No. 23-1127

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

REPLY BRIEF FOR PETITIONER

ALLYSON N. HO
ANDREW LEGRAND
ASHLEY E. JOHNSON
STEPHEN J. HAMMER
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
(214) 698-3100

HELGI C. WALKER
Counsel of Record
ALY COX
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
hwalker@gibsondunn.com

NICHOLAS B. VENABLE
GIBSON, DUNN & CRUTCHER LLP
1801 California Street, Suite 4200
Denver, Colorado 80202
(303) 298-5700

Counsel for Petitioner

AMENDED RULE 29.6 STATEMENT

As of May 1, 2024, Petitioner Wisconsin Bell, Inc., was converted to Wisconsin Bell, LLC. As of May 2, 2024, Wisconsin Bell, LLC is a wholly owned subsidiary of AT&T Wireline Holdings, LLC. AT&T Wireline Holdings is a wholly owned subsidiary of AT&T DW Holdings, Inc. AT&T DW Holdings is a wholly owned subsidiary of BellSouth Mobile Data, Inc. BellSouth Mobile Data 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.

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Heath's response can't obscure the essential point that the Fifth and Seventh Circuits are openly divided over whether E-rate reimbursement requests are actionable claims under the False Claims Act. In holding that the FCA's treble damages and civil penalties apply to submissions made to a private corporation paying out private funds, the Seventh Circuit explicitly acknowledged that it was taking a "contrary view" from the Fifth Circuit about the identical program. Pet. App. 29a.

Heath's efforts to muddy that clear conflict are unavailing. He insists (at 11-12) the Fifth Circuit would've come to the same conclusion as the Seventh if it had known that some E-rate funds passed through the Treasury—but he overlooks the Fifth Circuit's focus on the government's financial stake in the requested funds, and here there is none. He also argues (at 13) there's no conflict under the "agent" prong of the FCA's post-2009 claim definition—but he ignores the Fifth Circuit's reasoning that forecloses any conclusion that the Administrative Company is the FCC's agent. And he emphasizes (at 14-15) the Seventh Circuit's holding that government supervision of the E-rate program triggers FCA liability—but he disregards multiple other circuits' holdings that mere regulatory oversight isn't enough.

Heath's attempts to diminish the importance of the question presented are equally unfounded. He can't deny that the conflict directly affects billions of dollars distributed each year under the E-rate and three other Universal Service programs. His argument (at 16-17) that the conflict affects only pre-2009 claims fails to grapple with *Shupe*'s reasoning. And

his insistence (at 17) that the Fund's move to the Treasury in 2018 diminishes the conflict's importance simply (and wrongly) assumes that the transfer of funds to the Treasury converted E-rate funds into public money—despite the Office of Management and Budget's ("OMB") prior conclusion that those funds *aren't* public money and can therefore be stored in a private bank account instead of the Treasury.

The acknowledged conflict casts a shadow of extraordinary liability over a massive number of transactions involving numerous private entities that are subject to government supervision. This Court should grant the petition to resolve the circuit split and restore clarity to the scope of the FCA as applied to government-adjacent programs funded with private money.

I. IN THE SEVENTH CIRCUIT, E-RATE REIMBURSEMENT REQUESTS ARE SUBJECT TO FCA LIABILITY, BUT IN THE FIFTH THEY AREN'T.

In the decision below, the Seventh Circuit expressly broke from the Fifth Circuit over the question whether E-rate reimbursement requests constitute "claims" under the FCA. Whereas the Fifth Circuit has held as a matter of law that such requests *aren't* FCA claims because the government doesn't "provide" the money in the program and the Administrative Company "is not itself a government entity," *U.S. ex rel. Shupe* v. *Cisco Sys., Inc.*, 759 F.3d 379, 388 (5th Cir. 2014) (per curiam), the Seventh Circuit openly "disagree[d]" with that decision and held—also as a matter of law—that these requests *are* subject to the FCA. Pet. 14-19. 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 government—which is absent in this case. Pet. 19-21. Heath disputes the conflict on three grounds, but none withstands scrutiny.

A. *First*, Heath asserts (at 11-12) that the Fifth and Seventh Circuits are actually aligned because *Shupe* refers to cases saying that the government need only give "a drop of treasury money to the defrauded entity," 759 F.3d at 383, and the evidence before the Seventh Circuit indicates that delinquent debts, civil settlements, and criminal restitution payments passed through the Treasury on their way to the Fund, Pet. App. 22a-23a.

That argument presumes that *Shupe*'s offhand reference to "treasury money" includes *any* money that ever touches Treasury accounts. But the decision makes clear that its test turns on whether a request seeks *public money*—and therefore risks "financial loss to the government." *Shupe*, 759 F.3d at 384 (quoting *Hutchins* v. *Wilentz, Goldman & Spitzer*, 253 F.3d 176, 184 (3d Cir. 2001)); see also *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.").

As Wisconsin Bell's petition explains—and Heath doesn't dispute—not all funds that pass through the Treasury are public money. For example, although overpaid taxes may be "treasury money" in the sense that they're initially deposited in the Treasury, they've never been considered part of the public fisc. Pet. 24 (citing Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1358 & n.67 (1988)). The same is true of the debt collections, civil settlements, and criminal restitution payments that temporarily

passed through the Treasury before being deposited in the Fund. Pet. 23-24. Indeed, if those private funds became "public money," the Miscellaneous Receipts Act would have required them to be kept in the Treasury, not the private bank account that held the Fund during the events at issue in this case. 31 U.S.C. § 3302(a)-(b).

The evidence before the Seventh Circuit would not have changed *Shupe*'s outcome. The Fifth Circuit held that E-rate reimbursement requests aren't FCA claims because the United States "does not have a financial stake" in the fraudulent losses of the E-rate program. *Shupe*, 759 F.3d at 385. The United States has no "financial stake" in debts, settlements, and restitution owed to the Fund, so none of the evidence below would've altered the Fifth Circuit's conclusion.

Without support for his all-money-that-touches-the-Treasury-is-government-money argument, Heath asserts that none of the other circuit decisions discussed in the petition, see Pet. 19-21, involve money that passed through the Treasury. Even if that were relevant, it's not correct. *United States ex rel. Sanders* v. *American-Amicable Life Insurance Co. of Texas*, for example, involved a direct deposit scheme that diverted insurance payments from service members' paychecks—and therefore straight from the Treasury. 545 F.3d 256, 257 (3d Cir. 2008). The Third Circuit explained that even though "the funds at issue *were in fact government property* until they were disbursed" to the insurance company defendants, it was the service members—not the government—who "provided" the funds to the insurance companies because they elected to participate in the fraudulent direct deposit program. *Id.* at 260 (emphasis added). There, as here,

the fact that the case involved "treasury money" as Heath defines it didn't make the payments FCA claims.

B. *Second*, Heath's argument (at 13) that there's no split under the "agent" prong of the FCA's post-2009 definition of a claim ignores *Shupe*'s holding that the Administrative Company is "independent from the Government." *Shupe*, 759 F.3d at 386.

Relevant to the agency issue, the Fifth Circuit held that:

- the FCC has "no ability to control the [Fund] through direct seizure or discretionary spending";
- the Administrative Company "holds dominion" over the Fund and "has discretion over if, when, and how it disburses universal service funds to beneficiaries"; and
- the National Exchange Carrier Association—the Administrative Company's "sole shareholder and therefore the program's administrator"—"acted exclusively as an *agent for its members*"—not for the government.

Shupe, 759 F.3d at 386 *(*quoting *In re Incomnet*, 463 F.3d 1064, 1071 (9th Cir. 2006) (first, second, and third quotes) and *Farmers Tel. Co.* v. *FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999) (fifth quote)) (emphasis added).

Those holdings can't be reconciled with the Seventh Circuit's decision, which concluded that the Administrative Company is an agent of the United States because "the FCC controls" it. Pet. App. 25a. As the Fifth Circuit explained, the Administrative

Company—not the FCC—exercises "dominion" over the Fund, and its sole shareholder is not a government agent. *Shupe*, 759 F.3d at 386.

C. *Third*, Heath denies the conflict (at 14-15) because the Seventh Circuit held that, even if no E-rate funds passed through the Treasury, the government "can be deemed to 'provide' money" through its "active role in its collection and distribution," Pet. App. 30a-31a, and the Fifth Circuit was supposedly under the misimpression that E-rate funds never passed through the Treasury. That argument doesn't follow.

Contrary to Heath's assertion, this aspect of the Seventh Circuit's decision directly conflicts with *Shupe*. The Seventh Circuit held that even apart from any money from the Treasury, the government can be said to "provide" funds in the E-rate program because of its "role in establishing and overseeing" that program. Pet. App. 25a-26a. "[R]eceipt of Treasury funds," it explained, "is a sufficient *but not necessary* basis for applying the False Claims Act." Pet. App. 30a (emphasis added). That sweeping conclusion would have required the opposite result in *Shupe* even if no money ever passed through the Treasury on its way to the Fund. But see *Shupe*, 759 F.3d at 388 (holding the government doesn't provide money in the E-rate program despite the FCC's "regulatory supervision" of the program). And it's flatly inconsistent with decisions of the Second, Third, and Eight Circuits, all of which hold that—in keeping with the statute's text, structure, and history—FCA liability requires a potential loss to the government, not mere regulatory oversight. Pet. 19-21; see Wash. Legal Found. Amicus Br. 16-20; USTelecom and CTIA Amici Br. 3.

Heath's efforts to paper over the split created by the Seventh Circuit crumble on inspection. The Seventh Circuit expressly "disagree[d] with *Shupe*'s holding," Pet. App. 29a, and its conclusion can't be reconciled with the decisions of other circuits recognizing that FCA liability requires a risk of government loss.

II. THE QUESTION PRESENTED IS OF EXCEPTIONAL AND CONTINUING IMPORTANCE.

The question presented is exceptionally important. Heath doesn't dispute that the E-rate program itself is massive, distributing up to $4.5 billion per year. Pet. 7.[1] Nor does he deny that the Seventh Circuit's reasoning could sweep up transactions with the three other programs administered by the Administrative Company—each of which involves a "vast array of regulatory requirements" that may now trigger "essentially punitive" FCA liability for participating providers. Wash. Legal Found. Amicus Br. 9-13 (first quote); *Vt. Agency of Nat. Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 784 (2000) (second quote); see Pet. 28-29; USTelecom and CTIA Amici Br. 4-9. It will also affect the Telecommunications Relay Service Fund, which is similarly structured to the Universal Service Fund. Wash. Legal Found. Amicus Br. 7-9. In the face of these severe consequences—which threaten to undermine Congress's universal service goals by deterring voluntary provider participation, see USTelecom and CTIA Amici Br. 13-14—Heath's efforts to contest the question's importance ring hollow.

A. Heath contends (at 16-17) that the conflict isn't important because it supposedly implicates only pre-2009 claims. Not so. The pre-2009 "provides"

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

prong of the claim definition remains part of the post-2009 definition, 31 U.S.C. § 3729(b)(2)(A)(ii)(I), so at minimum—and as *Shupe* itself noted—the interpretation of that prong will "influence the reach of the False Claims Act current and past." 759 F.3d at 383. The conflict has clear relevance to the "agency" prong of the post-2009 definition as well, because *Shupe*'s reasoning forecloses the conclusion that the Administrative Company is a government agent. See *supra* pp. 5-6.

B. Heath also argues (at 17) that the Fund's move to the Treasury in 2018 diminishes the importance of the conflict going forward. But far from resolving the status of reimbursement requests made to the E-rate program in the future, that move only begs the question whether E-rate funds are "public money" that belongs in the Treasury in the first place.

In 2000, OMB provided the FCC with a legal opinion on whether the Fund constitutes "public money" received "for the use of the United States" that must be deposited in the Treasury under the Miscellaneous Receipts Act.[2] Applying the general principle that "[f]unds are received for the use of the United States only if they are to be used to bear the expenses of the Government or to pay the obligations of the United States," OMB concluded that the Fund is not "public money" and may therefore be "appropriately maintained outside the Treasury by a non-governmental

[2] See Off. of Mgmt. & Budget, Exec. Off. of the President, Opinion Letter on the Status of the Universal Service Fund 1 (Apr. 28, 2000), bit.ly/49udXwN.

manager."[3] The Fund was accordingly stored in a private bank account.[4]

In 2014, OMB apparently changed its mind, concluding that Universal Service funds "are federal resources and should enjoy the same rigorous management practices and regulatory safeguards as other federal programs."[5] That about-face led the FCC to move the Fund from a private bank account to the Treasury in 2018.[6]

OMB's legal flip-flop on the status of E-rate funds doesn't resolve the status of E-rate reimbursement requests under the FCA. E-rate funds are either "public money" or they're not. If they're not public money—as OMB correctly concluded in 2000—then the government doesn't "provide" those private funds regardless of whether they're stored in the Treasury. See *supra* pp. 3-4 (not all money in the Treasury is part of the public fisc); USTelecom and CTIA Amici Br. 14. This Court's resolution of the question presented is therefore of continuing importance in determining the legal status of reimbursement requests for E-rate funds today.

C. The Seventh Circuit's decision on the agency issue carries sweeping consequences for the future,

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[3] *Id.* at 2-3 (quoting *Fam. Lines Rail Sys.—Return of Funds*, B-205901, 1982 WL 26811, at *1 (Comp. Gen. May 19, 1982)) (first quote).

[4] U.S. Gov't Accountability Off., GAO-17-538, *Telecommunications: Additional Action Needed to Address Significant Risks in FCC's Lifeline Program* 23 (May 2017), bit.ly/3Wq46FA.

[5] *Ibid.*

[6] See *ibid.*; Letter from FCC Chairman Ajit V. Pai to Congresswoman Gwen Moore 1 (July 23, 2018), bit.ly/3QGXAGD.

even beyond the telecom context. The Seventh Circuit's far-reaching definition of "agency" as including any private entity subject to the "ultimate control" of the government, Pet. App. 25a, would also encompass Fannie Mae and Freddie Mac—federally chartered private companies that are "two of the Nation's leading sources of mortgage financing." *Collins* v. *Yellen*, 141 S. Ct. 1761, 1770 (2021); see Wash. Legal Found. Amicus Br. 13-16.

The Federal Housing Finance Agency "is tasked with supervising nearly every aspect of [Fannie Mae's and Freddie Mac's] management and operations," including "if necessary, stepping in as their conservator or receiver." *Collins*, 141 S. Ct. at 1770-71. That's a far greater degree of "ultimate control" than the FCC (which lacks any analogous power of conservatorship or receivership) has over the Administrative Company. Pet. App. 25a; see Wash. Legal Found. Amicus Br. 14-15.

As a result, the Seventh Circuit's definition of an "agent of the United States" will affect not only providers in the E-rate program—it means that countless mortgage companies and borrowers may face FCA liability for their interactions with Fannie Mae and Freddie Mac. That's despite the Ninth Circuit's contrary holding (in agreement with an amicus brief submitted by the United States) that Fannie Mae and Freddie Mac can't be government agents because they're "private companies"—just like the Administrative Company. *U.S. ex rel. Adams* v. *Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1260-61 (9th Cir. 2016); Wash. Legal Found. Amicus Br. 15-16.

This Court's review is needed to provide clarity in this critical area of the law, and to ensure that the

FCA is not extended to claims that don't involve any loss of governmental money.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ALLYSON N. HO
ANDREW LEGRAND
ASHLEY E. JOHNSON
STEPHEN J. HAMMER
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
(214) 698-3100

HELGI C. WALKER
Counsel of Record
ALY COX
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
hwalker@gibsondunn.com

NICHOLAS B. VENABLE
GIBSON, DUNN & CRUTCHER LLP
1801 California Street, Suite 4200
Denver, Colorado 80202
(303) 298-5700

Counsel for Petitioner

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