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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The disclosure statement included in the reply brief for petitioner filed on May 20, 2024 remains accurate.

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REPLY BRIEF FOR PETITIONER

Congress could have designed the E-rate program to draw on public funds and be administered by a government instrumentality. It didn't. That choice has consequences under the False Claims Act, which has always been about guarding the funds and property of the government. The Seventh Circuit reversibly erred in stretching the FCA to reach submissions made to a private corporation paying out only private money.

Heath maintains that the government "provides" E-rate funds because it requires carriers to supply that money. But he can't come up with a single example supporting the notion that a person "provides" money by requiring *someone else* to pay. No wonder. That reading confounds ordinary usage, defies the FCA's context, structure, and history, and raises grave constitutional concerns.

Heath's assertion that the government at least provides debts, settlements, and restitution it collects for the Company fares no better. To "provide" money means being the source of the funds, not a conduit for their transmission. That's particularly true here, because it's well established that private money doesn't turn (poof!) into public funds just because it passes through government hands on the way back to its rightful owner. That straightforward conclusion forecloses FCA liability for pre-2009 E-rate requests.

The claim definition's agency prong doesn't rope in post-2009 requests, either. Heath and the government concede that "agent" bears its settled common-law meaning in the FCA. Under that meaning, an entity is an agent of the United States when it (1) can bind the government and (2) is subject to the govern-

ment's power of interim control. Heath and the government don't contend that the Company can bind the government. So they resort to ditching the first requirement and diluting the second. Their laundry list of ways the FCC purportedly controls the Company omits the one thing that matters—any interim control over grants of reimbursement requests.

The absence of an agency relationship is a feature, not a bug. The Government Corporation Control Act all along has prevented the FCC from creating a corporation to act on its behalf. And by deliberately insulating the E-rate program from the public fisc, the political branches foreclosed any role for the FCA, which isn't an all-purpose fraud statute. The Company and the FCC retain an array of tools, including audits, penalties, and debarments, to deter and prevent fraud and abuse (which didn't happen here). So the E-rate program can be safeguarded without distorting the FCA or magnifying the constitutional concerns swirling around it.

The judgment below should be reversed.

ARGUMENT

I. THE GOVERNMENT DOESN'T "PROVIDE" ANY MONEY IN THE E-RATE PROGRAM.

E-rate reimbursement requests aren't claims under the FCA's provides prong because private telecommunications carriers—not the government—supply all the money in the E-rate program. Pet. Br. 17-33. Heath's insistence that the government provides money by requiring others to supply it defies the ordinary tools of statutory interpretation and raises serious constitutional problems to boot. And his contention that the government at least provides the money

it collects on behalf of the Company is equally unsupported, because those funds are no different in character than the contributions carriers pay directly to the Company.

A. In ordinary meaning, a person "provides" money by supplying it—not by ordering someone else to supply it.

As a matter of ordinary meaning, to "provide" something means to "furnish" or "supply" it. Pet. Br. 18-22. The FCA's text, context, structure, and history all confirm that the government provides money by furnishing it from the public fisc—not by shifting obligations to private parties. *Ibid.* Heath doesn't dispute that telecommunications carriers "provide" the money in the E-rate program. See *id.* at 27-29. Instead, his theory appears to be that E-rate funds are provided *both* by the carriers that actually supply the money *and* by the government that requires the supplying. But none of Heath's arguments holds up.

1. Heath emphasizes (at 29-30) that "provide" can also mean "make available." But Wisconsin Bell has already explained why that definition can't do the work Heath needs. Pet. Br. 23. Even if it were literally possible to read "provide" to mean "make available through the exercise of regulatory power," that reading strains against common usage, which is that a person "provides" something when he supplies it himself—not when he compels another to do so. See *id.* at 19, 23.

That's exactly how Congress used the term in specifying that reimbursements from the Affordable Connectivity Fund should be "provided" from appropriations instead of private contributions. 47 U.S.C. § 1752(i)(4); see Pet. Br. 20-21; USTelecom and CTIA Br. 9-10. And that ordinary meaning is what matters

under the FCA, which has always been focused on the risk of "financial loss to the Government"—not to private parties. *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232 (1968).

If Congress had wanted Heath's reading, it would have said "provided *for*," as it did numerous times elsewhere—including the statute at issue in *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 591 U.S. 657, 676 (2020), upon which Heath relies (at 29). See Pet. Br. 23-24 (collecting "provide for" statutes); Chamber Br. 8-9 (more). But when Congress wants to indicate the supplier of something, it uses the simple "provide," as it did here. See, *e.g.*, 31 U.S.C. § 705(c)(8) (Inspector General may "provide copies of all reports to the Audit Advisory Committee"); *id.* § 9105(b) ("a Government corporation shall provide to the Comptroller General *** all books, accounts, [and] financial records").

Heath's pizza hypo (at 32) gives his case away by asking who provided the *food* rather than who provided the *money*. If the employee put the pizza on his assistant's credit card, an ordinary English speaker would say the assistant—not the employee—provided the money for the food, because the assistant was the source of the funds. Pet. Br. 23.

Heath insists (at 33) that the statutory text would support Wisconsin Bell even more clearly if Congress had said "directly provides." But directness isn't the issue. The carriers supply E-rate money whether their contributions go directly to the Company or are routed through an intermediary like a bank. The government, by contrast, doesn't provide E-rate money either directly *or* indirectly—it simply designates a private funding source.

2. Heath contends (at 33-36) that statutory context and structure support his reading. But interpreting "provides" to mean requiring others to pay makes a hash of the "statute as a whole." *Fischer* v. *United States*, 144 S. Ct. 2176, 2183 (2024) (citation omitted).

Start with the other verbs. Heath acknowledges (at 34) that Congress paired "will reimburse," 31 U.S.C. § 3729(b)(2)(A)(ii)(II), with "provides or has provided," *id.* § 3729(b)(2)(A)(ii)(I), to make clear that a claim can exist no "matter *when* the Government provides money." But if Heath were right that the government provides money by making it available in any abstract sense, there'd be no independent work for "has provided" or "will reimburse" to do. The government would've made funds available today by supplying them yesterday or committing to reimburse them tomorrow. Pet. Br. 24.

Now consider who gets the funds the government provides: "a contractor, grantee, or other recipient." 31 U.S.C. § 3729(b)(2)(A)(ii); *id.* § 3729(c) (2008). Heath asserts (at 33-34) that an entity is a grantee or other recipient if it obtains funds the government required a private party to pay. But that stretches ordinary meaning past the breaking point. When the government passes a minimum-wage law for private employers, no one would call increased wages government "grants." And no one would say that employees whose salaries go up are "recipients" of funds "provided" by the government. The statute's reference to contractors, grantees, and recipients underscores that its focus is on the government's transfer of its *own* money—not on its regulatory authority to make someone else pay. Pet. Br. 19.

The 2009 claim definition's statement that a request can qualify as a claim "whether or not the

United States has title to the money or property" doesn't disturb that plain meaning. 31 U.S.C. § 3729(b)(2)(A). Here, as elsewhere in the claim definition, "Congress' use of a verb tense is significant." *United States ex rel. Totten* v. *Bombardier Corp.*, 380 F.3d 488, 493 (D.C. Cir. 2004) (quoting *United States* v. *Wilson*, 503 U.S. 329, 333 (1992)), cert. denied, 544 U.S. 1032 (2005). The title clause clarifies that the FCA can apply even if the government no longer "*has* title"—present tense—"to the money or property" when the request is made. 31 U.S.C. § 3729(b)(2)(A) (emphasis added).

That clarification was necessary because one district court had reached the opposite conclusion, holding that unless the government has title to the money when the request is made, there's no FCA claim even when the government has parted with public money. See *United States ex rel. DRC, Inc.* v. *Custer Battles, LLC*, 376 F. Supp. 2d 617, 646-47 (E.D. Va. 2005), rev'd in part, 562 F.3d 295 (4th Cir. 2009). The title clause forecloses that reading by confirming that a request for money provided by the government to a grantee is still a claim, even though the grantee holds title to the money when the request is made. In that situation, the request still poses a financial risk to the government by diverting public funds supplied to the grantee.

Heath's attempt (at 26-27) to brush off the FCA's remedial provision is another exercise in misdirection. True, the FCA imposes liability (through civil penalties) on defendants who submit false claims even when "there is no dollar loss," S. Rep. No. 99-345, at 3 (1986)—such as "where the government discovers that a claim is false before it makes payment," *United States ex rel. Sanders* v. *Am.-Amicable Life Ins. Co. of*

Tex., 545 F.3d 256, 259 (3d Cir. 2008). But that's far from the case here. The government not only *didn't* suffer a financial loss—it *couldn't* have suffered one. Heath offers no reason to believe the FCA, which "is only intended to cover instances of fraud 'that might result in financial loss to the Government,'" applies when government funds were never at risk. *Ibid.* (quoting *Neifert-White*, 390 U.S. at 232); see Washington Legal Foundation Br. 21-25; DRI Br. 4-6.

3. Heath argues (at 21-24, 27-28) that purported fraud on the E-rate program causes financial loss to the government because "USF funds are Government funds in the sense that matters." The government also declares (at 21) that it "owns the money in the Fund." But saying doesn't make it so. There's no dispute that the Company "takes legal title" to contributions from private carriers, so E-rate money never belonged to the government to begin with. *In re Incomnet, Inc.*, 463 F.3d 1064, 1072 (9th Cir. 2006); see 47 C.F.R. § 54.702(b). That reality can't be obscured by the dog's breakfast of contrary arguments offered by Heath and the government.

For starters, they piece together snippets from the plurality opinion and separate writings in *United States* v. *American Library Association, Inc.*, 539 U.S. 194 (2003), as support for the notion that E-rate monies are "public funds" subject to Congress's "spending power." Resp. Br. 21; U.S. Br. 13-14. But that case is far afield—it involved a constitutional challenge to a statute requiring libraries to use internet filters as a condition of receiving federal grants appropriated by Congress *in addition to* E-rate funds. *Am. Libr. Ass'n*, 539 U.S. at 198-99 (plurality opinion). The question whether the government "provides" E-rate money for

FCA purposes was neither presented nor decided. And elsewhere the government has disclaimed reliance on the Taxing and Spending Clause as the constitutional basis for the universal service programs. Pet. at 16-17, *FCC* v. *Consumers' Rsch.*, No. 24-354 (Sept. 30, 2024).

Heath (at 23-24) and the government (at 21-22) contend that universal service funds are federal money because various government documents have put that label on them. But the government's been inconsistent at best on the point, as exhibited by OMB's reversal of its longstanding position that universal service funds aren't public money. Pet. Br. 9 nn.5-6; Resp. Br. 24. The Fund's move to the Treasury after OMB's flip-flop (and after the events in this case) only begs the question rather than shedding light on it.

Heath's attempt (at 23-24) to leverage legislation exempting the Fund from the Anti-Deficiency Act backfires, because Congress passed that legislation on an emergency basis to correct the FCC's own abrupt conclusion that E-rate funds were subject to the Act, which resulted in "the entire E-Rate program [being] frozen." 151 Cong. Rec. S749 (Feb. 1, 2005) (statement of Sen. Snowe for herself and Sens. Rockefeller, Stevens, and Inouye).[1] Understandably, members of Congress expressed "frustration" about the failure to acknowledge that universal service funds "obviously [are] not an appropriation." *S. 241, Permanently Exempting the Universal Service Fund from Portions of*

[1] Gov't Accountability Off., GAO-05-546T, *Telecommunications: Application of the Antideficiency Act and Other Fiscal Controls to FCC's E-Rate Program* 9-10 (Apr. 11, 2005), bit.ly/3BviaVK.

the Anti-Deficiency Act: Hearing Before the S. Comm. on Com., Sci. & Transp., 109th Cong. 49 (2005) (statement of Sen. Snowe); accord 151 Cong. Rec. S749.

At the end of the day, the government's conflicting bookkeeping practices are beside the point. Courts must "apply their 'judgment' *independent* of the political branches when interpreting the laws those branches enact." *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2273 (2024) (citation omitted). Labels aside, what matters under the FCA is that requests for money supplied by private carriers to a private corporation pose no risk of loss to the government.

4. Heath (at 36-37) and the government (at 31-32) try to wave away the constitutional concerns their reading raises by insisting Article III doesn't care whether an FCA claim involves any risk of financial injury to the government because early statutes authorized private informers to sue on the government's behalf when no public funds were at stake. But even if those examples pulled that reading out of the Article III frying pan, it would only land in the Article II fire.

When a false claim is made against the United States, it suffers both an "injury to its sovereignty arising from violation of its laws" and a "proprietary injury resulting from the alleged fraud." *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). Because the E-rate program involves no public money, the government suffers no proprietary injury from any losses the program may suffer. That leaves only the injury to the government's sovereign interests. But "conducting civil litigation * * * for vindicating public rights" is a "core executive power." *Buckley* v. *Valeo*, 424 U.S. 1, 140 (1976) (per curiam) (first quote); *Seila Law LLC* v. *CFPB*, 591 U.S. 197,

219 (2020) (second quote). Just as assigning criminal prosecutorial power to a private citizen would violate Article II, so too would assigning power to vindicate the government's sovereign interests in preventing fraud on private parties to a relator. See Center for Constitutional Responsibility Br. 9-11, 20.

Private citizens can't exercise core executive power—as Heath seeks to do—without endangering the separation of powers. Indeed, one court recently held that the FCA's qui tam provisions violate Article II even without the heightened concerns where, as here, the government delegates only its sovereign interests to the relator. *United States ex rel. Zafirov* v. *Fla. Med. Assocs., LLC*, 2024 WL 4349242, at *18 (M.D. Fla. Sept. 30, 2024). The constitutional doubt raised by Heath's sweeping theory is one more good reason to stick to the FCA's plain text.

B. The government doesn't "provide" money it collects on the Administrative Company's behalf because that money was never the government's to supply.

Just as E-rate contributions from carriers to the Company are provided by the carriers, so too are debts, settlements, and restitution that the government collects on the Company's behalf. Pet. Br. 29-30. All those funds are owed to the Company. The government simply collects and returns them to their rightful owner. *Id.* at 31-33. The government can't "provide" money that was never its to supply in the first place.

Heath barely contests that money the government holds for another's benefit isn't public money. While he nitpicks Wisconsin Bell's cases (at 24-26), he unearths no support of his own for the notion that pri-

vate money becomes public just because it's temporarily held by the government pending return to its rightful owner. The government doesn't dispute that the case law is to the contrary. See Pet. Br. 30-32.

Instead, Heath (at 18-21) and the government (at 18-21, 23) argue that the United States can "provide" money under the FCA by collecting and transmitting private funds. But as a matter of ordinary usage, the government can only provide money that is the government's to dole out—in other words, public money. Congress didn't need to spell out a requirement that the money be "public" because that's already baked into the FCA's reference to money the government "provides"—the key ingredient missing from all of Heath's statutory references to "public money" (at 18).

Heath (at 20) and the government (at 15) acknowledge that the Post Office obviously doesn't provide the cash when it delivers a birthday card from grandma with a $20 bill tucked inside—even though it undoubtedly transmitted the funds. But they dismiss the analogy because grandma "chose to send the money." Resp. Br. 21; accord U.S. Br. 15. But grandma's state of mind has nothing to do with it—she provided the money whether she sent the cash with a smile on her face or a grimace because the grandkids never call.

If anything, the point is even clearer when the provider is legally compelled to fork over the funds. Consider child support. Even if a parent would prefer not to pay, that parent is still the one providing the money—and that's true even if the government withholds the parent's income, collects the money, and sends it to the other parent. Congress used the word

"provide" just this way in authorizing states to withhold federal pay and retirement benefits "to enforce the legal obligation of the individual to *provide* child support." 42 U.S.C. § 659(a) (emphasis added); see Chamber Br. 8. There, as here, the person who "provides" the money is the one whose pocket it comes out of, even if the government requires it and facilitates the transfer.

That plain meaning is reinforced by this Court's precedents, which established long ago that FCA liability depends on government funds or property being placed at risk. In *United States* v. *Cohn*, 270 U.S. 339 (1926), this Court held that the FCA didn't apply to a false request to obtain the release of cigars held by U.S. customs officials—but owned by a third party—because no government money or property was involved. *Id.* at 345-46. The Court has continued to uphold that requirement in later cases establishing that the FCA applies only to "a demand for money or for some transfer of public property" because "Congress wanted to stop th[e] plundering of the public treasury." *United States* v. *McNinch*, 356 U.S. 595, 599 (1958) (citation omitted).

Heath doesn't meaningfully engage with this precedent. He can't deny that *Cohn* held that the FCA doesn't apply to requests for property "merely in the temporary possession" of the government. 270 U.S. at 346. And he doesn't acknowledge this Court's declaration that the FCA exists "to protect the funds and property of the Government." *Rainwater* v. *United States*, 356 U.S. 590, 592 (1958).

The government (at 19) at least recognizes this backdrop but insists that some fundamental change extended the FCA to wholly private funds. Yet the government can't point to anything that accomplished

that radical departure or overruled this Court's precedents. The title clause couldn't have done the trick. Its plain text doesn't reach so far. See *supra* pp. 5-6. Besides that, the 2009 amendment retained the word "provides" and continued to impose liability in the form of civil penalties plus "3 times the amount of damages which the Government sustains." 31 U.S.C. § 3729(a)(1).

Congress doesn't "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The title clause—which by the government's own account was narrowly aimed at the district court's decision in *Custer Battles*, U.S. Br. 19—would've been quite an oblique way of expanding the FCA to private funds for the first time in 146 years.

Heath (but not the government) separately attempts (at 21, 23, 28) to establish that the government "provides" money under the FCA because it collects delinquent contributions owed to and overpayments from the Fund as "claims" under the Debt Collection Improvement Act before returning them to the Company. But the DCIA is "a different statutory scheme with different language." *Blanca Tel. Co.* v. *FCC*, 991 F.3d 1097, 1114 (10th Cir.), cert. denied, 142 S. Ct. 486 (2021). While the FCA "*limit[s]* a claim to money that the United States *provides*," "the DCIA defines claim more expansively"—without regard to effect on the public fisc. *Ibid.* (emphases added); see, *e.g.*, 31 U.S.C. § 3701(b)(1)(C), (D). The government's role as the Company's debt collector under the DCIA casts no doubt on the conclusion that because private carriers—not the government—supply all the money in the Fund, E-rate reimbursement requests don't qualify as

FCA claims under the provides prong of the claim definition.

II. THE ADMINISTRATIVE COMPANY ISN'T AN AGENT OF THE UNITED STATES.

Heath and the government concede that the word "agent" in the FCA bears its "settled common law meaning." Resp. Br. 44; accord U.S. Br. 23. Under that meaning, an entity is an "agent of the United States" when it (1) can bind the government and (2) is subject to the government's power of interim control. Pet. Br. 33-46. Heath and the government can argue that the Administrative Company is an agent of the United States only by ditching the first requirement, diluting the second, and setting the Company on a collision course with the Government Corporation Control Act.

A. The agent prong requires the power to bind the United States—but the Company can't.

Heath and the government trip up on the first requirement for agency—the power to bind. The Company lacks the power to bind the United States because it can't make policy of any sort, doesn't disburse public funds, and can't obligate the government to pay anything. Pet. Br. 43-45. Heath and the government don't dispute that the Company can't bind the government. Instead, they argue that the power to bind the United States isn't necessary for the Company to be its agent. Resp. Br. 40-45; U.S. Br. 25-27. But the common law, this Court's precedent, and the FCA's structure and history show otherwise.

Perhaps that's why even the government (at 25) grants that the power-to-bind requirement contains at least a "kernel of truth." The full truth is that all of

agency law sprouted from that kernel. As Justice Story explained, a person "may choose to delegate * * * his own authority" to an agent, with the "correlative" that "what is done by another is to be deemed done by the party himself." Joseph Story, *Commentaries on the Law of Agency* § 2, at 2-3 (1839); see *Ford* v. *United States*, 273 U.S. 593, 623-24 (1927) (describing this maxim as the "general rule" of agency). Another treatise similarly observed that the "primary function" of an agent is "to bind the principal and not himself, to third persons." Floyd R. Mechem, *A Treatise on the Law of Agency* § 408, at 246 (1889). Heath's and the government's attempt to shear the power to bind from agents is foreign to the common law and this Court's cases.

1. Heath's description of the common law is incoherent. He agrees (at 38) that an agent is a person who "act[s] on the principal's behalf." Restatement (Third) of Agency § 1.01, at 17 (2006) (Restatement). But he never explains what it means to "act on the principal's behalf" beyond asserting (at 39) that the Company clears that bar by administering the E-rate program. "[O]ne person provid[ing] services to another" isn't enough for agency. Restatement § 1.01 cmt. c, at 19. Nor is it enough that one person has the power to supervise or direct another. *Meyer* v. *Holley*, 537 U.S. 280, 286 (2003).

A person acts "on the principal's behalf" only when she takes actions "with power to affect the legal rights and duties of the other person." Restatement § 1.01 cmt. c, at 18. Other sources contemporaneous with the 2009 FCA amendment likewise define an agent's ability to act on the principal's behalf as a power to bind the principal. *E.g.*, *Black's Law Diction-*

ary 70 (9th ed. 2009) ("agency" is "[a] fiduciary relationship * * * in which one party (the *agent*) may act on behalf of another party (the *principal*) and bind that other party by words or actions"). So "act[ing] on the principal's behalf" is just another way of saying that an agent has the power to bind the principal in at least some respects.

Heath highlights (at 40) the Restatement's proviso that agents needn't have the ultimate power "to bind their principals to contracts" so long as they have some authority "to negotiate or to transmit or receive information on their behalf." Restatement § 1.01 cmt. c, at 19. But authority to receive information—such as service of process—on someone's behalf *is* a power to bind when it alters that person's legal rights and obligations. *E.g.*, Fed. R. Civ. P. 4(h)(1)(B). Only *because* agents must have some power to bind was it necessary for the Restatement to clarify that agents need not have the specific power to bind their principals to contracts.

2. The notion that the power to bind isn't required for agency finds no home in this Court's precedent, either.

This Court has long equated an agent's authority to act on the principal's behalf with the agent's power to bind the principal. In *Briscoe* v. *Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1837), the question was whether a state-chartered bank acted as Kentucky's agent in issuing notes and thereby violated the constitutional prohibition on state bills of credit. *Id.* at 314-16. Kentucky owned the bank's assets and selected its president and directors, but this Court held that the bank wasn't Kentucky's agent because "no law" empowered it "to bind the state." *Id.* at 319-20. Since *Briscoe*, this Court and the courts of appeals have consistently tied

agent status to the power to bind. *E.g.*, *Sheboygan County* v. *Parker*, 70 U.S. (3 Wall.) 93, 96 (1866); Chamber Br. 13-14 (collecting examples).

Given the deep historical roots of the power to bind, Wisconsin Bell couldn't agree more with Heath (at 42) that this Court wasn't "making a new general rule of agency law" in *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941). There, the Court held that federal contractors lacked "the status of agents," despite the government's "very extensive control," because they couldn't "bind the Government." *Id.* at 13. Heath paints *King & Boozer* as an outlier turning on the contract's statement that the contractors could "not bind or purport to bind the Government." *Id.* at 11. But contractually withholding any power to bind was the obvious off-switch for agent status.

The government (at 26) pigeonholes *King & Boozer* as a tax-immunity case. But as this Court has explained, that case applied "traditional agency rules" in an era before this Court altered the tax-immunity test. *United States* v. *New Mexico*, 455 U.S. 720, 732-33 (1982). The government purports (at 6) to apply "the traditional elements of an agency relationship" but looks the other way when this Court says what they are.

Both Heath (at 41-42) and the government (at 26) try to wriggle out from under the power-to-bind requirement by citing two cases holding that agents couldn't bind the government in certain respects. But neither case helps them.

In *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984), an insurance company couldn't bind the government through its oral advice to a beneficiary about reimbursable costs. *Id.* at 64-65. But the company still qualified as an

agent because it acted as the government's fiscal intermediary with the power to disburse Medicare funds. *Id.* at 54-55.

In *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947), a committee couldn't bind the government to provide crop insurance. *Id.* at 383-84. But it qualified as an agent, too, because it distributed federal grants and other federal property to farmers on the government's behalf. Act of Feb. 29, 1936, ch. 104, § 1, 49 Stat. 1148, 1150.

Heckler and *Merrill* stand for the commonsense point that a government agent's power to bind depends on the scope of its lawful authority—not that the power to bind can be dispensed with altogether. See Restatement § 2.03 cmt. g, at 126.

Heath insists (at 43) that *Department of Employment* v. *United States*, 385 U.S. 355 (1966), provides "damning" proof that the power to bind is unnecessary. Not so. There, this Court held that the Red Cross was immune from state taxation because the United States had "devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions * * * and to assist the Federal Government in providing disaster assistance to the States." *Id.* at 358-59. Discharging the government's legal treaty obligations and disbursing public funds are classic powers to bind. *Medellín* v. *Texas*, 552 U.S. 491, 504 (2008) (treaties impose "international law obligations" and sometimes create domestic legal obligations, too); *United States* v. *Tingey*, 30 U.S. (5 Pet.) 115, 128 (1831) (officer who disburses public funds has been delegated sovereign power).

So Heath finishes where he started—without a single decision of this Court rejecting the power-to-bind requirement.

3. Despite the Company's undisputed lack of a power to bind, Heath and the government theorize that the Company nevertheless acts "on behalf of" the United States when it bills carriers and pays out subsidies. Resp. Br. 39; U.S. Br. 25.

Heath's line of attack hits a dead end, though, because that money was owed to and owned by the Company, not the government. See *supra* p. 7. So contrary to the government's suggestion (at 25), the Company's actions don't "affect the legal rights and duties" of the government, as the agent prong requires. Restatement § 1.01 cmt. c, at 18; see Pet. Br. 44; Chamber Br. 16.

Shifting for solid ground, Heath (at 40) and the government (at 24) tout the fact that the government sometimes refers to the Company as its agent. But that's irrelevant. Under traditional principles of agency law, what matters is the power that a putative agent wields—not the labels the parties attach. *E.g.*, *Bd. of Trade of Chi.* v. *Hammond Elevator Co.*, 198 U.S. 424, 438-42 (1905). The Company's lack of any power to bind the United States means it can't be a government agent—full stop.

B. The United States lacks interim control over the Company's reimbursement grants.

Although they quibble with the phrase "day-to-day," Heath (at 47) and the government (at 28) both concede the Company can't be an agent if the United States doesn't have the "right to give interim instructions." Restatement § 1.01 cmt. f, at 26.

Heath and the government look for interim control everywhere but the one place that matters under the FCA—the ability to act on a false claim. While

they compile a laundry list of ways the FCC purportedly controls the Company, Resp. Br. 5-7; U.S. Br. 28-29, what's conspicuously absent is any control over *grants* of reimbursement requests. They don't dispute that the FCC can directly review only reimbursement *denials* because review hinges on whether an "aggrieved" party seeks review. 47 C.F.R. § 54.719(b); see Resp. Br. 48; U.S. Br. 30. And the FCC's means of "indirectly influenc[ing]" the Company's decision aren't enough to establish interim control for agency. *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 16 (2021); see Pet. Br. 45-46.

Heath (but not the government) invokes (at 47) the FCC's ability to direct the Company to suspend payments during audits of carriers. 47 C.F.R. § 54.707(a). As the government appears to recognize, however, that regulation doesn't establish interim control because it authorizes the FCC to intervene only when the Company later audits a carrier. The FCC can't exercise interim control over the Company's decisions to disburse private funds through either direct review or "direct seizure." *United States ex rel. Shupe* v. *Cisco Sys., Inc.*, 759 F.3d 379, 386 (5th Cir. 2014) (per curiam) (citation omitted).

C. Heath's and the government's agency arguments flout the Government Corporation Control Act.

Heath and the government never really grapple with the repercussions of their agency arguments. But make no mistake—transforming the Company into an agent of the United States would cast serious doubt on the lawfulness of the whole E-rate program.

The Government Corporation Control Act "prohibit[s] creation of new Government corporations without specific congressional authorization." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 390 (1995). Because the FCC never got such authorization, it can't lawfully act through the Company as its agent. Pet. Br. 47-49.

Both Heath and the government seek a magic-words escape hatch in the Act's proviso that the FCC needs congressional authorization to establish "a corporation to act as an agency." 31 U.S.C. § 9102. Heath (at 49) and the government (at 30-31) stress that "agent" and "agency" are different words. But Congress defined "agency" in Title 31 to include "a department, agency, or *instrumentality* of the United States Government." *Id.* § 101 (emphasis added).

Neither Heath nor the government explains how the Company could act on the FCC's behalf without being an impermissible government "instrumentality." Indeed, the government relies (at 31) on executive guidance describing an "instrumentality" under the Act as "a thing through which a person or entity acts." *Applicability of Government Corporation Control Act to Gain Sharing Benefit Agreement*, 24 Op. O.L.C. 212, 218 (2000) (citation omitted). The GAO determined that the FCC had violated the Act precisely because the FCC had attempted to establish two corporations to "act as its *agents* in carrying out functions assigned by statute to the Commission."[2]

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[2] Gen. Acct. Off., GAO/T-RCED/OGC-98-84, *Telecommunications: FCC Lacked Authority to Create Corporations to Administer Universal Service Programs* 13 (Mar. 31, 1998), bit.ly/4ciPj52 (emphasis added).

Heath (but not the government) tries to minimize the import of Congress giving the cold shoulder to the FCC's request for statutory authorization to create a government corporation, Pet. Br. 48-49; USTelecom and CTIA Br. 7-8—pointing out (at 51) that Congress never *disapproved* the FCC's use of the Company to administer the universal service programs. But if the FCC has improperly attempted to turn the Company into its agent, Heath can't rely on Congress's "mere silence" as a green light for unenacted "[e]xecutive proposals." *INS* v. *Chadha*, 462 U.S. 919, 958 n.23 (1983). Congress's inaction makes perfect sense anyway if the Company has remained the "independent, non-federal entity" Congress expected. 143 Cong. Rec. S8213, S8214 (July 29, 1997) (Sense of the Senate resolution).

The government says (at 32-33) that it doesn't matter whether the E-rate program is lawful, citing cases in which claimed constitutional violations were irrelevant to a statute's "elements." *Bryson* v. *United States*, 396 U.S. 64, 72 (1969). Here, by contrast, the conclusion that the Company can't exercise authority under the Government Corporation Control Act or Article I's Vesting Clause would directly refute the agent prong. Pet. Br. 49. An agent without lawful authority is no agent at all.

* * *

Heath's effort to level the FCA's firepower at E-rate reimbursement requests founders on text, context, structure, and precedent—and raises serious separation-of-powers concerns. The simple answer is the right one: The FCA doesn't apply when someone requests private funds from a private corporation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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