Testimony Of

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On Behalf of

The U.S. Conference of Mayors,
The National League of Cities,
The National Association of Counties
The National Association of Telecommunications
Officers and Advisors,
and
The Government Finance Officers Association

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On
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(H.R. 5793)

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Good afternoon, Chairwoman Sanchez and Members of the Subcommittee. I am Tillman Lay, partner in the Washington, D.C., law firm of Spiegel & McDiarmid LLP, and I am here to testify on behalf of the U.S. Conference of Mayors ("USCM"), the National League of Cities ("NLC"), the National Association of Counties ("NACo"), the National Association of Telecommunications Officers and Advisors ("NATOA"), and the Government Finance Officers Association ("GFOA") concerning H.R. 5793. I have represented these organizations and several individual municipalities on telecommunications and telecommunications tax matters for a number of years.

Thank you for the opportunity to testify on behalf of these organizations, which represent our nation's local governments, their telecommunications staff and advisors, and their finance officers. We oppose H.R. 5793. Its proposed moratorium on state and local wireless taxes would represent an unwarranted federal intrusion into the long-recognized authority of state and local governments to make tax classifications and open the door to unprecedented federal control and oversight of state and local tax authority.

Moreover, the legislation is a solution in search of a problem: Industry presents no data indicating that state and local wireless taxes have had any adverse effect on wireless service subscribership, revenue or investment. To the contrary, wireless industry subscribership, revenue and investment have soared during the same period that it suffered from the supposedly onerous state and local tax burden about which it complains. In addition, when stripped of universal service fund ("USF") and E-911 fees and other user-specific fees, industry's own data concerning the supposed burden of state and local taxes on the wireless industry fail to show any appreciable or widespread higher tax burden on wireless than on other business sectors. In fact,

wireless service enjoys a lower state and local tax burden than some other industry sectors, such as public utilities.

Local governments are more than willing to discuss reform of telecommunications taxes with industry.[1] Given the increasing convergence of telecommunications-related services, revising service definitions and simplifying taxes is a goal state and local governments share with industry. But by compelling favorable treatment of the wireless industry versus the many other sectors of the telecommunications industry, this bill would not further state and local telecommunications tax reform; it would instead create a new obstacle to such reform.

Local governments oppose any federal preemption of state and local governments' taxing authority, and any federally-compelled special tax favoritism of one industry. Yet that is what the wireless industry seeks in this bill.

The wireless industry's plea for federally mandated tax favoritism will open the door to other industries asking Congress for similar special exemptions or protections from state and local tax authority. That poses a dire threat not merely to state and local tax revenues, but to the entire existence of independent state and local taxation authority in our system of federalism.

Congressional policymakers who are basing their decision on wireless industry tax studies are being misled by the wireless industry's flawed data and unsound policy analysis. By requiring that "discriminatory taxes" on a specific business sector must be measured against, and not exceed, the taxes imposed by state and local governments on "general" businesses, H.R. 5793 would, if enacted, open the door to unchecked federal oversight, and rewriting of, all state and local tax laws and classifications. And since most state and local governments, unlike the federal government, must balance their budgets, such a federalization of state and local tax

[1] As an example, just eight years ago USCM, NLC, NACo, NATOA and GFOA worked with the wireless industry to enact the Mobile Telecommunications Sourcing Act of 2000, 4 U.S.C. §§ 116-126 (2000) ("MTSA"). I discuss MTSA in Part 3 below.

classifications would not even lower total taxes paid by state and local taxpayers; it would just redistribute the tax burden among those taxpayers.

1. H.R. 5793 Represents An Unprecedented, and Dangerous, Intrusion on State and Local Tax Authority That Would Threaten Our System of Federalism.

The Supreme Court has long recognized that state and local governments have broad discretion in the field of taxation, where they possess "the greatest freedom in classification."[2] The reason should be obvious: "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments,"[3] and our system of federalism therefore requires "scrupulous regard for the rightful independence of state governments" in matters of tax classification.[4]

H.R. 5793 departs radically from these longstanding principles of federalism. It would single out not just one sector of industry, but one subpart of the telecommunications industry sector – wireless services – for preferential federal preemptive protection from state and local tax classifications. That would set a precedent that would endanger state and local taxing authority in at least two very disturbing ways.

First, it would move us further away from state and local government efforts at telecommunications tax reform. The bill would essentially require that state and local governments treat wireless services more preferentially than their landline telecommunications service competitors. Narrowing the permissible tax base for telecommunications to landline telecommunications would put upward pressure on state and local landline telecommunications service taxes (and likely on public utility taxes as well). It does not take a prophet to figure out

[2] *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940).
[3] *Dows v. City of Chicago*, 78 U.S. (11 Wall) 108, 110 (1871) (quoted in *DirecTV, Inc. v. Tolson*, 513 F.3d 119, 123 (4th Cir. 2008)).
[4] *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 108 (1981) (quoted in *Tolson*, 513 F.3d at 123).

the next shoe to drop: The landline telecommunications industry will then demand from Congress similar preferential, preemptive protection from state and local taxes.

Second, and more generally, the bill would set an unprecedented, and dangerous, new standard for federal intervention into state and local government tax classifications. Under the bill, "discrimination" is defined as any tax imposed on a particular industry (in this case, the wireless industry) that "is not generally imposed, or is generally imposed at a lower rate," than that imposed generally on all businesses. If the standard for federal intervention into supposedly "discriminatory" state and local taxation becomes that every industry sector and every service has to be taxed at the same rate, then there would be no limit at all to federal intervention in state and local tax classifications. And you can expect other industries that are subject to different, and often higher state and local tax classifications – such as the utilities industries, the petroleum distribution industry, the entertainment industry, and others – to ask Congress for similar preemptive relief from state and local taxes.[5] Indeed, such a standard for "discriminatory" state and local taxes would mean, contrary to long-established precedent, that the federal government has the power to preempt *all* state and local tax classifications and to impose a federally-mandated state and local tax code of only a single tax rate for all businesses.

[5] The wireless industry's claim that its state and local tax burden is inappropriate given its non-monopoly status rests on the mistaken assumption that the telecommunications industry's historical monopoly status is the only rational tax policy justification for taxing different industry sectors at different rates. There are a variety of tax policy justifications for having different business tax classifications. To use but one example, telecommunications and utility services have different demand characteristics than many other consumer goods; demand for telecommunications and utility services tends to be less elastic, and less volatile in economic downturns, therefore providing a more stable, predictable tax base than taxes on most consumer goods. Telecommunications and utility services taxes also have different tax distribution effects than general sales taxes. Businesses tend to consume relatively larger amounts of telecommunications and utility services than residential consumers, meaning that the burden of telecommunications and utility taxes falls relatively more on businesses and less on residential consumers. If utility taxes and general sales taxes were equalized, the result would be a shift of the relative tax burden away from business taxpayers to residential taxpayers. *See* Tillman Lay, "Some Thoughts on Our System of Federalism in a World of Convergence," 2000 L. Rev. M.S.U.-D.C.L. 223, 233-34.

That would mean the end of state and local tax classification authority. The power of the federal government to preempt state and local taxes is ultimately the power to destroy state and local governments – a power that cannot be reconciled with our basic system of federalism.

2. There Is No Factual Basis for the Wireless Industry's Claims of Excessive State and Local Tax Burdens.

The remarkable and unprecedented intrusion into state and local tax classification H.R. 5793 would represent far outweighs any plausible benefit the bill would offer. In fact, when the arguments and data underlying the wireless industry's claims about state and local wireless taxes are assessed objectively, the bill is nothing more than a very drastic solution in search of an illusory problem. It is also nothing more than a self-interested plea by a single industry for its own special federal protection from state and local tax classifications.

a. There Is No Evidence That State or Local Taxes Have Had Any Adverse Effect on Wireless Industry Subscribership, Revenue or Investment.

The only plausible justification for such a dramatic federal intrusion into state and local tax classifications would be if it could be shown that state and local wireless taxes were having a uniquely harmful effect on the growth and health of the wireless industry. But there is no evidence of that at all.

To the contrary, allegedly excessive state and local wireless fees and taxes notwithstanding, the wireless industry has enjoyed remarkable growth, in terms of subscribers and revenues, over the past seven years. According to the FCC, wireless industry subscribership has grown 158% since 2000, and wireless industry revenue has grown 124% over that same period:

MOBILE WIRELESS TELEPHONE SUBSCRIBERS
and
TELECOMMUNICATIONS INDUSTRY WIRELESS SERVICE REVENUES

Year	No. of Mobile Wireless Telephone Subscribers[6] (in millions)	% Increase From Prior Year	Total Telecommunications Industry Wireless Service Revenues (in millions)	% Increase From Prior Year
2000	99.0	n/a	$ 62.0	n/a
2001	128.5	30 %	$ 74.7	20 %
2002	141.8	10 %	$ 81.5	9 %
2003	160.6	13 %	$ 89.7	10 %
2004	184.7	15 %	$ 98.6	10 %
2005	213.0	15 %	$ 107.1	9 %
2006	241.8	14 %	$ 115.3	8 %
2007[7]	255.4	6 %	$ 138.9	20 %
Total Cumulative 7-Yr Increase	156.4	158 %	$ 76.9	124 %

What these figures reveal is that, regardless whether one subjectively believes that a particular individual state or local tax or fee on the wireless industry is "too high," "too low," or "just about right," there is no evidence that collectively, those taxes and fees have had any measurable or even discernable impact at all on wireless industry growth. Nor have supposedly onerous wireless taxes stalled wireless industry investment; wireless providers "have been

[6] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Twelfth Report, 23 FCC Rcd 2241 (2008) ("*Twelfth Report*"). This report is available on the FCC's web site at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-28A1.pdf, and also at http://wireless.fcc.gov/index.htm?job=cmrs_reports#d36e145, which provides links to all the previous Annual Competition Reports beginning with the first report in 1995. *See also* Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, *Trends in Telephone Service* (August 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284932A1.pdf.

[7] The FCC has not yet published year-end data for 2007. The *Twelfth Report*, although adopted on January 28, 2008, and released on February 4, 2008, is retrospective and focuses on the marketplace for Commercial Mobile Radio Services as of the end of calendar year 2006. The total number of wireless subscribers and total industry wireless service revenues shown here for 2007 are those reported by CTIA-The Wireless Association® in its *Semi-Annual Wireless Industry Survey for Year End 2007* (2008), *available at* http://files.ctia.org/pdf/CTIA_Survey_Year_End_2007_Graphics.pdf.

spending about $20 billion per year over the past five years on network upgrades and service expansions."[8]

That wireless industry growth and investment seems little affected by state and local taxes is not a surprising conclusion. Wireless service growth in recent years has been characterized by large-scale, "macro" demand curve-shifting characteristics – decreasing cellphone unit size, increased convenience, and increasing number of services provided over cellphones – that would overwhelm any marginal effects of taxes on the industry's cost curve.

b. The Wireless Industry's Tax and Fee Data Shows Nothing Onerous or Excessive about the State and Local Wireless Taxes It Seeks to Preempt.

The wireless industry's claims of supposedly excessive taxes and fees are based upon an apples-and-oranges mix of federal, state and local fees and taxes, many of which would not be affected or limited by H.R. 5793 at all. CTIA, for instance, has claimed that "about 15 percent of each customer's monthly bill already [goes] to taxes and fees."[9] But this 15% figure includes federal taxes and federal USF charges.[10] The 15% figure also includes state USF fees and state or local E-911 fees, two categories of fees that H.R. 5793 exempts from its reach.[11] And the 15% figure also includes state and local general sales taxes, which of course would not be subject to the bill's moratorium.[12] Furthermore, the 15% figure also includes some state fees

[8] Scott Mackey, "Excessive Taxes and Fees on Wireless Service: Recent Trends," 47 *State Tax Notes*, 519, 521 (Feb. 18, 2008) ("*2008 Wireless Service Trends*").
[9] "CTIA – The Wireless Association® Calls for Passage of Cell Tax Fairness Legislation" (Apr. 15, 2008) *available at* http://www.ctia.org/media/press/body.cfm/prid/1752.
[10] *2008 Wireless Service Trends* at 519.
[11] *See id* at 519 & 523-531.
[12] *See id* at 523-531.

imposed generally on telecommunications service providers, such as telecommunications relay service for the deaf fees and state public utility commission fees.[13]

When these various federal and state fees and taxes are stripped away, what the wireless industry's own data show is that the level of true state and local taxes imposed on wireless service (that is, general revenue-raising state and local taxes) is not that significant at all.[14] And of the true state and local wireless taxes that remain, most are either telecommunications or utility taxes that apply not only to wireless services, but to landline services (and sometimes utility services and/or cable and satellite services) as well. Preempting the further application of such taxes to wireless service would simply create a new form of tax "discrimination" between wireless and landline telecommunications services and between wireless and other communications services generally. By federally mandating such discrimination, H.R. 5793 would frustrate the ability of state and local governments to reform telecommunications taxes by broadening the tax base. And it also will inevitably lead to new pleas by yet other sectors of industry – the landline telecommunications service sector, and possibly video service providers and utilities as well – for the same preemptive, federally-favored tax treatment. That, in turn, could only lead to further erosion of state and local tax bases for already cash-strapped state and local governments that must balance their budgets.

Thus, the wireless industry's claims about supposedly excessive state and local wireless taxes are based in large part on federal and state fees that H.R. 5793 would *not* preempt in any way. The perverse effect is obvious: By seeking to preempt state and local wireless taxes, industry seeks to blame local governments, and their general fund budgets, *not* for the taxes they

[13] *See id.* Indeed, if these latter categories of wireless or telecommunications-specific user fees were included in H.R. 5793's classification of "discriminatory taxes," the bill would give the wireless industry a tax *break* relative to other "general businesses."
[14] *See 2008 Wireless Service Trends* at 525-531.

have imposed, but for various user fees imposed by the federal and state governments that the bill saves from preemption.

The wireless industry presents no reliable aggregate data concerning the amount and number of the state and local taxes to which the bill actually would apply, pointing instead to an average "total tax and fee burden" on wireless, a substantial portion of which is composed of fees to which the bill would not apply at all. That is not evidence of excessive taxation of wireless services by local or state governments. It is instead evidence of a skewed and misleading manipulation of data to lead policymakers astray.

3. The Mobile Telecommunications Sourcing Act Ensures That State and Local Elected Officials Are No Less Sensitive and Responsive To Constituents Concerns About Wireless Taxes Than Congress.

Eight years ago, USCM, NLC, NACo, NATOA and GFOA and the wireless industry worked together to develop and support enactment of MTSA. Among other things, MTSA provides a simplified and uniform method for the imposition of state and local taxes on wireless service. It ensures that only a single state and a single local jurisdiction may tax wireless service: The state and locality where the wireless customer's "place of primary use" (either the customer's home or business address) is located. MTSA thus eliminates the possibility of double or inconsistent taxation of wireless by multiple jurisdictions.

MTSA also did something else: By permitting taxation only at a customer's place of primary use, it also ensures that a customer knows precisely what jurisdiction is responsible for a state or local wireless tax and thus what elected state or local officials to hold responsible if the wireless customer does not like the tax. Put a little differently, MTSA assures political accountability: A state or local wireless tax will end up being paid by the constituents of the state or local government that imposed the tax.

No more can be asked of a tax in our system of federalism. No elected official enjoys imposing, or increasing, any tax, and that is just as true of state and local elected officials as it is of members of Congress. There is one difference, however: State and local governments usually must balance their budgets. And political accountability ensures that if state or local government constituents who pay a wireless tax feel that the tax is excessive, there is a very effective cure: the election process.[15]

The federal preemption approach in H.R. 5793, in contrast, violates all principles of political accountability. It would enable the federal government to place a preemptive ceiling on state and local taxing authority, while leaving to state and local elected officials the difficult task of deciding what other taxes to raise, or services to cut, to compensate for the federal limitation. For political accountability to exist, the same governmental body that cuts or limits taxes must also be responsible for raising other taxes or cutting government services to pay for the tax cut. That principle of political accountability is a foundation on which the federal government's longstanding historical respect for state and local government tax classifications rests. And it is that foundation which H.R. 5793 would upset.

We therefore ask that the Subcommittee vote against approving H.R. 5793.

Thank you for your time, and I would be happy to answer any questions you may have.

[15] Indeed, a wireless industry spokesperson has elsewhere conceded as much. *See 2008 Wireless Service Trends* at 521, 523 & 524 ("the state-local [tax and fee] burden on wireless fell slightly between July 2006 and July 2007," "for the first time since 2003, no states imposed a new [industry-specific] tax or increased the rate of an existing [wireless-specific] tax," and "if state lawmakers and local officials target wireless consumers for new taxes and fees, they can expect more resistance [from their constituents] than in the past").