No.

IN THE

Supreme Court of the United States

WISCONSIN BELL, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL. TODD HEATH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Telecommunications Act of 1996 directs the FCC to further the goal of universal access to telecommunications services. In response, the FCC established what's known as the "E-rate" program to provide discounted services to eligible schools and libraries.

The program is administered by a private, nonprofit corporation and funded entirely by contributions from private telecommunications carriers. After telecommunications carriers provide services to eligible schools and libraries, either the schools and libraries or the providers can submit reimbursement requests to the private corporation for the amount of the discount. In this way, the E-rate program distributes up to $4.5 billion each year.

The question presented is:

Whether reimbursement requests submitted to the E-rate program are "claims" under the False Claims Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. All parties to the proceeding are named in the caption.

2. Petitioner Wisconsin Bell, Inc., is a wholly owned subsidiary of AT&T Inc. AT&T Inc. is publicly traded on the New York Stock Exchange. No one person or group owns 10% or more of the stock of AT&T Inc.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *United States ex rel. Heath* v. *Wisconsin Bell, Inc.*, No. 22-1515 (7th Cir.) (judgment entered Aug. 2, 2023; rehearing en banc denied Jan. 16, 2024; amended judgment entered Jan. 16, 2024);
- *United States ex rel. Heath* v. *Wisconsin Bell, Inc.*, No. 12-3383 (7th Cir.) (judgment entered July 28, 2014); and
- *United States ex rel. Heath* v. *Wisconsin Bell, Inc.*, No. 08-cv-724 (E.D. Wis.) (judgment entered Sept. 18, 2012; mandate issued reversing judgment Sept. 19, 2014; judgment entered Mar. 23, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wisconsin Bell, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a) is reported at 92 F.4th 654. The original opinion of the court of appeals (Pet App. 32a) is reported at 75 F.4th 778. The decision and order of the district court granting petitioner's motion for summary judgment (Pet. App. 51a) is reported at 593 F. Supp. 3d 855.

JURISDICTION

The judgment of the court of appeals was originally entered on August 2, 2023. A timely petition for rehearing en banc was denied on January 16, 2024. (Pet. App. 62a). The amended judgment of the court of appeals was entered on January 16, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3729(b)(2) of chapter 31 of the United States Code defines a "claim" for the purposes of the False Claims Act as follows:

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property.

STATEMENT

The False Claims Act is the heavy artillery of the administrative state, wielded to impose effectively punitive liability in the form of treble damages and mandatory minimum civil penalties for regulatory infractions. Congress deemed that formidable weapon necessary to protect funds and property that belong to the public.

Yet, in the decision below, the Seventh Circuit aimed the FCA at submissions made to a *private* nonprofit corporation paying out *private* funds. It held that reimbursement requests to the Schools and Libraries Universal Service Support program (better

known as the "E-rate" program)—which subsidizes telecommunications services for schools and libraries—are actionable "claims" under the FCA, even though the program is funded exclusively by contributions from private carriers and administered by a private non-profit entity.

In doing so, the Court of Appeals openly acknowledged that it was breaking from the Fifth Circuit, which has squarely held as a matter of law that the FCA does *not* apply to E-rate reimbursement requests because "the United States does not have a financial stake" in any money allegedly lost. *U.S. ex rel. Shupe* v. *Cisco Sys., Inc.*, 759 F.3d 379, 385 (5th Cir. 2014) (per curiam). Beyond that explicit circuit split, the Seventh Circuit's decision is at odds with decisions of the Second, Third, and Eighth Circuits recognizing that a potential loss to the government is an essential prerequisite for FCA liability. The stakes of the conflict and surrounding confusion are immense given the severe consequences of FCA liability.

In addition to the conflict, the Seventh Circuit's decision is irreconcilable with the statutory text, basic principles of agency law, and the history of the E-rate program.

The FCA defines a "claim" in part as a request for money "provided" by the federal government. 31 U.S.C. § 3729(b)(2)(A)(ii)(I). The Seventh Circuit concluded that the government "provided" the money in the E-rate program because the Federal Communications Commission compelled private carriers to contribute those funds. Pet. App. 26a-31a. But to "provide" something means to "supply" it—not to compel someone else to. If a teacher told her student to let a

classmate borrow a pencil, and the student handed his pencil over, any ordinary English speaker would say that the student—not the teacher—provided the pencil. Just so here. The private carriers provided the money at issue because that money undisputedly comes out of *their* pockets, not the government's.

The FCA also defines a "claim" as a request for money presented to an "agent of the United States." 31 U.S.C. § 3729(b)(2)(A)(i). But the private nonprofit corporation that administers the E-rate program isn't a federal agent because it lacks the authority to bind the United States and isn't subject to the federal government's day-to-day control. In fact, Congress denied the FCC's request for direct control over the E-rate program.

This Court's review is needed now to avoid the sweeping consequences of the Seventh Circuit's decision. The E-rate program distributes up to nearly $4.5 billion in funds each year, so the legal status of reimbursement requests is significant in and of itself. And extending the FCA to any case where the government arguably "made the funds available" through its regulatory powers, but the public fisc suffered no possible harm, will have far-reaching ramifications beyond even this massive program. Pet. App. 27a (citation omitted). Under the Seventh Circuit's decision, FCA liability may attach even to transactions with organizations like the Boy Scouts, the Veterans of Foreign Wars, and the U.S. Olympic Committee merely because of "the federal government's role in establishing and overseeing" them. Pet. App. 26a.

Given the separation-of-powers concerns raised by the FCA's unique qui tam enforcement mechanism,

expanding the statute's reach in this way is especially troubling. This Court should resolve this conflict and restore the FCA to its proper role in safeguarding government coffers.

1. The FCA imposes liability on anyone who knowingly presents (or causes to be presented) a materially false "claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A); see *Universal Health Servs., Inc.* v. *U.S. ex rel. Escobar*, 579 U.S. 176, 193 (2016).

Before 2009, the FCA defined a "claim" to include a request for money made to a "contractor, grantee, or other recipient if the United States government provides any portion of the money or property which is requested." 31 U.S.C. § 3729(c) (2008). After being amended in 2009, the statute currently defines a "claim" to include both a request for payment made to a "contractor, grantee, or other recipient" if the federal government "has provided any portion of the money or property requested," and a request for payment "presented to an officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2)(A); see Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a), 123 Stat. 1617, 1622-23 (effective May 20, 2009) (adopting current definition of "claim").

An FCA defendant is subject to "essentially punitive" liability in the form of up to "3 times the amount of damages which the Government sustains," plus civil penalties "of not less than $5,000 and not more than $10,000," adjusted for inflation. *Vt. Agency of Nat. Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 769, 784 (2000) (first quote); 31 U.S.C. § 3729(a)(1) (second and third quotes).

Since its enactment, the FCA has "imposed civil liability for many deceptive practices meant to appropriate *government* assets." *U.S. ex rel. Polansky* v. *Exec. Health Res., Inc.*, 599 U.S. 419, 424 (2023) (emphasis added). The Act "dates to the Civil War, when a Congressional committee uncovered 'stupendous abuses' in the sale of provisions and munitions to the War Department." *Ibid.* (citation omitted). Congress adopted the FCA "[t]o put a stop to the plunder—and more generally, to 'protect the funds and property of the Government.'" *Ibid.* (quoting *Rainwater* v. *United States*, 356 U.S. 590, 592 (1958)).

Procedurally, "[t]he statute is unusual." *Polansky*, 599 U.S. at 423. Federal prosecutors may, as is the normal course, sue an alleged violator under the statute. *Id.* at 424 (citing 31 U.S.C. § 3730(a)). But the FCA also "authoriz[es] private parties—known as relators—to sue on the Government's behalf." *Id.* at 423. If the government chooses not to intervene, a successful relator may receive up to 30 percent of the proceeds of the case, plus attorneys' fees and costs. 31 U.S.C. § 3730(d).

2. The Telecommunications Act of 1996 directs the FCC to advance universal access to telecommunications services. 47 U.S.C. § 254. In response, the FCC established the Schools and Libraries Universal Service Support program, called the E-rate program. 47 C.F.R. § 54.500 *et seq.* The program provides discounted services to eligible schools and libraries by: (1) having service providers competitively bid on the lowest price for service; and (2) subsidizing the cost of service. *Id.* §§ 54.503, .505.

The E-rate program is funded exclusively by private money. Funding for the E-rate program is drawn from the Universal Service Fund, which receives its money from the contributions of private telecommunications carriers. 47 U.S.C. § 254(d); 47 C.F.R. § 54.706(a)-(b). As of 2024, the E-rate program could distribute up to nearly $4.5 billion in funding per year.[1] The Fund is administered by the Universal Service Administrative Company, a private non-profit organization incorporated in Delaware. 47 C.F.R. §§ 54.701(a), .702.[2] The Administrative Company's lone shareholder and parent company—the National Exchange Carrier Association, Inc.—is privately run by industry representatives. *Id.* §§ 54.5, 69.602.

By design, the Fund is insulated from the public fisc. The Administrative Company receives fees directly from private telecommunications carriers and deposits them into the Fund. 47 C.F.R. §§ 54.702(b), .706(b). If the Administrative Company needs additional funds to cover its financial obligations, it must acquire those funds through private sources of credit, not from the Treasury. *Id.* § 54.709(c). Because the Fund holds no "public money," it is not subject to the Miscellaneous Receipts Statute's requirement that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury." 31 U.S.C. § 3302(a)-

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[1] FCC, *E-Rate: Universal Service Program for Schools and Libraries* (last updated Feb. 27, 2024), bit.ly/3wXpJlU.

[2] *By-Laws of Universal Service Administrative Company* (revised Jan. 26, 2024), bit.ly/3voRfrX.

(b).[3] As a result, the Fund's assets may be (and were during all periods at issue in this case) held in a private bank account. *Cf.* 31 U.S.C. § 3302(a) (prohibiting "an official or agent of the United States Government" from "depositing [public] money in a bank").[4]

The E-rate program requires service providers to charge schools and libraries the "lowest corresponding price"—the lowest price a provider charges for similar services to a non-residential customer that is "similarly situated" to the school or library in terms of geography, traffic volume, contract length, and other cost factors. 47 C.F.R. §§ 54.500, .511(b). Once a school or library receives E-rate services, it either: (1) pays the service provider the full price, then submits a request to the Administrative Company for partial reimbursement; or (2) pays the service provider a discounted price, after which the provider submits a reimbursement request to the Administrative Company for the remainder of the price. *Id.* §§ 54.505, .514.

3. Relator Todd Heath learned about the E-rate program from his attorney while operating two companies that offered to help schools uncover telecommunications-related billing errors. D. Ct. Doc. 277-1,

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[3] See Off. of Mgmt. & Budget, Exec. Off. of the President, Opinion Letter on the Status of the Universal Service Fund 3 (Apr. 28, 2000), bit.ly/49udXwN (concluding that "the Universal Service Fund does not constitute public money pursuant to the Miscellaneous Receipts Statute, 31 U.S.C. 3302, and is appropriately maintained outside the Treasury by a non-governmental manager").

[4] The Fund was moved from a private bank account to the Treasury in 2018, after the events alleged in this case. D. Ct. Doc. 277-1, at 2 (Mar. 17, 2021).

at 55-56 (Mar. 17, 2021). He filed this lawsuit in 2008, alleging that Wisconsin Bell violated the FCA by submitting (and causing to be submitted) allegedly false reimbursement requests to the Administrative Company as part of the E-rate program between 1997 and 2015.[5] Heath claimed that Wisconsin Bell overcharged schools and libraries by charging prices higher than the lowest corresponding price, and that each reimbursement request was therefore a false claim. Pet. App. 5a-6a. The government declined to intervene. Pet. App. 5a.[6]

Wisconsin Bell moved to dismiss Heath's complaint on the ground that the alleged submissions were not actionable "claims" under the FCA because they didn't involve government funds or requests to government agents. *U.S. ex rel. Heath* v. *Wisconsin Bell, Inc.*, 111 F. Supp. 3d 923, 926, 928 (E.D. Wis. 2015). The district court disagreed and denied Wisconsin Bell's motion to dismiss. *Id.* at 926-28. The district court also denied Wisconsin Bell's motion to certify that order for interlocutory appeal. D. Ct. Doc. 140 (Jan. 20, 2016).

Wisconsin Bell later moved for summary judgment, arguing that Heath had failed to demonstrate a genuine issue of material fact as to falsity because he failed to offer any evidence that Wisconsin Bell

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[5] Heath later stipulated that he was seeking to recover only for reimbursement requests made between 2002 and 2015. D. Ct. Doc. 175, at 5-6 (Sept. 25, 2017).

[6] The district court initially dismissed the case for lack of jurisdiction based on the FCA's public disclosure bar, but the Seventh Circuit reversed. *U.S. ex rel. Heath* v. *Wisconsin Bell, Inc.*, 760 F.3d 688 (7th Cir. 2014).

charged similarly situated customers different amounts for similar types of service. Wisconsin Bell also argued that Heath couldn't prove scienter, materiality, or the existence of actionable claims. The district court granted summary judgment for Wisconsin Bell on the ground that Heath failed to offer evidence of falsity or scienter. It didn't reach Wisconsin Bell's arguments regarding materiality or whether the requests were actionable FCA claims. Pet. App. 53a-58a.[7]

The Seventh Circuit reversed. The court concluded that Heath had offered sufficient evidence of falsity and scienter, Pet. App. 39a, 45a, and declined to affirm the district court's judgment on the alternative ground of lack of materiality, Pet. App. 47a. In a single paragraph, the court also declined to affirm on the alternative ground that the reimbursement requests were not paid "using funds provided by the federal government," and therefore are not "claims" under the FCA. Pet. App. 50a. The court held that whether "government funds were involved in the payments" was an issue for the jury. *Ibid.*

After Wisconsin Bell sought rehearing en banc, pointing out the problems with the FCA analysis, the panel issued an amended opinion that reached the same result but added more discussion addressing the claim issue as a question of law. Pet. App. 19a-31a. Analyzing the issue under both the pre- and post-2009 versions of the FCA, the court concluded that the reimbursement requests counted as FCA claims for three different reasons. Pet. App. 22a-31a.

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[7] The basis for the district court's jurisdiction was 28 U.S.C. § 1331 and 31 U.S.C. § 3732.

First, applying both the pre- and post-2009 definitions of a claim, the court held that the "United States Government provides [a] portion of the money or property which is requested or demanded" from the Fund, 31 U.S.C. § 3729(c) (2008); see *id.* § 3729(b)(2)(A)(ii)(I) (as amended effective May 20, 2009), because "collections of delinquent debts to the Fund, along with penalties and interest, as well as civil settlements and criminal restitution payments" temporarily passed through U.S. Treasury accounts on their way to the Fund. Pet. App. 22a-23a.

Second, applying the post-2009 definition of a claim, the court held that the Administrative Company is an "agent of the United States," 31 U.S.C. § 3729(b)(2)(A)(i) (as amended effective May 20, 2009), because it "act[s] on the government's behalf," Pet. App. 24a-25a.[8]

Third, the court held that there was a "sufficiently close nexus" between the Administrative Company and the federal government "such that a loss to the former is effectively a loss to the latter." Pet. App. 25a-29a. The court concluded that there was a sufficiently "high degree of government involvement in the E-Rate program" because, among other things, the FCC sets the revenue percentage service providers

[8] The FCA's post-2009 definition of claim applies only to requests for reimbursement submitted on or after May 20, 2009—the date the FCA amendment was enacted—because that amendment was not retroactive. See Fraud Enforcement and Recovery Act § 4(f) ("The amendments made by this section * * * shall apply to conduct on or after the date of enactment * * * *"); *Shupe*, 759 F.3d at 383 n.2. Any requests submitted before that date would be subject to the pre-2009 definition of claim.

must contribute, "reviews denials of subsidy applications," and "offers final guidance on policy and interpretation questions." Pet App. 26a-27a. At bottom, the court reasoned, the federal government "made the funds available" within the meaning of the FCA because it "required the common carriers to pay into the Fund." Pet. App. 27a (citation omitted).

The Seventh Circuit expressly acknowledged that "[t]he Fifth Circuit took a contrary view in *United States ex rel. Shupe v. Cisco Systems, Inc.*, 759 F.3d 379 (5th Cir. 2014), which reversed a denial of a motion to dismiss a False Claims Act claim based on allegedly false claims to the [Administrative Company] for reimbursement from the Universal Service Fund." Pet. App. 29a. But the panel "disagree[d] with *Shupe*'s holding," noting that the court in *Shupe* "apparently [hadn't] learned" that some money "in the E-Rate program *can* be traced back directly to the Treasury" in the form of delinquent debts, civil settlements, and criminal restitution payments. Pet. App. 23a, 29a, 30a.

After requesting a response to Wisconsin Bell's petition for rehearing en banc, the court denied rehearing and issued its amended opinion on January 16, 2024. Pet. App. 1a, 62a. The court granted Wisconsin Bell's consent motion to stay its mandate pending this petition.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision creates an acknowledged circuit split on an issue of immense practical importance and opens the door to expansive and unpredictable treble-damages liability. The precise issue over which the circuits have divided—

whether reimbursement requests under the nearly $4.5 billion-per-year E-rate program are "claims" under the FCA—is alone significant enough to warrant this Court's review. But the troubling consequences of the Seventh Circuit's decision don't end there. It provides a roadmap to potentially massive liability whenever a defendant seeks private funds that the government has made available through its regulatory powers—even when there is no possible harm to the public fisc. This turns the FCA upside down and raises serious separation-of-powers concerns as well.

The Seventh Circuit's decision misreads the FCA's plain text, distorts basic principles of agency law, and ignores the history of the E-rate program, extending the statute far beyond the bounds Congress fixed. The FCA defines a "claim" to include requests for money "provided" by the federal government or made to an "agent of the United States." The whole point of the FCA, and its outsized penalties, is to protect *government* money. But it is private telecommunications carriers—not the federal government—that supply the money used in the E-rate program. The Seventh Circuit's conclusion that the government "provided" the funds at issue because it "made the funds available" defies the ordinary meaning of the text. Pet. App. 27a (citation omitted).

And the Administrative Company is nothing like a federal agent subject to the government's day-to-day management. In fact, Congress *rejected* the FCC's request for direct control over the Fund, with the result that a private entity—the Administrative Company—assumed the function the FCC wanted for itself.

This Court should resolve the overt conflict between the Fifth and Seventh Circuits now. The question presented is exceptionally important. It implicates not only the E-rate program itself—which handles billions of dollars in funds per year—but any number of financial interactions with government-adjacent entities, including federally chartered private corporations such as Fannie Mae and Freddie Mac. Given the serious separation-of-powers concerns raised by the FCA's unique qui tam enforcement mechanism, expanding the statute's reach to purely private losses is especially troubling. This case is an excellent vehicle to address the question presented because the issue was fully developed and decided below as a matter of law. This Court should grant the petition.

I. THE SEVENTH CIRCUIT'S DECISION CREATES AN ACKNOWLEDGED CIRCUIT CONFLICT.

The Seventh Circuit's holding that E-rate reimbursement requests are actionable FCA "claims" is in direct, express conflict with the Fifth Circuit's decision in *Shupe*, which held the opposite as a matter of law. More broadly, the Seventh Circuit's decision is irreconcilable with decisions of the Second, Third, and Eighth Circuits recognizing that potential loss to the government is an essential prerequisite for FCA liability.

A. The Fifth and Seventh Circuits are expressly divided over whether E-rate reimbursement requests are FCA "claims."

The decision below created an express circuit conflict over whether reimbursement requests from the E-rate program are actionable claims under the FCA.

The Fifth Circuit has squarely held, as a matter of law, that such requests are *not* claims because "there are no federal funds involved in the program, and [the Administrative Company] is not itself a government entity." *Shupe*, 759 F.3d at 388. But the Seventh Circuit took the opposite position, expressly "disagree[ing]" with the Fifth Circuit's decision and holding—also as a matter of law—that reimbursement requests from the E-rate program *are* actionable claims under the FCA. Pet. App. 29a.

1. The Fifth Circuit has held that reimbursement requests from the E-rate program are not actionable claims under the FCA. Although the Fifth Circuit applied the pre-2009 version of the FCA, under which a claim was defined to include a request for payment made to a "contractor, grantee, or other recipient" if the federal government "provides any portion of the money or property which is requested," 31 U.S.C. § 3729(c) (2008), the court noted that, because that statutory definition is "reproduced in the now amended statute, * * * the rule extracted from our opinion will influence the reach of the False Claims Act current and past," *Shupe*, 759 F.3d at 383.

The Fifth Circuit rejected the argument (which the Seventh Circuit here adopted) that the government "provides" the money in the Fund by "direct[ing] the collection and disbursement of * * * funds," finding that "broad view" to be "unsupported by the cases interpreting the FCA." *Shupe*, 759 F.3d at 383 (citation omitted). The court held instead that the government does not "provide" funds within the meaning of the statute unless fraud "might result in financial loss to the Government." *Id.* at 385 (citation omitted). The court concluded that because the money in the Fund

"is provided by private telecommunications providers," the government "does not have a financial stake in its fraudulent losses" and FCA liability is not available. *Id.* at 385, 387.

The Fifth Circuit observed that numerous courts "have limited the FCA's application to 'instances of fraud that might result in financial loss to the Government.'" *Shupe*, 759 F.3d at 385 (quoting *U.S. ex rel. Sanders* v. *Am.-Amicable Life Ins. Co. of Tex.*, 545 F.3d 256, 259 (3d Cir. 2008)); see *infra* pp. 19-21.

The Fifth Circuit also rejected the argument that the FCC's oversight of the E-rate program was a sufficient basis to count reimbursement requests as FCA claims. The court observed that the Fund "is independent from the Government," and that the FCC "has no ability to control the [Fund] through direct seizure or discretionary spending." *Shupe*, 759 F.3d at 386 (quoting *In re Incomnet*, 463 F.3d 1064, 1071 (9th Cir. 2006)) (second quote).

The court further explained that the private National Exchange Carrier Association—the Administrative Company's "sole shareholder and therefore the [E-rate] program's administrator"—"acted exclusively as an agent for its members and had no authority to perform any adjudicatory or governmental functions." *Shupe*, 759 F.3d at 386-87 (quoting *Farmers Tel. Co.* v. *FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999)) (second quote). While the Administrative Company "came about through the actions of Congress and the FCC, and the FCC retains some oversight and regulation," the court reasoned, "it is explicitly a private corporation owned by an industry trade group"—not an arm of the government. *Id.* at 387.

"Because there are no federal funds involved in the program, and [the Administrative Company] is not itself a government entity," the Fifth Circuit held that E-rate reimbursement requests are not actionable claims under the FCA as a matter of law. *Shupe*, 759 F.3d at 388.

2. In the decision below, the Seventh Circuit held the opposite. It acknowledged that "[t]he Fifth Circuit took a contrary view" but explicitly "disagree[d] with *Shupe*'s holding." Pet. App. 29a. Applying both the pre- and post-2009 versions of the FCA, it held as a matter of law that E-rate reimbursement requests are actionable claims for three reasons—each of which is irreconcilable with the Fifth Circuit's decision.

The Seventh Circuit first held that E-rate reimbursement requests are FCA claims because the federal government "has provided any portion of the money or property requested." 31 U.S.C. § 3729(b)(2)(A)(ii)(I); see 31 U.S.C. § 3729(c) (2008). The court concluded that the federal government "provide[s]" money in the Fund because some funds from private telecommunications carriers, including delinquent debts, settlements, and restitution payments passed through Treasury accounts on their way to being deposited in the Fund. Pet. App. 22a-23a.

While the Seventh Circuit supposed that the Fifth Circuit's contrary conclusion might be explained by the fact that it "apparently [hadn't] learned about" the collections that passed through the Treasury, Pet. App. 23a, 30a, that doesn't alter the legal analysis because the collected funds were private money. See *infra* pp. 23-24. The Fifth Circuit's holding as a matter of law that "the Government did not provide the funds

to the [Fund] to subject claims to it to FCA liability," *Shupe*, 759 F.3d at 387, squarely conflicts with the Seventh Circuit's holding—also as a matter of law—that the government "provide[s]" money in the Fund, Pet. App. 22a-23a, 25a-29a.

The Seventh Circuit next held that E-rate reimbursement requests are claims because the Administrative Company qualifies as an "agent of the United States" under the post-2009 version of the FCA. 31 U.S.C. § 3729(b)(2)(A)(i); see Pet. App. 24a-25a. That was so, the Seventh Circuit concluded, because "the statute and regulations leave no room to deny that the FCC controls the [Administrative Company]." *Ibid.*

That holding, too, can't be squared with the Fifth Circuit's decision. While the Fifth Circuit was applying the pre-2009 version of the FCA, which didn't contain the "agent of the United States" language, it nevertheless rejected the same argument that the Seventh Circuit accepted—that "the FCA applies because of the extent of the FCC's control over the E-Rate program." *Shupe*, 759 F.3d at 385. The Fifth Circuit's conclusion that the Fund "is independent from the Government," *id.* at 386, directly contradicts the Seventh Circuit's holding that the Administrative Company is a federal agent because "[a]ll of [its] actions are subject to the ultimate control" of the FCC, Pet. App. 25a.

The Seventh Circuit finally held that the federal government "provided" money in the Fund simply because the FCC established and oversees the E-rate program. 31 U.S.C. § 3729(b)(2)(A)(ii)(I); *id.* § 3729(c) (2008); see Pet. App. 26a. The Seventh Circuit concluded that the federal government "made the funds

available" because it "required the common carriers to pay into the fund"—precisely the argument the Fifth Circuit had explicitly rejected. Pet. App. 28a (citation omitted).

The conflict between the Fifth and Seventh Circuits over the application of the FCA to E-rate reimbursement requests is open and acknowledged. In Texas, Louisiana, and Mississippi, telecommunications carriers cannot be subjected to "essentially punitive" FCA liability for such requests as a matter of law. *Stevens*, 529 U.S. at 784. In Illinois, Indiana, and Wisconsin, they can. This Court's intervention is needed to resolve this conflict and restore uniformity to this critical area of the law under a massive program in two of the nation's most important commercial centers.

B. The Seventh Circuit's decision can't be reconciled with other circuits' decisions recognizing that an FCA claim requires potential government loss.

In addition to conflicting expressly with the Fifth Circuit's decision in *Shupe*, the Seventh Circuit's decision is also at odds with decisions of the Second, Third, and Eighth Circuits holding that FCA liability requires a potential loss to the federal government.

The Third Circuit has held that submissions of fraudulent legal bills to a federal bankruptcy court for approval didn't count as FCA claims because "submission of false claims to the United States government for approval which do not or would not cause financial loss to the government are not within the purview of the False Claims Act." *Hutchins* v. *Wilentz, Goldman & Spitzer*, 253 F.3d 176, 184 (3d Cir. 2001). Because

the funds at issue were provided by the bankruptcy estate, they could not cause financial loss to the federal government. See *id.* at 184-85.

The Third Circuit has also held that money directly debited from the salaries of military personnel to a fraudulent insurance scheme "did not involve any claim against the government" actionable under the FCA. *Sanders*, 545 F.3d at 259. As the court explained, "[n]othing in the plain language of § 3729(c) suggests that the federal government 'provides' funds when it simply releases the salary of its employees (per their instructions) directly to a third party." *Ibid.*

Similarly, the Eighth Circuit has held that requests for payment from an environmental trust fund set up by a private company based on negotiations with the EPA weren't claims under the FCA because no money in the trust fund was "provided by the United States Government." *Costner* v. *URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998). The trust fund was funded by a private chemical company, overseen by the state of Arkansas, and the federal government never accessed it, controlled its disbursement, or reimbursed it for money disbursed. *Ibid.* Because claims on the trust fund couldn't result in losses to the government, the FCA couldn't apply. *Ibid.*

Even cases upholding the application of the FCA have required a potential loss to the government. For example, in holding that loan applications made to regional Federal Reserve banks are FCA claims, the Second Circuit reasoned that the failure to repay those loans "injures the public fisc" because the regional banks "are required to remit all their excess earnings to the United States Treasury." *U.S. ex rel.*

Kraus v. *Wells Fargo & Co.*, 943 F.3d 588, 604-05 (2d Cir. 2019). Although the Seventh Circuit purported to rely on the Second Circuit's decision, Pet. App. 28a-30a, it disregarded that court's conclusion that "economic loss to the United States" is an essential prerequisite for FCA liability, *Kraus*, 943 F.3d at 605 n.21, holding instead that "the federal government's involvement in the E-Rate program" was "enough to say that the government 'provided' funds," Pet. App. 29a.

Before the decision below, the circuits applied a textually based bright line rule that FCA liability requires a potential loss to the government. The Seventh Circuit's contrary holding that the "the federal government's role in establishing and overseeing the E-Rate program is sufficient to apply the False Claims Act" threatens that consensus. Pet. App. 26a. This Court's review is necessary to bring the circuits into conformity on this fundamental question of FCA liability.

II. THE SEVENTH CIRCUIT'S DECISION IS WRONG.

Under the plain text of the FCA, reimbursement requests to the E-rate program aren't actionable claims. The government doesn't "provide" the money requested—private telecommunications carriers do. And the Administrative Company isn't an "agent of the United States" because it can't bind the government and isn't subject to the government's day-to-day control.

A. The government doesn't "provide" the money in the Fund.

1. Telecommunications carriers supply the funds for the E-rate program.

The FCA defines a "claim" in part as a request for money made to a "contractor, grantee, or other recipient" if the federal government "provided any portion of the money" requested. 31 U.S.C. § 3729(b)(2)(A)(ii)(I); see *id.* § 3729(c) (2008). Reimbursement submissions to the E-rate program don't qualify as claims under this definition—and therefore aren't subject to the FCA at all—because the United States doesn't "provide[ ] any portion of the money" requested.

The FCA doesn't define the word "provided," so the term bears its ordinary meaning. See *Encino Motorcars, LLC* v. *Navarro*, 584 U.S. 79, 85 (2018). In ordinary usage, "provide" means to "furnish" or "supply." See, *e.g.*, *American Heritage Dictionary, Second College Edition* 997 (1982) ("[t]o furnish; supply"); 12 *Oxford English Dictionary* 713 (2d ed. 1989) ("[t]o supply or furnish for use").

As a result, the government "provides" money only if the government itself "suppl[ies]" the funds. That doesn't occur under the E-Rate program. That program is funded entirely through the private contributions of telecommunications companies to the Fund—a private fund, administered by a private company, the Administrative Company. See 47 U.S.C. § 254(d); 47 C.F.R. §§ 54.701, .706, .709. And if there is a shortfall in the Fund, the Administrative Company must acquire additional funds through private sources of credit, not from the U.S. Treasury. 47 C.F.R.

§ 54.709(c). The federal government doesn't contribute a penny to the Fund.

The Seventh Circuit's reasoning that the federal government "provides" money in the Fund by "requir[ing] the common carriers to pay into the Fund" is textually untenable. Pet. App. 27a. The entities that "provide" the money to the Fund are the telecommunications companies cutting the checks, not the government mandating the payment. Because the government does not "provide" the money, no amount of "government involvement in the E-Rate program" can turn requests for *private* money into actionable FCA claims. Pet. App. 27a.

2. Debts, settlements, and restitution payments that passed through the Treasury don't support FCA liability.

The Seventh Circuit's alternative theory that the government "provides" money in the Fund because delinquent debts (plus penalties and interest), civil settlements, and criminal restitution payments temporarily passed through Treasury accounts *en route* to the Fund is also legally unsupported. Those transactions were entirely revenue neutral as to the government, so there was never any risk of "financial loss to the Government." *United States* v. *Neifert–White Co.*, 390 U.S. 228, 232 (1968).

That the government serves as a debt collector for the Administrative Company at the Administrative Company's request doesn't convert private money owed to the Fund (or the penalties and interest accrued on those debts) into public money—as case law from other contexts shows. For example, parties may file suit in federal court to collect money owed to them,

and they may seek the assistance of a United States Marshal to enforce a court-ordered judgment. See Fed. R. Civ. P. 69(a)(1). Under the Seventh Circuit's view, because the government assists with the enforcement of the money judgment, any false claim made in the course of the litigation would trigger the FCA. But as the Third Circuit has held, fraudulent legal bills submitted to a federal bankruptcy court for payment by a private debtor aren't actionable under the FCA because they involve no "economic loss to the United States government." See *Hutchins*, 253 F.3d at 181-84. The same is true here.

Civil settlements and criminal restitution payments that temporarily passed through the Treasury before being deposited in the Fund likewise provide no basis for application of the FCA. Funds merely held by the United States, such as overpaid taxes, funds in escrow, and money held in trust during litigation have never been considered part of the public fisc. See Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1358 & n.67 (1988). Civil settlements and criminal restitution payments from telecommunications carriers meant to compensate the Administrative Company for its private losses don't involve "the funds and property of the Government," so they provide no hook for FCA liability. *Rainwater*, 356 U.S. at 592.

B. The Administrative Company is not an "agent of the United States."

The FCA also defines a "claim" as a request for money presented "to an officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2)(A)(i). E-rate reimbursement requests don't count as claims

under this definition either because the Administrative Company is a private non-profit corporation—not a federal officer, employee, or agent.

The Administrative Company is plainly not a federal officer or employee. It is "explicitly a private corporation owned by an industry trade group." *Shupe*, 759 F.3d at 387; see 47 C.F.R. § 54.5.

The Administrative Company isn't a federal "agent" either. The FCA doesn't define the term agent, but "[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Escobar*, 579 U.S. at 187 (citation omitted). At common law, agency requires a "consensual relationship in which one person * * * acts as a representative of or otherwise acts on behalf of another person *with the power to affect the legal rights and duties of the other person*." Restatement (Third) of Agency § 1.01 cmt. c (2006) (emphasis added). So "proof of actual or apparent authority to act on behalf of the principal is necessary to establish that a person acts as an agent." *O'Neill* v. *Dep't of Hous. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (citation omitted).

The Administrative Company doesn't act as an agent of the government because Congress hasn't authorized it to alter "the legal relations between the [United States government] and third persons." *O'Neill*, 220 F.3d at 1360 (citation omitted). The Administrative Company may not "make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress." 47 C.F.R. § 54.702(c). Nor may it exercise governmental functions. See Federal Activities Inventory Reform Act of 1998, Pub. L.

No. 105-270, § 5, 112 Stat. 2382 (codified at 31 U.S.C. § 501 note) (defining "inherently governmental function").

The National Exchange Carrier Association—the Administrative Company's "sole shareholder and therefore the program's administrator"—"act[s] exclusively as an agent for its members and ha[s] no authority to perform any * * * governmental functions." *Shupe*, 759 F.3d at 386-87 (quoting *Farmers Tel. Co.*, 184 F.3d at 1250). The same is true of the Administrative Company, which "is not simply holding funds in the [Fund] as the FCC's agent." *In re Incomnet, Inc.*, 463 F.3d at 1074; see also *Shupe*, 759 F.3d at 386 (the Fund is "independent from the Government").

The Seventh Circuit's contrary conclusion distorts basic rules of agency law. It concluded that the necessary agency relationship was present because, among other things, "[a]ll of the [Administrative Company's] actions are subject to the ultimate control of the principal, the FCC, acting as part of the United States government." Pet. App. 25a. Even setting aside that the Administrative Company lacks the necessary authority to alter the federal government's legal obligations, the FCC's "control" over the Administrative Company falls far short of the level required to establish a principal-agent relationship. A principal's control over its agent includes "the right to give interim instructions or directions to the agent once their relationship is established." Restatement (Third) of Agency § 1.01, cmt. f. While the FCC exercises some degree of regulatory oversight over the Administrative Company, it has no ability to give interim instructions regarding the administration of the Fund.

In fact, Congress "*rejected* the FCC's request to directly administer the E-rate program." *Shupe*, 759 F.3d at 387 (emphasis in original, citation omitted). Under the Government Corporation Control Act of 1945, the FCC lacks authority to create a government corporation without congressional authorization, see 31 U.S.C. § 9102, and the Telecommunications Act of 1996 provided no such authority. When the FCC tried in 1997 to create two government corporations to administer what is now known as the E-rate program, the Government Accountability Office stated that it had acted without statutory authority.[9] In response, the FCC expressly requested authorization to establish a government entity to administer the E-rate program.[10] But Congress never acceded. The result was that a wholly private entity—the Administrative Company—assumed the function the FCC wanted for itself.

The Administrative Company's status as a private company, insulated from day-to-day control by the government, cuts decisively against the existence of any agency relationship. See *U.S. ex rel. Adams* v. *Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1260 (9th Cir. 2016) (holding—in agreement with amicus brief submitted by the United States—that Fannie Mae and Freddie Mac are not federal officers, employees, or

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[9] U.S. Gov't Accountability Office, GAO/T-RCED/OGC-98-84, *Telecommunications: FCC Lacked Authority to Create Corporations to Administer Universal Service Programs* 12-13 (1998), bit.ly/4ciPj52.

[10] Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579, Report to Congress, 13 FCC Rcd. 11810, 11818-19 (May 8, 1998).

agents under the FCA because they "are private companies, albeit companies sponsored or chartered by the federal government").

As the Fifth Circuit correctly concluded, "[b]ecause there are no federal funds involved in the [E-rate] program, and [the Administrative Company] is not itself a government entity," E-rate reimbursement requests aren't actionable claims under the FCA. *Shupe*, 759 F.3d at 388.

III. THE QUESTION PRESENTED IS IMPORTANT, AND THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING IT.

The question presented—and the express circuit conflict created by the Seventh Circuit's decision—is exceptionally important for this Court to resolve, and this case is an excellent vehicle for doing so.

A. The question presented is exceptionally important.

The status of reimbursement requests made to the E-rate program is significant in itself due to the program's sheer size. As of 2024, the program can distribute up to nearly $4.5 billion per year.[11] The legal status of reimbursement requests for those funds—including whether they are clouded by the FCA's treble damages and civil penalties provisions—is of critical importance to the telecommunications carriers that are central to the program's success.

The conflict over the status of E-rate reimbursement requests will also affect interactions with the three other Universal Service programs managed by

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[11] FCC, *E-Rate: Universal Service Program for Schools and Libraries*, *supra*.

the Administrative Company to promote telecommunications access—the Connect America Fund (for rural areas), Lifeline (for low-income consumers), and Rural Health Care (for eligible health care providers). Like the E-rate program, each of those programs is funded through the contributions of private telecommunications carriers.[12] Altogether, those three programs approved for disbursement $5.6 billion in funds in 2023 alone.[13] The Seventh Circuit's expansive interpretation of FCA liability in the E-rate context may carry over to those programs as well.

Even beyond the confines of the Universal Service programs, the Seventh Circuit's misunderstanding of an FCA "claim" has potentially ruinous consequences for individuals and companies dealing with government-adjacent entities. Certifications made to federally chartered private corporations such as Fannie Mae and Freddie Mac may now fall within the FCA's crosshairs based on the Seventh Circuit's broad understanding of a federal "agent" as any entity under the "ultimate control" of the government. But see *Adams*, 813 F.3d at 1260. And even transactions with federally chartered nonprofits furthering federal goals like the Boy Scouts, Veterans of Foreign Wars, or U.S. Olympic Committee may be subject to punishing FCA liability—even though they are private entities financed with private funds—because of "the federal government's role in establishing and overseeing" them. Pet. App. 26a.

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[12] FCC, *Universal Service* (last updated Apr. 10, 2024), bit.ly/448DHhv.

[13] Universal Service Administrative Company, *2023 Annual Report* 3, bit.ly/49vq397.

In fact, if the FCA reaches not only transactions in which the United States has a "financial stake," but also transactions in which the Government has some arguable "regulatory interest," see *Shupe*, 759 F.3d at 385, its reach would be "almost boundless," *Allison Engine Co.* v. *U.S. ex rel. Sanders*, 553 U.S. 662, 669 (2008) (citation omitted). That would defy this Court's admonition that the FCA is not "an all-purpose antifraud statute," and "would expand the FCA well beyond its intended role of combating 'fraud against the *Government*.'" *Id.* at 669, 672 (quoting *Rainwater*, 356 U.S. at 592).

Even as properly confined to its text, the FCA raises significant separation-of-powers concerns. As several members of this Court have recognized, "there is good reason to suspect that Article II does not permit private relators to represent the United States' interests in FCA suits." *Polansky*, 599 U.S. at 451 (Thomas, J., dissenting); see *id.* at 442 (Kavanaugh, J., concurring, joined by Barrett, J.). Expanding the FCA's scope to private losses, as the panel did, in suits brought by private parties, takes the FCA even closer to becoming the "all-purpose antifraud statute" it was never meant to be. *Allison Engine*, 553 U.S. at 672.

The Seventh Circuit's expansion of the FCA to private transactions also undermines "the theoretical justification for relator standing." *Stevens*, 529 U.S. at 778. The thinner the government's interest in the underlying claim, the more improbable that a relator—with no personal stake in that claim himself—could have Article III standing by means of a "partial assignment of the Government's damages claim." *Id.* at 773. Under the Seventh Circuit's decision, oppor-

tunistic relators would have license to turn contractual disputes between private parties—with no potential financial loss to the government—into FCA claims subject to treble damages and civil penalties.

The extraordinary liability imposed by the FCA makes the uniform application of the statute particularly important. And this Court has regularly interceded to restore uniformity to this critical area of the law, granting certiorari in FCA cases seven times in the last ten terms. See *U.S. ex rel. Schutte* v. *SuperValu Inc.*, 143 S. Ct. 644 (2023); *U.S. ex rel. Proctor* v. *Safeway Inc.*, 143 S. Ct. 643 (2023); *U.S. ex rel. Polansky* v. *Exec. Health Res., Inc.*, 142 S. Ct. 2834 (2022); *Cochise Consultancy, Inc.* v. *U.S. ex rel. Hunt*, 139 S. Ct. 566 (2018); *State Farm Fire & Cas. Co.* v. *U.S. ex rel. Rigsby*, 578 U.S. 1011 (2016); *Universal Health Servs., Inc.* v. *U.S. ex. rel. Escobar*, 577 U.S. 1025 (2015); *Kellogg Brown & Root Servs., Inc.* v. *U.S. ex rel. Carter*, 573 U.S. 957 (2014).

B. This case is an excellent vehicle.

This case is an excellent vehicle for resolving the circuit conflict, restoring nationwide uniformity, and applying the FCA's plain meaning.

The question presented was fully developed below and was thoroughly addressed in the amended panel opinion. See Pet. App. 19a-31a. The Seventh Circuit expressly held as a matter of law that E-rate reimbursement requests are actionable claims under the FCA. Pet. App. 31a. The relevant facts about the government's involvement with the Fund are not in dispute—only the legal significance of those facts is contested. And a determination that E-rate

reimbursement requests are not FCA claims would dispose of this long-running case in its entirety.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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