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**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.

**MEMORANDUM OF *AMICI CURIAE*
MULTICULTURAL MEDIA, TELECOM AND
INTERNET COUNCIL; NAACP ALASKA OREGON
WASHINGTON STATE-AREA CONFERENCE; AND
WA BUILD BACK BLACK ALLIANCE IN SUPPORT OF
PETITION FOR REVIEW**

Blake J. Robinson, WSBA
#45119

Davis Wright Tremaine LLP
1300 SW Fifth Avenue
Suite 2400

Portland, OR 97201

Tel: (503) 778-5341

Email: blakerobinson@dwt.com

Heather Moelter

(*pro hac vice* pending)

Davis Wright Tremaine LLP
1300 SW Fifth Avenue
Suite 2400

Portland, OR 97201

Tel: (503) 778-5406

Email: heathermoelter@dwt.com

Attorneys for Amici Curiae

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The Multicultural Media, Telecom and Internet Council, NAACP Alaska Oregon Washington State-Area Conference, and WA Build Back Black Alliance respectfully submit this Memorandum of Amici Curiae. As more fully explained in its concurrently filed Motion for Leave to File Memorandum of Amici Curiae, *amici* support efforts to close the digital divide through the Federal Communications Commission’s (“FCC”) Lifeline program and other programs like it that bring broadband access to more people of color and other vulnerable populations.

II. INTRODUCTION

For nearly forty years, the federal Lifeline program has benefited millions of low-income Americans by giving them access to vital communications services. The Washington Court of Appeals’ Opinion (“Opinion”) jeopardizes low-income individuals’ access to the Lifeline program and its crucial services.

The Court of Appeals ruled that Lifeline services are subject to Washington sales tax, based on the amount of federal funds paid to Lifeline carriers to support the availability of Lifeline service. The court ruled that *either* the Lifeline recipient or the Universal Service Administrative Company (“USAC”) is the “buyer” of Lifeline service and should pay sales tax on some amount of the federal support. That decision is incorrect and introduces uncertainty as to who will actually bear the liability of this new tax.

Imposing the sales tax on low-income Lifeline recipients would be an unexpected and substantial burden on the people least able to afford it. Worse yet, this additional tax could prevent the very people Congress intended to benefit from universal service programs like Lifeline from accessing the services. Appellant, like most Lifeline carriers, offers *free* prepaid Lifeline plans as part of a “government assistance program.” If Lifeline carriers must collect sales tax from Lifeline recipients based on the Lifeline reimbursement amount, the recipients would be

burdened with an unexpected cost of up to \$0.95 per month. Although this amount may not seem like a lot of money, to low-income Lifeline beneficiaries, it might make the difference between having telecommunications and broadband services, or going without.

Also, the Lifeline program depends on the voluntary participation of carriers, which receive support through federally disbursed funds overseen by the FCC and held by the U.S. Department of the Treasury. However, if in Washington, Lifeline carriers must either face the quandary of collecting sales tax from the federal government, charging low-income individuals with whom they often have no billing relationship, or assuming the additional cost of providing service itself, Lifeline carriers will be deterred from future participation. This damages the stability of the Lifeline program and, ultimately, Lifeline recipients dependent on this program for essential communications services.

Alternately, imposing a sales tax obligation on USAC, the universal service programs administrator for the FCC, including Lifeline, directly burdens the federal government's Lifeline program. Setting aside the unconstitutionality of imposing sales tax on the federal government, taxing USAC means diverting federal funds away from low-income individuals in Washington and potentially eroding the framework of other federal universal service programs.

Accordingly, *amici* urge this Court to grant the Petition for Review to consider the negative ramifications the Court of Appeals' decision would have on Lifeline and low-income Washingtonians' access to affordable communications services.

III. ARGUMENT

A. Lifeline supports essential access to communication services for low-income individuals and minority communities.

The Lifeline program ensures that “qualifying low-income Americans have the opportunities and security that voice service brings, including being able to find jobs, access health care, and

connect with family.” *Lifeline and Link Up Reform and Modernization*, 30 FCC Rcd. 7818, 7819 (2015). Lifeline’s goal is to ensure all Americans are able to access the communication services necessary to participate fully in society. Only the most vulnerable segments of society qualify for Lifeline. *See* 47 C.F.R. § 54.409 (establishing qualification for Lifeline at or below 135 percent of the Federal Poverty Guidelines or participation in other federal assistance programs).

Historically, individuals that lacked access to digital technology and communications services have been on the wrong side of the so-called “digital divide.” Even as recently as 2020, over eighteen million Americans lacked access to fixed high-speed terrestrial broadband¹. *In re Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans*, 35 FCC Rcd. 8986, 9034 (2020). Communities of

¹ “Broadband” is a specific type of Internet access that is always available over cables or fiber at a specific location, as opposed to a mobile or wireless Internet access service.

color have disproportionately fallen on the wrong side of this divide. See Ayebea Darko et. al, *Closing the Digital Divide in Black America*, MCKINSEY, <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/closing-the-digital-divide-in-black-america#/> (last visited June 6, 2023).

The availability of affordable wireless services through Lifeline, including data plans, has played a significant role preventing this divide fromg being even wider. *Lifeline: Improving Accountability and Effectiveness: Hearing before the Subcomm. on Comm., Technology, Innovation, and the Internet of the Comm. on Com., Sci., and Transp.*, 114th Cong. 17-21 (2015) (statement of Scott Bergmann, Vice President, Regulatory Affairs, CTIA) (“The impact of the Lifeline program has been especially dramatic with respect to households with incomes of less than \$10,000.”). The gap in telephone subscribership between low-income households and all households nearly halved once the FCC permitted wireless

carriers to participate in Lifeline. *Id.* Specifically, the introduction of free wireless plans has made it easy and affordable to get connected, and contributed to the growth of Lifeline participation. United States Government Accountability Office, *FCC Should Evaluate the Efficiency and Effectiveness of the Lifeline Program*, GAO-15-335, Mar. 2015.

Free wireless through Lifeline addresses some of the greatest barriers to broadband and communications options, providing both widespread access and affordable pricing structures that attract people of color, low-income households, rural populations, and other underserved groups. “When consumers are able to only intermittently remain on the network, they are not fully connected to society and the economy because, among other things, they are unable to apply for and receive callbacks for jobs or reach important social services, health care, and public safety agencies on a constant basis.” *Lifeline and Link Up Reform and Modernization*, 27 FCC Rcd. 6656, 6665 (2012). For communities of color in particular, which have historically faced

inequities in access to resources for advancement, a communications connection means a connection to opportunity and a range of associated beneficial outcomes, including economic empowerment, improved healthcare outcomes for chronic illnesses, broader opportunities for advanced education, safer workplaces, and much more. *See* Sophia Campbell, et. al, *The Benefits and Costs of Broadband Expansion*, BROOKINGS INSTITUTE (Nov. 9, 2021), <https://www.brookings.edu/blog/up-front/2021/08/18/the-benefits-and-costs-of-broadband-expansion/> (discussing significant social returns from broadband investment). Lifeline’s success in bridging the digital divide depends on this attractive prepaid wireless plan being *free*, not one with an additional hidden cost to consumers.

B. Taxing vulnerable populations directly undermines Lifeline’s important objectives.

Collecting sales tax from low-income individuals on their free prepaid wireless service is poor policy and will undercut the goals of Lifeline. The Court of Appeals’ Opinion implied that either Lifeline recipients are—or USAC is—liable for the sales

tax on some portion of the Lifeline support amounts that the Lifeline carriers receive from the federal government because that support is third-party consideration. (Opinion 10.) Either outcome has a detrimental effect on low-income customers.

If Lifeline recipients are the “buyer” of the free plans, then Lifeline carriers have an obligation to collect sales tax from all Lifeline recipients. Any unpaid tax would constitute a debt from the buyer to the seller. RCW 82.08.050(8). This not only exposes future subscribers to a tax, but it could also expose past Lifeline recipients to additional tax debts. For many low-income individuals, the additional expense might be significant enough for them to forgo wireless services in favor of basic necessities, such as food. FCC, Report on the State of the Lifeline Marketplace 30 (2021), <https://www.fcc.gov/general/e-rate-schools-libraries-usf-program>.

Taxing the *free* prepaid wireless plans would also mislead and confuse vulnerable populations. Prepaid wireless plans are advertised as a free plan, and must note that “Lifeline is a

government assistance program.” 47 C.F.R. § 54.405(c). Also, because the Court of Appeals did not specify the consideration amount on which the tax is to be calculated (Petition for Review 14–15), this lack of clarity poses problems not only for the Lifeline carrier who must calculate and collect the tax, but for the Lifeline recipient who may be liable for the furtive tax amount. The Lifeline recipient has no transparency into how the tax they are being charged is calculated. Nor are Lifeline recipients expert in the FCC rules and regulations or aware of the \$9.25 reimbursement. And since a Lifeline recipient only needs to verify eligibility on an annual basis to receive service without any interaction with the Lifeline carrier, recipients would not be aware they are even incurring a monthly charge.

C. Imposing a new tax on Lifeline customers, by extension, is a new tax on Lifeline carriers that threatens the availability of Lifeline services for low-income customers.

If the Lifeline recipient fails to pay their portion of the sales tax, requiring Lifeline carriers to absorb the consequences (unless they take legal action against the low-income recipients)

is also detrimental to low-income customers, as the additional cost to Lifeline carriers would disincentivize broad carrier participation. Ensuring continued participation by multiple carriers is critically important to close the digital divide. Lifeline recipients benefit from as many participating carriers as possible, as increased competition among Lifeline providers “will result in better services for eligible consumers to choose from and more efficient usage of universal service funds.” *In re Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund*, 31 FCC Rcd. 3962, 4041 (2016); accord *In re Lifeline and Link Up Reform and Modernization*, 30 FCC Rcd. 7818, 7821 (2015).

If the Opinion stands, Lifeline carriers would be disincentivized from participating in the Lifeline program for multiple reasons. First, participation in the program comes at an additional cost to the carrier, as they, practically speaking, are unable to collect the tax from the Lifeline recipients. The current

disbursement model administrated by USAC does not tie Lifeline reimbursements to individuals' billing information from the carrier's perspective. *See* 47 C.F.R. § 54.407. The inability to collect from end users is especially true for Assurance and other wireless carriers that provide free prepaid service. Many Lifeline recipients never receive bills or provide payment methods. Carriers cannot realistically recover this additional amount through litigation, given that the litigation cost is disproportionately larger than the sum that could be recovered from any one low-income individual (assuming that the resulting judgment would even be collectible, which is unlikely).

Nor is there a mechanism that carriers can use to enforce the tax liability by incentivizing payment of an additional amount by Lifeline subscribers. Federal law prohibits Lifeline providers from cutting off service based on a customer's failure to pay, which would include an amount based on the purported state tax

obligation. *See* 47 C.F.R. § 54.405 (setting out de-enrollment procedures and obligations).

Additionally, carriers not providing Lifeline services will not have to pay this tax out of their own pocket, as they can collect sales tax from their more affluent customers. Thus, a desire to avoid additional tax burdens (and the associated competitive disadvantage) would deter Washington carriers from joining or continuing to participate in Lifeline.² This diminished participation would further restrict low-income customer access to affordable services, causing substantial harm to vulnerable populations.

D. Mischaracterizing the FCC's active role in Lifeline threatens all Universal Service programs.

In alternatively concluding that USAC might be the buyer of Lifeline services, the Court of Appeals also mischaracterized

² Carriers may discontinue participation in Lifeline by simply notifying the state commission. *See* 47 U.S.C § 214(e)(4). The carrier only needs to show that there will be at least one remaining Lifeline provider in the carrier's service area. *Id.*

USAC's role. USAC is a mere administrator of the FCC's program, performing data review and making non-binding recommendations to the FCC regarding the Lifeline program. The money that funds Lifeline is federal funding, and the FCC does not delegate any authority to USAC, or otherwise provide USAC with any discretion on how to spend federal funds. Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company, 2 (Dec. 19, 2018), <https://www.fcc.gov/sites/default/files/usac-mou.pdf> ("MOU"). The universal service funds are held by the U.S. Department of the Treasury, not USAC. MOU at 2, 12. Nor is USAC responsible for the disbursement of federal funds. *See* MOU at 12 ("USAC understands and agrees that all disbursements from the USF Treasury account require approval by a FCC certifying official.").

Instead, Congress vested this authority to develop and oversee Lifeline in the FCC, creating it in part "to make available

. . . to all the people of the United States . . . communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151. Universal service programs, such as Lifeline, are one of the ways the FCC accomplishes this objective. 47 U.S.C. § 254. The Court of Appeals’ conclusion that USAC can incur and pay amounts subject to its own discretion is badly aligned with Congress’ intent.

This mischaracterization critically undermines the FCC’s authority, not just for Lifeline but for all of the universal service programs which USAC administers. If the Court of Appeals decision stands, and USAC can be billed for state sales taxes on all universal service support payments, it could set a precedent for taxing USAC on all other universal service programs, such as the High Cost Program (subsidizing rural connectivity services), E-Rate (subsidizing school and library broadband service), and Rural Health Care (subsidizing connectivity for rural hospitals and health clinics). These financial support programs all serve a crucial role in expanding access to communications services, and

Washington should not be permitted to destroy or limit the effectiveness of these federal programs by taxing them.

IV. CONCLUSION

For the foregoing reasons, *amici* urge the Court to accept the petition for review.

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RESPECTFULLY SUBMITTED this 6th day of June, 2023.

Davis Wright Tremaine LLP
Attorneys for *Amici Curiae*

By: s/ Blake J. Robinson
Blake J. Robinson, WSBA #45119
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201
Tel: (503) 778-5341
Email: blakerobinson@dwt.com

Heather Moelter
(*pro hac vice* pending)
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201
Tel: (503) 778-5406
Email: heathermoelter@dwt.com

CERTIFICATE OF SERVICE

I certify that on June 6, 2023, through my legal assistant,
I electronically filed and served this document with the Clerk of
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pursuant to agreement, on:

Scott M. Edwards
Brett S. Durbin
Lane Powell PC
edwardss@lanepowell.com
durbinb@lanepowell.com
craiga@lanepowell.com
docketing@lanepowell.com

and

Eric Tresh
Alla Raykin
Eversheds Sutherland LLP
EricTresh@eversheds-sutherland.com
AllaRaykin@eversheds-sutherland.com

Attorneys for Appellant Assurance Wireless USA

Charles E. Zalesky
Rosann Fitzpatrick
Chuck.Zalesky@atg.wa.gov
Rosann.Fitzpatrick@bta.wa.gov
REVOLyEF@atg.wa.gov

*Attorneys for Respondent
Washington State Department of Revenue*

Christopher B. Durbin
Henry Wendell
J.G. Harrington
Belen A. Crisp
Cooley LLP
cdurbin@cooley.com
hwendel@cooley.com
jgharrington@cooley.com
belencrisp@cooley.com

*Attorneys for Amici Curiae Former FCC Commissioners
Mignon L. Clyburn and Robert M. McDowell*

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

DATED this 6th day of June, 2023, at Portland, Oregon.

s/ Blake J. Robinson
Blake J. Robinson, WSBA #45119

DAVIS WRIGHT TREMAINE LLP

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- susanengland@dwt.com

Comments:

Sender Name: Blake Robinson - Email: blakerobinson@dwt.com

Address:

1300 SW 5TH AVE STE 2400

PORTLAND, OR, 97201-5610
Phone: 503-241-2300

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