No. 23-1127

IN THE
Supreme Court of the United States

WISCONSIN BELL, INC.,
Petitioner,

v.

UNITED STATES, EX REL. TODD HEATH,
Respondent.

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

BRIEF OF USTELECOM – THE BROADBAND ASSOCIATION AND CTIA – THE WIRELESS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are trade associations whose members offer wired and wireless communications services to low-income individuals, rural health care providers, schools, and libraries, and that voluntarily participate in four programs offered through the Universal Service Fund ("Fund") that provide different kinds of subsidies for those customers. *Amici*'s members take their obligations as participants in those Universal Service programs seriously. And they recognize that they may face enforcement actions and be held liable, should they violate any of those programs' reporting, auditing, or certification requirements. But, as Wisconsin Bell explains in its petition (at 12-21), until the decision below, those participants would not face the threat of treble damages and civil penalties under the False Claims Act, because Universal Service programs rely exclusively on private funding, not the public fisc.

The decision below thus puts *amici*'s members in that Circuit under the threat of novel—and potentially ruinous—liability. And it gives private relators the ability to wield that threat of massive liability to extract settlements, even in non-meritorious cases. The Court should grant certiorari to eliminate the split between the Fifth and Seventh Circuits, and confirm the rulings of the Second, Third, Fifth, and Eighth Circuits, that the False Claims Act reaches only false claims that could harm the public fisc.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* certify that counsel of record for all parties received timely notice of the intention to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under federal law, the money that supports the Federal Communications Commission's Universal Service programs comes from telecommunications services providers (including *amici*'s members) and their customers—not from congressional appropriations or taxes. *See* 47 U.S.C. § 254(d); 47 C.F.R. § 54.706(a). If the Fund's balance is ever insufficient to fulfill the needs of the Universal Service programs, the Treasury does not make up the difference. Instead, the private entity responsible for administering the Fund, the Universal Service Administrative Company ("the Administrative Company"[2]), must "borrow funds commercially," with "such debt secured by future contributions" from telecommunications providers—not by the federal government. 47 C.F.R. § 54.709(c); *see id.* §§ 54.701(a), 54.702(a)-(b).

Based on these factors, and others, the Fifth Circuit held that requests for payment from the Fund are *not* "claims" within the ambit of the False Claims Act, 31 U.S.C. § 3729(b)(2)(A). *See United States ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379, 385 (5th Cir. 2014) (per curiam).[3]

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[2] The Administrative Company is a nonprofit corporation that is solely owned by a single private entity, the National Exchange Carrier Association, Inc. ("NECA"). *See* BY-LAWS OF UNIVERSAL SERVICE ADMINISTRATION CO. art. I, § 1 (rev. Jan 26, 2024), https://bit.ly/44vy3V4; *Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999).

[3] *Shupe* concerned allegedly false claims that were submitted before the False Claims Act was amended in 2009. *See* 759 F.3d at 382-83. But under both the pre- and post-2009 definition of the word "claim," liability attaches for requests for the payment of money made to a "contractor, grantee, or other recipient" if the government "has provided any portion of the money or property

As petitioner explains (at 14-21), the decision below directly conflicts with *Shupe* and is inconsistent with the holdings of the Second, Third, and Eighth Circuits. All of those courts—like the Fifth Circuit—"appl[y] a textually based bright line rule that [False Claims Act] liability requires a potential loss to the government." Pet. 21. Yet there is no such potential loss here.

Petitioner ably demonstrates (at 21-24) how the decision below is wrong and (at 28-32) why this ripe circuit split is especially deserving of this Court's attention. *Amici* write separately to highlight two consequences of the decision below that underscore the need for the Court's review.

First, the Seventh Circuit's decision is not limited to the E-Rate program. E-Rate is one of *four* Universal Service programs that draw from the same Fund. The Administrative Company distributes billions of dollars each year to service providers (like *amici*'s members) that participate in those Universal Service programs, which bring needed communications services and infrastructure to rural and low-income areas. In a single decision, the court below has exposed hundreds of service providers in the Seventh Circuit—and potentially thousands of providers nationwide—to the threat of ruinous liability at the hands of *qui tam* relators who have no personal interest in the suit but are pursuing a monetary bounty.[4]

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requested." *Compare* 31 U.S.C. § 3729(b)(2)(A) *with* 31 U.S.C. § 3729(c) (2006). *See also* Pet. 5 (explaining statutory history).

[4] This highlights the already "significant separation-of-powers concerns" with the *qui tam* mechanism and counsels in favor of construing the False Claims Act narrowly. Pet. 30; *see United States ex rel. Polansky v. Executive Health Res., Inc.,* 599 U.S.

Second, that unprecedented expansion of liability threatens future voluntary participation in Universal Service programs. The potentially ruinous liability that flows from the False Claims Act's one-two punch of treble damages and mandatory civil penalties may prove too risky for service providers considering participating in current and future Universal Service programs.

The question presented is worthy of review, and the need for review is urgent. This Court should grant the petition.

ARGUMENT

I. THE DECISION BELOW EXPANDS THE FALSE CLAIMS ACT'S REACH FAR BEYOND THE E-RATE PROGRAM

While the decision below discusses only the False Claims Act's applicability to the E-Rate program, the Seventh Circuit has effectively ruled that every Universal Service program falls within the Act's ambit. That has far-reaching consequences for programs that collectively invest billions of dollars annually into communications infrastructure and access, including extending broadband service in rural and costly to serve areas.

A. The Administrative Company Implements Three Other Universal Service Programs Alongside E-Rate

The E-Rate program is "the government's largest educational technology program."[5] It offers all public and nonprofit libraries and elementary and secondary

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419, 451 (2023) (Thomas, J., dissenting); *id.* at 442 (Kavanaugh, J., concurring, joined by Barrett, J.).

[5] FCC, *Universal Service Program for Schools and Libraries (E-Rate)*, https://tinyurl.com/3kcf2s4p.

schools support for "telecommunications, telecommunications services, internet access, internal connections, and basic maintenance of internal connections."[6] Depending on its demonstrated need, an eligible school or library can receive as much as a 90-percent discount on the approved service(s). *See* 47 C.F.R. § 54.505(b). Those investments paid off quickly in the program's early years: by 2006, nearly all public schools had internet access; 94 percent of all instructional classrooms obtained internet access; and 98 percent of libraries offered public internet access. *See E-Rate Modernization Order* ¶ 10.

Recently, the FCC has shifted the focus of its E-Rate program to "providing broadband services, including significantly expanding Wi-Fi access."[7] Just last year, the Administrative Company "received over 35,000 applications requesting just over $3 billion in funding."[8] Overall, in 2023, the E-Rate program enabled more than 1,600 service providers to perform $2.46 billion worth of reimbursable work for the 132,000 schools and libraries enrolled in the program.[9]

But the E-Rate program is one of four separate programs that draw from the same Universal Service

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[6] Report and Order and Further Notice of Proposed Rulemaking, *Modernizing the E-Rate Program for Schools and Libraries*, 29 FCC Rcd 8870, ¶ 11 (2014) ("*E-Rate Modernization Order*").

[7] Cong. Res. Serv., *The Future of the Universal Service Fund and Related Broadband Programs* at 8 (updated Mar. 1, 2024) ("*Future of the Fund*"), https://tinyurl.com/6she422w.

[8] Univ. Serv. Admin. Co., *2023 Annual Report* at 7 ("2023 Fund Report") (distribution total), https://tinyurl.com/2kfhhtct.

[9] *See* 2023 Fund Report at 7 (funding and beneficiary data); Univ. Serv. Admin. Co., SL33-Funding-Year-2023-Disbursements-to-SP-through-4Q2023 (service provider total), https://tinyurl.com/mr29dz32.

Fund. The three other current Universal Service initiatives are the Lifeline, High Cost, and Rural Health Care programs. Thousands of providers nationwide voluntarily participate in these programs, to the great benefit of tens of millions of Americans.

Lifeline provides eligible low-income consumers with a discount of $9.25 per month (or up to $34.25 per month for residents of Tribal lands) on landline phone, wireless phone, or internet services. *See* 47 C.F.R. § 54.403(a)(1), (3). In 2023, the Administrative Company distributed $870 million to subsidize the provision of essential services to nearly 7.4 million subscribers who are customers of one of the more than 2,600 participating providers.[10]

Through the High Cost program, "eligible telecommunications carriers, usually those serving rural, insular, and high cost areas, are able to obtain funds to help offset the higher than average costs" of providing phone and broadband services.[11] While, "[h]istorically, the High Cost Program subsidized voice service to ensure universal access," in recent years the program has transitioned "to provide support for broadband." *Future of the Fund* at 2. In 2023 alone, the High Cost program distributed money to providers

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[10] *See* 2023 Fund Report at 3, 11 (distribution and subscriber figures); Univ. Serv. Admin. Co., LI03-Eligible-Telecommunications-Carriers-3Q2023, cell E:2745 (provider data), https://tinyurl.com/mr29dz32. Mechanically, the provider charges the consumer the Lifeline program rate and then requests reimbursement from the Administrative Company. *See* 47 C.F.R. § 54.403(b)(1).

[11] Cong. Res. Serv., *Universal Service Fund: Background and Options for Reform* at 3 (updated Oct. 25, 2011), https://tinyurl.com/3rhd9z9x.

that deployed broadband services "to nearly 8.2 million locations, including 1.5 million locations with speeds of a gigabit or faster." 2023 Fund Report at 9. Across all High Cost initiatives, the Administrative Company distributed $4.3 billion in 2023. *Id.* at 17. And so far this year, the Administrative Company has distributed more than $1 billion to more than 1,700 participating service providers.[12]

The Rural Health Care program offers eligible health care providers in rural areas two different benefits. First, the program subsidizes internet and telecommunications services rates for providers in rural areas to ensure they pay similar rates as providers in urban areas.[13] Second, the program gives eligible providers a 65-percent discount on broadband services, network equipment, and other eligible, related expenses. *See RHC Order* ¶ 91. Last year alone, the Administrative Company received more than 15,000 Rural Health Care applications "representing $739.47 million in gross demand." 2023 Fund Report at 13.

B. The Seventh Circuit's Erroneous Ruling Extends the False Claims Act to All Universal Service Programs

While the decision below only considered the False Claims Act's applicability to the E-Rate program, each of the three factors the court cited for holding that the government "provides" Fund money applies equally across all four Universal Service programs.

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[12] *See* Univ. Serv. Admin. Co., *High Cost*, https://tinyurl.com/mr2w98hx.

[13] *See* Report and Order, *Rural Health Care Support Mechanism*, 27 FCC Rcd 16678, ¶ 12 (2012) ("*RHC Order*"); *see also* 47 U.S.C. § 254(h)(1)(A).

First, the court reasoned that the Treasury's occasional involvement in collecting outstanding payments owed to the Fund "quite literally" entails the government "provid[ing] money to the E-Rate program." App. 30a. That rationale, *see* Pet. 23-24, is not limited to E-Rate. The Treasury is similarly involved in collecting outstanding payments owed for the money that funds the Lifeline, High Cost, and Rural Health Care programs.

Second, the court concluded that the Administrative Company is "an agent of the federal government." App. 30a; *but see* Pet. 24-28. The court's view rested primarily on the United States' "assent for the [Administrative Company] to act on the government's behalf" and the Administrative Company's subsequent implementation of the E-Rate program "according to the statutory framework and implementing regulations." App. 24a. The same is true of the other three Universal Service programs, all of which the Administrative Company administers according to the governing statutes and regulations. *See*, *e.g.*, 47 C.F.R. § 54.702(a)-(b).

Third, the court asserted that the federal government has "an active role in [the] collection and distribution" of the Fund. App. 31a. The court's reasons for finding that "active role" also apply to all four programs. The congressional mandate that all carriers pay into the Fund, App. 26a, is program agnostic, *see* 47 U.S.C. § 254(d); 47 C.F.R. § 54.709(a)(1)-(2). The same is true of the FCC's oversight responsibilities. *See* App. 26a. For all Universal Service programs, the FCC reviews denials of subsidy applications, *see* 47 C.F.R. § 54.719; makes final policy interpretations, *see id.* § 54.702(c); and collects delinquent debts, *see Blanca Tel. Co. v. FCC*, 991 F.3d 1097, 1114-15 (10th

Cir. 2021) (approving FCC's use of the Debt Collection Improvement Act of 1996 to collect monies providers owe to the Fund).

At bottom, all four Universal Service programs draw from the same pool of money, for which the Administrative Company has the same kinds of ministerial functions subject to statutes, regulations, and FCC oversight. If that is enough to bring E-Rate within the False Claims Act's ambit, it is enough for all Universal Service programs.

The decision below, issued after receiving truncated briefing on a petition for rehearing en banc and without oral argument, could not appreciate just how far its logic might reach. This case presents an efficient vehicle to both resolve a ripened circuit split and thoroughly vet the soundness of applying the False Claims Act to claims of fraud that, as petitioner explains (at 21-24), have never had any potential to harm the public fisc.

II. EXPOSING UNIVERSAL SERVICE FUND PROGRAM PARTICIPANTS TO FALSE CLAIMS ACT SUITS RISKS DETERRING FUTURE VOLUNTARY PARTICIPATION IN ITS PROGRAMS

The Seventh Circuit's erroneous decision threatens future voluntary participation in all Universal Service programs. The Seventh Circuit "has let loose a posse of *ad hoc* deputies" armed with "vexatious *qui tam* suits," *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992), which could result in massive treble damages awards and per-violation civil penalties, *see* 31 U.S.C. § 3729(a)(1). But there already exist ample remedies for the FCC and the Administrative Company to remedy frauds upon the Fund. Now, on top of

those existing remedies, telecommunications services providers in Wisconsin, Indiana, and Illinois—and potentially across the country—face the threat of duplicative, and potentially ruinous, suits from relators.

A. The Administrative Company and the FCC Already Have the Necessary Tools To Compensate the Fund for Losses and To Punish and Deter Fraud

There was no need for the Seventh Circuit to extend the False Claims Act to Universal Service programs to protect the Fund. Congress and the FCC have created ample statutory and regulatory mechanisms to fully compensate the Fund for any fraudulent losses, punish any who might commit fraud, and deter future fraud.

The Administrative Company has an ongoing duty to audit contributors to, and "beneficiaries" of (i.e., those receiving distributions from), the Fund. *See* 47 C.F.R. §§ 54.516, 54.707.[14]

The FCC's rules and orders require the Administrative Company to "recover[] in full" any wrongfully distributed Fund money.[15] In these collection actions,

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[14] *See also* Univ. Serv. Admin. Co., *Beneficiary and Contributor Audit Program (BCAP)* (detailing Administrative Company's auditing efforts for contributions to, and payments received pursuant to, all four Universal Service programs), https://tinyurl.com/m7tefyzu.

[15] *E.g.*, Fifth Report and Order and Order, *Schools and Libraries Universal Service Support Mechanism*, 19 FCC Rcd 15808, ¶ 20 (2004); Order, *Changes to the Board of Directors of the National Exchange Carrier Ass'n, Inc.*, 17 Commc'ns Reg. (P&F) 1192, 1999 WL 809695, ¶¶ 7, 10 (1999); Report and Order, *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, 22 FCC Rcd 16372, ¶ 30 (2007) ("*Fund Administration Order*").

the Administrative Company has the authority to charge fees and penalties necessary to "compensate the [Fund] for the time value of money" and ensure "that those who create additional administrative burdens will pay for them." *Fund Administration Order* ¶ 13.[16]

Separately, the FCC may bring actions to recover overpayments from the Fund. Specifically, the FCC may bring an action under the Debt Collection Improvement Act, 31 U.S.C. §§ 3711-3717, to recover the overpayment. As the Tenth Circuit explained, in distinguishing *Shupe*, the Debt Collection Improvement Act authorizes broader categories of claims than the False Claims Act—namely, "overpayments 'disallowed by audits performed by the Inspector General of the agency administering the program.'" *Blanca Tel.*, 991 F.3d at 1114-15 (quoting 31 U.S.C. § 3701(b)(1)(C)).

The FCC and the Administrative Company also have an array of punitive "[s]anctions" they may employ "in cases of waste, fraud, and abuse." *Fund Administration Order* ¶ 30.

For instance, Congress has authorized the FCC to impose a "forfeiture penalty" against any service provider that "willfully or repeatedly fail[s] to comply with" Universal Service program regulations along

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[16] In addition, when estimating how much money it will require from service providers to implement the four Universal Service programs, the Administrative Company considers the costs of these collection actions (and their subsequent appeals to the FCC). *See*, *e.g.*, Univ. Serv. Admin. Co., *Federal Universal Service Support Mechanisms Fund Size Projections for Second Quarter 2024*, at 26-27, 55 (Feb. 1, 2024) (for Funding Year 2022, listing a balance for funds reserved for "Administrative Expenses," "USAC Appeals," and "FCC Appeals"), https://tinyurl.com/2sv78bev.

with any other applicable penalty. 47 U.S.C. § 503(b)(1)(B). For "common carrier[s]" like *amici*'s members, forfeiture penalties can amount to nearly $250,000 "*for each violation*." *Id.* § 503(b)(2)(B) (emphasis added); 47 C.F.R. § 1.80(b)(2). Additional sanctions can include, but are not limited to, heightened auditing requirements and oversight measures.[17]

In addition, a service provider convicted of, or held civilly liable for, any theft- or fraud-related offenses while participating in a Universal Service program "*shall*" be "suspend[ed] and debar[red]" from the program, ordinarily for three years. 47 C.F.R. § 54.8(b), (g) (emphasis added).[18] To that end, the Administrative Company publishes on its website a list of every active suspension and debarment, including a letter explaining the circumstances leading to that sanction. In the FCC's words, suspensions and debarments are "prudent and consistent with [its] goal of ensuring that the universal service support mechanisms operate without waste, fraud, or abuse." Second Report and Order and Further Notice of Proposed Rulemaking, *Schools and Libraries Universal Service Support Mechanism*, 18 FCC Rcd 9202, ¶ 66 (2003).

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[17] *See*, *e.g.*, Order, *GCI Commc'n Corp.*, File No. EB-IHD-19-00028792, 2023 WL 3530721, at *11-21 (FCC May 11, 2023) (detailing the terms of a particularized "Compliance Plan" and auditing requirements).

[18] For an example of a debarment, see Notice of Debarment and Order Denying Waiver Petition, *NEC-Business Network Solutions, Inc.*, 21 FCC Rcd 7491, ¶¶ 20-28 (2006), in which the FCC upheld a debarment resulting from a criminal conviction for wire fraud committed against the E-Rate program, and imposing "additional precautionary [monitoring] measures" to prevent "additional waste, fraud, or abuse."

B. Subjecting Universal Service Providers to the Threat of Potentially Ruinous *Qui Tam* Suits Could Deter Program Participation

While *contributing* to the Fund is mandatory, *participating* in the programs it makes possible is not. Indeed, without the voluntary participation of service providers like *amici*'s members, Congress's commitment to promote universal service, *see* 47 U.S.C. § 254(b), would ring hollow. The FCC and the Administrative Company therefore have every incentive to implement the Universal Service programs in a way that incentivizes participation while still policing against the possibility of fraud.

The existing statutory and administrative mechanisms strike the appropriate balance. The Administrative Company can (and indeed must) recover all Fund overpayments, including any "ancillary costs, such as the costs of detection and investigation." *United States v. Halper*, 490 U.S. 435, 445 (1989); *see Fund Administration Order* ¶ 13. Service providers further know that fraudulent conduct is subject to harsh penalties. *See*, *e.g.*, *GCI Commc'n*, 2023 WL 3530721, ¶ 8 & n.27.

The decision below now introduces a new risk factor providers must consider before beginning, continuing, or expanding their participation in Universal Service programs within the Seventh Circuit: *qui tam* relators wielding the threat of potentially ruinous False Claims Act liability to induce settlements of even nonmeritorious cases. *See*, *e.g.*, *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1921 (2023) (lawsuits carrying "the possibility of colossal liability can lead to what Judge Friendly called 'blackmail settlements'"); *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 677-78 (7th Cir.

2009) ("When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good[.]"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) (noting that defendants facing "potentially ruinous liability" feel "inordinate or hydraulic pressure . . . to settle"). For some providers, this threat may eclipse the benefits of participating in a Universal Service program. Deterring service providers from participating in Universal Service programs—at any magnitude—is at odds with Congress's long-standing Universal Service goals.

Contrary to respondent's assertions (at 17), the fact that Universal Service money now sits in an account in the Treasury, rather than in a private bank, does not change the ongoing importance of this issue. Respondent assumes—without argument—that the mere existence of that Treasury account is sufficient to extend the False Claims Act to all Universal Service programs. Not so. Nothing has changed about the source of the money in that account—assessments on private parties that are not taxes. And nothing has changed about where the Administrative Company must look to make up any shortfalls in the Fund—private markets secured by future private contributions, not the Treasury. The Treasury no more "provides" the money in the Fund than the bank that previously held the Fund's account. Respondent's argument elevates form over substance.

* * *

The Seventh Circuit created a circuit split by amending an opinion in response to a petition for rehearing en banc. It did not receive full merits briefing. And it did not receive oral argument. Yet its ruling will have far-reaching consequences that threaten all Universal Service programs now and in the future. The Court should grant certiorari now to reaffirm that the False Claims Act cannot reach claims that do not impact the public fisc before the ill effects of the decision below can manifest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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