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.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Regulations

I. INTRODUCTION

Assurance Wireless USA (Assurance) meets none of the criteria for discretionary review in RAP 13.4(b). The Court of Appeals applied established law to undisputed material facts when it affirmed the Board of Tax Appeals and rejected Assurance's claim that it was not liable for remitting retail sales tax on its sales of "Lifeline" telecommunications service. *Assurance Wireless, USA, LP v. Dep't of Revenue*, __ Wn. App. 2d __, 522 P.3d 65 (2022). The decision below does not conflict with any decision of this Court or the Court of Appeals, raises no significant constitutional question, and involves no issue of substantial public interest.

Assurance posits, however, that further review is needed "to address the statutory and constitutional problems created by the Court of Appeals' decision." Pet. for Rev. at 4. Specifically, Assurance seeks review in order to rehash its prior arguments that (1) providing Lifeline service to Washington consumers does not involve a retail sale and (2) even if there was a retail sale of

telecommunications service, the "buyer" was the federal government. But the Court of Appeals cogently analyzed and rejected both arguments. So too did the Board of Tax Appeals. Assurance may not like the result, but its continued use of judicial resources to reargue its legal theories finds no support in RAP 13.4(b).

In short, Assurance throughout this appeal has pushed factual and legal arguments that are unsupported by the record or relevant law. Unsurprisingly, courts have rejected those arguments at every level of review. This Court's review of those same counter-factual arguments is not warranted. Accordingly, this Court should deny review.

II. STATEMENT OF THE ISSUES

1. Washington treats the sale of telecommunications service to consumers as a retail sale, and imposes a duty on the seller to remit the tax to the state. Did the Court of Appeals and Board of Tax Appeals correctly reject Assurance's argument

that providing Lifeline telecommunications service to Washington consumers is not a retail sale?

2. Under the intergovernmental tax immunities doctrine, states may not directly tax the federal governments or recognized instrumentalities of the federal government. Did the Court of Appeals and Board of Tax Appeals correctly reject Assurance's alternative argument that the incidence of the retail sales tax at issue falls on the federal government or an instrumentality of the federal government?

III. STATEMENT OF THE CASE

A. Assurance Provides Lifeline Telecommunications Service to Washington Consumers

This case involves subsidy payments Assurance received under the federal "Lifeline" program. Lifeline is one of four "Universal Service Fund" programs established by the Federal Communications Commission (FCC) to increase access to telecommunications services throughout the nation. CP 268. The other three programs are the Rural Health Care program, the Schools and Libraries program, and the Connect America Fund.

CP 304 at ¶ 10; *see also* https://www.fcc.gov/general/universal-service (last visited 4/28/2023). These programs are funded by contributions from telecommunications service providers. CP 304 at ¶ 10; *see also* CP 328-29 (describing how the Universal Service Fund programs are funded).

The Universal Service Fund programs—including the Lifeline program—are administered by the Universal Service Administrative Company (USAC). CP 304 at ¶ 10. The USAC is not a federal government agency. CP 299. Instead, it is a not-for-profit subsidiary of the National Exchange Carrier Association, Inc., which is an association of local exchange carriers. CP 278. As part of its duties, the USAC performs billing, collection, and disbursement functions with respect to the various Universal Service Fund programs.

A carrier seeking to participate in the Lifeline program in a particular state must first be designated by the state as an "eligible telecommunications carrier." CP 303 at ¶ 6. In 2010, Assurance obtained the necessary designation from the Washington Utilities

and Transportation Commission to offer its "Assurance Wireless" Lifeline plan to eligible Washington subscribers. CP 303 at ¶ 8. Under that plan, Assurance offered eligible subscribers a wireless phone along with monthly service consisting of a fixed amount of voice minutes, text messaging, and data. CP 303 at ¶ 9. As compensation, Assurance received payments from the USAC at the fixed rate of $9.79 per subscriber per month for periods prior to September 2012, and $9.25 per subscriber per month thereafter. CP 304 at ¶ 11.

For accounting purposes, Assurance treated the transaction as a sale at the time the service was provided to the consumer by debiting an "Accounts Receivable" asset account and crediting its "Prepaid Access/MRC" revenue account. CP 289.[1] When Assurance received the Lifeline subsidy payment from the USAC a month later, it credited (reduced) the Accounts Receivable asset account. CP 289-90. Assurance did not treat

[1] The acronym "MRC" likely stands for "monthly recurring charge."

the receipt of the subsidy payment as a new or different type of revenue.

During the 2011 through 2016 tax periods, Assurance received Lifeline subsidy payments from the USAC totaling $40,671,770. CP 304 at ¶ 12. Although the payments pertained to telecommunications service Assurance provided to Washington consumers, it did not report any of the payments on its Washington excise tax returns.

B. The Department Assesses Assurance for Unpaid B&O Tax and Unremitted Retail Sales Tax

The Department audited Assurance's excise tax records for the January 2010 through December 2011 tax periods and, at the end of the audit, issued an assessment for unpaid business and occupation (B&O) tax and retail sales tax on the subsidy payments Assurance received from the USAC during the audit period. CP 304 at ¶ 14; CP 332. Assurance petitioned the Department's Administrative Review and Hearing Division for review of the assessment.

While the administrative review petition was pending, the Department completed a subsequent audit of Assurance's excise tax records. CP 305 at ¶ 15. That audit resulted in an assessment of B&O tax and retail sales tax on payments Assurance received from the USAC for the January 2012 through December 2016 tax periods. *Id.*; CP 359. Assurance petitioned for review of the second assessment, which was consolidated with its prior administrative appeal.

The Department's Administrative Review and Hearings Division issued a written determination upholding the assessments. CP 305 at ¶ 17; CP 386.

C. The Board Grants Summary Judgment to the Department, Affirming the Tax Assessments

Assurance appealed the Department's determination to the Board of Tax Appeals. CP 426. Once discovery was completed, and after the parties had entered into a partial stipulation of the material facts, the Department filed a motion for summary judgment. CP 213. Assurance raised two arguments in opposition. First, it argued that no taxable sale occurred when it

provided Lifeline service to Washington consumers. CP 119-22. Second, it argued that even if a taxable sale occurred, the tax impermissibly fell on the federal government and must be abated. CP 123-29.

The Board granted the Department's motion, concluding that "[t]here is no prohibition against imposing B&O or retail sales tax on the Taxpayer for amounts it receives from the USAC for providing telecommunications services to consumers in Washington." CP 65-66. Shortly thereafter, Assurance sought judicial review of the Board's decision under the Administrative Procedure Act. CP 30. By agreement, the appeal was transferred to the Court of Appeals for direct review. CP 460. The Court of Appeals affirmed the Board, concluding that "a taxable retail sale occurred and … the tax does not fall on the federal government or an instrumentality of the federal government." *Assurance Wireless*, 522 P.3d at 68.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

A. The Court of Appeals Correctly Decided Both Issues, Rejecting Assurance's Counter-Factual Claims

At its core, Assurance seeks discretionary review to rehash the same arguments it offered below. Those arguments had no merit when presented to the Court of Appeals, and they have no merit now.

As explained by the Court of Appeals, Washington imposes retail sales tax on "each retail sale" in this state. *Assurance Wireless*, 522 P.3d at 70; *see also* RCW 82.08.020 (imposing retail sales tax).[2] A "retail sale" includes providing telecommunications service to consumers. RCW 82.04.050(5). The tax is imposed on the buyer, but the seller remains liable for payment of the tax if it fails to collect the tax from the buyer, whether that failure is "the result of the seller's own acts or the result of acts or conditions beyond the seller's control."

[2] Assurance has dropped its claim that it does not owe B&O tax. *See* Pet. for Rev. at 9 n.1.

RCW 82.08.050(3); *accord White v. State*, 49 Wn.2d 716, 725, 306 P.2d 230 (1957) (applying same principle to the E-911 tax, citing former RCW 82.14B.042(2) (2003)).

At the Court of Appeals, Assurance argued that it did not make retail sales of Lifeline telecommunications services because it was engaged in two separate, non-taxable transactions:

> Assurance argues that, in what it calls "business activity 1," it provides free services to Lifeline consumers and, because Assurance receives no consideration from the consumer, there is no sale at that stage. Assurance then argues that, in what it calls "business activity 2," "[d]ivorced from the consumer's enrollment and use of the prepaid telecommunication services" Assurance receives Lifeline payments from USAC as "an incentive to encourage participation in Lifeline."

Assurance Wireless, 522 P.3d at 70 (quoting from Assurance's merit briefs).

The Court of Appeals soundly rejected the argument, explaining that "[t]he language of FCC form 497, required under federal law, shows there is a retail sale occurring under

Washington law." *Id*. By filing form 497 each month, Assurance certified that it would pass through the full amount of Lifeline subsidy payments to the subscriber. *Id*. at 71; *see also* CP 137 (representative form 497). "Congress expected that Lifeline funds would be applied to the consumer's bill, which presupposes a sale, or toward providing a prepaid wireless plan, which also falls under the definition of a retail sale according to Washington law." *Assurance Wireless*, 522 P.3d at 71 (citing RCW 82.04.050(5) and RCW 82.04.065(21)).

Other undisputed facts in the record also undercut Assurance's "two transactions" argument, most notably its internal accounting practices. Consistent with basic accrual accounting, Assurance recorded the sale of Lifeline service as income at the time the service was provided to the eligible consumer by debiting an "Accounts Receivable" asset account and crediting its "Prepaid Access/MRC" revenue account. CP 289. When Assurance received the Lifeline subsidy payment from the USAC a month later, it credited (reduced) the

Accounts Receivable asset account and debited cash. CP 289-90. It did not book the receipt of the USAC payment as another type of revenue from some separate transaction.

The record plainly reflects that Assurance did not treat payments from the USAC as revenue from a distinct transaction in its accounting records, and there is no evidence that it did so for any other purpose. For this additional reason, the Court of Appeals correctly rejected Assurance's "two transactions" argument. Assurance offers no cogent reason for this Court to re-analyze the uncontested facts in the record or to review Assurance's counter-factual claim. Rather, if Assurance wants additional guidance on how to properly comply with the state's retail sales tax laws based on factual scenarios rather than unsupported suppositions, it can seek guidance from the Department. *See generally* Pet. for Rev. at 14-15 (positing rhetorical questions Assurance contends were left unanswered by the Court of Appeals).

Additionally, the Court of Appeals correctly rejected Assurance's alternative argument that the retail sales tax at issue falls directly on the federal government. No evidence supports the claim. Importantly, the FCC does not incur the legal obligation to pay Assurance and is not the "buyer" of Lifeline service under this Court's precedent. *See Murray v. State*, 62 Wn.2d 619, 624, 384 P.2d 337 (1963) (the "buyer" in a retail transaction is the person "*legally obligated* to pay the seller"); *F. D. Rich Co. v. State*, 79 Wn.2d 296, 300, 484 P.2d 1138 (1971) (quoting *Murray* and upholding retail sales tax imposed on the construction of military housing at Fort Lewis).

The evidence in the record points to the USAC as the entity legally obligated to pay Assurance for providing Lifeline service to Washington consumers. Not only did Assurance submit its monthly request for payment to the USAC, it received the payments directly from the USAC. CP 304 at ¶ 12. Moreover, the USAC, as the administrator of the Lifeline program, is "responsible for billing contributors, collecting

contributions … and disbursing universal service support funds." 47 C.F.R. § 54.702(b). That legal responsibility, coupled with the established course of dealing, suggests that the USAC was the person legally obligated to pay Assurance to complete the transaction. And, as discussed below in section IV.C of this Answer, the USAC is not constitutionally immune from Washington's tax laws.

The Court of Appeals correctly applied the material facts to established Washington law. Further, as discussed in section IV.C of this Answer, the Court of Appeals correctly applied established constitutional law. Because the retail sales tax at issue did not fall directly on the federal government, Assurance cannot avoid its obligation to remit the tax to the state. *F. D. Rich Co.*, 79 Wn.2d at 300.

B. The Court of Appeals' Decision Does Not Conflict with Any Decisions of This Court or Court of Appeals

The decision below does not conflict with any decisions of this Court or the Court of Appeals. To the contrary, the Court

of Appeals applied established precedent when it affirmed the Board of Tax Appeals.

Assurance makes a half-hearted claim that the Court of Appeals decision conflicts with this Court's decision in *Steven Klein, Inc. v. Department of Revenue*, 183 Wn.2d 889, 357 P.3d 59 (2015). Pet. for Rev. at 10. There is no conflict. *Steven Klein* involved a very different circumstance, and this Court's discussion of how the state's tax laws applied to that business has no bearing on how the tax laws apply to Assurance.

Steven Klein involved an automobile dealership that received incentive payments from an automobile manufacturer (Honda) to help boost the sales of certain vehicle models. 183 Wn.2d at 891, 892-93. The taxpayer argued that the payments were a non-taxable "bona fide discount" on its purchase of Honda automobiles, thereby reducing its purchase price, not a separate form of gross income subject to B&O tax. *Id*. at 901. The Department of Revenue, the Board of Tax Appeals, the Superior Court, and the Court of Appeals all disagreed, ruling

that the payments were subject to B&O tax under the "service and other" tax classification. *Id*. at 894-95. This Court affirmed, explaining that the "catchall" service and other B&O tax classification "applies to 'other' or 'addition[al]' business activities that do not constitute a retail sale." *Id*. at 898 (quoting RCW 82.04.290(2)). Klein Honda's participation in the dealer cash program "fits within the catchall provision" because it pertained to business activity unrelated to making retail sales. *Id*.

Assurance asserts that the decision below "contravenes" *Steven Klein* because the Court of Appeals did not determine whether the buyer of the Lifeline service was the USAC, who remitted payment to Assurance to complete the transaction, or the Washington consumers that signed up for and utilized the telecommunications service. Pet. for Rev. at 10-11. To reach its proposed conflict, Assurance seems to rely on this Court's summary of Washington's B&O tax system and, in particular, the statute imposing B&O tax on a taxpayer's "business

activities." Pet. for Rev. at 10-11; *see also Steven Klein*, 183 Wn.2d at 896 (summarizing the B&O tax system and quoting RCW 82.04.220(1)). Under the tax imposing statute, "the government … must first identify a business activity and then determine which tax measure and rate applies (depending on the business activity)." *Id.* at 896-97.

With respect to this appeal, and unlike the facts in *Steven Klein*, the Department determined that Assurance was engaged in a retailing business activity when it provided Lifeline telecommunications service to Washington consumers, and assessed Assurance for unpaid retailing B&O tax and retail sales tax. CP 386, 390. While Assurance argued against that tax classification based on its "two transactions" theory, the fact that the Court of Appeals sided with the Department and not Assurance does not create a conflict with *Steven Klein*. Here, the subsidy payments Assurance received from the USAC were directly related to a retail sale under Washington law, *see* RCW

82.04.050(5), whereas the dealer cash payments received by Klein Honda were not.

Additionally, Assurance's "who is the buyer" question was not an issue raised in *Steven Klein*. Rather, the answer to that question depends on whether the Lifeline reimbursements are direct payments from the USAC to Assurance for providing telecommunications service to low-income consumers (in which case, the USAC would be the buyer legally obligated to pay Assurance for the retail service) or represent an assignment of a benefit belonging to the consumers of the service (in which case, the consumers would be the buyer legally obligated to pay Assurance for the retail service). *See AARO Med. Supplies, Inc. v. Dep't of Revenue*, 132 Wn. App. 709, 719-20, 132 P.3d 1143 (2006), *rev. denied* 159 Wn.2d 1013, 154 P.3d 919 (2007) (Medicare beneficiaries were the buyers of medical products where the sellers received payment "through assignment from the Medicare beneficiary according to statutory conditions").

Regardless, Assurance remains responsible for remitting the tax to the state. RCW 82.08.050(3); *White*, 49 Wn.2d at 725.

Going forward, Assurance can gather facts relevant to its "who is the buyer" question and present them to the Department of Revenue in a request for a letter ruling. *See* https://dor.wa.gov/contact/binding-rulings-sellers-and-services-providers (explaining how to request a binding letter ruling). But for purposes of this appeal, the Court of Appeals was absolutely correct when it held that Assurance was responsible for paying the tax to the state under either circumstance. *Assurance Wireless*, 522 P.3d at 74. Review of Assurance's "who is the buyer" question by this Court at this time is not warranted.

C. The Decision Below Raises No Substantial Constitutional Issues

As an alternative to its "two transactions" argument, Assurance contends that the legal incidence of the retail sales tax falls on the FCC. As previously discussed, no facts in the record support the claim. Additionally, Assurance ignores or

misstates controlling law and mischaracterizes the reasoning of the Court of Appeals, suggesting that the Court "pronounced a new test" for applying federal tax immunity. Pet. for Rev. at 30. The Court of Appeals did no such thing, and Assurance's misguided attack on the lower court's reasoning raises no substantial constitutional issue warranting this Court's review.

1. The intergovernmental tax immunities doctrine does not bar nondiscriminatory state taxes on government contractors

In its Petition, Assurance offers a confused mixture of reasons why the FCC, and not the USAC, is directly liable for retail sales tax imposed on the sale of Lifeline services. Pet. for Rev. at 20-29. But Assurance never addresses the controlling law. A quick summary of the intergovernmental tax immunities doctrine may be helpful in providing context.

The United States Constitution does not expressly provide that the states may not tax the federal government or instrumentalities of the federal government. However, courts

have long recognized that the Supremacy Clause[3] implicitly bars state taxation of the federal government. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819). Although not directly relevant in this appeal, there is also an implied bar on federal taxation of the sovereign states. *South Carolina v. Baker*, 485 U.S. 505, 518 n.11, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988). These implied limits are referred to as the "intergovernmental tax immunities doctrine." *Baker*, 485 U.S. at 517.

For a time, courts applied the doctrine broadly to shield government *contractors* from taxes imposed by a different sovereign. By the late 1930s, however, that "general immunity for government contract income [had] been thoroughly repudiated." *Id*. at 520. Under modern case law, the doctrine is limited to "only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign

[3] U.S. Const. art. VI, cl. 2.

or those with whom it dealt." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 811, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989).[4]

When addressing the reach of the doctrine, the Supreme Court has consistently held that it is of no importance that a tax might be passed on to the federal government or burden a governmental function. *See, e.g., United States v. California*, 507 U.S. 746, 753, 113 S. Ct. 1784, 123 L. Ed. 2d 528 (1993) ("whereas the Government is absolutely immune from direct taxes, it is not immune from taxes merely because they have an 'effect' on it, or 'even because the Federal Government shoulders the entire economic burden of the levy'") (quoting *United States v. New Mexico*, 455 U.S. 720, 734, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982)). In short, tax immunity "does not exist where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence

[4] Assurance does not argue that imposing retail sales tax on Lifeline telecommunications service is discriminatory.

upon the exercise of the functions of government." *Columbia River Bridge Co. v. State*, 46 Wn.2d 385, 390, 282 P.2d 283 (1955) (internal quotation marks and citation omitted).

A state tax falls directly on the federal government only if it is imposed "on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." *Baker*, 485 U.S. at 523 (quoting *New Mexico*, 455 U.S. at 735). The Supreme Court has not identified a bright-line test to determine if a private entity is an "instrumentality" of the federal government. *See Dep't of Emp't v. United States*, 385 U.S. 355, 358-59, 87 S. Ct. 464, 17 L. Ed. 2d 414 (1966) (there is "no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality"). Rather, the Court has employed a number of legal formulations. *See First Agric. Nat'l Bank v. Massachusetts Tax Comm'n*, 392 U.S. 339, 353, 88 S. Ct. 2173,

20 L. Ed. 2d 1138 (1968) (Marshall, J., dissenting) (describing "[v]arious formulations" the Court has used).

More recently, however, the Court has narrowed the concept of an "instrumentality" of the federal government, deferring instead to congressional power to designate an entity as immune from state tax when it sees fit to do so. *See, e.g., New Mexico*, 455 U.S. at 737 ("If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision"). Consistent with this narrow approach, it is well established that tax immunity "requires something more than the invocation of traditional agency notions: to resist the State's taxing power, a private taxpayer must actually 'stand in the Government's shoes.'" *Id.* at 736 (quoting *City of Detroit v. Murray Corp. of Am.*, 355 U.S. 489, 503, 78 S. Ct. 458, 2 L. Ed. 2d 441 (1958)).

2. No evidence supports Assurance's claim that the sales tax at issue falls directly on the FCC

Assurance speculates that Washington's retail sales tax on Lifeline services falls directly on the federal government. According to Assurance, "Congress delegated all responsibility to the FCC to administer Lifeline and its congressionally-designated funding—making the FCC the only entity legally liable for Lifeline." Pet. for Rev. at 21. Assurance also contends that the federal government's tax immunity should be applied broadly. *Id*. at 29. Both arguments fail.

First, no facts in the record suggest that the FCC is the entity liable for the sales tax at issue. The FCC does not directly interact with Assurance or other Lifeline providers, does not collect Lifeline funds, and does not remit payment to providers. Rather, the undisputed facts and controlling law prove that the USAC has taken on those responsibilities. *See, e.g.,* 47 C.F.R. § 54.702(b) (USAC is tasked with collecting and distributing Universal Service funds). The USAC is not a federal government agency. CP 299. Instead, it is a not-for-profit subsidiary of an

association of local exchange carriers. CP 278. As part of its duties, the USAC performs billing, collection, and disbursement functions with respect to the various Universal Service Fund programs it administers. *Id*. The funds its uses to make disbursements—including the Lifeline disbursements at issue here—are collected from telecommunications carriers that are required by federal law to contribute to the Lifeline program and the other Universal Service Fund programs. CP 278.

From these undisputed facts, Assurance cannot show "that the legal incidence of the challenged tax falls on the FCC." *Assurance Wireless*, 522 P.3d at 73. It is settled law that federal tax immunity is not invoked merely because a state tax might impact a federal program. *New Mexico*, 455 U.S. at 734-35. As the Court of Appeals correctly explained, "'[s]o long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory.'" *Assurance Wireless*, 522 P.3d at 72 (quoting *Washington v. United States*, 460 U.S. 536, 540, 103 S. Ct. 1344, 75 L. Ed. 2d 264 (1983)).

Assurance also cannot show that the USAC is an instrumentality of the FCC. To qualify as an instrumentality, a private actor must be "'so assimilated by the Government as to become one of its constituent parts.'" *New Mexico*, 455 U.S. at 736 (quoting *United States v. Boyd*, 378 U.S. 39, 47, 84 S. Ct. 1518, 12 L. Ed. 2d 713 (1964)). That difficult standard is not met by asserting an agency relationship with the federal government. *Id*. If the law were different, federal tax immunity "could be conferred by a simple stroke of the draftsman's pen." *United States v. District of Columbia*, 669 F.2d 738, 744 n.8 (D.C. Cir. 1981) (quoting *United States v. Twp. of Muskegon*, 355 U.S. 484, 486, 78 S. Ct. 483, 2 L. Ed. 2d 436 (1958)). In light of this established law, the Court of Appeals correctly rejected Assurance's claim that the USAC was a federal instrumentality merely because the USAC, when carrying out its various functions, must comply with FCC regulations. *Assurance Wireless*, 522 P.3d at 74.

Finally, Assurance is wrong when it argues that the courts should broadly apply federal tax immunity. *See* Pet. for Rev. at 29. The United States Supreme Court held just the opposite in *New Mexico*, explaining that courts should not confer federal tax immunity on a private person unless that person "actually stand[s] in the Government's shoes" and is "so assimilated by the Government as to become one of its constituent parts." *New Mexico*, 455 U.S. at 736 (internal quotation marks and citations omitted). In all other cases, tax immunity may only be conferred by Congress. *Id*. at 737.

Courts have consistently followed the guidance in *New Mexico* over the past forty years. *See, e.g., Arizona Dep't of Revenue v. Blaze Const. Co., Inc.*, 526 U.S. 32, 35, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999). This "'narrow approach' to the scope of governmental tax immunity'" fits with "'competing constitutional imperatives, by giving full range to each sovereign's taxing authority.'" *Id*. (quoting *New Mexico*, 455 U.S. at 735-36). Thus, for federal tax immunity "to be

expanded beyond these 'narrow constitutional limits,' … Congress must 'take responsibility for the decision'" *Id*. at 35-36 (quoting *New Mexico*, 455 U.S. at 737).

Assurance's arguments fly in the face of *New Mexico* and forty years of established precedent, and do not warrant further review. To prevail in its refund claim, Assurance was required to prove that the challenged tax fell directly on the FCC or an instrumentality of the federal government. Assurance did not meet that burden below, and offers no compelling reason why this Court should re-weigh the evidence under a "broad" application of federal tax immunity.[5]

[5] Assurance suggests for the first time in its Petition that the FCC has no authority to delegate its Universal Service Fund responsibilities to the USAC. Pet. for Rev. at 27-28. Assurance did not raise this issue before the Board of Tax Appeals or the Court of Appeals. In any event, federal courts have generally rejected the notion that the FCC overstepped its authority when it appointed the USAC to administer the Universal Service Fund programs. *Cf.*, *Consumers' Research v. Fed. Commc'ns Comm'n*, 63 F.4th 441, 451-52 (5th Cir. 2023) (FCC properly delegated authority to the USAC to seek contributions from telecommunications providers to fund the Universal Service

3. The Court of Appeals did not "pronounce a new test"

Assurance wrongly contends that the Court of Appeals "pronounced a new test: requiring Assurance to 'show[] a clear congressional mandate that USAC or USF funds [are] exempt from state taxation." Pet. for Rev. at 30. The Court of Appeals did no such thing. Rather, the Court correctly applied the law, recognizing that (1) the USAC was not an instrumentality of the federal government under the analysis in *New Mexico*, and (2) Congress had not acted to confer tax immunity on the USAC. *Assurance Wireless*, 522 P.3d at 73-74. In short, the Court of Appeals looked at both parts of the *New Mexico* analysis—whether the person "stands in the shoes" of the federal government or, alternatively, whether Congress has acted.

The Court of Appeals did not adopt a "new test," but faithfully followed the holding and analysis in *New Mexico* and other controlling precedent. Assurance simply misstates the

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Fund). As long as the FCC retains appropriate oversight and controls, there is no unconstitutional "subdelegation." *Id*.

lower court's analysis, which does not provide a basis for discretionary review.

V. CONCLUSION

The Court of Appeals applied well-established law to reach the correct result in this case. Assurance can show no conflict with any prior decisions of this Court or the Court of Appeals, and fails to establish any substantial constitutional issue that merits this Court's review. Accordingly, the Department respectfully requests that this Court deny review.

This document contains 4,977 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 8th day of May, 2023.

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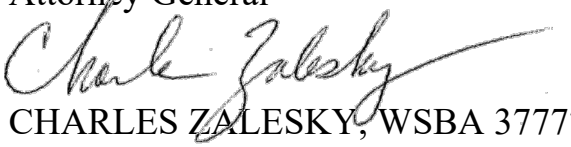

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PROOF OF SERVICE

I certify that on May 8, 2023, through my legal assistant, I electronically filed and served this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal and served a copy of this document via electronic mail, pursuant to agreement, on:

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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 8th day of May, 2023, at Olympia, WA.

s/Charles Zalesky
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