No. 13-1269

In the
Supreme Court of the United States

WORLDCOM, INC.,

Petitioner,

v.

INTERNAL REVENUE SERVICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents some 300,000 direct members and indirectly represents the interests of more than three million businesses and organizations of every size and in every industry sector and region of the country. A principal function of the Chamber is to advocate for the interests of its members by filing *amicus curiae* briefs in cases involving issues of concern to the nation's business community.

The Chamber and its members are deeply troubled by the decision below and its implications for the business community and the Internet. The Chamber has repeatedly supported prohibitions against federal, state, and local taxes on Internet access, in order to help to maintain the affordability of broadband and spur the deployment of the technology across the nation.

Yet despite the fact that Congress has repeatedly voted to impose a moratorium on taxation of Internet access, the court of appeals construed the federal excise tax on local telephone service—a tax originally created to fund the Spanish-American War and not

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2, the parties in this case have granted consent to the filing of this brief in letters on file with the Clerk's office.

substantively changed since 1965—to apply to data-only services that bear no resemblance to voice communication services covered by the tax. That holding threatens to undermine the affordability of broadband and other Internet services that are critical to continued technological development and efficient commerce across the nation. Moreover, while a broadly applicable Internet data-service excise tax would adversely impact businesses of all stripes, small businesses and under-served populations that benefit significantly from low-cost Internet access will likely be hit hardest by such a tax. Accordingly, the Chamber submits this brief to highlight the Second Circuit's erroneous construction of the tax statute and to underscore the importance of granting the writ.

SUMMARY OF THE ARGUMENT

The Second Circuit's conclusion that data-only services are covered by the "local telephone service" excise tax is wrong. The relevant statutory text makes clear that only services that can themselves complete local telephone calls are taxable under 26 U.S.C. § 4252(a). The Second Circuit's contrary conclusion is based on a convoluted construction of the statutory text and fails to account for why the textual variations the court found dispositive were adopted in the first place. The Second Circuit's holding is also irreconcilable with IRS revenue rulings, the FCC's long-standing view of how data-only services should be treated under federal law, and Federal Circuit precedent defining the scope of the "local telephone service" tax.

This is not the sort of case where the Court should defer review of the matter to some later date. The Second Circuit's unduly broad construction of the "local telephone service" tax threatens the continuing growth and availability of broadband Internet services and related data services that are vital to our nation's businesses and the growth of our economy. The IRS has already demonstrated a willingness to ignore the statutory text, not to mention its own interpretation of that text, in the name of the aggressive pursuit of tax collection. The Second Circuit's opinion will only embolden the IRS moving forward. But if any entity is going to reverse course on the progress that has been made in realizing the benefits of expanded broadband and Internet use through the application of an excise tax, it should be Congress and not the IRS or the courts.

ARGUMENT

I. The Second Circuit Wrongly Construed The "Local Telephone Service" Tax To Cover Data-Only Services.

Under a straightforward reading of the statutory provision governing the federal excise tax on "local telephone service," 26 U.S.C. § 4252(a), data-only services such as the one at issue in this case are not taxable. Federal law states that, in order to be taxable as a "local telephone service," the service must provide the purchaser "access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone or radio telephone stations constituting a part of such local telephone system." *Id.* The text makes plain that a "telephonic quality

communication" is one between the purchaser of the service and a person *using a telephone or radio telephone*, and a service offers the "privilege of" such communication only if it can be used with telephones or radio telephones to complete local voice calls. *Id.*

Rather than adopting the conclusion the plain text compels, the Second Circuit engaged in interpretive gymnastics to conclude that a service that cannot complete a local voice call nonetheless offers "telephonic quality communication" if it uses a communication channel that could in theory complete local voice calls if it were part of a different service. *See* Pet. App. 5a ("the COBRA system was theoretically capable of transmitting an ordinary telephone call" but "was not set up for voice communication"). The Second Circuit's reasons for reaching that atextual conclusion cannot withstand scrutiny. First, the Second Circuit thought its conclusion was supported by the fact that the statute speaks of both "telephonic quality communications" and "telephonic communications." In defining "toll telephone service," 26 U.S.C. § 4252(b)(1) uses the term "telephonic quality communication" and 26 U.S.C. § 4252(b)(2) uses the term "telephonic communication." Leaning heavily on the canon against surplusage, the Second Circuit reasoned that "telephonic *quality* communication" must include something more than "telephonic communication." *See* Pet. App. 14a-16a.

The Second Circuit's reasoning on this score is flawed for several reasons. As numerous courts have recognized, the language used in § 4252(b)(1) and § 4252(b)(2) simply "account[s] for the two distinct

billing methods employed in 1965 by AT&T, the sole long-distance provider at that time." *OfficeMax, Inc. v. United States*, 428 F.3d 583, 592 (6th Cir. 2005); *see, e.g.*, *Nat'l R.R. Passenger Corp. v. United States*, 431 F.3d 374, 375 (D.C. Cir. 2005) (discussing AT&T billing methods). In 1965, AT&T offered a single "long-distance telephone service" under "two billing plans": Message Toll Service ("MTS") and Wide Area Telephone Service ("WATS"). 431 F.3d at 375. "Congress designed subsection (b)(1) to cover MTS and subsection (b)(2) to cover WATS." *Id.* There is no reason to believe that Congress, in 1965, used "quality" in § 4252(b)(1) to ensure that a data-only long-distance service would be taxed if billed as MTS but not as WATS. Yet that is what the Second Circuit's interpretation requires. This unjustified application of the canon against surplasage is no basis to disregard the plain text of the statute.

Moreover, by myopically (and needlessly) focusing on the canon against surplusage, the Second Circuit ignored two other canons that would have resulted in an interpretation consistent with the plain text. The first is the canon against interpreting statutory provisions so as to avoid absurd results. *See Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 (1993) (discussing "the common mandate of statutory construction to avoid absurd results"). As just explained, the Second Circuit's construction leads to the senseless outcome that a data-only long-distance service would be taxed if billed one way (MTS) but not the other (WATS). The second is the canon that "if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer." *Hassett v. Welch*,

303 U.S. 303, 314 (1938). This Court has underscored that the "canon against surplusage is not an absolute rule." *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013). "[O]ther circumstances evidencing congressional intent … overcome the[] force" of that canon, as does the application of competing canons yielding results more consistent with the statutory text. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). So it is here.

Next, the Second Circuit concluded that the statute's definition of a now-obsolete data service—teletypewriter exchange service—which excludes "any service which is 'local telephone service,'" Pet. App. 17a (quoting 26 U.S.C. § 4252(c)), bolstered its view of the statute. Based on that provision, the court of appeals concluded that Congress must have thought that a service could "qualify as a local telephone service, even absent the provision of any voice communication," because it felt the need to explain that "local telephone service" did not count as "teletypewriter exchange service." Pet. App. 17a-18a.

That view ignores the historical evolution of the statutory text. In 1958, Congress imposed an excise tax on "any service" to which a teletypewriter "may be connected," "if by means of such connection communication may be established with any other teletypewriter." Pub. L. No. 85-859, § 133, 72 Stat. 1275, 1290 (1958). Like fax machines, teletypewriters could be used to communicate over local telephone lines. As a result, in 1958, local telephone service was taxed as "teletypewriter exchange service" when put to that use. *Id.* In 1965, Congress shifted gears and decided to tax "the

service" rather than "the equipment." H.R. Rep. No. 89-433, at 30 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1645, 1676. Accordingly, Congress changed the relevant definition to include only services that provide access "to the teletypewriter exchange *system* of which [the teletypewriter] is a part." 26 U.S.C. § 4252(c) (emphasis added). Section 4252(c) was amended to apply solely to teletypewriter-only services, and Congress' statement that such services are not taxed under § 4252(a) simply confirmed the changed focus of the excise tax to services as opposed to equipment. It in no way suggested that Congress meant for "local telephone service" to include services incapable of completing voice calls.

While the Second Circuit's reasoning fails on its own terms, several additional considerations also cut against the Second Circuit's conclusion that data-only services are subject to the federal excise tax on local telephone service. As an initial matter, while the IRS has changed its tune in recent litigation, its long-held view of § 4252(a) is that "telephonic quality communication" "means voice quality communication." *Excise Taxes; Communications Services*, 69 Fed. Reg. 40345, 40345 (July 2, 2004). Pursuant to that view, the IRS has found in a line of rulings that a service is *not* taxable as local telephone service if the "only information transmitted to" the customer "is in non-voice form," and that is true even where "the initial access to service begins on a voice quality line." IRS Priv. Ltr. Rul. 96-50-008, 1996 WL 715840 (Dec. 13, 1996); *see* IRS Priv. Ltr. Rul. 92-15-059, 1992 WL 801394 (Apr. 10, 1992) (e-mail service accessed from "public telephone network" that cannot complete local voice calls is not taxable); IRS Priv.

Ltr. Rul. 89-50-011, 1989 WL 597200 (Dec. 15, 1989) (same); Rev. Rul. 79-245, 1979-2 C.B. 380, 1979 WL 51191, at *2 (to be taxable a service must allow the purchaser to "plug[] in a regular telephone" and receive "telephonic (voice) quality communication").

The IRS's long-standing view that "telephonic quality communication" is "voice communication" or involves a service "capable of carrying such voice communication," IRS Priv. Ltr. Rul. 94-12-018, 1993 WL 604384 (Mar. 25, 1994), should have controlled even though the IRS ignored it in the proceedings below. *See* Pet. App. 18a-19a n.8 (The IRS did "not at all discuss the portion of the revenue ruling [79-245] that undercuts the position it takes here."). An agency cannot abandon ship for another vessel on an opposite course without providing a "reasoned explanation for its action" and "may not … depart from a prior policy *sub silentio*." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Lest there be any doubt, this rule applies with the same force to the IRS as it applies to all other agencies. *See Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (explaining that this Court has refused "to carve out an approach to administrative review good for tax law only").

The Second Circuit's conclusion also cannot be squared with FCC rules. The FCC treats data services like the one at issue here not as local calls, but as "analogous" to "long distance call[s]" that connect "the dial-up customer and the global" Internet. Order on Remand and Report and Order, *In re Implementation of the Local Competition*

Provisions of the Telecomms. Act of 1996, 16 FCC Rcd 9151 ¶¶ 58-60 (2001). The FCC also classifies data services that convert communications from one network protocol to another as information services that are exempt from statutory provisions governing local and long distance voice telecommunications services. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975-977, 992-995 (2005). The Second Circuit ruling thus creates substantial and unnecessary tension between (litigation-generated) IRS policy and FCC policy.

Last but by no means least, as WorldCom explains in its petition, the Second Circuit's approach in this case conflicts with Federal Circuit precedent. Under the rule adopted in *USA Choice Internet Services, LLC v. United States*, 522 F.3d 1332 (Fed. Cir. 2008), a service used solely for data transmission is taxable if—but only if—the purchaser could use that service to complete local telephone calls. Thus, the decision below and the Federal Circuit's decision in *USA Choice* are directly at odds.

II. A Broadly Applicable Tax On Data Services Threatens The Further Development And Deployment Of Internet And Broadband Services, To The Detriment Of The U.S. Economy.

The decision below "broaden[ed] the scope" of the tax on local telephone service to include "those communications in the same class, kind, or grade as communication by telephone." Pet. App. 15a (quotation marks omitted). In so doing, the Second Circuit's opinion opens the door to taxing Internet access and related broadband data services of all

shapes and sizes simply because some small component of those services touches on a local telephone service (broadly defined). As a result, the ruling below threatens to drastically exacerbate the "affordability barrier" that limits the reach of broadband Internet access, to the detriment of businesses and consumers alike. That an excise tax on Internet and broadband services could have a significant negative impact on the U.S. economy is all the more reason why the Second Circuit's decision should not escape this Court's review.

As the FCC recently reaffirmed, "[t]he Internet is America's most important platform for economic growth, innovation, competition, free expression, and broadband investment and deployment." *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, 2014 WL 2001752, at *1 (FCC May 15, 2014). "[T]he Internet has been, and remains to date, the preeminent 21st century engine for innovation and the economic and social benefits that follow." *Id.* Indeed, Internet access is "essential" in today's modern economy. Robert Crandall et al., *The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data*, 6 Issues in Economic Policy 1 (The Brookings Institution, July 2007) ("*Effects of Broadband Deployment*"); *see also*, *e.g.*, Office of Sci. & Tech. Pol'y & The Nat'l Econ. Council, *Four Years of Broadband Growth* 2 (June 2013), http://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf ("Broadband access is an essential part of our economy. Given the reliance of so many American businesses and families on this basic technology, it's easy to overlook that just 15

years ago broadband barely existed for consumers."); John L. Sullivan III, *Federal Courts Act as a Toll Booth to the Information Super Highway—Are Internet Restrictions Too High of a Price to Pay?*, 44 New Eng. L. Rev. 935, 956 (2010) ("Internet access [is] essential to daily life in today's economic climate.") (discussing survey data).

The Internet drives economic growth, productivity, and innovation by fostering a nationwide marketplace that promotes open access and efficiency. Businesses depend on the Internet for myriad reasons, such as to connect with potential employees and consumers, and consumers depend on the Internet to obtain information about products and to purchase those products. Small business owners in particular rely heavily on the Internet, which allows them to access new markets, interface with consumers, and create opportunities to compete on a global scale.

More specifically, the proliferation of broadband and Internet access has served as a catalyst for growth in many sectors of the U.S. economy. For example, the growth of the "manufacturing and services industries (especially finance, education and health care)" is directly tethered to the expansion of broadband coverage in the United States. *Effects of Broadband Deployment* at 2. And that growth has resulted in the increased output of U.S.-based goods and services, which, in turn, has generated countless "spillover" effects yielding "wide-reaching benefits across the economy." *Id.* at 2-3.

Internet access also improves people's lives. U.S. Chamber studies have highlighted the profound

social benefits that broadband access has had and will continue to have for people with disabilities, on innovations in telemedicine, and on access to education. *See, e.g.*, U.S. Chamber of Commerce, *The Impact of Broadband on Education* (Dec. 2010), http://uscham.com/1ggNhEp; Advanced Commc'ns. L. & Pol'y Inst., *The Impact of Broadband on Telemedicine*, http://uscham.com/TmJKue.

A broadly applicable excise tax on Internet data services places all of this at risk. Neither businesses nor consumers will be as likely to use such services as the costs of those services increase, especially when the increase is driven by the application of an antiquated tax (as opposed to an increase in the quality of service provided). This is particularly true for under-served consumers and businesses, such as those in many rural and inner-city areas. According to the Internet Tax Freedom Coalition, U.S. Census data show that lack of Internet access is "most prevalent among poorer and less educated Americans"—while 99% of American households earning $150,000 or more have Internet access, only 57% of American households earning $15,000 or less have that access. Internet Tax Freedom Coalition, *Did You Know?* (May 9, 2014), http://itfacoalition.org/the-issue/did-you-know/; *see Four Years of Broadband Growth*, *supra*, at 8-14 (discussing "uneven adoption" of broadband).

That is because even now—before the IRS has had an opportunity to broadly apply the Second Circuit's decision and drive up the cost of data services—many individuals cannot afford Internet access. The total cost of broadband access has affected and will

continue to affect the ability of price-sensitive underserved populations to take full advantage of the broadband revolution. As the White House has recognized, "price remains one of the key challenges to increasing broadband adoption in the United States." *Four Years of Broadband Growth*, *supra*, at 10. An FCC study concluded that 36% of those without broadband access blame the overall cost. FCC, *Connecting America: The National Broadband Plan* 168 (2010). As a result, many of those who stand to benefit the most from Internet access are least likely to have it.

By the same token, increasing the cost of data services through taxation makes those services less attractive to invest in and develop. That is why commentators and legislators have repeatedly noted the "critical" nature of steering clear of "new regulatory polices" that "reduce" incentives to invest in Internet access and broadband deployment. *Effects of Broadband Deployment* at 3; *see*, *e.g.*, S. Rep. No. 108-155, at 2 (2003), *reprinted in* 2004 U.S.C.C.A.N. 2435, 2436 (discussing the "need to ensure that taxes on Internet access will not pose a hurdle to … [basic] access or to the migration from basic Internet access to broadband Internet access"). By increasing the cost of broadband access, not only will the IRS's new backdoor Internet tax deter capital investment in network infrastructure, it will also slow growth in broadband-enabled jobs, which U.S. Telecom estimates to have added 6.3 million new jobs since 2010 alone. U.S. Telecom, Jobs, http://www.ustelecom.org/broadband-industry/broadband-industry-stats/jobs/.

In short, protecting the Internet and the data services it enables from the administrative and financial burdens of taxation fosters the advancement of Internet technology and creation of the corresponding economic and social benefits. The imposition of those burdens does the opposite. If anyone is to make the decision to broaden the telephone tax statute to cover data services and with that tax apply the brakes to the wheels of Internet-driven progress, it should be Congress. *See*, *e.g.*, *American Bankers Ins. Grp., Inc. v. United States*, 408 F.3d 1328, 1333 (11th Cir. 2005) (It is up to Congress "to bring the statute in line with today's reality," if it so chooses, and not for the courts "to bend an old law toward a new direction.").

The notion that the IRS will seek to use the Second Circuit's tax-friendly decision expansively, and thus erase the benefits of growing broadband and Internet use, is more than hypothetical. The IRS has already tipped its hand on the matter by expanding its claimed authority in the wake of *USA Choice*. When before the Federal Circuit in that case, the IRS promoted a rule that would allow taxation under § 4252(a) if the service at issue was susceptible to plugging in a phone and making a call. In other words, when the only thing standing in the way of using a service as a "local telephone service" was the choice of the service's purchaser, imposition of the telephone excise tax was appropriate. But the IRS has now taken this theory one gigantic step further and claimed the authority to apply the "local telephone service" excise tax to any system that merely contains a *component* that *might* be able to be used *by a different entity in a different system under*

different circumstances as part of a "local telephone system." That unjustifiable expansion potentially brings a number of services within the ambit of the IRS's telephone tax—including, but not limited to, conventional and high-speed Internet service, HDTV and digital video service, and even ATM service—that would not have been taxable under the IRS's view of the law as expressed in *USA Choice* (or, as described, numerous other regulatory actions). As the government's need for revenue continues to grow, the temptation to further exploit the "local telephone service" excise tax—especially given the political opposition to the enactment of new taxes—will likely grow in lock step.

Even if a broad swath of data services is not immediately targeted by the IRS, the risk that it could be due to the Second Circuit's decision is harmful in and of itself. Ambiguity about what is taxable and what is not distorts purchasing and investment decisions. And here, given the very substantial benefits that flow from widely available Internet access and use, courts should not be permitted to massage statutory language in a way that might satisfy the IRS, but freezes businesses and consumers while the IRS decides on its next move.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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