No. 23-1127

IN THE
Supreme Court of the United States

WISCONSIN BELL, INC.,
Petitioner,

v.

UNITED STATES, EX REL. TODD HEATH,
Respondent.

On 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 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, if affirmed, would put *amici*'s members across the country under the threat of novel—and potentially ruinous—liability. And it would give private relators the ability to wield that threat of massive liability to extract settlements, even in non-meritorious cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under federal law, the money that supports the Federal Communications Commission's ("FCC") Universal Service programs comes from telecommunications services providers (including *amici*'s members) and

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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.

their customers—not from congressional appropriations or enacted legislation imposing 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 correctly 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]

Petitioner ably demonstrates (at 17-33) how the decision below is inconsistent with the False Claims Act's text, history, and structure. *Amici* write

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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 "provides . . . any portion of the money or property requested." *Compare* 31 U.S.C. § 3729(b)(2)(A) *with* 31 U.S.C. § 3729(c) (2006). *See also* Pet'r Br. 3-5 (explaining statutory history).

separately to underscore three additional reasons for reversing the judgment below.

First, the decision below is inconsistent not only with the history of the False Claims Act, but also with the history of the Universal Service Fund itself. When Congress created the modern Universal Service Fund, it did not also create—or authorize the FCC to create—any new federal entities for administering the program. Congress's choice thus insulates the demands on the Fund from drawing down the public fisc and, consequently, from the reach of the False Claims Act.

Second, the decision below cannot be cabined 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. Unless the decision below is reversed, thousands of providers nationwide will now face 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.

Third, 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.

ARGUMENT

I. CONGRESS NEVER PLACED THE ADMINISTRATIVE COMPANY WITHIN THE FALSE CLAIMS ACT'S REACH

As petitioner ably demonstrates (at 22), the text of the False Claims Act makes clear "that the government 'provides' money" for purposes of the Act's scope "only if it supplies that money, thereby exposing the government to loss." The decision below is contrary to both that plain mandate, *see* Pet'r Br. 18-19, and the False Claims Act's "structure[] and history," *id.* at 19-22.

But there is more evidence of the lower court's error: the origins of the Administrative Company itself. Through the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), Congress crafted an entirely new framework for accomplishing its long-standing goal of promoting universal service. While Congress could have created a new branch of the administrative state to manage the Fund or authorized the FCC to create a new, government-owned body to do so, Congress did neither. That inaction has consequences. It confirms that the Administrative Company's disbursement of Fund monies does not "expos[e] [the government] to the risk of financial loss that's the hallmark of [False Claims Act] liability." Pet'r Br. 33.

A. Through the Telecommunications Act of 1996, Congress Gave the FCC the Power To Administer Universal Service Programs, but Not To Create a New Agency To Administer Those Programs

"Beginning with the passage of the Communications Act of 1934 . . . , Congress has made universal service a basic goal of telecommunications regulation." *Texas*

Off. of Pub. Util. Counsel v. FCC, 183 F.3d 393, 405 (5th Cir. 1999) ("*TOPUC*"); *see* 47 U.S.C. § 151. But the Administrative Company is a comparatively recent addition to the Universal Service regime.

Initially, "in the years after the passage of the 1934 Communications Act," when telephone service was offered through a government-sanctioned monopoly, "a universal-service concept was slowly developed and advanced largely through cross-subsidization of local service by . . . long-distance service." Steve G. Parsons & James Bixby, *Universal Service in the United States: A Focus on Mobile Communications*, 62 Fed. Comm. L.J. 119, 126-27 (2010); *see also id.* at 123-29 (exploring this history in depth).

The first iteration of the Fund came in 1983. *See* Third Report and Order, *MTS and WATS Market Structure*, 93 F.C.C.2d 241, ¶¶ 3, 123-137 (1983). At the same time, the FCC ordered the creation of what soon became the National Exchange Carrier Association, or NECA. *Id.* ¶¶ 7, 148-150; *see also* 47 C.F.R. § 69.601. "NECA is neither an independent federal agency nor a subagency of the FCC." *Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999). It is "a nonprofit, non-stock membership corporation," *Allnet Commc'n Serv., Inc. v. National Exch. Carrier Ass'n, Inc.*, 965 F.2d 1118, 1119 (D.C. Cir. 1992), whose "board of directors and membership consist entirely of industry participants," *Farmers Tel.*, 184 F.3d at 1246 (citing 47 C.F.R. § 69.602). Among its many other functions at the time, NECA "administer[ed] the Universal Service Fund." *Allnet*, 965 F.2d at 1119; *see also id.* (describing NECA's other roles); *Farmers Tel.*, 184 F.3d at 1245-46 (same).

In the 1996 Act, Congress introduced competition into local telephony. The old cross-subsidy model for

universal service would not work in a competitive market—"a carrier that tries to subsidize below-cost rates to rural consumers with above-cost rates to urban customers is vulnerable to a competitor that offers at-cost rates to urban consumers." *TOPUC*, 183 F.3d at 406. Therefore, Congress directed the FCC to implement "specific, predictable and sufficient . . . mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5). Congress also specified how Universal Service programs would now be funded: by mandatory contributions from "[e]very telecommunications carrier that provides interstate telecommunications services." *Id.* § 254(d). But Congress otherwise delegated to the FCC the task of implementing a mechanism for handling those contributions. *See id.* § 254(h).

The FCC at first appointed NECA as "the temporary administrator" of the universal service support programs. Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 866 (1997). To address concerns that NECA might not act impartially (given that its members are telecommunications providers that both make and receive disbursements from the Fund), NECA proposed creating "an independently functioning, not-for-profit subsidiary, to be designated the Universal Service Administrative Company." Report and Order and Second Order on Reconsideration, *Changes to the Board of Directors of the National Exchange Carrier Association, Inc. & Federal-State Joint Board on Universal Service*, 12 FCC Rcd 18400, ¶ 25 (1997). Under that proposal, which the FCC accepted, the Administrative Company would "be directly responsible for billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds." *Id.* ¶ 41.

The FCC separately directed NECA "to incorporate two not-for-profit, unaffiliated corporations"—the Schools and Libraries Corporation and the Rural Health Care Corporation—that would "be responsible for administering the schools and libraries and rural health care programs, [respectively,] except with regard to those matters directly related to billing, collection, and disbursement of funds." *Id.* ¶ 57. The FCC gave specific directions for NECA to incorporate these two corporations in the State of Delaware entirely "independent of, and unaffiliated with," both NECA and the Administrative Company. *Id.*

As it turns out, the FCC lacked the authority to do that. In 1998, the General Accounting Office ("GAO") observed that these "private corporations" would "not [be] subject to statutes that impose obligations on federal entities and federal employees." GAO Letter[4] at 8. Nor would "Congress ha[ve] [any] direct oversight over the corporations." *Id.* at 9. In these circumstances, the Government Corporation Control Act, 31 U.S.C. § 9102, demanded that the FCC point to some "specific statutory authority" in the 1996 Act for it to create those corporations. GAO Letter at 4-5. GAO concluded, however, that, "with respect to the provision of universal service, Congress provided no [such] authority." *Id.* at 5 n.8.

In response, the FCC asked Congress to give it "specific statutory authority . . . to create or designate, on or before January 1, 1999, one or more entities, such as the Universal Service Administrative Company, to administer the federal universal service support mechanisms." Report in Response to Senate Bill 1768

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[4] Letter from Off. of Gen. Counsel, GAO, to Hon. Ted Stevens, B-278820 (Feb. 10, 1998) ("GAO Letter"), https://www.gao.gov/assets/b-278820.pdf.

and Conference Report on H.R. 3579, 13 FCC Rcd 11810, ¶ 15 (1998).

But that congressional authorization never came. So, in late 1998, the FCC published a Final Rule appointing the Administrative Company as the permanent administrator of the Universal Service programs, merging into it the previously created Schools and Libraries Corporation and Rural Health Care Corporation. *See* Final Rule, *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, 63 Fed. Reg. 70,564, 70,564-65, 70,572-73 (Dec. 21, 1998) (codified, as amended, at 47 C.F.R. § 54.701).

The FCC explained that it saw no statutory impediment to making the Administrative Company, a NECA subsidiary, the permanent administrator. *Id.* at 70,564. Congress "was aware of NECA's role" in "administering the high cost support mechanism for more than a decade" prior to the passage of the 1996 Act, but in passing the 1996 Act did nothing "to prohibit the Commission from using NECA, or another independent entity[,] to administer universal service." *Id.* Congress thus "implicitly affirmed the Commission's authority to employ an independent entity to administer universal service." *Id.*

B. The Administrative Company's Isolation from the Public Fisc Places Its Funds Beyond the False Claims Act's Reach

To this day, the Administrative Company remains the administrator of Universal Service programs. *See* 47 C.F.R. § 54.701. Yet Congress has never statutorily embraced it as a government agency or government corporation, and has never authorized the FCC to formally label it an FCC subagency. *Cf. Farmers Tel.*, 184 F.3d at 1250. As a result, the Administrative

Company "is not itself a government entity," meaning its activities cannot expose the government to financial loss. *United States ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379, 388 (5th Cir. 2014) (per curiam). And without that necessary "financial stake in [the Fund's] fraudulent losses," the False Claims Act—however broad it may be—cannot reach fraud upon the Fund. *Id.* at 385.

That the Fund is also sequestered from the public fisc further confirms the point. It consists entirely of mandatory contributions from private telecommunications service providers. *See* 47 U.S.C. § 254(d); 47 C.F.R. § 54.706; *see also* Pet'r Br. 27-28. In the event of a budgetary shortfall, the Administrative Company can only look to privately sourced credit—not federal tax dollars—to make up the difference. *See* 47 C.F.R. § 54.709(c). And even the Administrative Company's budget must come from that same Fund. *See id.* § 54.715(c).

"Congress' decision . . . to externalize the cost of administering the [Universal Service] program" therefore confirms that the False Claims Act has no role to play in remedying fraud upon the Fund. *Shupe*, 759 F.3d at 388. Congress's decision for the Fund also contrasts sharply with Congress's enactment of the Affordable Connectivity Program ("ACP"). There, Congress specifically appropriated money from the Treasury for the ACP, expressly authorized the Administrative Company's involvement, and prohibited the use of any Fund money as part of the ACP. *See* 47 U.S.C. § 1752(i)(2), (4)-(5). Indeed, Congress not only provided the ACP funds, in the ordinary meaning of that word, *see* Pet'r Br. 18-21, but also used "provide" with that ordinary meaning: ACP disbursements "shall be provided from amounts [Congress] made

available," 47 U.S.C. § 1752(i)(4). Thus, the False Claims Act encompasses the ACP because fraud against the ACP would harm the public fisc.

That is not to deny the close relationship between the FCC and the Administrative Company. But contrary to the Seventh Circuit's conclusion, App. 27a, 31a, the closeness between the FCC and the Administrative Company does not transform the privately contributed money in the Fund into the public fisc for purposes of the False Claims Act. *Cf. Hall v. American Nat'l Red Cross*, 86 F.3d 919, 922 (9th Cir. 1996) (explaining that a corporation may be "performing sufficient secondary or derivative government functions to be shielded from state taxation" without, for example, becoming "subject to a constitutional restriction against burdening free exercise of religion") (citation omitted).[5]

Whether the False Claims Act grants *qui tam* relators the ability to wield the threat of treble damages suits against Universal Service program participants thus "must be examined" independently, in light of "the wishes of Congress as expressed in [the] relevant legislation." *Arkansas v. Farm Credit Servs. of Cent. Arkansas*, 520 U.S. 821, 830 (1997). As petitioner demonstrates (at 17-26), and as the Fifth Circuit held in *Shupe*, Congress's wishes are to limit the False Claims Act to alleged frauds with the potential to impact the public fisc.

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[5] More recently, the United States has argued that the American Red Cross is a "person" under the Sherman Act notwithstanding its immunity from state taxation, because the two doctrines are distinct. *See* Statement of Interest of the United States at 14-18, *Verax Biomedical Inc. v. American Nat'l Red Cross*, No. 1:23-cv-10335-PBS, ECF No. 34 (D. Mass. Aug. 4, 2023).

The Second, Third, Eighth, and D.C. Circuits all frame the False Claims Act inquiry similarly.

For instance, the Third Circuit held that the False Claims Act does not cover allegedly false legal bills submitted to a federal bankruptcy court, because the estate (not the government) paid those bills, and the False Claims Act "is only intended to cover instances of fraud that might result in financial loss to the Government." *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 183 (3d Cir. 2001); *see United States ex rel. Sanders v. American-Amicable Life Ins. Co.*, 545 F.3d 256, 259-60 (3d Cir. 2008) (following *Hutchins* and affirming dismissal where the alleged false claims in selling insurance policies to soldiers "could not cause the government . . . to suffer any economic loss").

Similarly, the Eighth Circuit reversed the denial of a motion to dismiss a complaint based on alleged false claims for reimbursement from a private trust fund for cleanup at a Superfund site. Although the trust fund that paid those claims was created following a federal action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, "[n]one of the money in the . . . trust fund . . . was provided by the United States Government," and "no money disbursed from the private fund was ever reimbursed by the federal government." *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 671, 677 (8th Cir. 1998). The False Claims Act did not reach those alleged false claims, because they could not "caus[e] the United States to pay out money it is not obligated to pay, or . . . deprive the United States of money it is lawfully due." *Id.* at 677.

The Second and D.C. Circuits have applied the same (correct) legal rule, allowing False Claims Act cases to proceed only after identifying an injury to the public

fisc. The Second Circuit held that the False Claims Act protected loans that Federal Reserve Banks issued to private banks, because "the [Banks] are required to remit all their excess earnings to the United States Treasury." *United States ex rel. Kraus v. Wells Fargo & Co.*, 943 F.3d 588, 604 (2d Cir. 2019). A borrower's failure to pay the right amount of interest on a loan from such a Bank, therefore, "injures the public fisc." *Id.* at 605.[6] And the D.C. Circuit found that allegedly false claims for payment submitted to Howard University, a private university, could create False Claims Act liability because congressional appropriations and other federal grants made up 80 percent of its total budget. Therefore, the federal government "would suffer a loss if the money appropriated for legitimate purposes were instead wasted on a false claim." *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 739 (D.C. Cir. 1998).

The weight of authority interpreting the False Claims Act's ambit is thus consistent with its text: no liability extends to fraudulent claims for payment that cannot "expos[e] [the government] to the risk of financial loss." Pet'r Br. 33.[7] Here, despite the relationship between the FCC and the Administrative Company,

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[6] Although the Second Circuit cited with approval the district court's decision denying Wisconsin Bell's motion to dismiss, *see Kraus*, 943 F.3d at 602, that court still identified a way in which the alleged fraud directly impacted the United States Treasury, *see id.* at 603-05.

[7] *See also* Br. for the United States as Amicus Curiae in Support of Neither Party 26-30, *United States ex rel. Adams v. Aurora Loan Servs., Inc.*, No. 14-15031, Dkt. No. 17 (9th Cir. May 27, 2014) (arguing that the False Claims Act could apply to fraudulent claims submitted to Fannie Mae and Freddie Mac because those entities could draw funds from the Treasury to make up any budgetary shortfall).

the public fisc is unaffected by fraud upon the Fund. That is because Congress never statutorily deputized the Administrative Company as a governmental entity; it has never given the FCC the authorization to do so; and it has never authorized Treasury funds to be used for Universal Service programs. Accordingly, the federal government does not "provide[]" Fund money to Universal Service program participants. 31 U.S.C. § 3729(c) (2006); 31 U.S.C. § 3729(b)(2)(A)(ii)(I).

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

While the decision below discusses the False Claims Act's applicability only to the E-rate program, the Seventh Circuit has effectively ruled that every Universal Service program falls within the Act's ambit. Embracing that holding would have 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."[8] It offers all public and nonprofit libraries and elementary and secondary schools support for "telecommunications, telecommunications services, internet access, internal connections,

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

and basic maintenance of internal connections."[9] 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."[10] Overall, in 2023, the E-rate program enabled more than 1,600 service providers to launch and improve broadband services for the 132,000 schools and libraries enrolled in the program.[11]

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

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[9] 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*").

[10] 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.

[11] *See* Univ. Serv. Admin. Co., *2023 Annual Report* at 7 ("2023 Fund Report") (beneficiary data), https://tinyurl.com/2kfhhtct; Univ. Serv. Admin. Co., SL33-Funding-Year-2023-Disbursements-to-SP-through-4Q2023 (service provider total), https://tinyurl.com/mr29dz32.

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 alone, the Administrative Company authorized Fund distributions 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.[12]

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.[13] 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 Fund money to providers 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.

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

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[12] *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).

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

rural areas to ensure they pay similar rates as providers in urban areas.[14] 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 "a record number" of more than 15,000 applications. 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 considered the False Claims Act's applicability only 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.

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 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." *Id.* 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

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[14] *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).

E-rate program "according to the statutory framework and implementing regulations." App. 24a. If the Court adopted that logic, it would apply equally to 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, *see* 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.

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

Accepting the Seventh Circuit's erroneous reading of the False Claims Act 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 across the country would 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 is no need 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 and deter future fraud.

For starters, the FCC may bring actions to recover overpayments from the Fund under the Debt Collection Improvement Act, 31 U.S.C. §§ 3711-3717. There, Congress authorized actions to recover overpayments "disallowed by audits performed by the Inspector

General of the agency administering the program." 31 U.S.C. § 3701(b)(1)(C). As the Tenth Circuit recognized, the Debt Collection Improvement Act is "a different statutory scheme with different" and "more expansive[]" language than the False Claims Act. *Blanca Tel.*, 991 F.3d at 1114-15. That is why there is no inconsistency between the Fifth Circuit's ruling that the Fund is outside of the False Claims Act's reach and the Tenth Circuit's confirmation that the FCC can use the Debt Collection Improvement Act to pursue amounts an audit identifies are owed to the Fund. *See id.* at 1114 (citing *Shupe*, 759 F.3d at 387-88); *see also* Pet'r Br. 29-33.

The Administrative Company separately 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.[15] Indeed, the FCC's rules and orders require the Administrative Company to "recover[] in full" any wrongfully distributed Fund money.[16] Through the Administrative Company's auditing process, *see id.* § 54.707, it has the authority to charge fees necessary to "compensate the [Fund] for the time value of money" and cover the attendant

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[15] *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.

[16] *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*").

administrative costs, *Fund Administration Order* ¶ 13.[17]

The FCC and the Administrative Company also have an array of punitive "[s]anctions" they may employ "in cases of waste, fraud, and abuse." *Id.* ¶ 30. For example, if after an Article III proceeding a service provider is convicted of, or held civilly liable for, any theft- or fraud-related offenses while participating in a Universal Service program, that provider "*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] 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.[19] 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,

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[17] 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.

[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."

[19] *See* Univ. Serv. Admin. Co., *Suspensions & Debarments*, https://tinyurl.com/2zbtp5kc.

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).

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 they face additional consequences for engaging in fraudulent conduct. *See Fund Administration Order* ¶ 30; 47 C.F.R. § 54.8(b), (g).

The decision below, if affirmed, would introduce a new risk factor providers must consider before beginning, continuing, or expanding their participation in Universal Service programs: *qui tam* relators wielding the threat of potentially ruinous False Claims Act liability to induce settlements of even non-meritorious 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.

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. The mere existence of that Treasury account is insufficient to extend the False Claims Act to all Universal Service programs. 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.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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