112TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
112–188

WIRELESS TAX FAIRNESS ACT OF 2011

JULY 29, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1002]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1002) to restrict any State or local jurisdiction from imposing a new discriminatory tax on cell phone services, providers, or property, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

99–006

The Amendment

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Wireless Tax Fairness Act of 2011".

SEC. 2. FINDINGS.

Congress finds the following:

(1) It is appropriate to exercise congressional enforcement authority under section 5 of the 14th Amendment to the Constitution of the United States and Congress' plenary power under article I, section 8, clause 3 of the Constitution of the United States (commonly known as the "commerce clause") in order to ensure that States and political subdivisions thereof do not discriminate against providers and consumers of mobile services by imposing new selective and excessive taxes and other burdens on such providers and consumers.

(2) In light of the history and pattern of discriminatory taxation faced by providers and consumers of mobile services, the prohibitions against and remedies to correct discriminatory State and local taxation in section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. 11501) provide an appropriate analogy for congressional action, and similar Federal legislative measures are warranted that will prohibit imposing new discriminatory taxes on providers and consumers of mobile services and that will assure an effective, uniform remedy.

SEC. 3. MORATORIUM.

(a) IN GENERAL.—No State or local jurisdiction shall impose a new discriminatory tax on or with respect to mobile services, mobile service providers, or mobile service property, during the 5-year period beginning on the date of enactment of this Act.

(b) DEFINITIONS.—In this Act:

(1) MOBILE SERVICE.—The term "mobile service" means commercial mobile radio service, as such term is defined in section 20.3 of title 47, Code of Federal Regulations, as in effect on the date of enactment of this Act, or any other service that is primarily intended for receipt on, transmission from, or use with a mobile telephone or other mobile device, including but not limited to the receipt of a digital good.

(2) MOBILE SERVICE PROPERTY.—The term "mobile service property" means all property used by a mobile service provider in connection with its business of providing mobile services, whether real, personal, tangible, or intangible (including goodwill, licenses, customer lists, and other similar intangible property associated with such business).

(3) MOBILE SERVICE PROVIDER.—The term "mobile service provider" means any entity that sells or provides mobile services, but only to the extent that such entity sells or provides mobile services.

(4) NEW DISCRIMINATORY TAX.—The term "new discriminatory tax" means a tax imposed by a State or local jurisdiction that is imposed on or with respect to, or is measured by, the charges, receipts, or revenues from or value of—

(A) a mobile service and is not generally imposed, or is generally imposed at a lower rate, on or with respect to, or measured by, the charges, receipts, or revenues from other services or transactions involving tangible personal property;

(B) a mobile service provider and is not generally imposed, or is generally imposed at a lower rate, on other persons that are engaged in businesses other than the provision of mobile services; or

(C) a mobile service property and is not generally imposed, or is generally imposed at a lower rate, on or with respect to, or measured by the value of, other property that is devoted to a commercial or industrial use and subject to a property tax levy, except public utility property owned by a public utility subject to rate of return regulation by a State or Federal regulatory authority;

unless such tax was imposed and actually enforced on mobile services, mobile service providers, or mobile service property prior to the date of enactment of this Act.

(5) STATE OR LOCAL JURISDICTION.—The term "State or local jurisdiction" means any of the several States, the District of Columbia, any territory or possession of the United States, a political subdivision of any State, territory, or possession, or any governmental entity or person acting on behalf of such State,

territory, possession, or subdivision that has the authority to assess, impose, levy, or collect taxes or fees.

(6) TAX.—

(A) IN GENERAL.—The term "tax" means a charge imposed by a governmental entity for the purpose of generating revenues for governmental purposes, and excludes a fee imposed on a particular entity or class of entities for a specific privilege, service, or benefit conferred exclusively on such entity or class of entities.

(B) EXCLUSION.—The term "tax" does not include any fee or charge—

(i) used to preserve and advance Federal universal service or similar State programs authorized by section 254 of the Communications Act of 1934 (47 U.S.C. 254); or

(ii) specifically dedicated by a State or local jurisdiction for the support of E–911 communications systems.

(c) RULES OF CONSTRUCTION.—

(1) DETERMINATION.—For purposes of subsection (b)(4), all taxes, tax rates, exemptions, deductions, credits, incentives, exclusions, and other similar factors shall be taken into account in determining whether a tax is a new discriminatory tax.

(2) APPLICATION OF PRINCIPLES.—Except as otherwise provided in this Act, in determining whether a tax on mobile service property is a new discriminatory tax for purposes of subsection (b)(4)(A)(iii), principles similar to those set forth in section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. 11501) shall apply.

(3) EXCLUSIONS.—Notwithstanding any other provision of this Act—

(A) the term "generally imposed" as used in subsection (b)(4) shall not apply to any tax imposed only on—

(i) specific services;

(ii) specific industries or business segments; or

(iii) specific types of property; and

(B) the term "new discriminatory tax" shall not include a new tax or the modification of an existing tax that—

(i) replaces one or more taxes that had been imposed on mobile services, mobile service providers, or mobile service property;

(ii) is designed so that, based on information available at the time of the enactment of such new tax or such modification, the amount of tax revenues generated thereby with respect to such mobile services, mobile service providers, or mobile service property is reasonably expected to not exceed the amount of tax revenues that would have been generated by the respective replaced tax or taxes with respect to such mobile services, mobile service providers, or mobile service property; and

(iii) is a local jurisdiction tax that may not be imposed without voter approval, provides for at least 90 days' prior notice to mobile service providers, and is required by law to be collected from mobile service customers.

SEC. 4. ENFORCEMENT.

Notwithstanding any provision of section 1341 of title 28, United States Code, or the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this Act.

(1) JURISDICTION.—Such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this section.

(2) BURDEN OF PROOF.—The burden of proof in any proceeding brought under this Act shall be upon the party seeking relief and shall be by a preponderance of the evidence on all issues of fact.

(3) RELIEF.—In granting relief against a tax which is discriminatory or excessive under this Act with respect to tax rate or amount only, the court shall prevent, restrain, or terminate the imposition, levy, or collection of not more than the discriminatory or excessive portion of the tax as determined by the court.

SEC. 5. GAO STUDY.

(a) STUDY.—The Comptroller General of the United States shall conduct a study, throughout the 5-year period beginning on the date of the enactment of this Act, to determine—

(1) how, and the extent to which, taxes imposed by local and State jurisdictions on mobile services, mobile service providers, or mobile property, impact the costs consumers pay for mobile services; and

(2) the extent to which the moratorium on discriminatory mobile services taxes established in this Act has any impact on the costs consumers pay for mobile services.

(b) REPORT.—Not later than 6 years after the date of the enactment of this Act, the Comptroller General shall submit, to the Committee on the Judiciary of the House of Representatives and Committee on the Judiciary of the Senate, a report containing the results of the study required subsection (a) and shall include in such report recommendations for any changes to laws and regulations relating to such results.

Purpose and Summary

The average combined state and local tax rate on wireless telecommunications services is significantly higher than the combined state and local sales tax rate imposed on the purchase of other goods and services.[1] The wireless industry and many state and local government groups agree that wireless tax reform is needed.[2] The Wireless Tax Fairness Act of 2011, without affecting any existing state or local tax laws, imposes a 5-year moratorium, effective from the date of enactment, on new "discriminatory" taxes on wireless services, providers, or property, so that states and localities may use that period to enact meaningful communications tax reform on their own terms.[3] According to the bill's sponsor, "[t]he Wireless Tax Fairness Act would advance core national priorities of innovation, economic growth, and competitiveness, by fostering the expansion of next-generation communications and information networks."[4]

Background and Need for the Legislation

I. INTRODUCTION

On March 10, 2011, Rep. Zoe Lofgren (D-CA) (sponsor) and Rep. Trent Franks (R-AZ) (lead cosponsor) introduced H.R. 1002, the Wireless Tax Fairness Act of 2011 (as amended, the "WTFA").[5] An identical bill was introduced in the Senate by Senators Ron Wyden (D-OR) and Olympia J. Snowe (R-ME).[6] The WTFA is substantially similar to the Cell Tax Fairness Act of 2009 and the Cell Phone Tax Moratorium Act of 2007, which Ms. Lofgren and Mr. Franks introduced in the 111th and 110th Congresses, respectively.[7]

---

[1] *See generally* Daniel M. Rothschild, *The Case Against Taxing Cell Phone Subscribers* (Mercatus Center at George Mason University ed., June 2011); Glenn Woroch, *The "Wireless Tax Premium" Harms American Consumers and Squanders the Potential of the Mobile Economy* (Georgetown Center for Business & Public Policy ed., June 2011); Scott Mackey, *A Growing Burden: Taxes, Fees, and Government Charges on Wireless Service,* 59 STATE TAX NOTES 475 (Feb. 14, 2011) [hereinafter *Mackey 2011*].

[2] *See* Press Release, CTIA–The Wireless Association, Statement After the House Judiciary Committee Hearing [sic] on the Wireless Tax Fairness Act (July 14, 2011), http://ctia.org/media/press/body.cfm/prid/2093 (expressing wireless industry's support for H.R. 1002); Letter from Government Finance Officers Association, National Association of Counties, National League of Cities, and the U.S. Conference of Mayors to Deborah Bierbaum, Director of External Taxes, AT&T (Oct. 15, 2010) (on file with Committee) (confessing authors' understanding of the need for reform); *State Taxation of Interstate Telecommunications Services: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary,* 109th Cong. 32 (2006) [hereinafter *2006 Hearing*] (testimony of David Quam, Director, Office of State and Federal Relations, National Governors Association) (acknowledging that "changes [in state taxation of wireless services] do need to be made").

[3] Wireless Tax Fairness Act of 2011, H.R. 1002, 112th Cong. § 3 (2010).

[4] *Wireless Tax Fairness Act of 2011: Hearing on H.R. 1002 Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. 15 (2011) [hereinafter *2011 Hearing*] (statement of Rep. Zoe Lofgren (D-CA).

[5] H.R. 1002.

[6] Wireless Tax Fairness Act of 2011, S. 543, 112th Cong. (2011).

[7] *See* Cell Tax Fairness Act of 2009, H.R. 1529, 111th Cong. (2009); Cell Phone Tax Moratorium Act of 2007, H.R. 436, 109th Cong. (2007).

In general, the WTFA prohibits state and local governments from imposing any "new discriminatory tax on or with respect to mobile services, mobile service providers, or mobile service property" for 5 years from the date of its enactment.[8] The bill specifically excludes from its scope charges assessed to support universal access (primarily in rural and low-income areas) and E–911 fees.[9] The bill also provides concurrent Federal court jurisdiction to a party seeking an injunction under the WTFA, which would not otherwise be available due to the Tax Injunction Act.[10]

II. WIRELESS TAX RATES ARE GENERALLY HIGHER THAN AVERAGE SALES TAX RATE

Before the popularization of wireless telecommunications services, the American Bell Telephone System (commonly referred to as "Ma Bell"), which later became AT&T, had a regulated monopoly over telephony services. As one commentator explains, the regulated monopoly system "involved extraordinary privileges (protected monopoly) in return for shouldering extraordinary burdens—taxes, government controls, special service obligations and others."[11] As a regulated monopoly, AT&T charged taxes on telephone services that were higher than the state's taxes on the purchase of other goods and services.

The U.S. Department of Justice forced the breakup and divestiture of AT&T in 1984. The regulated monopoly structure continued with the smaller Bell companies until the Telecommunications Act of 1996 introduced competition into local telephone services markets.[12] A corresponding decrease in taxes on telephone services presumably should have attended the disappearance of the government-protected monopoly, but it did not. Not only did high tax rates persist on traditional landline telephone customers but they were extended to the growing number of wireless telecommunications consumers as well. "Rather than reducing excessive taxes on local landline phone companies and their customers, which would reduce existing state and local revenue, some policymakers claim that they have leveled the playing field by expanding discriminatory taxes to wireless services."[13] To date, in almost every state, the combined state and local tax rate on wireless telecommunication service is still significantly higher than the tax rate on other goods and services.[14]

The effective rate of taxation on wireless services increased 4 times faster than the rate on other taxable goods and services between January 2003 and July 2007.[15] These tax increases have affected a substantial portion of the population. The wireless industry has grown exponentially, from 33.8 million customers in 1995

---

[8] H.R. 1002 § 3.
[9] *Id.* § 3(b)(6)(B).
[10] *See* 28 U.S.C. § 1341 (prohibiting a Federal court from enjoining tax collection if a state court remedy is available).
[11] Larry F. Darby & Joseph P. Fuhr, Jr., *Investing in Economic Growth: Broadband Network Tax Forbearance,* 18 MEDIA L. & POL'Y 1, 16 (2008).
[12] Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (1996).
[13] Scott Mackey, *Excessive Taxes and Fees on Wireless Service: Recent Trends,* 47 STATE TAX NOTES 519, 520 (Feb. 18, 2008) [hereinafter *Mackey 2008*].
[14] *Mackey 2011, supra* note 1, at 475.
[15] *Mackey 2008, supra* note 13, at 521.

to over 300 million customers in 2010.[16] According to a recent report, these 300 million users "now face a combined federal, state, and local tax and fee burden of 16.3 percent, a rate two times higher than the average retail sales tax rate and the highest wireless rate since 2005."[17] In Nebraska, for example, a consumer pays a combined state and local tax rate of 23.69 percent for wireless service while the average state and local combined sales tax rate applicable to other goods and services in that state is 7 percent.[18] These high tax rates are in addition to the Federal USF (Universal Service Fund) tax, which has increased 0.9 percent since 2007 (compared to state and local wireless tax increases of 0.2 percent).[19] A report published on January 24, 2011, observed the following variations between state and local wireless and generally applicable sales tax rates, ranked beginning with the state whose effective tax on wireless services exceeds its generally applicable sales tax the most:[20]

[16] http://ctia.org/media/industry_info/index.cfm/AID/10323.
[17] *Mackey 2011, supra* note 1, at 475.
[18] *Id.* at 478.
[19] *Id.* at 477. The USF was created by the Telecommunications Act of 1996, *supra* note 12. Proceeds of the USF are used to subsidize telecommunications service to schools, libraries, hospitals, and rural consumers.
[20] *Id.* at 478.

Rank	State	State-Local Wireless Rate	State-Local Sales Tax Rate
1	Nebraska	18.64%	7.00%
2	New York	17.78%	8.25%
3	Florida	16.57%	7.25%
4	Washington	17.95%	9.00%
5	New Hampshire	8.18%	0.00%
6	Rhode Island	14.62%	7.00%
7	Pennsylvania	14.08%	7.00%
8	Missouri	14.23%	7.23%
9	Illinois	15.85%	9.00%
10	Delaware	6.25%	0.00%
11	Maryland	12.23%	6.00%
12	South Dakota	12.02%	5.96%
13	Montana	6.03%	0.00%
14	District of Columbia	11.58%	5.75%
15	Utah	12.16%	6.80%
16	Kansas	13.34%	8.13%
17	Arizona	11.97%	7.20%
18	North Dakota	10.68%	6.00%
19	Kentucky	10.42%	6.00%
20	Alaska	6.69%	2.50%
21	Texas	12.43%	8.25%
22	Hawaii	7.75%	4.00%
23	New Mexico	10.52%	7.60%
24	Indiana	9.84%	7.00%
25	Colorado	10.40%	7.56%
26	Wisconsin	8.34%	5.55%
27	Arkansas	11.07%	8.38%
28	Wyoming	7.94%	5.50%
29	Tennessee	11.58%	9.25%
30	Oklahoma	10.74%	8.45%
31	South Carolina	9.52%	7.25%
32	Maine	7.16%	5.00%
33	Mississippi	9.08%	7.00%
34	Vermont	8.50%	6.50%
35	New Jersey	8.87%	7.00%
36	Oregon	1.81%	0.00%
37	North Carolina	9.43%	7.75%
38	Minnesota	9.38%	7.71%
39	Massachusetts	7.81%	6.25%
40	Virginia	6.56%	5.00%
41	California	10.67%	9.25%
42	Iowa	7.91%	6.50%
43	Michigan	7.27%	6.00%
44	Georgia	8.57%	7.50%
45	Connecticut	6.96%	6.00%
46	Ohio	7.95%	7.13%
47	West Virginia	6.23%	6.00%
48	Alabama	7.45%	7.25%
49	Louisiana	6.28%	9.00%
50	Idaho	2.20%	6.00%
51	Nevada	2.08%	7.91%

The proceeds of certain taxes imposed uniquely on wireless services are increasingly being used to fund government programs that have nothing to do with communications services. In 2009, Wisconsin raised wireless taxes by 75 cents per line to fund police and fire services.[21] Utah finances its poison control centers with wireless fees.[22] Some municipalities in New York are allowed to tax wireless services to pay for local schools or transportation infrastructure.[23] In addition, states collect E–911 fees, which they are supposed to use to support local emergency communications systems, but some states have diverted millions of dollars from E–911 revenues to fund unrelated programs.[24]

III. THE IMPACT OF HIGH WIRELESS TAX RATES

High wireless tax rates artificially alter the demand market for wireless services. Economic studies have shown that wireless services are elastic: as price increases, quantity demanded decreases.[25] In fact, state and local governments may be disadvantaging themselves by imposing such high taxes. A 2009 study concluded:

> The distortionary effects of an ad valorem tax on wireless services vary inversely with the own-price elasticity of demand for wireless services. Although the demand for wireless service has become more elastic over the last decade, wireless taxes have increased. Consequently, the efficiency loss from wireless taxation has also risen during that period. **In states that tax wireless services most aggressively, the efficiency loss from an additional dollar of tax revenue raised may be as high as two dollars.** Therefore, federal, local, and state governments should carefully scrutinize the tax rates they currently impose on wireless consumers, recognizing that the tax policies in place can produce more harm than good.[26]

The irony of state and local governments' imposition of high taxes on wireless services is that decreasing taxes on wireless service may actually generate *more* revenue by broadening the wireless tax base and flattening the rate to bring it more in line with sales taxes on other goods and services. One study concluded that state and local governments lose $15 billion per year because of hikes in tax rates.[27]

High wireless taxes discourage a percentage of potential customers from subscribing to wireless services, which results in a smaller tax base and consequently less tax revenue to governments. Wireless carriers' inability to attract these potential customers because of high tax rates means they have less capital to invest in and improve telecommunications infrastructure. "Wireless

---

[21] *Mackey 2011, supra* note 1, at 479.
[22] *Id.*
[23] Woroch, *supra* note 1, at 4.
[24] FEDERAL COMMUNICATIONS COMMISSION, SECOND ANNUAL REPORT TO CONGRESS ON STATE COLLECTION AND DISTRIBUTION OF ENHANCED 911 FEES AND CHARGES 10–11 (Aug. 13, 2010), *available at* http://transition.fcc.gov/pshs/services/911-services/statecollections.html (last visited July 26, 2011).
[25] Jerry Hausman, *Efficiency Effects on the U.S. Economy from Wireless Taxation,* NAT'L TAX J. 53, no. 3 (Sept. 2000).
[26] Allan T. Ingraham and J. Gregory Sidak, *Do States Tax Wireless Services Inefficiently? Evidence on the Price Elasticity of Demand,* 24 VA. TAX REV. 249, 261 (2004) (emphasis added).
[27] Woroch, *supra* note 1, at 10.

carriers invested about $25 billion in their wireless networks in 2008, or roughly 17 percent of their gross revenues. If wireless services were subject to the same tax treatment as other taxable goods and services, carriers would have had up to $2.5 billion more available to invest in network improvements."[28] On February 10, 2011, President Obama announced his Wireless Innovation and Infrastructure Initiative, which seeks to expand wireless services to 98 percent of Americans to bring "considerable benefits to our economy and society."[29] State and local taxes that deprive the wireless industry of capital it could invest in infrastructure hinder the president's objective and slow his goal of universal access.

Consumers ultimately pay the price of high discriminatory taxes on wireless services. In other contexts, high taxes on particular goods and services reflect a legislature's measured view that the good or service imposes a harm on society or the environment or causes some other negative externality. For example, taxes on cigarettes discourage decisions that result in poor health; they also fund the health costs borne by the state or locality when a smoker is unable to pay for a tobacco-related illness at the local hospital. Similarly, taxes on gasoline encourage commuters to travel more efficiently and conserve resources. An analogy between these so-called "sin" taxes and taxes on wireless services, however, is inapposite. There is nothing inherently dangerous about using cell phones; their use actually projects a positive externality on society, *e.g.* more efficient business communications and more intimate social connections. High taxes on wireless subscriptions are akin to taxes on cigarettes and gasoline even though there is no justifiable reason to discourage use of a cell phone.

Finally, tax policies that discourage wireless use also negatively affect secondary markets for smartphone applications, wireless-based Internet service, and digital goods and services delivered over telecommunications networks.[30] These electronically delivered goods and services are used in a variety of important fields, including the provision of e-health services and Internet-base education. High wireless taxes incidentally burden the demand for these beneficial goods and discourage innovation in the digital economy.[31]

IV. LEGISLATIVE HISTORY IN PRIOR CONGRESSES

In the 111th Congress, the Subcommittee on Commercial and Administrative Law held a legislative hearing on the Cell Tax Fairness Act of 2009 on June 9, 2009.[32] On September 15, 2011, the subcommittee forwarded the bill to the full Committee by voice vote, but the full Committee did not act on it.[33]

In the 110th Congress, the Subcommittee on Commercial and Administrative Law held a legislative hearing on the Cell Tax Fair-

---

[28] *Mackey 2011, supra* note 1, at 479.

[29] Press Release, White House, President Obama Details Plan to Win the Future through Expanded Wireless Access (Feb. 10, 2011), http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access.

[30] *Cf.* Digital Goods and Services Tax Fairness Act of 2011, H.R. 1860, 112th Cong. (2011) (prohibiting state and local taxation of digital goods and services at rate higher than generally applicable sales tax rate).

[31] *See generally Digital Goods and Services Tax Fairness Act of 2011: Hearing on H.R. 1860 Before Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011).

[32] *See generally Cell Tax Fairness Act of 2009: Hearing on H.R. 1521 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary,* 111th Cong. (2009).

[33] A transcript of the subcommittee markup is on file with the Committee.

ness Act of 2008 on September 18, 2008.[34] No further action was taken that Congress.

In the 109th Congress, the Subcommittee on Commercial and Administrative Law held an oversight hearing entitled "State Taxation of Interstate Telecommunications Services" on June 13, 2006.[35]

Hearings

On March 15, 2011, the Subcommittee on Courts, Commercial and Administrative Law held a legislative hearing on H.R. 1002 and heard testimony from: Harry Alford, President and CEO of the National Black Chamber of Commerce; Bernita Sims, Councilwoman, High Point, North Carolina; and Scott Mackey, a partner at KSE Partners LLP and the former Chief Economist of the National Conference of State Legislatures.[36]

Committee Consideration

On July 14, 2011, the Committee met in open session and ordered the bill H.R. 1002 favorably reported with two amendments by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 1002.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1002, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

---

[34] *See generally Cell Tax Fairness Act of 2008: Hearing on H.R. 5793 Before Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. (2008).

[35] *See generally 2006 Hearing, supra* note 1.

[36] *See generally 2011 Hearing, supra* note 4.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 28, 2011.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1002, the "Wireless Tax Fairness Act of 2011."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1002—Wireless Tax Fairness Act of 2011.

SUMMARY

H.R. 1002 would prohibit State and local governments from imposing certain new taxes on providers of wireless communications service for 5 years after enactment of the legislation. The bill would also require the Government Accountability Office (GAO) to conduct a study examining the impact of the moratorium on consumers. CBO estimates that enacting H.R. 1002 would have no significant impact on the Federal budget. Pay-as-you-go procedures do not apply to this legislation because it would not affect direct spending or revenues.

H.R. 1002 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that the mandate would impose no cost on State, local, or tribal governments. This bill contains no private-sector mandates as defined in UMRA.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

H.R. 1001 would not assign any significant new responsibilities to any Federal agencies, and CBO estimates that implementing the legislation would have no significant cost to the Federal Government.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

The bill would impose an intergovernmental mandate as defined in UMRA because it would preempt the authority of State and local governments to impose new taxes, or change existing taxes, on wireless services, providers, or property. The authority of State and local governments to impose or change taxes that they broadly impose on services, businesses, or property would be preserved under the bill. The bill also would not preempt the authority of governments to collect revenue from taxes on wireless services that have already been enacted and enforced. CBO did not identify any State or local governments that planned to change or impose new wire-

less taxes in the next 5 years; therefore, CBO estimates that the preemption would impose no cost on State, local, or tribal governments.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

This bill contains no private-sector mandates as defined in UMRA.

ESTIMATE PREPARED BY:

Federal Costs: Martin von Gnechten
Impact on State, Local, and Tribal Governments: Elizabeth Cove Delisle
Impact on the Private Sector: Samuel Wice

ESTIMATE APPROVED BY:

Theresa Gullo
Deputy Assistant Director for Budget Analysis

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1002 prohibits state and local governments from imposing new discriminatory taxes on mobile services, mobile services providers, or mobile service property, or any combination thereof, for 5 years from the date of its enactment.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1002 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Sec. 1. Short Title. Section 1 sets forth the short title of the Act as the "Wireless Tax Fairness Act of 2011."

Sec. 2. Findings. Section 2 makes findings that Congress may use its Commerce Clause power and its power under Section 5 of the 14th Amendment to enact the legislation. Section 2 also compares discriminatory wireless taxes to the taxes on railroads remedied by the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4–R Act"). Section 2 states that discriminatory taxes on wireless services should be remedied in a manner consistent with the remedies set forth in the 4–R Act for railroad taxes.

Sec. 3. Moratorium. Section 3(a) provides that no state or local jurisdiction shall impose a new discriminatory tax on mobile services, mobile service providers, or its mobile service property during the 5-year period beginning on the date of enactment.

Section 3(b)(1) defines "mobile service." "Mobile Service" means commercial mobile radio service or any other service that is primarily intended for receipt on, transmission from, or use with a mobile telephone or other mobile device. For example, if streamed music is primarily intended for receipt on a desktop computer, but sometimes is received on a mobile telephone, the bill would not af-

fect a state's ability to impose a new discriminatory tax on streamed music. The bill is agnostic with respect to whose intent—whether society's, each individual user's, or otherwise—is to be considered in making a "primary intent" determination. "Mobile service" includes without limitation the receipt of a "digital good," but the bill does not define "digital good."

Section 3(b)(2) defines "mobile service property." "Mobile service property" means all property of any type used by a mobile service provider in connection with its business of providing mobile services.

Section 3(b)(3) defines "mobile service provider." "Mobile service provider" means any entity that sells or provides mobile services, but only to the extent that it provides mobile services.

Section 3(b)(4) defines "new discriminatory tax." That term means a tax imposed by a state or local jurisdiction on or with respect to (A) mobile services, and is not generally imposed, or is generally imposed at a lower rate, on or with respect to tangible personal property, (B) a mobile service provider, and is not generally imposed, or is generally imposed at a lower rate, on other businesses, or (C) mobile service property, and is not generally imposed, or is generally imposed at a lower rate, on other commercial or industrial property (without regard to taxes on public utility property). This provision prohibits state and local governments from imposing any new tax on mobile services, mobile service property, or mobile service providers that is not also imposed on tangible goods and services, non-mobile property, or non-mobile service providers, respectively. The bill would not preclude a state or locality from raising taxes on all goods and services generally, even though doing so would result in raising taxes on wireless services. The bill specifically does not prohibit any tax that was imposed and actually enforced on mobile services, mobile service providers, or mobile service property prior to the date of enactment, even if such tax, were it to be imposed in the future, would be considered discriminatory under the bill.

Section 3(b)(5) defines "State or local jurisdiction" to mean any of the several states, the District of Columbia, and U.S. territories and possessions, and any subdivisions thereof.

Section 3(b)(6) defines "tax." "Tax" means a charge imposed by a governmental entity for the purpose of generating revenues for governmental purposes. It excludes a fee imposed on a particular entity or class of entities for a specific privilege, service, or benefit conferred exclusive on such entity or entities. The term "tax" does not include a fee or charge used to preserve and advance universal service or dedicated to supporting E–911 communications systems.

Section 3(c) provides rules of construction. Under section 3(c)(1), for purposes of determining what constitutes a "new discriminatory tax," all taxes, tax rates, exemptions, credits, deductions, and all other adjustments to a generally imposed tax, by whatever name called, are to be taken into account. Thus, a state that currently imposes a 5 percent general sales tax and gives a 2 percent credit on wireless subscriptions so that customers currently pay only 3 percent on wireless service may not reduce the amount of that credit because doing so would result in a higher tax rate only on mobile services.

Section 3(c)(2) states that the principles applicable in determining whether a tax is discriminatory under the 4–R Act shall apply in determining whether a tax is discriminatory under this bill.

Section 3(c)(3) states that the term "generally imposed" does not take into account any tax imposed only on specific services, industries, or types of property. If a state has a generally imposed tax on tangible personal property but excludes all taxation on skateboards, the one-off exemption for skateboards is excluded from the comparison class of "generally imposed" taxes. This section also provides that the term "new discriminatory tax" does not include a replacement tax that a jurisdiction imposes that is designed to result in less revenue to the taxing authority, so long as it gives 90 days' prior notice to mobile service providers, is approved by popular vote, and is collected from mobile service customers. Without this section, a state that currently imposes a 10 percent tax on mobile services and a 5 percent tax on all other services could not lower its mobile services tax to 8 percent because the new imposition, still 3 percent higher than the generally imposed tax, would be considered new and discriminatory.

Sec. 4. Enforcement. Section 4 permits review of violations of the Act in Federal district court notwithstanding the Tax Injunction Act. It also establishes a burden of proof that a party seeking relief must meet when bringing lawsuits under the Act and allows for specific relief for that party. This section does not pre-empt state court jurisdiction; rather, it gives Federal courts concurrent jurisdiction with state courts.

Sec. 5. GAO Study. Section 5 requires the Comptroller General of the United States to study, throughout the 5-year moratorium, (i) how, and the extent to which, taxes imposed by state and local jurisdictions on mobile services, mobile service providers, and mobile service property impact the costs consumers pay for mobile services, and (ii) the extent to which the bill impacts those costs. A report containing the results of the study must be transmitted to Congress within 6 years of the enactment of the Act.

Dissenting Views

When considering legislation affecting state taxation, we should carefully balance competing interests. On one hand, we should ensure that the states do not burden interstate commerce through their taxing authority. On the other hand, we should respect the right of states to tax activity within their borders, especially during these difficult economic times.

H.R. 1002 is one such bill that presents this challenge.

I agree that increased taxes and fees on wireless services hurt consumers. Every penny matters and every increased expenditure can have a negative impact on consumers' pocketbooks and their choices to spend on other goods and services.

While we consider this legislation, we should also consider how we can help our state and local governments. One solution would be legislation similar to H.R. 5660, the "Main Street Fairness Act," which was introduced by my former colleague, Representative Bill Delahunt (D-MA) in the 110th Congress. H.R. 5660 would help level the playing field between remote retailers and their brick and mortar counterparts as well as provide an equitable avenue to en-

sure state and local governments are able to collect sales and use taxes.

I cannot support H.R. 1002 unless it is combined with legislation similar to the Main Street Fairness Act.

JOHN CONYERS, JR.

I. INTRODUCTION

H.R. 1002, the "Wireless Tax Fairness Act of 2011," would impose on states a 5-year moratorium on any new discriminatory tax on mobile services, mobile service providers, and mobile service property. The bill will undermine the ability of states to pay for essential services, such as public health and safety, education, and maintenance of state highways and will be especially harmful during this difficult economic time as it impacts the flexibility of states to respond to the economic downturn. The legislation is based on faulty information and will benefit the wireless services industry. Further, the legislation contains vague language that will lead to increased litigation for both state and local governments and the wireless industry. Because of these and other concerns presented by the bill, local governments, the American Federation of State, County and Municipal Employees, and the Federation of Tax Administrators oppose H.R. 1002.[1]

For these reasons, and those discussed below, I respectfully dissent and urge my colleagues to reject this seriously flawed legislation.

II. SUMMARY OF H.R. 1002

H.R. 1002 imposes on states a 5-year moratorium on any new discriminatory taxes on mobile services, mobile service providers, and mobile service property. The legislation will prevent states from imposing taxes on:

- mobile services unless the tax is also imposed on all other services or tangible personal property;
- mobile service providers unless the tax is also imposed on all other businesses; and
- mobile service property unless the tax is also imposed on all other commercial or industry property.

III. H.R. 1002 WILL FORCE STATES TO CUT SERVICES AND INCREASE TAXES ON NON-WIRELESS TAXPAYERS

As a policy matter, we note that state and local governments work closely with the federal government to provide essential government services such as educating our children, maintaining need-

[1] Letter from the National Association of Counties, the National League of Cities, the United States Conference of Mayors, the International City/County Management Association, the Government Finance Officers Association, and the National Association of Telecommunications Officers and Advisors to Representative Lamar Smith, Chairman of the House Committee on the Judiciary (July 13, 2011) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff); General Letter from Charles M. Loveless, Director of Legislation for the American Federation of State, County and Municipal Employees, AFL–CIO (July 13, 2011) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff); Letter from Patrick T. Carter, President of the Federation of Tax Administrators to Representative Lamar Smith, Chairman of the House Committee on the Judiciary and Representative John Conyers, Jr., Ranking Member of the House Committee on the Judiciary (July 12, 2011) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

ed transportation infrastructure, and protecting us from domestic and foreign terrorism. State and local governments pay for these services through tax revenues. States, however, would be hampered in their ability to provide these essential services if Congress restricts their ability to collect needed revenues as proposed by H.R. 1002.

H.R. 1002 will have a substantial negative impact state revenues. Although the Congressional Budget Office estimates that the bill's impact would not exceed the Unfunded Mandates threshold, it will restrain the states' ability to cope with economic downturns in several respects.[2]

In addition, H.R. 1002 will deny states the flexibility to raise revenue in several respects.[3] First, the legislation's moratorium becomes effective upon enactment,[4] which would prevent states from enforcing enacted tax laws that have yet to become effective. This will give states insufficient time to adjust to the expected revenue losses. Second, H.R. 1002 will hinder the states' ability to balance their budgets. Most states and local governments are required, either statutorily or constitutionally, to balance their budgets.[5] To balance their budgets, they increase revenue through taxes and fees, or cut spending.

During the current economic climate, the tax revenue base has declined as a result of higher unemployment, lower real estate property taxes, and less sales tax revenue. The need for state and local government services, however, has not correspondingly declined. In fact, demand for many of these essential services, such as unemployment payments and other social programs, has increased during the current economic downturn.[6] The Center on Budget and Policy Priorities estimates that the states will face combined budget shortfalls of $103 billion for fiscal year 2012.[7] To balance their budgets, state and local governments have had to respond through regressive measures. For example, 44 states have cut more than 400,000 government jobs since August 2008; California, Michigan, and Delaware have slashed benefits to families living below the poverty line; and Texas cut about $1 billion in education funding over the past two years from its already below-average education budget and another $1 billion from its higher education budget.[8] Additionally, some states have reduced their aid to

---

[2] Congressional Budget Office Cost Estimate, H.R. 1002: Wireless Tax Fairness Act of 2011 (July 28, 2011).

[3] *State Taxation: The Impact of Congressional Legislation on State and Local Government Revenues: Hearing Before the Subcommittee on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 111th Cong. 27–28 (2010) (Testimony of Vermont Governor Jim Douglas).

[4] H.R. 1002, Section 3(b)(4).

[5] *State Taxation: The Impact of Congressional Legislation on State and Local Government Revenues: Hearing Before the Subcommittee on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 111th Cong. 5 (2010) (testimony of Vermont Governor Jim Douglas) ("As you know, states must balance their budgets."); *id.* at 14 (testimony of B. Glen Whitley, Tarrant County Judge on behalf of the National Association of Countie s) ("Unlike the Federal Government, local governments must balance their budgets. . . ."); National Association of State Budget Officers, Budget Processes in the States, at 40 (Summer 2008).

[6] Donald J. Boyd, Nelson A. Rockefeller Institute of Government, Recession, Recovery, and State-Local Finances, Presentation before the Forecasters Club of New York, at 2 (Jan. 28, 2010).

[7] Center on Budget and Policy Priorities, New Fiscal Year Brings Further Budget Cut to Most States, Slowing Economic Recovery (June 28, 2011).

[8] *Instead of Signs of Recovery, a Sucker Punch for State Budgets,* WASH. POST, May 29, 2011, at G7.

local governments for fiscal 2012.[9] while others, such as Hawaii, Connecticut, and Illinois, have significantly raised personal and corporate income taxes.[10]

H.R. 1002, however, will prevent states from considering all potential tax bases to respond to economic changes. The moratorium will exclude from possible state taxation millions if not billions of dollars in future revenue from wireless services taxes.[11] Thus, to balance their budgets, states will be forced to cut even more services and shift more of the tax burden onto other local taxpayers. For example, state and local governments may have to increase taxes on traditional land line phone services, which will impact older and less well-to-do residents who continue to rely more heavily on those services.[12]

In sum, H.R. 1002 will foreclose from state and local governments millions of dollars in revenue which they desperately needed to rebound from the recent recession.

IV. H.R. 1002 SECURES FAVORABLE TREATMENT FOR WIRELESS SERVICE PROVIDERS

H.R. 1002 specifically benefits one industry. Although wireless service providers contend that they have been unfairly singled out for taxation, which inhibits economic growth and development, evidence reveals otherwise.[13]

First, many types of industries are subject to taxes that are specifically targeted to their industries. These include the travel, hotel, entertainment, and transportation industries, and non-telecom public utilities.[14] As disparate tax treatment is not unconstitutional.[15] state and local legislators may decide whether an industry, such as the wireless industry, should be subject to different tax rates.[16]

Second, some jurisdictions have, in fact, favored the wireless services industry over other industries.[17] Although many states treat telecommunications as a separate classification, and therefore tax it at a different rate than other goods and services, some juris-

---

[9] National Governors Association and National Association of State Budget Officers, The Fiscal Survey of States, Spring 2011, at 8, available at http://www.nasbo.org/LinkClick.aspx?fileticket=yNV8Jv3X7Is%3d&tabid=38.

[10] *Instead of Signs of Recovery, a Sucker Punch for State Budgets,* WASH. POST, May 29, 2011, at G7.

[11] "[T]he legislation would effectively create a ban on all wireless services taxes because of the difficulties involved in raising other taxes, for example, property and sales taxes. . . ." *The Cell Tax Fairness Act of 2009: Hearing on H.R. 1521 Before the Subcommittee on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 111th Cong. 84 (2009) (written responses of Joanne Hovis).

[12] *Id.* at 86.

[13] *The Cell Tax Fairness Act of 2008: Hearing on H.R. 5793 Before the Subcommittee on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 110th Cong. 73 (2008) (lay responses to post-hearing questions).

[14] Tillman L. Lay, *Some Thoughts on Our System of Federalism in a World of Convergence,* L. Rev. Mich. State Univ.-Detroit C. L. 223–237 (2000).

[15] In *Regan v. Taxation With Representation,* the Supreme Court stated that "legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." 461 U.S. 540, 547 (1983). *See also* Madden v. Kentucky, 309 U.S. 83, 87–88 (1940) ("The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies.").

[16] *The Wireless Tax Fairness Act of 2011: Hearing on H.R. 1002 Before the Subcommittee on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary,* 112th Cong. 42 (2011) (testimony of Bernita Sims).

[17] *The Cell Tax Fairness Act of 2009: Hearing on H.R. 1521 Before the Subcommittee on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 111th Cong. 87 (2009) (written responses of Joanne Hovis).

dictions, including Idaho, Louisiana, and Nevada, favor wireless services by imposing on them lower rates than the general sales tax rate.[18]

Additionally, the actual state and local tax burden on wireless services and providers is lower than reported. H.R. 1002 addresses state and local taxes and fees, and does not include federal taxes and fees. However, supporters commonly include federal fees and taxes to assert the burdensomeness of state and local taxes on wireless services.[19] Further, providers do not pay more in property taxes when compared to other businesses; in fact, they pay roughly the same percentage.[20]

Finally, supporters of H.R. 1002 suggest that wireless taxes burden broadband development and competitiveness and therefore a moratorium is needed.[21] However, state and local taxes on wireless services and providers have not diminished adoption rates.[22] Taxes also have not inhibited broadband expansion. As City Council Member from High Point, North Carolina Bernita Sims stated,

"[p]rofit motivation is the reason for slower (or nonexistent) deployment in rural areas. Deployment of communications networks is extremely costly; communications carriers are private, for-profit companies and they quite rationally allocate their investment resources to areas of the country where they are likely to achieve the highest return on investment—those areas that have relatively dense populations and thereby greater potential penetration and higher revenues per mile of construction."[23]

H.R. 1002 relies upon inaccurate arguments to benefit wireless service providers.

V. H.R. 1002 WILL NOT ENSURE TAX REFORM AND MAY LEAD TO SUCCESSIVE TEMPORARY MORATORIA

Supporters of a 5-year moratorium suggest that the moratorium will inspire state and local governments to reform their tele-

---

[18] *The Wireless Tax Fairness Act of 2011: Hearing on H.R. 1002 Before the Subcommittee on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary,* 112th Cong. 30 (2011) (testimony of Scott Mackey).

[19] *The Cell Tax Fairness Act of 2008: Hearing on H.R. 5793 Before the Subcommittee on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 110th Cong. 50 (2008) (testimony of Tillman Lay).

[20] H.R. 1521, the Cell Tax Fairness Act of 2009: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 51 (2009) (Written Testimony of Don Stapley).

[21] H.R. 1002, the Wireless Tax Fairness Act of 2011: Hearing Before the Subcomm. on Courts, Com. and Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 25–26 (2011) (Written Testimony of Scott Mackey); id. at 15 (Written Testimony of Representative Zoe Lofgren); State Taxation: The Impact of Congressional Legislation on State and Local Government Revenues: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 80 (2010) (Written Responses of Honorable B. Glen Whitley) ("[T]he cell phone industry claims that it is unfairly taxed, which hinders innovation, growth, and profitability.").

[22] H.R. 1002, the Wireless Tax Fairness Act of 2011: Hearing Before the Subcomm. on Courts, Com. and Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 44 (2011) (Written Testimony of Bernita Sims); H.R. 1521, the Cell Tax Fairness Act of 2009: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 29 (2009) (Written Testimony of Joanne Hovis); H.R. 1521, the Cell Tax Fairness Act of 2009: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 94 (2009) (Written Responses of Honorable Don Stapley); H.R. 5793, the Cell Tax Fairness Act of 2008: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 110th Cong. 49 (2008) (Written Testimony of Tillman Lay).

[23] H.R. 1002, the Wireless Tax Fairness Act of 2011: Hearing Before the Subcomm. on Courts, Com. and Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 44 (2011) (Written Testimony of Bernita Sims).

communications taxes.[24] This suggestion ignores the efforts that such governments have already been making toward reforming their telecommunications taxes.[25] By excluding from the discussion the wireless services platform, the moratorium will effectively prevent for the next five years a broad and meaningful reform which is both technology and revenue neutral.[26] Further, as with the Internet Tax Freedom Act.[27] the temporary moratorium at the heart of H.R. 1002 may be continued for future years.

VI. VAGUE DEFINITIONS WITHIN H.R. 1002 WILL LEAD TO INCREASED LITIGATION

H.R. 1002 will increase litigation costs for wireless services providers and state and local governments.[28]

Two simple examples highlight the many uncertainties that H.R. 1002 creates. First, H.R. 1002 describes "new discriminatory tax" as a tax that is "not generally imposed, or is generally imposed at a lower rate" on similar services, businesses, or property.[29] Courts will undoubtedly have to interpret the vague term "generally imposed." Second, H.R. 1002 requires as part of the determination as to whether a tax is a "new discriminatory tax" "all taxes, tax rates, exemptions, deductions, credits, incentives, exclusions, and other similar factors."[30] Because many jurisdictions exclude from sales tax imposition milk, for example, courts will have to determine whether the legislation is intended to compare the tax rates on wireless services and something as disparate as milk.

Given these and other new limitations on their ability to raise revenue, states will litigate to establish the narrowest interpretations of the terms within H.R. 1002. Likewise, wireless service providers will litigate to establish the broadest interpretations of the terms within H.R. 1002.

---

[24] H.R. 1521, the Cell Tax Fairness Act of 2009: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 88 (2009) (Written Responses of Honorable Joseph A. Gibbons).

[25] Hearing on State Taxation: The Impact of Congressional Legislation on State and Local Government Revenues: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 15 (2010) (Statement of Honorable B. Glen Whitley) ("NACo has long supported communication, tax reform, and simplification."); H.R. 1521, the Cell Tax Fairness Act of 2009: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 82 (2009) (Written Responses of Honorable Mara Candelaria Reardon).

[26] Hearing on State Taxation: The Impact of Congressional Legislation on State and Local Government Revenues: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 15 (2010) (Statement of Honorable B. Glen Whitley) ("Moratoriums harm local governments' ability to reform their tax systems, and are especially troubling for local jurisdictions that rely on wireless taxes."); H.R. 1002, the Wireless Tax Fairness Act of 2011: Hearing Before the Subcomm. on Courts, Com. and Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 67 (2011) (Statement of the Federation of Tax Administrators); H.R. 1521, the Cell Tax Fairness Act of 2009: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 95 (2009) (Written Responses of Honorable Don Stapley).

[27] Pub. L. No. 110–108, 121 Stat. 1024 (2007).

[28] H.R. 1002, the Wireless Tax Fairness Act of 2011: Hearing Before the Subcomm. on Courts, Com. and Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 68 (2011) (Statement of the Federation of Tax Administrators).

[29] H.R. 1002, Section 3(b)(4). Also see Hearing on State Taxation: The Impact of Congressional Legislation on State and Local Government Revenues: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 27 (2010) (Statement of Vermont Governor Jim Douglas) ("[the wireless tax bill] uses the term 'discriminatory,' and there will probably be a lot of debate over what constitutes a discriminatory tax.").

[30] H.R. 1002, Section 3(c)(1).

VII. CONCLUSION

H.R. 1002 is irresponsible legislation that will restrict state flexibility to raise much-needed revenues, which will force state governments to eliminate essential governmental programs and services, and shift tax burdens to other taxpayers. For all of these reasons, I respectfully dissent.

JUDY CHU.

○