for a fixed monthly charge. At a minimum, the Attorney General cannot show that section 1105(b) unambiguously supports his construction—as is required for tax liability to lie.

The Court's ultimate purpose in interpreting a statute is "to discern and give effect to the Legislature's intention." *Albany Law School* v. *New York State Office of Mental Retardation & Developmental Disabilities*, 19 N.Y.3d 106, 120 (2012). It is well settled, however, that "the text of a provision is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning." *Id.* (internal quotation marks and citation omitted). In addition, special rules of statutory interpretation apply in the tax context. Most importantly, a tax statute "must be narrowly construed," with "any doubts concerning its scope and application . . . resolved in favor of the taxpayer." *Debevoise & Plimpton* v. *New York State Department of Taxation & Finance*, 80 N.Y.2d 657, 661 (1993); *accord, e.g.*, *Manhattan Cable TV Services* v. *Freyberg*, 49 N.Y.2d 868, 869 (1980); *RCN New York Communications, LLC* v. *Tax*

Commission of City of New York, 943 N.Y.S.2d 480, 480 (1st Dep't 2012); *Expedia, Inc.* v. *City of New York Department of Finance*, 934 N.Y.S.2d 123, 124 (1st Dep't 2011). Also, "it is the established rule not to extend [the] provisions [of tax statutes], by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out." *American Locker Co.* v. *City of New York*, 308 N.Y. 264, 269 (1955) (internal quotation marks and citation omitted). Thus, should this Court conclude that section 1105(b) is unclear on the question whether interstate voice service is subject to taxation when it is sold with other services for a fixed monthly charge, then it should order dismissal of the complaint as a matter of law.

1. The Statutory Text Clearly Establishes That Interstate Voice Service Is Not Taxable, Even When It Is Sold By A Mobile Provider With Other Services For A Fixed Monthly Charge

Although section 1105(b) contains three paragraphs, the Attorney General's erroneous interpretation relies entirely on paragraph (b)(2). Indeed, the Attorney General argued below that "paragraph (b)(2) stands alone and is neither limited nor illuminated by paragraphs (b)(1)(B) or (b)(3)." R104. That approach flouts the bedrock principle of statutory construction that a statute "is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative

intent." McKinney's Cons. Laws of N.Y., Book 1, Statutes § 97. That principle has particular force here given that paragraph (b)(2) expressly references paragraph (b)(1)(B).

In fact, the other provisions of section 1105(b) are critical to a proper understanding of paragraph (b)(2). To begin with, paragraph (b)(1)(B) establishes the general rule that a sales tax of 4% is imposed on "telephony and telegraphy and telephone and telegraph service of whatever nature." N.Y. Tax Law § 1105(b)(1)(B). That tax, however, does not apply to "interstate and international telephony and telegraphy and telephone and telegraphy service." *Id.*[5] Interstate mobile telecommunications services plainly fall within that exception; the Attorney General acknowledged below that the exclusion of interstate telecommunications services from sales tax is "explicit" and "applies to mobile services." R104; R105 n.6.

Paragraph (b)(2) provides a specific rule regarding the application of the 4% sales tax to mobile telecommunications services. It makes clear that the tax applies to "[t]he receipts from every sale of mobile telecommunications service provided by a home service provider . . . *that are voice services, or any other services that are taxable under [section 1105(b)(1)(B)],*

[5] The term "telephony" is not defined in the Tax Law itself, but it is defined by regulation to include the "use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals." N.Y. Comp. Codes R. & Regs. tit. 20, § 527.2(d)(2).

sold for a fixed periodic charge (not separately stated), whether or not sold with other services." N.Y. Tax Law § 1105(b)(2). By its plain terms, paragraph (b)(2) reaches only those services that are *both* taxable under paragraph (b)(1)(B) and sold for a fixed periodic charge without separate statement of the individual components. That is, otherwise taxable services do not escape taxation by being bundled with non-taxable services. Because interstate services are excluded from taxation under paragraph (b)(1)(B), they are not taxable under paragraph (b)(2), even when they are sold with other services for a fixed monthly charge. Put another way, services that are not taxable under paragraph (b)(1)(B) do not *become* taxable under paragraph (b)(2) simply because they are bundled together with other services and sold for a fixed monthly charge.

Finally, paragraph (b)(3) confirms that the tax imposed under "this subdivision"—that is, section 1105(b) in its entirety, including paragraph (b)(2)—is imposed on "*intrastate* mobile telecommunications services." N.Y. Tax Law § 1105(b)(3). It further clarifies the circumstances in which a call by a New York customer shall be considered an "intrastate" call—namely, when a call occurs either within New York or wholly within another state. *See id.*

Read as a whole, section 1105(b) excludes from taxation all interstate telecommunications service, including interstate voice service sold by mobile providers. And to the extent there is any ambiguity on the question, that

ambiguity must be construed in Sprint's favor. *See, e.g.*, *Debevoise*, 80 N.Y.2d at 661.

2. The Statutory Structure Supports The Conclusion That Interstate Voice Service Sold By A Mobile Provider With Other Services For A Fixed Monthly Charge Is Not Taxable

If the Legislature had intended to impose sales tax on any interstate telecommunications services, such as interstate voice service sold by mobile providers, it would have made that intention clear, as it did elsewhere in the Tax Law. For example, section 1105(c)(9)(i) imposes a sales tax on "entertainment service" and "information service" regardless of whether they are "delivered by means of . . . telephone or telegraph services (*whether intrastate or interstate*) of whatever nature." N.Y. Tax Law § 1105(c)(9)(i). And section 1105(b)(1)(D) imposes sales tax on "prepaid telephone calling service," a term that is expressly defined in section 1101(b)(22) to include "intrastate, interstate or international telephone calls." *Id.* § 1101(b)(22).

Given the clarity with which the Legislature spoke elsewhere in the Tax Law when it intended to impose a tax on interstate telecommunications services, the absence of such language in section 1105(b)(2) is telling. *See, e.g.*, *Flores* v. *Lower East Side Service Center, Inc.*, 4 N.Y.3d 363, 369 (2005); *Albano* v. *Kirby*, 36 N.Y.2d 526, 530 (1975). That absence only confirms that

the Legislature did not intend to tax interstate voice service sold by a mobile provider as part of a fixed monthly charge.

3. The Legislative History Of Section 1105(b) Also Supports The Conclusion That Interstate Voice Service Sold By A Mobile Provider With Other Services For A Fixed Monthly Charge Is Not Taxable

Because the statutory text of section 1105(b) is clear, it is unnecessary to resort to legislative history or other extrinsic materials to elucidate its meaning. *See*, *e.g*, *RCN New York Communications*, 943 N.Y.S.2d at 481. But the legislative history of section 1105(b) supports Sprint's interpretation.

When the Legislature enacted section 1105(b)(1) in 1965, the distinction between interstate and intrastate telecommunications services was already firmly entrenched. The Federal Communications Act of 1934 "establishe[d] a dual federal and state system of regulating interstate and intrastate telecommunications services by specifically granting the Federal Communications Commission jurisdiction over 'all interstate and foreign' telecommunications services, but expressly exempting from its authority 'intrastate communication service.'" *People's Choice TV Corp.* v. *City of Tucson*, 46 P.3d 412, 415 (Ariz. 2002) (en banc) (quoting 47 U.S.C. § 152(a) and (b)); *accord Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 360 (1986). Seemingly grounded in that regulatory distinction, many states taxed intrastate but not interstate telecommunications services, *see People's*

Choice TV, 46 P.3d at 415, and New York joined those states when it enacted section 1105(b)(1)(B).

By the time the Legislature added sections 1105(b)(2) and (b)(3) in 2002, interstate telecommunications services had already been excluded from taxation under section 1105(b)(1)(B) for more than thirty years. There is no indication that, in enacting those provisions, the Legislature intended to eliminate that longstanding exclusion with respect to mobile providers.[6] To the contrary, paragraph (b)(2) specifically incorporated the limitations of paragraph (b)(1)(B), and paragraph (b)(3) cemented the distinction between interstate and intrastate telecommunications service by confirming that section 1105(b) taxes *intrastate* mobile telecommunications services.

Notably, those states that have imposed taxes on interstate telecommunications services have done so using precise language. For example, New Jersey imposes a sales tax on "receipts from every sale . . . of intrastate, interstate, or international telecommunications services." N.J.

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[6] The bill jacket for Assembly Bill 9762-B—the bill containing what is now section 1105(b)(2) and (b)(3)—includes letter from the Department of Taxation and Finance that was submitted to Governor Pataki after the Legislature had already passed the bill and while it was awaiting the Governor's action. *See* Letter from Department of Taxation and Finance, May 20, 2002, Bill Jacket, L. 2002, ch. 85. To the extent that letter opines on the effect of section 1105(b)(2) and (b)(3), it is entitled to little if any weight in discerning the intent of the Legislature, which had already voted on the bill. *See Albany Law School* v. *New York State Office of Mental Retardation and Developmental Disabilities*, 19 N.Y.3d 106, 123 n.5 (2012).

Rev. Stat. § 54:32B-3(f)(1) (2013). Kansas imposes a sales tax on "the gross receipts from intrastate, interstate or international telecommunications services." Kan. Stat. Ann. § 79-3603(b) (2013). Other states have used similarly explicit language. *See, e.g.*, Ky. Rev. Stat. Ann. § 139.200(2)(e) (2013) (imposing a sales tax on "the gross receipts derived from . . . [t]he furnishing of . . . [i]ntrastate, interstate, and international communications services"); Miss. Code Ann. § 27-65-19(1)(e)(i)(2) (2013) (imposing a sales tax on "the gross income received from all charges for interstate telecommunications services"). In those states, consistent with the clear directive of state law, Sprint collects and remits sales taxes on both intrastate and interstate voice services.

4. The Department of Taxation's Regulations Further Confirm That Interstate Voice Service Sold By A Mobile Provider With Other Services For A Fixed Monthly Charge Is Not Taxable

The regulations promulgated by the Department of Taxation and Finance also support the conclusion that section 1105(b) does not impose sales tax on interstate voice service when sold by a mobile provider as part of a fixed monthly charge.[7] The pertinent regulation unconditionally states that

[7] The Tax Law confers on the Commissioner of Taxation and Finance the authority to "make, adopt and amend rules and regulations appropriate to the carrying out of" Article 28, which includes section 1105. N.Y. Tax Law § 1142(1).

"[t]he provisions of section 1105(b) of the Tax Law with respect to telephony and telegraphy and telephone and telegraph service impose a tax on receipts from *intrastate* communication by means of devices employing the principles of telephony and telegraphy." N.Y. Comp. Codes R. & Regs. tit. 20, § 527.2(d)(1). Although that regulation was promulgated before the enactment of section 1105(b)(2) in 2002, the Department of Taxation and Finance did not amend the regulation, or issue an additional regulation separately addressing section 1105(b)(2), in the wake of its enactment. If section 1105(b)(2) had in fact eliminated the longstanding exclusion for interstate telephone services in any respect, one would expect the Department to have modified its regulations accordingly. But the Department did not do so—and has not done so to this day.

5. The Attorney General's Contrary Interpretation Of Section 1105(b) Is Erroneous

The Attorney General's interpretation of section 1105(b) is riddled with flaws.

a. To begin with, as noted above, the Attorney General's interpretation rests on a remarkable proposition of statutory construction: that section 1105(b)(2) "stands alone and is neither limited nor illuminated by paragraphs (b)(1)(B) or (b)(3)," which immediately precede and follow it. R104. That proposition, of course, is directly contrary to the bedrock interpretive principle that "all parts of an act are to be read and construed together to

determine the legislative intent." McKinney's Cons. Laws of N.Y., Book 1, Statutes § 97.

Perhaps recognizing that paragraph (b)(2) cannot truly be read in isolation, the Attorney General argued below that paragraph (b)(1)(B), including its exclusion of interstate telecommunications services, simply has no application to mobile telecommunications services sold for a fixed monthly charge. R104-105. As support for that argument, the Attorney General relied on the language in paragraph (b)(1)(B) stating that the tax in that paragraph does not apply to "any telecommunications service the receipts from the sale of which are subject to tax under [section 1105(b)(2)]." N.Y. Tax Law § 1101(b)(1)(B). That language, however, merely makes clear that services covered by both provisions are not subject to double taxation. Where a particular service would otherwise be subject to tax under both paragraphs (b)(1)(B) and (b)(2), it will be taxed only under (b)(2). That, of course, merely raises the question what services are subject to tax under paragraph (b)(2). The answer is clear: paragraph (b)(2) expressly incorporates the limitations of paragraph (b)(1)(B) and therefore applies only to services that would be taxable under that provision. As a result, the category of services subject to tax under paragraph (b)(2) can be no broader than the category of services subject to tax under paragraph (b)(1)(B).

In a similar vein, the Attorney General attempted to dismiss paragraph (b)(3) as irrelevant by asserting that it "merely addresses the situation unique to mobile phone service where a call may be intrastate, but not in the customer's home state." R105. Although paragraph (b)(3) does indeed clarify that a call by a New York customer may be considered an "intrastate" call when the call occurs entirely within another state, the critical point for present purposes is that paragraph (b)(3) confirms that section 1105(b) imposes tax on "*intrastate* mobile telecommunications service"—not interstate service. N.Y. Tax Law § 1105(b)(3).

b. As to paragraph (b)(2) itself, the Attorney General's interpretation relies heavily on words that appear nowhere in the text of that paragraph. The complaint asserts that paragraph (b)(2) "unequivocally imposes sales tax on the *entire amount* of fixed monthly charges for wireless voice services" and "requires the payment of sales taxes on the *full amount* of fixed period charges for wireless voice services." R60 (¶ 4); R66 (¶ 33) (second emphasis in original). One searches the statutory text in vain, however, for the phrases "entire amount" and "full amount." Paragraph (b)(2) provides only that certain services "sold for a fixed periodic charge" and "not separately stated" are subject to being taxed, not that every cent of that charge is taxable. N.Y. Tax Law § 1105(b)(2). In other words, services that are not otherwise taxable under paragraph (b)(1)(B) do not become

taxable simply because they are bundled with other services and sold for a fixed monthly charge.

In another attempt to avoid the actual language of paragraph (b)(2), the Attorney General attempted below to recharacterize the charge for Sprint's flat-rate monthly wireless plans as an "access" charge. R103. Section 1105(b), however, does not speak in terms of "access"; it speaks in terms of "telephony" and explicitly excludes interstate telephony from taxation. Notably, the complaint recognizes that Sprint determines the portion of its monthly fee that is attributable to "interstate" service and excludes that portion from taxation. R70 (¶ 44); R75-76 (¶¶ 67, 71-72). The Attorney General cannot avoid the question presented here—*viz.*, whether section 1105(b) imposes sales tax on interstate voice service sold by mobile providers with other services for a fixed monthly charge—merely by relabeling the charge an "access" charge, a term that appears nowhere in paragraph (b)(2) (or any of the other relevant provisions).

As to the actual language of paragraph (b)(2), the Attorney General contended below that paragraph (b)(2) incorporates the limitations of paragraph (b)(1)(B) only with respect to services that are not voice services. According to the Attorney General, the restrictive phrase "that are taxable under [paragraph (b)(1)(B)]" in paragraph (b)(2) must be read to modify only "any other services," and not "voice services," because the words "or any

other services that are taxable under [paragraph (b)(1)(B)]" are set off by commas. *See* R105; R107.

Perhaps never before in the history of the State of New York has the Attorney General placed so much weight on a pair of punctuation marks. And perhaps not surprisingly, they cannot bear that weight. The commas merely serve to separate the first requirement for taxation under paragraph (b)(2), that the services are taxable under paragraph (b)(1)(B), from the second, that the services are sold for a fixed periodic charge. Were it not for those commas, the sentence would be ungrammatical, and indeed incomprehensible, as the following modified version of paragraph (b)(2) illustrates:

> (2) The receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, that are voice services or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision sold for a fixed periodic charge (not separately stated), whether or not sold with other services.

N.Y. Tax Law § 1105(b)(2) (commas omitted).

Whatever can be said about those commas, they cannot be said unambiguously to demonstrate that the Legislature intended to repeal, for mobile voice services sold for a fixed periodic charge, the unqualified exclusion of interstate telecommunications service from sales tax in paragraph (b)(1)(B). If that had been the Legislature's intention, it would have said so in so many words, as it did elsewhere in the Tax Law. *See* pp. 18-19, *supra*. And tellingly, both the post-enactment legislative history and subsequent

Department of Taxation and Finance memorandum on which the Attorney General so heavily relied omit the purportedly critical comma between "voice services" and "any other services" in their discussion of paragraph (b)(2). *See* Letter from Department of Taxation and Finance, May 20, 2002, at 19, Bill Jacket, L. 2002, ch. 85; Department of Taxation and Finance, Office of Tax Policy Analysis, Technical Services Division, *Amendments Affecting the Application of the Sales and Use Tax and Excise Tax Imposed on Mobile Telecommunications Service*, Memorandum No. TSB-M-02(4)C, at 3 (July 30, 2002) (Department Memorandum).

The only natural reading of paragraph (b)(2) is that the requirement that the services be taxable under paragraph (b)(1)(B) applies to all types of mobile telecommunications service, whether voice or non-voice. And at the very least, the Attorney General cannot argue with a straight face that the mere presence of the pair of commas *unambiguously* supports the contrary reading—in a context in which, pursuant to well-established rules of statutory construction, any ambiguity necessarily redounds to Sprint's benefit.

Not only is the statutory text at best ambiguous, but the Attorney General has failed to offer any possible policy explanation for his interpretation. It is not apparent why the Legislature would have intended to abolish the exclusion for interstate *voice* service sold for a fixed monthly charge, while at the same time maintaining the exclusion for interstate *non-voice*

services. It is far more likely that the Legislature intended to maintain the exclusion for all interstate telecommunications service, whether voice or non-voice. In any event, the language of paragraph (b)(2) simply does not unambiguously abolish the exclusion.

c. The Attorney General contended below that Sprint's interpretation would render paragraph (b)(2) superfluous. *See* R106-107. Not true. Paragraph (b)(2) makes clear that, in the specific context of mobile telecommunications, services that would otherwise be taxable under the general provision of paragraph (b)(1)(B) are still taxable even when they are bundled with other services and sold for a fixed monthly charge; in other words, a mobile telecommunications provider cannot avoid taxation by engaging in such bundling. Sprint's construction therefore gives meaning to both paragraph (b)(1)(B) and paragraph (b)(2), while at the same time respecting the well-established principle that tax statutes should not be extended "beyond the clear import of the language used" or enlarged "so as to embrace matters not specifically pointed out." *American Locker*, 308 N.Y. at 269 (internal quotation marks and citation omitted); *accord UMG Recordings, Inc.* v. *Escape Media Group, Inc.*, 964 N.Y.S.2d 106, 111 (1st Dep't 2013).

d. Finally, the Attorney General relied below on a post-enactment memorandum issued by the Department of Taxation. *See* R109-110. That memorandum should not be accorded any weight. To begin with, a court

"need not accord any deference to the agency's determination" where "the question is one of pure statutory reading and analysis," given that "there is little basis to rely on any special competence or expertise of the administrative agency." *Belmonte* v. *Snashall*, 2 N.Y.3d 560, 565-566 (2004) (internal quotation marks and citation omitted); *accord Debevoise*, 80 N.Y.2d at 664.

In addition, it is well settled that an agency's interpretation of a tax statute is not entitled to any deference. While "[o]rdinarily courts will defer to legislative interpretation or interpretation given by the agency to the legislation that it administers," "the rule is otherwise with respect to a statute that levies a tax." *Carey Transportation, Inc.* v. *Perrotta*, 34 A.D.2d 147, 149 (1st Dep't 1970), *aff'd*, 29 N.Y.2d 814 (1971). That is because, as noted previously, a tax statute must be "construed most strongly against the government and in favor of the citizen." *Id.* (internal quotation marks and citation omitted). Consistent with that principle, memoranda issued by the Department of Taxation and Finance are merely advisory in nature; such memoranda "do not have legal force or effect, do not set precedent and are not binding." N.Y. Comp. Codes R. & Regs. tit. 20, § 2375.6(c). Indeed, courts and administrative tribunals routinely reject agency interpretations of tax statutes, including interpretations of the very statute at issue here. *See, e.g.*, *Debevoise*, 80 N.Y.2d at 661 (holding that the "Department's broad construction" of section 1105(b) "contravene[d] the accepted tenet that a tax

statute must be strictly construed with any doubts being resolved in favor of the taxpayer").[8]

In any event, the memorandum here is hardly persuasive on its own terms. The memorandum summarily concludes that "the total charge for a given number of minutes of air time that may be used for voice transmission is subject to sales tax under new section 1105(b)(2)." Department Memorandum 3. The memorandum then asserts, again without elaboration, that the monthly amount charged for a flat-rate calling plan is "subject to sales tax under section 1105(b)(2) of the Tax Law, regardless of whether the calls made under the plan were intrastate, interstate, or international calls." *Id.* The memorandum does not engage in any analysis of the statutory text, much less does it explain why interstate voice service is not excluded from taxation under paragraph (b)(2) given that provision's express incorporation of paragraph (b)(1)(B).[9] Nor does the memorandum address whether

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[8] *See also Empire State Building Co.* v. *Department of Taxation and Finance*, 185 A.D.2d 201, 201 (1st Dep't 1992) (rejecting the Department's interpretation of section 1105(b)), *aff'd*, 81 N.Y.2d 1002 (1993); *Compass Adjusters & Investigators, Inc.* v. *Commissioner of Taxation & Finance*, 197 A.D.2d 38, 42 (3d Dep't 1994); *Matter of Stuckless*, 2006 WL 2468525, at *17 (N.Y. Tax. App. Trib. Aug. 17, 2006); *Matter of Birds Eye Foods, Inc.*, 2010 WL 1539166, at *6-*7 (N.Y. Tax. App. Trib. Apr. 8, 2010); *Matter of 244 Bronxville Associates*, 1999 WL 417891, at *13 (N.Y. Tax. App. Trib. June 10, 1999).

[9] Notably, another memorandum that was subsequently published by the Department of Taxation and Finance reached the opposite conclusion. It

interstate voice service would still be taxable under paragraph (b)(2) if the provider were to disaggregate identifiable charges for such calls according to its books and records, as allowed by federal law, 4 U.S.C. § 123(b). Even if deference were warranted in this context, therefore, the memorandum contains no analysis to which deference could be given. Because the statutory text does not unambiguously support the interpretation contained in the memorandum and advanced by the Attorney General in this litigation, that interpretation should be rejected, and the complaint dismissed in its entirety.

6. The Supreme Court Erred In Concluding That The Complaint Alleges A Violation Of The Tax Law

In rejecting Sprint's interpretation of section 1105(b) and permitting the Attorney General's claims to go forward, the Supreme Court offered almost no analysis—and what little analysis it did offer was seriously flawed.

While purporting to construe the statute as a whole, the court based its decision entirely on paragraph (b)(2) and summarily concluded that "nothing

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stated that "New York imposes State and local sales tax on mobile telecommunications as part of its sales tax on 'telephone service . . . of whatever nature,'" and it confirmed that "[a] charge for interstate or international service is exempt" without carving out any exception for interstate voice service sold as part of a fixed periodic charge. James Stevens & Daniel Wood, Office of Tax Policy Analysis, Department of Taxation and Finance, *Estimating Mobile Telecommunications Sales Tax Revenue in New York State* 1 (Sept. 2002) <www.taxadmin.org/fta/meet/re_sum02/wood.pdf>.

in the plain language of Tax Law §§ 1105(b)(1) or (b)(3) addresses plaintiff's allegations that Sprint knowingly avoided New York sales taxes on the sale of mobile telecommunications services for a fixed monthly recurring access charge." R14. And as to paragraph (b)(2), the court failed even to acknowledge Sprint's argument that paragraph (b)(2) expressly incorporates the exception in paragraph (b)(1)(B) for interstate telephone services, much less explain why that argument was unavailing. Instead, the court concluded, again in summary fashion, that section 1105(b)(2) "unambiguous[ly]" imposes sales tax "on receipts from every sale of mobile telecommunications services . . . that are voice services sold for a fixed periodic charge." R13-14.

The court also erroneously reasoned that section 1111(*l*), the provision concerning the taxation of certain "debundled" services, "expressly requires mobile telecommunications providers to collect and pay state sales taxes on mobile telecommunications services included in a fixed periodic charge." R15. That is incorrect. Section 1111(*l*) does not impose any tax at all; instead, it merely provides statutory guidance for computing certain "receipts" that are subject to tax under section 1105(b). The latter provision is the one that actually imposes a tax, and it limits the tax to receipts from services that would otherwise be taxable under the general provision of section 1105(b)(1)(B). In this regard, it is noteworthy that the Attorney

General made no argument below that section 1111(*l*) imposes any affirmative obligation on Sprint to collect or pay tax.

In sum, section 1105(b) unambiguously excludes from taxation interstate voice service sold by mobile providers with other services for a fixed monthly charge. At the very least, it is ambiguous whether the Legislature intended to impose sales taxes on that service in enacting section 1105(b)(2), when interstate telecommunications service had previously been excluded from taxation for more than three decades. The Supreme Court erred by holding that section 1105(b)(2) unambiguously compelled the contrary conclusion, and its order denying the motion to dismiss should therefore be reversed.

B. To The Extent That New York Law Were Interpreted To Prohibit The Disaggregation Of Interstate Voice Service For Sales Tax Purposes, That Interpretation Would Be Preempted By Federal Law

Even assuming, as the Supreme Court erroneously held, that New York law could be interpreted to prohibit the disaggregation of voice services for sales-tax purposes, dismissal would still be warranted because New York law, as so interpreted, would be preempted by the federal MTSA.

Federal law preempts state law "[1] where Congress has expressly preempted state law, [2] where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for

state law, or [3] where federal law conflicts with state law." *Pacific Capital Bank, N.A.* v. *Connecticut*, 542 F.3d 341, 351 (2d Cir. 2008) (internal quotation marks and citation omitted). Conflict preemption "occurs when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (alterations, internal quotation marks and citation omitted). "[I]n order for conflict preemption to apply, the activity that is forbidden by state law need not be required by federal law; it is sufficient that the activity that state law prohibits is federally authorized." *Id.* at 351-352.

Here, it could not be clearer that the court's interpretation of New York law, if upheld, would give rise to a conflict warranting preemption. Congress enacted the MTSA in 2000 in light of a growing trend of bundling mobile services to, among other things, "provide customers with simpler billing statements." H.R. Rep. No. 106-719, at 6 (2000), *reprinted in* 2000 U.S.C.C.A.N. 508, 508. In relevant part, the MTSA provides as follows:

> If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business.

4 U.S.C. § 123(b). In other words, to preserve the simplicity of billing statements, the MTSA provides that states may not transform a non-taxable mobile telecommunications service into a taxable one simply because the provider has chosen not to state the non-taxable charge separately on a customer's bill. Where the provider disaggregates and can account for that service, it remains non-taxable.

The court's interpretation of New York law imposes precisely such a prohibited burden on mobile providers, and the court's holding that its interpretation would not be preempted by the MTSA is therefore erroneous. The Attorney General acknowledged below that interstate mobile telecommunications services are excluded from taxation under section 1105(b)(1)(B), *see* R105 n.6—with the result that, if a charge for interstate mobile service were separately stated on a customer's bill, it would be non-taxable. *See* N.Y. Tax Law § 1105(b)(2) (covering services that are "sold for a fixed periodic charge (not separately stated)"). The Attorney General claimed that that same service nevertheless becomes taxable under section 1105(b)(2) when Sprint sells it in a bundle with other services, on the ground that Sprint's invoices do not "separately state or otherwise break out any portions of the fixed periodic charge for voice service[]." R66 (¶ 33). That interpretation, which the Supreme Court adopted, is exactly what the MTSA prohibits: it would allow the State to tax otherwise non-taxable interstate mobile voice

service simply because it is "aggregated with and not separately stated from" taxable intrastate charges. 4 U.S.C. § 123(b).

Despite this clearly proscribed result, the court rejected Sprint's preemption argument on the ground that "[t]here is no apparent conflict between the MTSA and Tax Law § 1111(*l*)," the provision concerning the taxation of "debundled" services. R16. That conclusion, however, misses the point. Sprint's preemption argument was not premised principally on section 1111(*l*). Instead, Sprint argued that "[t]he Complaint's interpretation of New York law" more generally—including its interpretation of both sections 1105(b) and 1111(*l*)—would be preempted by the MTSA. R48. The Supreme Court entirely failed to address that broader argument.

Compounding its error, the court based its conclusion that there was no conflict between section 1111(*l*) and the MTSA on the premise that New York "subject[s] aggregated mobile telecommunications charges to taxation," and the MTSA only applies to "jurisdictions that do not otherwise subject aggregated mobile telecommunications services to taxation." R16. That reasoning, however, reflects a fundamental misunderstanding of both the MTSA and the New York Tax Law. Nothing in the MTSA limits its reach to states that do *not* subject aggregated charges for mobile telecommunications services to taxation, as the Supreme Court's opinion suggests. Indeed, the whole point of the MTSA is to *prevent* a state from taxing a

service that would not be taxable if sold individually, simply because that service is aggregated with and not separately stated from taxable charges. The limitation imposed by the court would completely undermine that goal.

In addition, contrary to the court's assertion, New York does not subject "aggregated" mobile telecommunications services to tax. Even under the Attorney General's flawed reading of section 1105(b)(2), services that are bundled and "sold for a fixed periodic charge" are taxable *only* when they are "not separately state[d]." R102. Thus, under the Attorney General's reading, the taxability of interstate voice services under New York law would turn on whether the charge is separately stated on a customer's bill, giving rise to a direct conflict with the MTSA. Section 1111(*l*)—New York's debundling provision—cannot remedy that conflict because it does not allow the debundling of voice services. *See* R69 (¶ 42); R111; N.Y. Tax Law § 1111(*l*)(2) (applying only to "interstate or international telephony or telegraphy . . . of whatever nature *which is not a voice service*"). The Attorney General's interpretation of New York law would therefore be preempted.

II. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE NEW YORK FALSE CLAIMS ACT BECAUSE SPRINT'S INTERPRETATION OF THE TAX LAW WAS OBJECTIVELY REASONABLE

Regardless of whether Sprint violated the Tax Law, the Supreme Court erred by permitting the Attorney General's FCA claim to proceed.

Sprint's interpretation of the Tax Law was objectively reasonable—and, for that reason, Sprint did not make any knowingly false statements within the scope of the FCA.

A. The FCA Punishes Only Knowingly False Statements

The FCA imposes treble damages and penalties on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government." N.Y. State Fin. Law § 189(1)(g). The complaint alleges that Sprint violated the FCA by submitting tax returns that, because of Sprint's disaggregation of interstate voice services, misstated the amount of sales tax owed to the State. R82-83 (¶¶ 95-101); R85 (¶¶ 111-113).

In order to prevail on that claim, the Attorney General must show not only that Sprint actually misstated the amount of sales tax owed, but that it did so "knowingly": that is, that Sprint "(i) ha[d] actual knowledge of the information; (ii) act[ed] in deliberate ignorance of the truth or falsity of the information, or (iii) act[ed] in reckless disregard of the truth or falsity of the information." N.Y. State Fin. Law § 188(3). It is not sufficient to show that Sprint acted "by mistake or as a result of mere negligence." *Id.* As one court has stated about the FCA's materially identical federal counterpart,[10] the

[10] Because New York's FCA is "closely modeled on the federal [False Claims Act]," it is construed consistently with that statute. *United States ex*

FCA is "not an appropriate vehicle" for policing compliance with statutes and regulations; rather, it is a "fraud prevention statute" that imposes liability only for knowing lies. *United States ex rel. Ramadoss* v. *Caremark Inc.*, 586 F. Supp. 2d 668, 691 (W.D. Tex. 2008) (internal quotation marks and citation omitted), *aff'd in part*, *rev'd in part*, 634 F.3d 808 (5th Cir. 2011).

B. Sprint's Tax Returns Were Not Knowingly False Because Sprint's Interpretation Of Section 1105(b) Was At Least Objectively Reasonable

Should this Court agree with Sprint about the correct interpretation of section 1105(b), the Attorney General's FCA claim would obviously fail. But even if this Court were to adopt the Attorney General's contrary interpretation, it should still dismiss the FCA claim, because Sprint's interpretation of that provision was not objectively unreasonable—and, for that reason, the statements on its tax returns were not knowingly false.

The United States Supreme Court's decision in *Safeco Insurance Co.* v. *Burr*, 551 U.S. 47 (2007), is illustrative. In *Safeco*, the Court held that, in order to establish that a defendant recklessly violated a statute, a plaintiff must show that a defendant's reading of the statute was so objectively unreasonable that it raised an "unjustifiably high risk" that the defendant's

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rel. Pervez v. *Beth Israel Medical Center*, 736 F. Supp. 2d 804, 816 (S.D.N.Y. 2010); *accord New York* v. *Amgen, Inc.*, 652 F.3d 103, 109 (1st Cir. 2011); *State ex rel. Seiden* v. *Utica First Insurance Co.*, 943 N.Y.S.2d 36, 39 (1st Dep't 2012).

conduct violated it. *Id.* at 70. Although the Court disagreed with the defendant's interpretation of the statute at issue in that case, it nevertheless concluded that the defendant did not knowingly or recklessly violate the statute, in light of the "less-than-pellucid statutory text" and lack of binding judicial or agency guidance. *Id.* The Court explained that, where there is more than one reasonable interpretation of the statute, "it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Id.* at 70 n.20.[11]

In the specific context of the federal False Claims Act, courts have consistently recognized that, when an asserted false claim relates to a failure to meet an obligation imposed by a statute, a plaintiff must show that "there is no reasonable interpretation of the law that would make the allegedly false statement true." *United States ex rel. Hixson* v. *Health Management Systems, Inc.*, 613 F.3d 1186, 1191 (8th Cir. 2010).[12] In *Hixson*, the relator

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[11] *Safeco* involved a claim under the Fair Credit Reporting Act, but its analysis is highly relevant to claims under the FCA, which similarly requires a defendant to act knowingly or recklessly. *See* 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 2.06[C], at 2-293 (4th ed. 2013).

[12] *See also, e.g.*, *United States ex rel. Wilson* v. *Kellogg Brown & Root, Inc.*, 525 F.3d 370, 377 (4th Cir. 2008); *United States ex rel. Morton* v. *A Plus Benefits, Inc.*, 139 Fed. Appx. 980, 982-983 (10th Cir. 2005); *United States ex rel. Siewick* v. *Jamieson Science and Engineering, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000); *United States ex rel. Lamers* v. *City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999); *Hagood* v. *Sonoma County Water Agency*, 81 F.3d 1465, 1478-1479 (9th Cir. 1996); *United States ex rel. Pritsker* v. *Sodexho*,

alleged that the defendants had violated the federal False Claims Act by failing to seek reimbursement from health-care providers for certain expenses. *Id.* at 1187. The Eighth Circuit affirmed dismissal of the claim, holding that "the relators ha[d] not stated a claim under the [federal False Claims Act]" because "there [was] a reasonable interpretation of the law that d[id] not obligate the defendants to seek reimbursement." *Id.* at 1191.

As discussed above, Sprint's interpretation of section 1105(b) is the substantively correct one, not least because any ambiguity in that statute must be construed in Sprint's favor. At a minimum, however, Sprint's interpretation was an objectively reasonable one at the time Sprint submitted the tax returns at issue. As of then, no court had yet considered whether section 1105(b) requires the payment of sales tax on interstate voice service sold by a mobile provider as part of a fixed monthly charge. What little agency guidance existed on the issue, moreover, did not address the precise circumstances presented in this case and was not legally binding. *See* pp. 29-31, *supra*. As a New York federal court recently recognized in dismissing a parallel shareholder derivative action involving the same underlying allegations for failure to allege that Sprint's directors knowingly caused the

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Civ. No. 03-6003, 2009 WL 579380, at *17 (E.D. Pa. Mar. 6, 2009), *aff'd*, 364 Fed. Appx. 787 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 179 (2010); *United States ex rel. Saltzman* v. *Textron Systems Corp.*, Civ. No. 09-11985, 2011 WL 2414207, at *4 (D. Mass. June 9, 2011).

company to violate New York law, Sprint was interpreting "murky legal concepts" involving an "unsettled question of law." *Louisiana Municipal Police Employees' Retirement System* v. *Hesse*, Civ. No. 12-4017, ___ F. Supp. 2d ___, 2013 WL 4516427, at *11 (S.D.N.Y. July 26, 2013). Because Sprint's statutory interpretation was at least objectively reasonable, Sprint cannot be held liable under the FCA for knowingly making false statements on its tax returns. *Cf. Caremark*, 586 F. Supp. 2d at 688 (noting that the federal False Claims Act does not impose liability where there are "legitimate grounds for disagreement over the scope of regulatory provisions").

C. The Attorney General's Arguments To The Contrary Are Unavailing

The Attorney General argued below that the complaint states a claim under the FCA because it alleges that Sprint "actually knew that its sales tax filings were false." R113. Even accepting that questionable characterization of the complaint,[13] however, Sprint's subjective views are irrelevant. "[W]here [d]efendants have 'followed an interpretation that could reasonably have found support in the courts,' they cannot be found to be making

[13] At most, the complaint alleges that Sprint knew its approach to debundling was "aggressive" and "risky," not that Sprint had actual knowledge that it was violating the Tax Law. *See* R70 (¶ 45); R73 (¶ 57). Pursuing a "risky" strategy, moreover, "could result in substantial rewards for the company in lieu of substantial losses." *Hesse*, 2013 WL 4516427, at *12.

knowingly or recklessly false claims, 'whatever their subjective intent may have been.'" *United States ex rel. Hixson* v. *Health Management Systems, Inc.*, 657 F. Supp. 2d 1039, 1057 n.14 (S.D. Iowa 2009) (quoting *Safeco*, 551 U.S. 47, 70 n.20), *aff'd*, 613 F.3d 1186 (8th Cir. 2010); *see also Simonoff* v. *Kaplan, Inc.*, Civ. No. 10-2923, 2010 WL 4823597, at *3 (S.D.N.Y. Nov. 29, 2010) (concluding that evidence of a company's subjective bad faith "cannot support a willfulness finding when the company's reading of the statute is objectively reasonable").

The Attorney General also argued below that Sprint's interpretation was unreasonable simply because two employees of the Department of Taxation and Finance told it so. *See* R114. Under that extraordinary reasoning, the government could impose treble damages and penalties under the FCA anytime it wishes simply by having an auditor take a taxpayer-adverse position on the interpretation of an ambiguous statute and then inform the defendant of that view. The government could thereby use the threat of treble damages to force parties to capitulate to its views on legal issues of first impression, depriving parties of the opportunity to have those issues litigated by the courts. That possibility is both deeply troubling and contrary to the law. Regulatory agencies are not the arbiters of truth—especially the Department of Taxation and Finance, whose non-binding opinions on the interpretation of a tax statute and on the amount of taxes it is

owed are entitled to no deference as a matter of law. *See Debevoise*, 80 N.Y.2d at 664.

D. The Supreme Court Erred In Concluding That The Complaint States A Claim Under The FCA

In denying Sprint's motion to dismiss the FCA claim, the Supreme Court concluded that the complaint had adequately pleaded a violation of the FCA because it "allege[d] at length that Sprint realized that their approach to unbundling was aggressive and risky, and that their decision to unbundle was motivated by a desire to gain a competitive advantage over other wireless carriers." R16. Even taking those allegations as true, adopting an aggressive tax position is a far cry from knowingly or recklessly making false statements on tax returns. *See Hesse*, 2013 WL 4516427, at *12 (noting that implementation of a risky tax strategy alone "is not clear evidence of misconduct").

In so concluding, the Supreme Court utterly failed to address Sprint's argument that the Attorney General could not meet the latter standard because Sprint's interpretation of the Tax Law was an objectively reasonable one. Instead, the court summarily concluded that "[t]he criterion on a motion to dismiss is whether the proponent of the pleading has a cause of action." R16-17. Maybe so, but the question whether Sprint's interpretation of the Tax Law was an objectively reasonable one (and therefore whether the Attorney General has a cause of action) is a question of law—one that the

court was required to consider, and resolve, at the motion-to-dismiss stage. Because Sprint's interpretation was plainly objectively reasonable—even assuming, *arguendo*, that it was not actually correct—the court erred by refusing to dismiss the Attorney General's FCA claim.

III. THE EX POST FACTO CLAUSE BARS LIABILITY UNDER THE FCA FOR ALLEGEDLY FALSE STATEMENTS MADE BEFORE AUGUST 13, 2010

The Ex Post Facto Clause of the federal Constitution, U.S. Const. Art. I, § 9, cl. 3, prohibits a state from enacting laws that punish conduct that was not unlawful at the time it occurred. *See Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). The Legislature did just that, however, when it amended the FCA to make it retroactively applicable to false statements in tax returns. Accordingly, even if this Court determines that New York law unambiguously taxes interstate voice service sold by a mobile provider as part of a fixed monthly charge, that such an interpretation would not be preempted by the MTSA, and that Sprint's contrary interpretation was not objectively reasonable, it should nevertheless dismiss the FCA claim to the extent it is based on statements made before August 13, 2010—the effective date of the FCA amendment.

A. The FCA Imposes Punishment And Therefore Triggers The Ex Post Facto Clause

As originally enacted, the New York FCA did "not apply to claims, records, or statements made under the tax law." N.Y. State Fin. Law § 189(4) (Supp. 2008). On August 13, 2010, Governor Paterson signed into law an amendment that removed the word "not," thereby allowing FCA claims to be made based on statements in tax returns. N.Y. Sess. Laws Ch. 379 (A. 11568), § 3 (McKinney). The amendment sought to apply this change retroactively to statements made "prior to . . . April 1, 2007." *Id.* § 13.

The Ex Post Facto Clause is implicated both by criminal laws and by civil laws that are intended to punish. *See Smith* v. *Doe*, 538 U.S. 84, 92 (2003). To determine whether a law is "criminal" or "intended to punish," a court must engage a two-step inquiry. A court must first consider what kind of law the legislature intended to enact. If criminal, "that ends the inquiry": the law triggers the Ex Post Facto Clause. *Id.* But if the legislature intended to enact a civil law, the court must further consider "whether the statutory scheme is 'so punitive either in purpose or effect as to negate the State's intention' to deem it 'civil.'" *Id.* (alterations omitted) (quoting *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980)). At the second step, the court looks to the factors set out in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), for guidance. *See Doe*, 538 U.S. at 97.

Because the Legislature has labeled the FCA's sanctions "civil," N.Y. State Fin. Law § 189(1)(h), the latter step of the inquiry applies here. Under *Mendoza-Martinez*, a court must consider whether the sanction at issue (1) "involves an affirmative disability or restraint"; (2) "has historically been regarded as punishment"; (3) "comes into play only on a finding of *scienter*"; (4) "will promote the traditional aims of punishment—retribution and deterrence"; (5) applies to behavior that "is already a crime"; (6) "may rationally be connected" to "an alternative purpose"; and (7) "appears excessive in relation to the alternative purpose." 372 U.S. at 168-169.

At least five of those factors support the conclusion that the FCA is "punitive either in purpose or effect." *Ward*, 448 U.S. at 248-249. Consequently, retroactive application of the FCA is prohibited under the Ex Post Facto Clause, and the Supreme Court erred in holding to the contrary.

1. The FCA's Sanctions Have Historically Been Regarded As Punishment

Where a law imposes no "affirmative disability or restraint," the starting point under *Mendoza-Martinez* is whether a statute's sanctions "historically [have] been regarded as a punishment." *Mendoza-Martinez*, 372 U.S. at 168.

a. Decisions of the New York Court of Appeals and the United States Supreme Court, as well as the FCA's statutory structure, leave no doubt that the FCA's penalties constitute punishment. The Court of Appeals recently characterized the sanctions imposed by the FCA as punitive. *See*

State ex rel. Grupp v. *DHL Express (USA), Inc.*, 19 N.Y.3d 278, 286-287 (2012). In *Grupp*, the Court of Appeals rejected the notion that the FCA merely "redress[es] the harm actually suffered" or "compensat[es] the State." *Id.* Instead, the Court of Appeals ruled that the FCA seeks solely to "*punish* and consequently deter . . . future conduct" and "evinces a . . . *punitive goal* of deterring fraudulent conduct against the State." *Id.*

The Court of Appeals' decision in *Grupp* is consistent with decisions of the United States Supreme Court, which has long held that treble damages are generally punitive. The Court has noted that the "very idea of treble damages reveals an intent to punish past, and deter future, unlawful conduct." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). Consistent with that proposition, the Court has approvingly cited the suggestion that "retroactive application of punitive treble damages provisions . . . would present a potential *ex post facto* problem." *Landgraf* v. *USI Film Products*, 511 U.S. 244, 281 (1994) (internal quotation marks and citation omitted). And with specific reference to the federal False Claims Act, the Court has held that, while that statute's treble-damages provision has some "compensatory traits," treble damages maintain a "punitive character." *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 130 (2003); *accord Vermont Agency of Natural Resources* v. *United States ex rel.*

Stevens, 529 U.S. 765, 784 (2000).[14] The Court of Appeals relied on those decisions in characterizing the sanctions imposed by the New York FCA as punitive. *See Grupp*, 19 N.Y.3d at 287.

b. In determining that the penalties in the FCA have not historically been regarded as punishment, the Supreme Court committed three separate errors. *First*, the court erred by attempting to distinguish the Court of Appeals' opinion in *Grupp* on the ground that it did not address the Ex Post Facto Clause. R18. To be sure, the question in *Grupp* was whether FCA claims were subject to the market-participant exception to preemption, not whether the imposition of liability under the FCA would violate the Ex Post Facto Clause. But that is beside the point. In determining that the market-participant exception was not applicable "[i]n light of the FCA's regulatory effect," the Court of Appeals squarely determined that the sanctions imposed by the FCA are punitive. *Grupp*, 19 N.Y.3d at 287. The court should have credited, not disregarded, that determination.

[14] New York's FCA imposes even harsher sanctions than the federal False Claims Act given that it expressly permits the recovery of "three times the amount of all damages, *including consequential damages.*" N.Y. State Fin. Law § 189(1)(h) (emphasis added). "The treble damages provision [in the federal False Claims Act]," by contrast, was "in a way, adopted by Congress as a *substitute* for consequential damages." *Chandler*, 538 U.S. at 131 n.9 (emphasis added).

Second, the court reasoned, with reference to the federal False Claims Act, that the sanctions imposed by that statute "do[] not rise to the level of 'punishment' merely because Congress provided for civil recovery in excess of the Government's actual damages." R18-19 (internal quotation marks and citation omitted). That reasoning was flawed, however, because the question for the court was not whether *any* sanction "exceeding" actual damages has historically been regarded as punitive, but whether the specific penalties in the FCA have been so regarded. As the United States Supreme Court has noted, not all monetary sanctions are equal, and any inquiries into the punitive nature of particular sanctions "depend[s] on the workings of a particular statute." *Chandler*, 538 U.S. at 130.

Third, the court misread *Chandler* by implying that it represented a retreat from the Supreme Court's historically punitive conception of treble damages. As noted above, however, in *Chandler*, the Court simply observed that "treble damages have a compensatory side . . . in addition to punitive objectives." 538 U.S. at 130.[15] That treble damages have compensatory traits is hardly a revelation; after all, part of *any* multiplied damages award

[15] In determining that the treble damages imposed by the federal False Claims Act "have a compensatory side," the Court relied in part on that statute's lack of a consequential damages provision. As discussed above, *see* p. 49 n.14, *supra*, the New York FCA expressly allows the recovery of consequential damages and thus serves even less of a compensatory purpose than its federal counterpart.

will reimburse the plaintiff for his loss, as well as for the trouble of bringing a lawsuit.[16] But the Court has repeatedly stressed that treble damages are "essentially punitive in nature." *Stevens*, 529 U.S. at 784.

In any event, the Court in *Chandler* had a specific reason for highlighting the "compensatory side" of treble damages. *Chandler* dealt with the issue of whether municipalities were liable under the federal False Claims Act in the wake of an amendment that raised the ceiling on damages from double damages to treble damages. Citing this "compensatory side" of the federal statute, the Court concluded that the presumption against imposing punitive damages on governmental entities was insufficient to overcome the "cardinal rule" that repeals by implication are not favored, and held that municipalities could still be liable. 538 U.S. at 132 (internal quotation marks omitted). Nothing in *Chandler* undermines the general proposition that treble damages are punitive in nature, and that factor weighs in favor of a determination that the FCA imposes punishment.

[16] The "compensatory side" of FCA damages clearly does not extend to the fixed penalty of $6,000 to $12,000 that the FCA imposes for each false statement. Unlike a damages multiplier, "[n]o damages to the government need be shown" for that penalty to be imposed. *United States* v. *Mackby*, 261 F.3d 821, 830 (9th Cir. 2001). Thus, that penalty "clearly has a punitive purpose." *Id.*; *accord Prince* v. *New York*, 966 N.Y.S.2d 16, 21 (1st Dep't 2013).

2. The FCA Contains A Scienter Requirement

The next *Mendoza-Martinez* factor—whether the statute "comes into play only on a finding of scienter," 372 U.S. at 168—also weighs in favor of a determination that the FCA imposes punishment. Because the FCA prohibits "*knowingly* mak[ing or] us[ing] . . . a false record or statement," N.Y. State Fin. Law § 189(1)(g), it plainly "comes into play only on a finding of scienter." *Mendoza-Martinez*, 372 U.S. at 168. The Attorney General has never argued otherwise.

The court's contrary conclusion rested on a cascading series of errors. First, the court adopted another court's misinterpretation of *Black's Law Dictionary* to define "scienter" as "a synonym for mens rea." R19 (citing *State* v. *Nelson*, 30 Misc. 3d 715, 726 (Sup. Ct. N.Y. Co. 2010), *aff'd*, 89 A.D.3d 441 (1st Dep't 2011)). Next, the court noted that "mens rea" is used exclusively in criminal law, and concluded that "scienter" therefore must be similarly constrained. R19. Finally, it determined that, because the Legislature expressly labeled the FCA's sanctions "civil," that statute could never contain a scienter requirement. *Id.*

Every step in the court's chain of logic was flawed. To begin with, "scienter" is not a synonym for "mens rea." "Scienter" is actually the Latin word for "knowingly." *See Oxford Latin Dictionary* 1703 (1982). *Black's Law Dictionary* defines it as "[a] degree of knowledge that makes a person legally

responsible," whether in the civil *or* the criminal context. *Black's Law Dictionary* 1463 (9th ed. 2009). And the court's reliance on the fact that the Legislature labeled the FCA's sanctions "civil" is misplaced, because the *Mendoza-Martinez* factors come into play only if the Legislature did not label the sanctions "criminal" in the first place.

3. The FCA's Sanctions Promote The Traditional Aims Of Punishment—Retribution And Deterrence

The next *Mendoza-Martinez* factor—whether the FCA's sanctions "promote the traditional aims of punishment—retribution and deterrence," 372 U.S. at 168—has already been effectively resolved by the New York Court of Appeals. As discussed above, in *Grupp*, the Court of Appeals determined that the FCA's sanctions were intended to "punish" and to "deter . . . future conduct," thereby "evinc[ing] a . . . punitive goal." 19 N.Y.3d at 286-287. Tellingly, the Attorney General has not contested the applicability of this factor.

The Supreme Court erroneously concluded that this factor did not weigh in favor of a determination that the FCA imposes punishment because *no* monetary sanctions can "promote the traditional aims of punishment." R20. But it should go without saying that monetary sanctions—particularly treble damages—can promote punitive goals. *See*, *e.g.*, *Texas Industries*, 451 U.S. at 639 (noting that "[the] very idea of treble damages reveals an intent to punish past, and deter future, unlawful conduct"). In light of the Court of

Appeals' determination in *Grupp*, the court's failure to count this factor in Sprint's favor was erroneous.

4. The FCA's Sanctions Apply To Behavior That Is Already A Crime

As to a fourth factor—whether the FCA's sanctions apply to behavior that "is already a crime," *Mendoza-Martinez*, 372 U.S. at 168—the Supreme Court correctly determined that New York's criminal tax statute, N.Y. Tax Law § 1804, punishes "actions similar to [those] proscribed by" the FCA. R20. But it erred by concluding that "[t]he existence of both a civil statute and a criminal statute weighs in favor of a *civil* purpose" for the FCA. *Id.* To the contrary, when a nominally civil law applies to behavior that the Legislature has already decided to punish as a crime, it suggests that the "civil" law is actually punitive. *See Mendoza-Martinez*, 372 U.S. at 168 (citing *United States* v. *La Franca*, 282 U.S. 568, 572-573 (1931)).

B. The Ex Post Facto Clause Bars Retroactive Application Of The FCA

The Supreme Court correctly evaluated the remaining *Mendoza-Martinez* factors. *First*, the FCA imposes only monetary penalties, and therefore does not involve "affirmative disability or restraint." R18. *Second*, because even punitive damages multipliers have a "compensatory side," *Chandler*, 538 U.S. at 130, the FCA can "rationally be connected" to a non-punitive remedial purpose. R18. *Third*, because the FCA's massive

sanctions go far beyond any realistic compensatory purpose, those sanctions are "excessive in relation to the alternative purpose assigned." R20.

Between the three *Mendoza-Martinez* factors the court evaluated correctly and the four it evaluated incorrectly, therefore, five of seven factors suggest the FCA is punitive "in purpose or effect." The FCA (1) imposes sanctions historically regarded as "punishment"; (2) contains a scienter requirement; (3) promotes the traditional aims of punishment; (4) penalizes conduct that is already criminal; and (5) imposes sanctions that are excessive in relation to the sole alternative purpose to which they rationally relate. Under the framework established by the Supreme Court in *Mendoza-Martinez*, therefore, the FCA imposes punishment and therefore triggers the Ex Post Facto Clause.

As a result, the Ex Post Facto Clause prohibits application of the FCA to conduct that was lawful at the time it occurred—*i.e.*, any statements made by Sprint before August 13, 2010. At a minimum, the Attorney General's FCA claim should have been dismissed to that extent. Because the Attorney General's interpretation of the Tax Law is not unambiguously correct, however, the Supreme Court should have dismissed the FCA claim, and the other claims based on Sprint's alleged violation of the tax law, in their entirety. The court erred by refusing to do so, and its order denying Sprint's motion to dismiss should therefore be reversed.

CONCLUSION

The Supreme Court's order denying Sprint's motion to dismiss should be reversed, and the action dismissed in its entirety with prejudice.

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, by Eric T. Schneiderman, Attorney General for the State of New York, and STATE OF NEW YORK, ex rel. EMPIRE STATE VENTURES, LLC, Plaintiffs-Respondents, v. SPRINT NEXTEL CORP., SPRINT SPECTRUM L.P., NEXTEL OF NEW YORK, INC., and NEXTEL PARTNERS OF UPSTATE NEW YORK, INC., Defendants-Appellants.	New York County Index No. 103917/2011E **PREARGUMENT STATEMENT**

Defendants-Appellants SPRINT NEXTEL CORP., SPRINT SPECTRUM L.P., NEXTEL OF NEW YORK, INC., and NEXTEL PARTNERS OF UPSTATE NEW YORK, INC., as and for their Preargument Statement pursuant to section 600.17 of the Rules of this Court, respectfully set forth the following:

1. Title of Action: The title of the action is set forth in the caption above, which also sets forth the index number.

2. Names of Parties: The full names of the original parties are set forth in the caption above. On or about July 10, 2013, in connection with a transaction involving SoftBank Corp., Sprint Nextel Corporation was renamed "Sprint Communications, Inc." and is now a wholly-owned subsidiary of Sprint Corporation. The names of the other three defendants remain unchanged.

3. Counsel for Defendants-Appellants: Sprint Nextel Corp. (now Sprint Communications, Inc.), Sprint Spectrum L.P., Nextel of New York, Inc., and Nextel Partners of Upstate New York, Inc. ("Defendants"):

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4. Counsel for Plaintiff-Respondent: People of the State of New York, by Eric T. Schneiderman, Attorney General for the State of New York, and State of New York, *ex rel.* Empire State Ventures, LLC ("Plaintiffs"):

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5. Court and County from which appeal is taken: Supreme Court, New York County.

6. Nature and object of the action: This case arises out of a *qui tam* action initially commenced by Empire State Ventures, LLC pursuant to the New York False Claims Act, State Finance Law § 189, alleging that Defendants failed to collect or pay New York sales taxes on

receipts from the sale of certain wireless telephone services. On April 19, 2012, the Attorney General for the State of New York filed a superseding Complaint asserting four causes of action—the first cause of action purports to be for violation of the New York False Claims Act, State Finance Law § 189(1)(g), based on an allegation that Defendants knowingly made, used, or caused to be made or used, false records or statements material to an obligation to pay or transmit money or property to the state and local governments; the second cause of action purports to be for violation of § 189(1)(c) of the New York False Claims Act for allegedly conspiring to commit a violation of State Finance Law § 189(1)(g); the third cause of action purports to be for allegedly persistent fraudulent or illegal acts in violation of Executive Law § 63(12); and the fourth cause of action purports to be for violation of Article 28 of the Tax Law for allegedly failing to collect or pay New York sales taxes on receipts from the sale of certain wireless telephone services. The Attorney General for the State of New York seeks damages, penalties and injunctive relief, among other forms of relief.

7. Result reached in the court below: This appeal is being taken from an Order of the Supreme Court, New York County (Hon. O. Peter Sherwood, J.S.C.), filed on July 1, 2013 (the "Order"), (i) granting in part Defendants' motion to dismiss in that it dismissed the second cause of action in its entirety and dismissed as time-barred the third and fourth causes of action insofar as they purported to reach periods before March 31, 2008; (ii) otherwise denying the motion to dismiss; (iii) directing that the remainder of the action be severed and continued; and (iv) directing the Defendants to answer the Complaint within 20 days after service of the Order with notice of entry.

8. Grounds for appeal: Defendants appeal the Order of the Supreme Court, New York County, to the extent it denied Defendants' motion to dismiss in its entirety.

First, Defendants appeal the Order's failure to dismiss the third cause of action for violation of Executive Law § 63(12) and the fourth cause of action for violation of Article 28 of the Tax Law in their entirety. The third and fourth causes of action fail to plead a violation of New York law for three reasons: (i) section 1105(b) of New York Tax Law—the statute underlying these causes of action—excludes interstate mobile telecommunications services from taxation; (ii) section 1105(b) is at least ambiguous regarding the taxability of interstate mobile telecommunications services when sold together with taxable mobile telecommunications services for a fixed periodic charge and, therefore, must be construed against the State and in favor of Defendants and their New York customers; and (iii) if § 1105(b) were construed to require the taxation of interstate mobile telecommunications services sold for a fixed periodic charge but not separately stated, it would be preempted by the Mobile Telecommunications Sourcing Act ("MTSA"), 4 U.S.C. § 123(b).

Second, Defendants appeal the Order's failure to dismiss the first cause of action for violation of the New York False Claims Act ("FCA"), State Finance Law § 189(1)(g), in its entirety. That cause of action fails to plead a violation of the FCA for three reasons: (i) the allegedly false records and statements that underlie the FCA claim were not false for the same reasons that the third and fourth causes of action fail to plead a violation of New York law; (ii) even if the New York Attorney General's construction of § 1105(b) were correct, Defendants' interpretation of the relevant statute was not so objectively unreasonable as to give rise to liability under the FCA; and (iii) the Complaint fails to state a claim with particularity, as required by CPLR 3016(b).

Finally, Defendants appeal the Order's failure to bar treble damages asserted under the first cause of action for periods before the law was enacted in August 2010 as violative of the *Ex Post Facto* Clause of the United States Constitution.

9. Related Cases: *Louisiana Municipal Police Employees' Retirement System, Derivatively on Behalf of Itself, and All Others Similarly Situated v. Dan R. Hesse, et al.*, Civ. Action No. 1:12-cv-04017-ALC-JCF (S.D.N.Y.) (motion to dismiss pending); *In re: Sprint Nextel Derivative Litig.*, No. 2:12-cv-02242-JTM-KGG (D. Kan.) (shareholder derivative actions consolidated; case stayed); *Randolph v. Hesse et al.*, No. 12-cv-04447 (Dist. Ct. of Johnson County, Kan.) (complaint filed; case stayed).

Dated: July 23, 2013

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