NO. 101873-8

SUPREME COURT OF THE STATE OF WASHINGTON

ASSURANCE WIRELESS USA, L.P., F/K/A VIRGIN MOBILE USA, L.P.,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

DEPARTMENT OF REVENUE'S ANSWER TO AMICUS CURIAE BRIEFS OF MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL ET AL. AND FORMER FCC COMMISSIONERS

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I. INTRODUCTION

Washington has made the policy decision to tax telecommunications services as a retail sale, and to require telecommunications providers to remit retail sales tax on their sales. The Legislature has not made an exception for Lifeline telecommunications service. And Assurance Wireless—a provider of Lifeline telecommunications service—has not established that Washington's tax laws are preempted under the Supremacy Clause. Consequently, Assurance owes the retail sales tax at issue in this appeal—as the Court of Appeals correctly decided.

Nonetheless, amicus curiae Multicultural Media, Telecom and Internet Council *et al*. ("Council") contends that this Court should accept review to address whether Washington's tax system as applied to Lifeline is bad policy. But the Council misapprehends the role of judicial review. As this Court recently explained, arguments about the wisdom of a statute are "not subject to judicial review." *In re Sargent*, 2023 WL 3874919 at

*7 (Wash. June 8, 2023) (internal quotations and citation omitted). Rather, the Legislature is the proper forum for debating whether Lifeline should be granted different tax treatment from other retail selling activity.

Arguments advanced by amicus curiae Former FCC Commissioners ("Former Commissioners") fare no better. The Former Commissioners posit that review is needed to address the relationship between the Federal Communications Commission (FCC) and the private contractor that administers the Lifeline program, the Universal Service Administrative Company (USAC). According to the Former Commissioners, the USAC had no independent authority to act on its own behalf and, therefore, cannot be liable for state taxes relating to Lifeline service. That, however, is not the law.

Federal tax immunity does not apply to government contractors unless the contractor is an "instrumentality" of the federal government—which is not the case here. This is true even when the contractor is heavily regulated, and when state taxes are

passed on to the federal government or "paid with government funds." *United States v. New Mexico*, 455 U.S. 720, 735, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982). The Former Commissioners offer a watered-down version of federal tax immunity—a version that cannot be squared with controlling precedent. This Court's review of the Former Commissioners' misguided interpretation of the law is not warranted.

For these reasons, and the reasons set out in the Department's Answer to Petition, review should be denied.

II. ARGUMENT

A. The Council Offers Only Policy Arguments Appropriately Directed to the Legislature, Not This Court

This appeal involves the application of Washington's retail sales tax laws to the sale of Lifeline telecommunications services. In upholding the Board of Tax Appeals, the Court of Appeals held that (1) the sale of Lifeline services is a retail sale under Washington law and (2) federal tax immunity does not exempt these sales from tax because the buyer is not "the

federal government or an instrumentality thereof." *Assurance Wireless, USA, LP v. Dep't of Revenue*, 25 Wn. App. 2d 237, 253, 522 P.3d 65 (2022). The decision is supported by the facts and established law and does not warrant further review.

Importantly, as the Court of Appeals correctly stated, the Legislature has defined a "retail sale" to include providing telecommunications services to consumers. *Assurance Wireless*, 25 Wn. App. 2d at 246 (citing RCW 82.04.050(5)). Equally as important, the Legislature has not enacted an exemption for Lifeline telecommunications services.

The Council asks this Court to accept review to address whether Washington's current tax laws are good public policy. Council Amicus Br. at 4, 8. The Court should decline.

This Court is not a legislative body. While it can take cases and controversies and determine whether a particular law was applied correctly or violates constitutional limits, it cannot set policy in the same way as the Legislature. It is "[t]he legislature's role … to set policy and to draft and enact laws." *Hale v.*

Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). Additionally, established separation of powers principles "bar [courts] from second-guessing the legislature's policy decisions . . . ." *State v. Hawkins*, 200 Wn.2d 477, 492, 519 P.3d 182 (2022) (citing *Hale*, 165 Wn.2d at 506).

Further, the Legislature is capable of making the type of policy changes that the Council champions. As a starting point, the Legislature can appropriately weigh the pros and cons of changing the law, including the fiscal impact on important governmental services such as funding public education, protecting natural resources, and providing public health and human services, to name only a few examples. If the Council would like to have the tax laws changed to benefit low income consumers of retail telecommunications service, they can present their arguments to the Legislature. Those arguments "are not pertinent" here. *City of Tacoma v. Tax Comm'n*, 177 Wash. 604, 617, 33 P.2d 899 (1934).

B. The Former Commissioners' Arguments Pertaining to Federal Tax Immunity Lack Merit

1. The Former Commissioners' view of the law cannot be squared with *United States v. New Mexico*

The Supremacy Clause prevents the states from directly taxing the federal government. It does not, however, prevent the states from taxing private entities which conduct business with the federal government or administer federal programs. *New Mexico*, 455 U.S. at 734.

New Mexico is controlling. In that case, the U.S. Supreme Court rejected many of the arguments and concepts advanced by the Former Commissioners. For instance, the Court summarily rejected the notion that federal tax immunity can be conferred on a government contractor based on agency principles. *Id.* at 733 (citing and discussing *United States v. Boyd*, 378 U.S. 39, 48, 84 S. Ct. 1518, 12 L. Ed. 2d 713 (1964)). It also rejected the notion that immunity may be conferred merely because a state tax impacts a government function, *id.* at 734, or is paid with government funds. *Id.* at 735. Instead, for courts to confer tax

immunity on a government contractor, the contractor "must actually 'stand in the Government's shoes.'" *Id.* at 736 (quoting *City of Detroit v. Murray Corp.*, 355 U.S. 489, 503, 78 S. Ct. 458, 2 L. Ed. 2d 441 (1958)). In all other cases, tax immunity may only be conferred by Congress. *Id.* at 737.

Ignoring *New Mexico*, the Former Commissioners argue that Washington's retail sales tax cannot be imposed on the USAC because—according to the Former Commissioners—the USAC is controlled by and subordinate to the FCC. As support, the Former Commissioners offer a mishmash of theories. First, they contend that the USAC is barred by FCC regulations from paying state taxes. Former Commissioners Amicus Br. at 10, 13. Second, they contend that the USAC cannot be liable for state taxes because Lifeline support payments are made from "federal funds," and disbursement of those funds "require approval by an FCC certifying official." *Id.* at 15. Third, they argue that the decision of the Court of Appeals contravenes the "private non-delegation doctrine under the U.S. Constitution." *Id.* at 16.

The Former Commissioners' view of the law cannot be squared with *New Mexico*, and does not raise any issue of substantial public interest warranting this Court's review, as explained below.

a. FCC regulations do not, and cannot, bar payment of state taxes

The Former Commissioners first argue that FCC regulations bar the USAC from paying state taxes, citing 47 C.F.R. §§ 54.7 and 54.403(a)(1) as authority. *See* Former Commissioners Amicus Br. at 10. However, those two regulations say nothing about the USAC's responsibility to pay state taxes. Instead, 47 C.F.R. § 54.7 pertains to the use of universal service support payments by persons receiving those payments from the USAC, not the USAC's use of contributions it collects from telecommunications carriers. Similarly, 47 C.F.R. § 54.403(a)(1) pertains to the amount of basic support payments an eligible provider is entitled to receive from the USAC. It is not a limitation on the USAC's ability to pay state taxes.

The other three federal regulations cited by the Former Commissioners, 47 C.F.R. §§ 54.407, 54.702, and 54.423, are also inapt. *See* Former Commissioners Amicus Br. at 13. Simply put, none of these regulations limit in any way the USAC's ability to pay its debts.

Just as importantly, the Former Commissioners fail to address 47 C.F.R. § 54.715(c), which provides that administrative expenses *incurred by the USAC* in connection with its administration of Lifeline and the other universal fund programs "shall be deducted from the annual funding of [those universal] support mechanism[s]." Moreover, the USAC's 2022 Annual Report lists "Tax Expenses" as one of its operating expenses. USAC 2022 Annual Report at 5 (listing "Tax Expenses" for 2022 of $176,946).[1] The record does not reflect whether any of that tax liability pertained to state taxes. But the listing of tax expenses on

[1] Available online at https://www.usac.org/wp-content/uploads/about/documents/annual-reports/2022/USAC_2022_Annual_Report.pdf.

the USAC's annual report, coupled with the lack of any relevant law or regulation purporting to bar the USAC from paying state taxes, undercuts the Former Commissioners' claim.

In any event, the FCC cannot confer federal tax immunity on the USAC, even if that were its intent. Conferring federal tax immunity on private entities is a power only Congress can wield. *New Mexico*, 455 U.S. at 738. And the Former Commissioners' mistaken view of the FCC's authority is not an issue warranting this Court's review.

b. The USAC is not clothed with federal tax immunity

The Former Commissioners do not argue that the USAC is a federal instrumentality. Instead, they contend that the USAC's administration of the Lifeline program should be disregarded because that entity provides only "ministerial services to the FCC" pursuant to FCC regulations and a 2018 "Memorandum of Understanding." Former Commissioners Amicus Br. at 14. They also contend that Lifeline contributions are "federal funds," and

that all disbursements made by the USAC "require approval by an FCC certifying official." *Id.* at 15.

However, the Former Commissioners fail to address how these circumstances can possibly clothe the USAC with immunity from Washington's tax laws under the "narrow approach to governmental tax immunity" applied by the courts. *New Mexico*, 455 U.S. at 735. The U.S. Supreme Court has expressly rejected the view that federal tax immunity applies merely because the economic impact of a state tax falls on the federal government or is paid from "federal funds." *Id.* at 734, 735. Likewise, no authority supports the view that federal oversight of the contractor's activities is relevant, as virtually all government contractors could claim that their actions are subject to oversight. And a federal agency cannot confer immunity on a government contractor "by changing a few words in a contract." *Id.* at 737 (quoting *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 126, 74 S. Ct. 403, 98 L. Ed. 546 (1954) (Douglas, J., dissenting)). Thus, none of the

circumstances the Former Commissioners allege in their brief would make the USAC immune from Washington's tax laws.

c. The FCC's delegation of responsibilities to the USAC does not violate the Constitution

The Former Commissioners' final argument in support of review posits that the Court of Appeals decision below, which held that the legal incidence of the retail sales tax owed on Assurance's sale of Lifeline services to Washington consumers did not fall directly on the FCC, "violates the private non-delegation doctrine under the U.S. Constitution." Former Commissioners Amicus Br. at 16. "The private nondelegation doctrine prevents 'governments from delegating too much power to private persons and entities.'" *Consumers' Research v. Fed. Commc'ns Comm'n*, 63 F.4th 441, 450 (5th Cir. 2023) (quoting *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 707 (5th Cir. 2017)). The doctrine "prevents agencies from giving private parties the 'unrestrained ability to decide whether another

citizen's property rights can be restricted.'" *Id.* (quoting *Boerschig*, 872 P.3d at 708).

As an initial point, the Commissioners' "private non-delegation doctrine" theory was not raised below. It is well established that appellate courts "will not address arguments raised only by [an] amicus." *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003). For that reason alone, the argument does not support granting review.

But even if Assurance had raised the issue below, it would have failed. Federal courts have uniformly rejected the claim that the FCC overstepped its authority when it appointed the USAC to administer the universal service fund programs. *Consumers' Research*, 63 F.4th at 451-52; *Consumers' Research v. Fed. Commc'ns Comm'n*, 67 F.4th 773, 795-96 (6th Cir. 2023). The USAC, among its various duties, is authorized to "collect, pool, and disburse the universal service support funds contributed by carriers." *In re Incomnet, Inc.*, 463 F.3d 1064, 1067 (9th Cir.

2006); *see also* 47 C.F.R. § 54.701(a) (delegation of authority to administer the "universal service support mechanisms"). As long as the FCC retains appropriate oversight and controls over these duties, there is no unconstitutional sub-delegation. *Consumers' Research*, 63 F.4th at 450-51. And nothing about the decision below suggests that the FCC violated any laws when it appointed the USAC to administer the Lifeline program, subject to FCC oversight. The Former Commissioners' unfounded speculation to the contrary is not an issue warranting this Court's review.

2. The Former Commissioners' slippery slope argument is mistaken

The Lifeline program is one of four "universal service fund" programs established by the FCC to increase access to telecommunications services throughout the nation. The others are the Connect America, Schools and Libraries, and Rural Health Care programs. Congress also recently enacted a related program pertaining to internet access, the Affordable Connectivity program. *See* https://www.fcc.gov/affordable-connectivity-program.

The Former Commissioners, seeking to bolster Assurance's petition for review, offer a slippery-slope argument, contending that if the sale of Lifeline to Washington consumers is subject to retail sales tax, the same could also be true for the other universal services programs. Former Commissioners Amicus Br. at 11-12. But that supposition is almost certainly incorrect.

The Department of Revenue, in a published Excise Tax Advisory, has explained that telecommunications support payments are not subject to retail sales tax unless the payments are directly related to a retail sale. ETA 3205-2017 at 3.[2] Lifeline meets this requirement because its support payments relate to telecommunications service "provided to the end consumer." *Id.* But when the support payment is made "without regard to a particular sales transaction," it is not taxed as a retail sale. *Id.* at 2. Thus, consistent with the Department's ETA,

[2] The ETA is at CP 284, and is available online at https://taxpedia.dor.wa.gov/documents/current%20eta/3205.pdf.

retail sales tax does not apply to support payments made under the other universal service fund programs because those payments are not related to a retail sale to end consumers.

Additionally, Washington does not treat internet access services as a retail sale. RCW 82.04.297(1). Thus, the recently enacted Affordable Connectivity program is not subject to retail sales tax, and that is unlikely to change.

The Former Commissioners' concerns about the application of Washington's tax laws to other universal service fund programs are misinformed and provide no persuasive reason for granting review of the decision below.

III. CONCLUSION

Amici offer no appropriate reason for this Court to accept review. Consequently, review should be denied.

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RESPECTFULLY SUBMITTED this 29th day of June, 2023.

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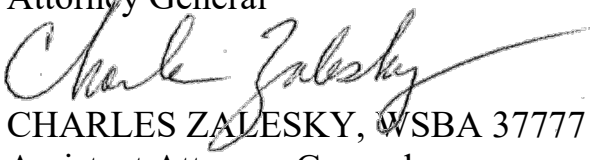

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of June, 2023, at Tumwater, WA.

Kyleen Inman, Legal Assistant

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