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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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

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

The question presented is:

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

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

TABLE OF CONTENTS

Page

QUESTION PRESENTED....................................i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES....................................v

BRIEF FOR PETITIONER....................................1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

SUMMARY OF ARGUMENT....................................13

ARGUMENT 17

I. THERE'S NO FCA CLAIM HERE BECAUSE THE GOVERNMENT DOESN'T "PROVIDE" ANY MONEY IN THE E-RATE PROGRAM. 17

A. To "provide" money means to supply it—not to order someone else to do so. 18

1. Text, context, structure, and history show that the government "provides" money only if the government "supplies" it....................................18

2. There's no textual support for reading "provides" money to mean requiring someone else to supply it. 22

B. Private telecommunications carriers supply all the money in the E-rate program.............26

1. The E-rate program is funded entirely by private carriers' contributions............27

2. The government doesn't supply debts, settlements, or restitution that it collects for the Administrative Company. 29

II. THE ADMINISTRATIVE COMPANY ISN'T AN AGENT OF THE UNITED STATES. 33

A. The FCA follows the traditional two-part test for agency. 34

1. An agent can't act on behalf of the United States unless it has power to bind the United States. 35

2. An agent must be subject to interim instructions through the federal government's day-to-day control. 40

B. The Administrative Company isn't an agent of the United States. 42

1. The Administrative Company can't bind the federal government. 43

2. The government can't exert day-to-day control over the Administrative Company. 45

3. The lack of an agency relationship between the Administrative Company and the United States is by design. 46

CONCLUSION 51

TABLE OF AUTHORITIES

Page(s)

Cases

Alabama v. *King & Boozer*,
314 U.S. 1 (1941) 36, 38, 40

Allison Engine Co. v.
United States ex rel. Sanders,
553 U.S. 662 (2008) 4, 18, 46

Auffmordt v. *Hedden*,
137 U.S. 310 (1890) 37

Barnhart v. *Peabody Coal Co.*,
537 U.S. 149 (2003) 28

Beecham v. *United States*,
511 U.S. 368 (1994) 37

Biden v. *Nebraska*,
600 U.S. 477 (2023) 35

Branch v. *United States*,
100 U.S. 673 (1879) 30

Buckley v. *Valeo*,
424 U.S. 1 (1976) 37, 41

Burlington Indus., Inc. v. *Ellerth*,
524 U.S. 742 (1998) 34

Consumers' Rsch. v. *FCC*,
— F.4th —, 2024 WL 3517592
(5th Cir. July 24, 2024) 28, 49

Consumers' Rsch. v. *FCC*,
67 F.4th 773 (6th Cir. 2023) 28

Consumers' Rsch. v. *FCC*,
88 F.4th 917 (11th Cir. 2023) 28

Coudert v. *United States*,
175 U.S. 178 (1899).. 30

Davis v. *Mich. Dep't of Treasury*,
489 U.S. 803 (1989).. 21

Dep't of Emp. v. *United States*,
385 U.S. 355 (1966).. 36

Edward J. DeBartolo Corp. v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*,
485 U.S. 568 (1988).. 25

Emery v. *United States*,
186 F.2d 900 (9th Cir. 1951)............................. 32

Encino Motorcars, LLC v. *Navarro*,
584 U.S. 79 (2018).. 19

Farmers Tel. Co. v. *FCC*,
184 F.3d 1241 (10th Cir. 1999)......................... 43

Fed. Crop Ins. Corp. v. *Merrill*,
332 U.S. 380 (1947).. 36

Fischer v. *United States*,
144 S. Ct. 2176 (2024).......................... 24, 37, 42

Gallardo ex rel. Vassallo v. *Marstiller*,
596 U.S. 420 (2022).. 23

Heckler v. *Cmty. Health Servs. of Crawford Cnty., Inc.*,
467 U.S. 51 (1984) 36

Helsinn Healthcare S.A. v. *Teva Pharms. USA, Inc.*,
586 U.S. 123 (2019) 40

Hollingsworth v. *Perry*,
570 U.S. 693 (2013) 38, 41, 45

Hutchins v. *Wilentz, Goldman & Spitzer*,
253 F.3d 176 (3d Cir. 2001) 39

In re Incomnet, Inc.,
463 F.3d 1064 (9th Cir. 2006) 8, 27, 45

Lebron v. *Nat'l R.R. Passenger Corp.*,
513 U.S. 374 (1995) 47, 49

Loper Bright Enters. v. *Raimondo*,
144 S. Ct. 2244 (2024) 21

McBoyle v. *United States*,
283 U.S. 25 (1931) 23

Meyer v. *Holley*,
537 U.S. 280 (2003) 34, 35, 40

Percoco v. *United States*,
598 U.S. 319 (2023) 34

Rainwater v. *United States*,
356 U.S. 590 (1958) 3, 25, 39, 42, 47, 49

Russello v. *United States*,
464 U.S. 16 (1983) 38

Sec. Inv. Prot. Corp. v. *Barbour*,
421 U.S. 412 (1975)... 44

Smyer v. *United States*,
273 U.S. 333 (1927)... 31

Snyder v. *United States*,
144 S. Ct. 1947 (2024)................................. 21, 39

Sw. Airlines Co. v. *Saxon*,
596 U.S. 450 (2022)..................................... 19, 37

Taggart v. *Lorenzen*,
587 U.S. 554 (2019)... 34

TransUnion LLC v. *Ramirez*,
594 U.S. 413 (2021)... 26

United States ex rel. Adams v.
Aurora Loan Servs., Inc.,
813 F.3d 1259 (9th Cir. 2016)........................... 44

United States ex rel. DRC, Inc. v.
Custer Battles, LLC,
562 F.3d 295 (4th Cir. 2009)............................. 19

United States ex rel. Polansky v.
Exec. Health Res., Inc.,
599 U.S. 419 (2023)................................... 3, 4, 26

United States ex rel. Shupe v.
Cisco Sys., Inc.,
759 F.3d 379 (5th Cir. 2014)..... 27, 28, 42, 43, 45

United States ex rel. Totten v. *Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) 4, 29, 49

United States v. *Aiello*, 912 F.2d 4 (2d Cir. 1990) 31

United States v. *Arthrex, Inc.*, 594 U.S. 1 (2021) 37, 41

United States v. *Cohn*, 270 U.S. 339 (1926) 30

United States v. *Neifert-White Co.*, 390 U.S. 228 (1968) 21, 30

United States v. *New Mexico*, 455 U.S. 720 (1982) 36

Universal Health Servs., Inc. v. *United States ex rel. Escobar*, 579 U.S. 176 (2016) 34

Varney v. *Warehime*, 147 F.2d 238 (6th Cir. 1945) 31

Vt. Agency of Nat. Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 4, 26

Young-Montenay, Inc. v. *United States*, 15 F.3d 1040 (Fed. Cir. 1994) 39

Statutes

26 U.S.C. § 9702 28

28 U.S.C. § 1254 1

31 U.S.C. § 705 20

31 U.S.C. § 3729 .... 1, 4, 5, 13, 15, 16, 18, 19, 20, 21, 24, 25, 32, 33, 34, 37, 38, 39

31 U.S.C. § 3729 (2008) 1, 4, 18, 19, 20, 21, 24, 25

31 U.S.C. § 3730 4

31 U.S.C. § 5351 24

31 U.S.C. § 6707 24

31 U.S.C. § 9102 .... 7, 47

31 U.S.C. § 9105 20

47 U.S.C. § 254 .... 6, 20, 27, 28, 47

47 U.S.C. § 503 29

47 U.S.C. § 1752 .... 20, 21

Act of Mar. 2, 1863,
ch. 67, 12 Stat. 696.. 3, 39

Communications Act of 1934,
ch. 652, 48 Stat. 1064... 5

False Claims Amendments Act of 1986,
Pub. L. No. 99-562, 100 Stat. 3153..................... 4

Fraud Enforcement and Recovery Act of 2009,
Pub. L. No. 111-21, 123 Stat. 1617 .... 4, 5, 39

Government Corporation Control Act,
ch. 557, 59 Stat. 597 (1945) 7

Telecommunications Act of 1996,
Pub. L. No. 104-104, 110 Stat. 56 6

Regulations

47 C.F.R. § 0.13 45

47 C.F.R. § 1.80 29

47 C.F.R. § 54.5 .... 8, 43

47 C.F.R. § 54.8 29

47 C.F.R. § 54.500 *et seq.* 7

47 C.F.R. § 54.500 10

47 C.F.R. § 54.503 7

47 C.F.R. § 54.505 .... 7, 10

47 C.F.R. § 54.511 10

47 C.F.R. § 54.514 10

47 C.F.R. § 54.516 29

47 C.F.R. § 54.701 .... 8, 44

47 C.F.R. § 54.702 .... 8, 16, 27, 43

47 C.F.R. § 54.706 .... 7, 27, 29

47 C.F.R. § 54.707 29

47 C.F.R. § 54.709 .... 7, 9, 14, 16, 27, 28, 43

47 C.F.R. § 54.717 45

47 C.F.R. § 54.719 .... 17, 45

47 C.F.R. § 69.602 8

Other Authorities

143 Cong. Rec. S8213 (July 29, 1997)........ 5, 6, 9, 47

60 Comp. Gen. 15 (1980)....................................... 32

American Heritage Dictionary of the English Language (1981)..................... 19, 20, 23

Walter Besant, *The Orange Girl* (1898) 23

By-Laws of Universal Service Administrative Company (revised Jan. 26, 2024)....................................... 8

Changes to the Board of Directors of the National Exchange Carrier Association, Inc., 13 FCC Rcd. 25058 (Nov. 20, 1998).......... 49

Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service, 12 FCC Rcd. 18400 (July 18, 1997).. 48

FCC, *E-Rate: Universal Service Program for Schools and Libraries* 7

Gen. Acct. Off., GAO-02-187,
Telecommunications: Federal and State Universal Service Programs and Challenges to Funding (Feb. 2002) 6

Gen. Acct. Off., GAO/T-RCED/OGC-98-84,
Telecommunications: FCC Lacked Authority to Create Corporations to Administer Universal Service Programs (Mar. 31, 1998) 8, 48

Gov't Accountability Off., B-321729, *Office of Natural Resources Revenue— Disbursement of Mineral Royalties* (Nov. 2, 2011) 32

Gov't Accountability Off., GAO-17-538,
Telecommunications: Additional Action Needed to Address Significant Risks in FCC's Lifeline Program (May 2017)................... 9

H.R. Rep. No. 99-660 (1986).................................. 22

H.R. Rep. No. 105-504 (1998) (Conf. Rep.) 48

Off. of Mgmt. & Budget, Exec. Off. of the President, Opinion Letter on the Status of the Universal Service Fund (Apr. 28, 2000)... 9

Oxford English Dictionary (2d ed. 1989)... 19, 20, 23

Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579, Report to Congress, 13 FCC Rcd. 11810 (May 8, 1998).. 8, 48

Restatement (Third) of Agency (2006). 35, 40, 41, 46

Antonin Scalia,
A Matter of Interpretation (1997) 23

S. Rep. No. 99-345 (1986)....................................... 22

S. Rep. No. 111-10 (2009)............................. 4, 22, 39

Kate Stith, *Congress' Power of the Purse*,
97 Yale L.J. 1343 (1988) 32

Universal Serv. Admin. Co., *Procurement* 49

BRIEF FOR PETITIONER

OPINIONS BELOW

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

JURISDICTION

The court of appeals originally entered judgment on August 2, 2023. J.A. 84-85. A timely petition for rehearing en banc was denied on January 16, 2024. Pet. App. 61a-62a. The court of appeals entered an amended judgment on January 16, 2024. J.A. 86-87. A petition for a writ of certiorari was timely filed on April 15, 2024, which this Court granted on June 17, 2024. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions (31 U.S.C. § 3729 and 31 U.S.C. § 3729 (2008)) are reproduced in the appendix to this brief. App., *infra*, 1a-7a.

STATEMENT

As the heavy artillery of the administrative state, the False Claims Act imposes punishing treble-damages liability and mandatory-minimum civil penalties for regulatory infractions. Congress deemed that formidable weapon necessary to protect funds and property that belong to the federal government.

Yet the court of appeals trained the FCA's considerable firepower on submissions made to a *private* corporation paying out only *private* funds. The court held that reimbursement requests submitted to the Schools and Libraries Universal Service Support program (better known as the "E-rate" program)—which subsidizes telecommunications services for schools and libraries—are actionable "claims" under the FCA, even though the program is funded entirely by contributions from private carriers and administered by a private corporation.

This Court should reverse. Since its inception, the FCA's sights have been set on preventing the loss of public—not private—money. That's why the statutory definition of an FCA "claim" requires money "provided" by the government. But by congressional design, the E-rate program is funded entirely with private money. So even if E-rate funds are somehow misused (which didn't happen here), the government doesn't lose a single penny—and other tools besides the FCA are available to protect the E-rate program. The bottom line is that private carriers—not the government—provide all the money at issue in E-rate reimbursement requests because those funds come out of the carriers' pockets, not the government's. Indeed, the decision below raises serious constitutional concerns by extending the FCA to allow private relators to wield considerable executive power as private attorneys general to recover treble damages for money lost by private third parties.

The FCA also defines a "claim" as a request for money presented to an "agent" of the United States. The private corporation that administers the E-rate program isn't a government agent, either, because the

familiar hallmarks of agency relationships are entirely lacking—(1) the agent's power to bind the principal, and (2) the principal's day-to-day control of its agent. The absence of any agency relationship here is a feature, not a bug. The E-rate program's insulation from the public fisc reflects a core congressional and executive policy choice. And Congress, despite the FCC's request, declined to grant the FCC authority to establish a federal instrumentality to administer the E-rate program. Those choices have consequences under the FCA, which exists to guard the funds and property of the government, not to serve as an all-purpose fraud statute. By extending the Act to wholly private funds, the decision below distorted that function, creating a threat of onerous liability even when the government isn't out a cent. This Court should reverse and restore the FCA to its proper role guarding the public coffers.

1. From its enactment in 1863 to today, the FCA has "imposed civil liability for many deceptive practices meant to appropriate government assets." *United States ex rel. Polansky* v. *Exec. Health Res., Inc.*, 599 U.S. 419, 424 (2023). The Act "dates to the Civil War, when a Congressional committee uncovered 'stupendous abuses' in the sale of provisions and munitions to the War Department." *Ibid.* (citation omitted). Congress adopted the FCA "[t]o put a stop to the plunder—and more generally, to 'protect the funds and property of the Government.'" *Ibid.* (quoting *Rainwater* v. *United States*, 356 U.S. 590, 592 (1958)); see Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

Since its inception, "the FCA has been enforced through a unique public-private scheme." *Polansky*, 599 U.S. at 424. The Department of Justice may sue

alleged violators. *Ibid.* (citing 31 U.S.C. § 3730(a)). But the FCA also "authoriz[es] private parties—known as relators—to sue on the Government's behalf." *Id.* at 423. If the government chooses not to intervene, a successful relator may receive up to 30 percent of the case's proceeds, plus attorneys' fees and costs. 31 U.S.C. § 3730(d). An FCA defendant is subject to "essentially punitive" liability in the form of up to "3 times the amount of damages which the Government sustains," plus civil penalties. *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000) (first quote); 31 U.S.C. § 3729(a)(1) (second quote).

2. Congress amended the FCA in 1986 to add a definition of "claim" to the statute for the first time—i.e., a request for money "made to a contractor, grantee, or other recipient *if the United States Government **provides** any portion of the money*." False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2, 100 Stat. 3153, 3154 (codified at 31 U.S.C. § 3729(c) (2008)) (emphases added).

Congress amended the FCA again in 2009 in response to decisions by this Court and the D.C. Circuit holding that the FCA doesn't apply to claims paid with government funds unless the claims were presented to the government or made to a contractor or grantee to get the government to pay. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617; see *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662, 670 & n.1 (2008); *United States ex rel. Totten* v. *Bombardier Corp.*, 380 F.3d 488, 493, 498 (D.C. Cir. 2004); see also S. Rep. No. 111-10, at 11-12 & n.4 (2009).

In the 2009 amendment, Congress modified the FCA's liability provision to reach one who "knowingly presents" a "false or fraudulent claim" or "makes * * * a false record or statement material to a false or fraudulent claim"—dropping the requirement that a claim be presented to a government officer or employee or paid by the government. § 4(a)(1), 123 Stat. at 1621 (codified at 31 U.S.C. § 3729(a)(1)(A)-(B)).

With that change, the 2009 amendment also revised the FCA's definition of a claim. Much like the 1986 amendment, it defined a claim as a request for money "made to a contractor, grantee, or other recipient * * * if the United States Government * * * provides or has provided any portion of the money." § 4(a)(2), 123 Stat. at 1622-23 (codified at 31 U.S.C. § 3729(b)(2)(A)(ii)). It also added a new definition of a claim as a request for money "presented to an officer, employee, or ***agent*** of the United States." § 4(a)(2), 123 Stat. at 1622 (codified at 31 U.S.C. § 3729(b)(2)(A)(i)) (emphasis added). The amended definition applies only to "conduct on or after the date of enactment." § 4(f), 123 Stat. at 1625 (codified at 31 U.S.C. § 3729 note).

3. Universal service—the principle that all Americans should have access to a "rapid, efficient, Nation-wide and world-wide wire and radio communication service"—has been a cornerstone of U.S. communications policy since the Communications Act of 1934. Ch. 652, § 1, 48 Stat. 1064, 1064. The 1934 Act pursued the goal of universal service through a combination of "regulation and monopoly." 143 Cong. Rec. S8213, S8214 (July 29, 1997) (statement of Sen. Kerrey). Rates were set by the FCC, §§ 201, 205, 48 Stat. at 1070, 1072, and, through long-distance charges,

AT&T (then the monopoly carrier for the vast majority of the country) subsidized telephone service to low-income households and high-cost areas.[1]

Congress left that monopoly approach behind in the Telecommunications Act of 1996, which aimed to "promote competition and reduce regulation" to "secure lower prices and higher quality services for American telecommunications consumers." Pub. L. No. 104-104, pmbl., 110 Stat. 56, 56. At the same time Congress "introduce[d] competition into all telecomm markets," it also sought to "preserve universal service." 143 Cong. Rec. at S8214 (statement of Sen. Kerrey).

To preserve universal service when monopoly gave way to competition, Congress struck a "bargain." 143 Cong. Rec. at S8214 (statement of Sen. Kerrey). "[C]ompetition would replace regulation," but "all carriers would share the responsibility for providing universal service." *Ibid.* Congress directed the FCC to "preserv[e] and advance[ ]" universal service—including for schools and libraries. § 101, 110 Stat. at 71, 74 (codified at 47 U.S.C. § 254(b), (h)(1)(B)). Instead of appropriating tax dollars, Congress required private telecommunications carriers to "contribute * * * to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." § 101, 110 Stat. at 73 (codified at 47 U.S.C. § 254(d)).

[1] Gen. Acct. Off., GAO-02-187, *Telecommunications: Federal and State Universal Service Programs and Challenges to Funding* 2 (Feb. 2002), bit.ly/3YC2ObG.

In response, the FCC established several universal service programs, including the Schools and Libraries Universal Service Support program—better known as the "E-rate" program. 47 C.F.R. § 54.500 *et seq*. The E-rate program provides discounted services to eligible schools and libraries by: (1) having service providers competitively bid on the lowest price for service; and (2) subsidizing the cost of service. *Id.* §§ 54.503, .505.

The E-rate program is funded entirely by private money. Financing for the E-rate program—like the other universal service programs—comes from the Universal Service Fund, which is funded entirely by the contributions of private telecommunications carriers. 47 C.F.R. § 54.706(a)-(b). Carriers contribute to the Fund at a rate determined by their revenues and a contribution factor based on the universal service programs' projected needs. *Id.* § 54.709. As of 2024, the E-rate program could distribute up to nearly $4.5 billion in funding per year.[2]

The FCC doesn't administer the E-rate program. And its choice of administrator is curtailed by the Government Corporation Control Act, ch. 557, 59 Stat. 597 (1945), which provides that "[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action." 31 U.S.C. § 9102. In 1998, the General Accounting Office (now the Government Accountability Office) determined that the FCC violated the Act when it attempted to establish two freestanding corporations to manage the E-rate program

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

and Rural Health Care program and "act as its agents in carrying out functions assigned by statute to the Commission."[3]

Because Congress didn't grant the FCC's subsequent request for statutory authorization to create a government-controlled corporation to manage the universal service programs, see Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579, Report to Congress, 13 FCC Rcd. 11810, 11819 (May 8, 1998), the Fund is administered by the Universal Service Administrative Company, a private nonprofit corporation, 47 C.F.R. § 54.701(a).[4] The Company's sole shareholder and parent company—the National Exchange Carrier Association, Inc.—is a private nonprofit run by industry representatives. *Id.* §§ 54.5, 69.602.

By design, the Fund is insulated from the public fisc. The Fund isn't a "legally cognizable entity" and can't own assets, incur liabilities, or conduct transactions (so it isn't some kind of bank distinct from the Administrative Company itself). D. Ct. Doc. 118-1, at 2 (Feb. 25, 2015). The Company collects contributions from private telecommunications carriers, "takes legal title" to those contributions, and disburses them to program participants. *In re Incomnet, Inc.*, 463 F.3d 1064, 1072 (9th Cir. 2006); see 47 C.F.R. § 54.702(b). If the Company runs short of money to cover "universal

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[3] 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.

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

service support program payments and administrative costs," it must "borrow funds commercially"—not from the Treasury. 47 C.F.R. § 54.709(c). In 2000, the Office of Management and Budget concluded that the Fund "does not constitute public money," so it needn't be deposited in the Treasury under the Miscellaneous Receipts Act.[5] As a result, during all periods at issue, the Fund was held in a private bank account.[6]

This regulatory model—private contributions administered by a private corporation with no recourse to the public fisc—upheld Congress's "bargain" in the 1996 Act by ensuring "there are no Federal tax dollars involved in the Universal Service Fund" and preventing the Fund from being "turned into a piggy bank which can be raided" "for budgetary gains." 143 Cong. Rec. at S8214 (statement of Sen. Kerrey) (first, third, and fourth quotes); *ibid.* (statement of Sen. Daschle) (second quote).

The E-rate program requires participating service providers to charge schools and libraries the "lowest corresponding price"—the lowest price a provider charges for similar services to a non-residential cus-

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[5] Off. of Mgmt. & Budget, Exec. Off. of the President, Opinion Letter on the Status of the Universal Service Fund 3 (Apr. 28, 2000), bit.ly/49udXwN.

[6] OMB appears to have reversed its position on the status of universal service funds in 2014. See 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. That about-face led the FCC to move the Fund from a private bank account to the Treasury in 2018, after the events alleged in this case. D. Ct. Doc. 277-1, at 2 (Mar. 17, 2021).

tomer that is "similarly situated" to the school or library. 47 C.F.R. §§ 54.500, .511(b). Once a school or library receives E-rate services, it pays the provider either: (1) the full price, and submits a request to the Administrative Company for partial reimbursement; or (2) a discounted price, and the provider submits a reimbursement request for the remainder. *Id.* §§ 54.505, .514.

4. Relator Todd Heath filed this FCA suit in 2008, alleging that Wisconsin Bell overcharged schools and libraries by charging prices higher than the lowest corresponding price, and that each E-rate reimbursement request to the Administrative Company was therefore a false claim. Pet. App. 5a-6a. The government declined to intervene. *Id.* at 5a. Heath later stipulated that he was seeking to recover only for reimbursement requests made between 2002 and 2015. D. Ct. Doc. 175, at 5-6 (Sept. 25, 2017).

Wisconsin Bell moved to dismiss Heath's complaint on the ground that the alleged submissions weren't actionable "claims" under the FCA because the government didn't "provide" the money in the E-rate program and the Administrative Company isn't an "agent of the United States." J.A. 46, 50.

The district court denied the motion. It held that the government "provided" the money in the E-rate program because it "made the funds available" by "requir[ing] the common carriers to pay into the Fund." J.A. 46. And it held that the Administrative Company is an "'agent' of the United States" because it "administered the Fund at the direction of the FCC and * * * [its] operations were carried out pursuant to FCC regulations" and under FCC oversight. J.A. 50.

Wisconsin Bell later moved for summary judgment, arguing that Heath failed to demonstrate a genuine issue of material fact on the essential element of falsity because he hadn't offered any evidence that Wisconsin Bell charged improper amounts. Wisconsin Bell also argued that Heath couldn't prove the elements of scienter or materiality, or the existence of actionable FCA claims. The district court granted summary judgment for Wisconsin Bell on the grounds that Heath failed to offer evidence of falsity and scienter. It didn't reach Wisconsin Bell's arguments about materiality or whether the requests were actionable FCA claims. Pet. App. 53a-58a.

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

After Wisconsin Bell sought rehearing en banc, the panel issued an amended opinion that reached the same result but added more analysis of the claim issue, which it decided as a matter of law. Pet. App. 19a-31a. The panel held that the government "provided" the money in the E-rate program under both the pre- and post-2009 claim definitions for two reasons.

First, the panel agreed with the district court that the government "provided" the money in the E-rate program because it "required the common carriers to pay into the Fund." Pet. App. 27a (citation omitted). "The high degree of government involvement in the E-Rate program," the panel reasoned, shows that there's a "sufficiently close nexus" between the Administrative Company and the government "such that a loss to the former is effectively a loss to the latter." *Id.* at 25a-29a (citations omitted).

Second, the panel concluded that the government "provides" at least some money in the E-rate program because, during the relevant years, the Universal Service Fund received funds from the Treasury, in addition to the fees that telecommunications carriers paid directly to the Fund. According to affidavits from FCC and Administrative Company officials, the money that passed through the Treasury on its way to the Fund consisted of "collections of delinquent debts to the Fund, along with penalties and interest," "civil settlements," and "criminal restitution." Pet. App. 22a-23a; J.A. 34-43.

The panel next held that the Administrative Company is an "agent of the United States" under the post-2009 claim definition. The panel concluded that the Administrative Company is a government agent because the United States "manifested its assent for the [Company] to act on the government's behalf," the Company "manifested its consent to this relationship," and the Company administers the E-rate program subject to the FCC's control. Pet. App. 24a-25a. The court held that the Administrative Company could be a government agent even if it lacked the

power to "alter the federal government's legal obligations." *Id.* at 25a.

SUMMARY OF ARGUMENT

I. In the FCA, Congress determined that the heavy artillery of effectively punitive liability was necessary to protect the public fisc. But that rationale falls apart when public dollars aren't at risk. Here, there's no FCA "claim" as defined by the statute because the federal government doesn't "provide[ ]" any money in the E-rate program. 31 U.S.C. § 3729(b)(2)(A)(ii)(I).

A. The ordinary meaning of "provide" is to "furnish" or "supply" something. So the government "provides" money under the FCA only when the government itself "furnishes" or "supplies" the funds at issue.

Statutory context confirms that ordinary meaning. The FCA's definition of "claim" includes requests made to "grantee[s]" and "other recipient[s]" of money the government "provides" or "will reimburse"—making clear that the government must pay or repay money to these entities. 31 U.S.C. § 3729(b)(2)(A)(ii).

Statutory structure and history lead to the same conclusion. The FCA provides for treble damages based on "the amount of damages *which the Government sustains*," 31 U.S.C. § 3729(a) (emphasis added), and the government can "sustain[ ]" damage only when the government itself supplied the money requested by the false claimant. That reflects the history of the FCA—which has always been trained on fraud that might result in financial loss to the government, not private parties.

The court of appeals' holding that the government "provides" money by requiring *someone else* to supply it departs from the FCA's text. While one meaning of "provides" is "to make available," it would be nonsensical to read "provides" in this context to suggest that *any* means of making money available—no matter how abstract—can support FCA liability. As a matter of common usage, the person who "provides" something is the one who furnishes or supplies it—even if that person is following someone else's directions. If Congress wanted to enact the court of appeals' interpretation, it could have easily drafted language to that effect by defining a claim to include requests for money that the government "provided *for*" through the statutory and regulatory scheme—just as Congress did other places in the Code. Yet Congress chose not to aim the FCA so far.

The court of appeals' reading also makes a hash of statutory context, structure, and history. It erases the distinction between "provide" and "reimburse," while allowing for FCA claims where there's no risk of loss to the government. And by deputizing private attorneys general to recover money lost by private third parties, it raises serious constitutional problems under Articles II and III.

B. Private carriers supply every dollar in the E-rate program—the government doesn't put in a cent. That insulation from the public fisc is a feature, not a bug, of Congress's and the FCC's design. Indeed, if there's any gap between the Fund's resources and its obligations, the Administrative Company must acquire additional funds through private sources of credit—not from the Treasury. 47 C.F.R. § 54.709(c).

This design ensures that the government has no financial stake in any losses suffered by the E-rate program.

The court of appeals' contrary conclusion that the government "provides" at least some of the money in the E-rate program in the form of debt collections, civil settlements, and criminal restitution is unsupported. That money was still supplied by the private carriers. When the government simply facilitates the transfer of money that was owed by private parties to the Administrative Company, it hasn't supplied any money of its own—or exposed itself to the risk of financial loss that animates the FCA.

II. There's no FCA claim here because the Administrative Company isn't an "agent of the United States," either. 31 U.S.C. § 3729(b)(2)(A)(i).

A. Because the FCA doesn't define "agent," this Court presumes that the statute incorporates traditional principles of agency law. Those principles dictate an entity is an agent of the United States only when:

(1) the entity acts on behalf of the United States with the power to affect the legal rights and duties of the federal government, and

(2) the United States retains the right to control the entity through interim instructions or directions.

Structurally, the power to bind gives effect to the shared attributes in the phrase "officer, employee, or agent of the United States," 31 U.S.C. § 3729(b)(2)(A)(i), while ensuring that the term

"agent" isn't read so broadly that the separate provision governing claims presented to a "contractor, grantee, or other recipient" has no work to do on its own, *id.* § 3729(b)(2)(A)(ii). That understanding aligns with statutory history, which confirms that an agent must have the power to alter the United States' legal obligations, because the FCA has always guarded government funds—even when a government instrumentality doesn't take the traditional form of an officer or employee.

The requirement of the United States' power to control its agents likewise follows from statutory context and history. The Constitution demands such control for officers and employees of the United States; surely no less is required of its agents. And historically speaking, strict budgetary and supervisory controls are what makes a government instrumentality part of the government itself.

B. The Administrative Company doesn't satisfy either criterion of the traditional agency test.

First, the Company can't bind the federal government. Federal law expressly deprives the Company of any authority to "make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress," 47 C.F.R. § 54.702(c), or to obligate federal funds, *id.* § 54.709(c). When the Company "bill[s] contributors" and "disburs[es] * * * funds" in the E-rate program, *id.* § 54.702(b), it doesn't alter the legal rights and obligations of the United States, which is neither able to seize the funds nor on the hook for any claims.

Second, the United States lacks the power to control the Administrative Company through interim instructions. The Company has discretion over its distribution of the carriers' private funds to the E-rate program's beneficiaries. And the FCC has only limited authority to review reimbursement requests. See 47 C.F.R. § 54.719(b).

The absence of an agency relationship is by design. When establishing the universal service programs, Congress relied on private contributions administered in a private fund outside the Executive Branch to avoid using federal tax dollars. And when the FCC attempted to create government corporations to act as its agents in administering universal service programs, Congress withheld such authority from the FCC under the Government Corporation Control Act. As a result of these deliberate policy choices, the Administrative Company lacks the power to alter the government's legal rights and obligations and isn't subject to the FCC's close control—so the Company isn't an agent of the United States.

Neither the E-rate program's funding mechanism nor its administrator can cause the United States to lose a dollar. Without that risk, there's no basis for deploying the powerful weaponry of the FCA, which has always been directed at protecting the public fisc.

ARGUMENT

I. THERE'S NO FCA CLAIM HERE BECAUSE THE GOVERNMENT DOESN'T "PROVIDE" ANY MONEY IN THE E-RATE PROGRAM.

The FCA defines a "claim" in relevant part as a request for money made to a "contractor, grantee, or other recipient" if the federal government "provided

any portion of the money" requested. 31 U.S.C. § 3729(b)(2)(A)(ii)(I); see *id.* § 3729(c) (2008) ("provides any portion of the money"). The plain statutory text—reinforced by context, structure, and history—makes clear that to "provide" something means to supply it. The court of appeals' contrary holding that the government can provide money by making *someone else* supply it departs from the text and contravenes the FCA's history—creating a threat of potentially ruinous liability even when the government was never exposed to financial loss.

Under the text's plain meaning, E-rate reimbursement requests aren't actionable FCA claims because *all* the money in the program comes out of the carriers' pockets. The court of appeals' alternative holding—that the government provided at least some E-rate money in the form of debts, civil settlements, and criminal restitution that it collects for the Administrative Company—is untenable because private carriers supplied that money, too.

A. To "provide" money means to supply it—not to order someone else to do so.

The ordinary tools of statutory interpretation establish that the government "provides" money for FCA claim purposes only if the government itself supplies that money.

1. Text, context, structure, and history show that the government "provides" money only if the government "supplies" it.

Interpreting the FCA's claim definition "start[s], as always, with the language of the statute." *Allison Engine*, 553 U.S. at 668 (citation omitted). The FCA

doesn't define "provides," so the term bears its ordinary meaning. See *Encino Motorcars, LLC* v. *Navarro*, 584 U.S. 79, 85 (2018). The ordinary meaning of "provide" is to "furnish" or "supply" something. *E.g.*, *American Heritage Dictionary of the English Language* 1053 (1981) ("[t]o furnish; supply"); 12 Oxford English Dictionary 713 (2d ed. 1989) ("[t]o supply or furnish for use"). So the government "provides" money for FCA claim-definition purposes only when the government itself "furnishes" or "supplies" the funds at issue.

Common usage confirms as much. When a teacher asks a student to "lend your classmate a pencil"—and the student hands over a Ticonderoga—an ordinary English speaker would say that the student, not the teacher, "provided" the pencil. Just so here.

Statutory context reinforces that ordinary meaning. See *Sw. Airlines Co.* v. *Saxon*, 596 U.S. 450, 455 (2022). The FCA's claim definition includes requests made to "a contractor, grantee, or other recipient" of money that the government "provides." 31 U.S.C. § 3729(b)(2)(A)(ii)(I); *id.* § 3729(c) (2008). A "recipient" is "[o]ne that receives" something, and to "receive" means "[t]o take or acquire (something given, offered, or transmitted); get." *American Heritage Dictionary*, *supra*, at 1087-88. Similarly, "[a] grantee is one to whom the money is given." *United States ex rel. DRC, Inc.* v. *Custer Battles, LLC*, 562 F.3d 295, 304 (4th Cir. 2009). So this list of requestees confirms that the government "provides" money only when the government is the one giving the money out. That makes sense given the FCA's historical role in guarding the public fisc.

A claim also includes requests for money made to a contractor, grantee, or other recipient if the government "will *reimburse* such contractor, grantee, or other recipient." 31 U.S.C. § 3729(b)(2)(A)(ii)(II) (emphasis added); *id.* § 3729(c) (2008). The ordinary meaning of "reimburse" is "to repay"—as in "[h]e reimbursed his creditors." *American Heritage Dictionary*, *supra*, at 1097; see also 13 *Oxford English Dictionary*, *supra*, at 534 ("[t]o repay or make up to one (a sum expended)"). So the "reimburse" clause necessarily refers to the government's supply of money used to repay a contractor, grantee, or recipient after it pays a request. In the same way, the "provides" clause should be understood to require the government itself to supply the money used to pay the request in the first place.

"Provide" bears that ordinary meaning in provisions across the U.S. Code. In Title 31, Congress consistently uses the term "provide" to mean supplying something. 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"). In the provision of the Telecommunications Act governing universal service, Congress directed carriers to "provide" discounted services to schools and libraries—meaning to supply them with those services. 47 U.S.C. § 254(h)(1)(B). And in a provision establishing the Affordable Connectivity Fund—which, unlike the Universal Service Fund, is funded by appropriations rather than private contributions, *id.* § 1752(i)(2)—Congress directed that reimbursements should be "provided" (i.e., supplied) from appropriated funds

“and not from contributions under section 254(d) of the Communications Act of 1934,” *id.* § 1752(i)(4). “Provide” means the same thing here.

The FCA’s “overall statutory scheme” confirms what text and context make plain. *Davis* v. *Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989). The FCA’s remedial provision imposes liability on false claimants in the form of civil penalties plus “3 times the amount of damages *which the Government sustains*.” 31 U.S.C. § 3729(a) (emphasis added); *id.* § 3729(a) (2008). The government can sustain damages only when the government itself supplied the money requested by the false claimant. So the FCA’s remedial provision confirms that “provides” bears its ordinary meaning in the claim definition.

The statutory history of the FCA supports this understanding as well. See *Snyder* v. *United States*, 144 S. Ct. 1947, 1955 (2024). Before the 1986 amendment, the FCA didn’t define “claim.” This Court turned to history showing that the FCA “was intended to reach all types of fraud * * * that might result in financial loss to the Government,” and held that FCA “claims” encompassed “all fraudulent attempts to cause the Government to pay out sums of money.” *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232-33 (1968).

The 1986 amendment’s history “if anything only underscores th[e] plain meaning” revealed by the text, context, and structure. *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2262 (2024). The House Judiciary Committee explained that the claim definition was drafted so that “claims or false statements made to a party other than the Government are covered by this term if payment thereon would *ultimately result*

in a loss to the United States." H.R. Rep. No. 99-660, at 21 (1986) (emphasis added). And the Senate Judiciary Committee stated that the claim definition was intended to clarify that the statute reaches "frauds perpetrated on Federal grantees, including States and other recipients of *Federal funds*." S. Rep. No. 99-345, at 21 (1986) (emphasis added). Those explanations confirm that the government "provides" money for FCA claims purposes only if it supplies that money, thereby exposing the government to loss.

Same with the 2009 amendment. The Senate Report said the revised statute remained "consistent with the intent of Congress" in the 1986 amendment to ensure "that a false claim includes claims submitted to grantees and contractors if the payment ultimately results in a loss to the Government." S. Rep. No. 111-10, at 11-12 & n.4 (citation omitted). The Senate's explanation again makes clear that the one who "provides" money is the one who supplies it. Since the beginning, that's what's mattered under the FCA.

2. There's no textual support for reading "provides" money to mean requiring someone else to supply it.

The court of appeals concluded that the government "provides" the money in the E-rate program because it "made the funds available" by "requir[ing] the common carriers to pay into the Fund." Pet. App. 27a (citation omitted); see also *id.* at 31a ("government can be deemed to 'provide' money * * * by maintaining an active role in its collection and distribution"). That give-a-mouse-a-cookie reading impermissibly rewrites the claim definition by inserting the words "provides *or requires someone else to provide* any portion of the money" requested.

To be sure, one meaning of the term "provide" is "to make available." *American Heritage Dictionary*, *supra*, at 1053. But even if "etymologically it is possible to use" the word "provide" to mean "make available" in the abstract sense embraced by the court of appeals, ordinary meaning doesn't permit that reading here. *McBoyle* v. *United States*, 283 U.S. 25, 26 (1931); see also Antonin Scalia, *A Matter of Interpretation* 24 (1997) (a "good textualist is not a literalist"). The money in the E-rate program is coming entirely from the private carriers—not one red cent from the government. That's what matters, because the whole point of the FCA is to protect the public fisc. If anything, the private carriers are both supplying the money *and* making it available in the sense that counts because it's their money either way.

Consider this literary example from the Oxford English Dictionary that illustrates the point. If the government contracts with a company to transport convicts and requires the company to give them certain rations, one would say that "[t]he contractors * * * *provide* the convicts the rations prescribed by the Government." 12 *Oxford English Dictionary*, *supra*, at 713 (quoting Walter Besant, *The Orange Girl* 337 (1898)) (emphasis added). There—as here—the person who "provides" something is the one who furnishes or supplies it—even if that action is "prescribed" by another party.

If Congress wanted to enact the court of appeals' contrary reading, "it easily could have drafted language to that effect." *Gallardo ex rel. Vassallo* v. *Marstiller*, 596 U.S. 420, 429 (2022) (citation omitted). For example, Congress could've defined a claim to in-

clude requests for money that the government "provided *for*" through the statutory and regulatory scheme. Title 31 consistently uses the phrases "provide for" and "provide by law for" to refer to programs established by legislation or regulation. *E.g.*, 31 U.S.C. § 5351(b)(3) ("the Secretary of the Treasury [shall] *provide for* the general administration of the program") (emphasis added); *id.* § 6707(a) ("[a] State government may *provide* by law *for* the allocation of" federal General Assistance welfare funds among the local governments in that state) (emphases added). But Congress chose not to aim the FCA so far.

Interpreting "provides" to mean making money available in any sense whatsoever would also violate the interpretive principle that courts "must give effect, if possible, to every clause and word of [the] statute." *Fischer* v. *United States*, 144 S. Ct. 2176, 2183 (2024) (citation and quotation marks omitted). On the court of appeals' reading, there would've been no need for Congress to distinguish between money the government "provides" and money the government "will reimburse." 31 U.S.C. § 3729(b)(2)(A)(ii)(I)-(II); *id.* § 3729(c) (2008). After all, when the government reimburses a requested payment, it "makes [that money] available" in some sense by alleviating any financial burden on the back end. So Congress's decision to include the term "reimburse" along with "provides" demonstrates that "provides" can't bear the expansive meaning the court of appeals gave it.

Similarly, the court of appeals' interpretation of "provides" would render pointless the variation in verb tense introduced in the 2009 amendment. That amendment clarified that a claim includes a request if the government "provides or has provided" the

money. 31 U.S.C. § 3729(b)(2)(A)(ii)(I). If "provides" means "furnish" or "supply," that amendment makes sense because it indicates that a false claim can occur both when (1) the government supplies funds to a recipient as claims are made to the recipient ("provides"), or (2) the government supplies those funds up front before claims are made to the recipient ("provided"). But on the court of appeals' understanding, the addition of "provided" was gratuitous, because "provides" already covered all the ways the government "makes money available"—which would include up-front payments.

That reading is also at odds with the FCA's structure and history. If the government can "provide" funds by requiring a private entity to supply them, then a request for payment can be an FCA claim even if it never poses a risk of financial loss to the government. That would contradict the FCA's core remedial provision, which presumes that a claim involves at least a risk of government loss. 31 U.S.C. § 3729(a); *id.* § 3729(a) (2008). And it would break from the FCA's long history, which has—since the Civil War—always been aimed at "protect[ing] the funds and property of the Government." *Rainwater*, 356 U.S. at 592.

On top of being unsustainable on textual grounds, the court of appeals' reading is untenable because it "raise[s] serious constitutional problems." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

For one, it undermines the Article III justification for allowing *qui tam* relator suits at all. This Court has explained that a relator's standing to bring an

FCA claim stems from "a partial assignment of the Government's damages claim" under the FCA. *Stevens*, 529 U.S. at 773. But that justification unravels when the government has never been exposed to any risk of financial loss and so has no claim of its own.

For another, if the FCA were read to deputize uninjured relators to recover money lost by private third parties who never consented to the claim's assignment, it "not only would violate Article III but also would infringe on the Executive Branch's Article II authority." *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 429 (2021). As several members of this Court have observed, the FCA's *qui tam* provision may violate Article II by vesting an "executive function" in an individual who isn't an "Officer of the United States." *Polansky*, 599 U.S. at 449, 451 (Thomas, J., dissenting) (brackets and citation omitted); see *id.* at 442 (Kavanaugh, J., concurring, joined by Barrett, J.).

The court of appeals' reading only magnifies those constitutional concerns by granting private relators roving executive commissions to seek treble damages for *private* frauds involving only *private* dollars. Reversal is warranted for that reason, too.

B. Private telecommunications carriers supply all the money in the E-rate program.

Under the plain meaning of the FCA, E-rate reimbursement requests aren't claims because private carriers supply all the money in the E-rate program. That's exactly how Congress and the FCC designed the program, keeping universal service money walled off from the public fisc and barring the program from using federal tax dollars in the event of a shortfall.

The court of appeals' alternative holding that the government provided at least some E-rate money in the form of debts, civil settlements, and criminal restitution that it collects for the Administrative Company is wrong because those funds remain private despite the government temporarily possessing them.

1. The E-rate program is funded entirely by private carriers' contributions.

E-rate reimbursement requests don't qualify as FCA claims under the provides prong because private carriers supply all the funds in the E-rate program.

The E-rate program—like all universal service programs—is funded by contributions from private telecommunications carriers. In the Telecommunications Act, Congress required private carriers to "contribute" to the "mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d). The FCC then required private carriers to contribute to the Universal Service Fund programs administered by the Administrative Company. See 47 C.F.R. § 54.706(a)-(b). Private carriers must contribute to the Fund at a rate determined by their revenues and a contribution factor based on the universal service programs' projected needs. *Id.* § 54.709. The Administrative Company—which is "explicitly a private corporation owned by an industry trade group," *United States ex rel. Shupe* v. *Cisco Sys., Inc.*, 759 F.3d 379, 387 (5th Cir. 2014) (per curiam)—collects the carriers' contributions, "takes legal title" to them, and disburses them to program participants. *Incomnet*, 463 F.3d at 1072; see 47 C.F.R. § 54.702(b).

As a result of the bargain struck by Congress in the 1996 Act, carrier contributions are the exclusive source of money for universal service programs. See *supra* pp. 6-9. The government never supplements the Fund with federal taxes to help meet universal service goals. Indeed, if there's any shortfall between the Fund's resources and its obligations, the Administrative Company must acquire additional funds through private sources of credit—not from the Treasury. 47 C.F.R. § 54.709(c). So "although the United States may have a regulatory interest in the E-Rate program, the United States does not have a financial stake in its fraudulent losses." *Shupe*, 759 F.3d at 385.

Not having a financial stake is what matters for FCA purposes. The E-rate program is like other "private plan[s]" that "shift financial burdens" to "private purses" away from "the public fisc." 26 U.S.C. § 9702(a)(1) (first quote); *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 (2003) (other quotes). The circuits have expressed different views about whether carriers' private contributions are essentially a tax for purposes of constitutional non-delegation claims. See *Consumers' Rsch.* v. *FCC*, — F.4th —, 2024 WL 3517592, at *8 (5th Cir. July 24, 2024) (en banc); *Consumers' Rsch.* v. *FCC*, 67 F.4th 773, 788 n.8, 791 (6th Cir. 2023), cert. denied, No. 23-456 (June 10, 2024); cf. *Consumers' Rsch.* v. *FCC*, 88 F.4th 917, 924 (11th Cir. 2023), cert. denied, No. 23-743 (June 10, 2024). But that debate doesn't make a difference here. Instead of funding universal service through the tax system, Congress directed it to be financed by private contributions. See 47 U.S.C. § 254(d). By doing so, Con-

gress treated the E-rate program as privately financed for statutory purposes, and that's what matters for False Claims Act coverage, which—unlike the Constitution—is "a matter 'within Congress's control.'" *Totten*, 380 F.3d at 492 (citation omitted).

FCA liability is also unnecessary to protect the E-rate program. The Administrative Company and the FCC have an array of tools to deter and prevent fraud and abuse in the program—none of which occurred here—even without the FCA. Service providers are subject to audit by the Company, which may suspend or delay program benefits or grants if the provider fails to give adequate verification of its delivery of supported services and compliance with regulatory requirements. 47 C.F.R. §§ 54.516, .707.

If a service provider "willfully or repeatedly fail[s] to comply with" universal service program regulations, the FCC can impose a "forfeiture penalty," which for common carriers can be up to nearly $250,000 per violation. 47 U.S.C. § 503(b)(1)(B), (2)(B); 47 C.F.R. § 1.80(b)(2). The FCC can also bar companies that attempt to defraud the program from receiving any of its benefits, 47 C.F.R. § 54.8(b), even though they're still subject to its mandatory contribution requirements, *id.* § 54.706. These tools ensure that the E-rate program can remain protected without distorting the FCA.

2. The government doesn't supply debts, settlements, or restitution that it collects for the Administrative Company.

The court of appeals held that the government "provided" at least some portion of the money in the

E-rate program because the Fund received some money from the Treasury in the form of "collections of delinquent debts to the Fund" plus "civil settlements and criminal restitution." Pet. App. 23a. But the government taking possession of those funds in the process of returning them to their rightful private owner—the Administrative Company—doesn't change their private character.

The government doesn't "provide" money to the Fund when it hands over private funds that it's held for the benefit of the Administrative Company. When the Post Office delivers a birthday card with a $20 bill inside, no one would doubt that grandma—not the government—"provides" the cash. The same is true here. When the government merely facilitates the transfer of money that was owed by private parties to the Administrative Company, it hasn't supplied any money of its own—or exposed itself to any risk of "financial loss." *Neifert-White*, 390 U.S. at 232; see also *United States* v. *Cohn*, 270 U.S. 339, 346 (1926) (holding that the FCA didn't apply to a request for property that was "merely in the temporary possession of an agent of the Government for delivery to the person who may be entitled to its possession").

It's just common sense that the government can't supply funds that were never public money in the first place. And this Court has long held that not all money held by the government—whether in the Treasury or elsewhere—is public. In cases arising out of Civil War–era confiscations, for example, this Court rejected the argument that the mere deposit of funds into designated depositaries of public money pending litigation made those funds public. See *Coudert* v. *United States*, 175 U.S. 178, 183 (1899); *Branch* v.

United States, 100 U.S. 673, 674 (1879). And the Court has long drawn a "clear distinction between public money and * * * sums of money received by an employee of the office charged with the specific duty of transmitting them to their real owners." *Smyer* v. *United States*, 273 U.S. 333, 337 (1927).

Applying that principle here, the government didn't provide any of the money on which the court of appeals relied because it merely collected and held that money for the benefit of the Administrative Company.

The debts collected by the government arise when either (1) private carriers fail to make their required contributions to the Fund, or (2) the Administrative Company previously disbursed amounts that later prove to be unwarranted. J.A. 40. Like direct contributions, these funds are provided by the carriers as either belated contributions or clawbacks of already disbursed private money that was originally provided by the carriers. The government simply collected and returned those private funds to their rightful owner, the Administrative Company. J.A. 37, 41-43. The government's role in collecting and holding those funds in the Treasury pending their return to the Administrative Company didn't convert them into public money. See *United States* v. *Aiello*, 912 F.2d 4, 7 (2d Cir. 1990) (rejecting argument that funds collected by the United States in forfeiture proceedings were public money because they were held in the Treasury during litigation), cert. denied, 498 U.S. 1048 (1991); *Varney* v. *Warehime*, 147 F.2d 238, 245 (6th Cir.) (holding that "[t]he mere fact that moneys are received by federal agencies in the lawful exercise of their public

functions" doesn't make those funds public), cert. denied, 325 U.S. 882 (1945).[7] Because the government's own money was never on the line, any subsequent misuse of those funds couldn't cause the government to "sustain[ ]" any "damages," 31 U.S.C. § 3729(a)—so the FCA has no role to play.

The government didn't "provide" the civil settlement and criminal restitution money for the same reason. The government collected that money in "federal law enforcement efforts on [Universal Service Fund] cases," then held those funds in Treasury accounts "before they [were] put back into" the Fund. J.A. 38, 43. The government holding money for victims in the Treasury before disbursing it doesn't make it the government's money. It's well established that settlement funds recovered by the government on behalf of third-party victims don't become public just because they're kept in the Treasury pending disbursement; instead, they are "held by the Government in trust" for the victims. *Emery* v. *United States*, 186 F.2d 900, 902 (9th Cir.), cert. denied, 341 U.S. 925 (1951); see also 60 Comp. Gen. 15, 16, 26 (1980); Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1358 & n.67 (1988) (funds merely held by the United States, such as overpaid taxes, funds in escrow, and money held in trust during litigation have never been considered part of the public fisc).

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[7] See also Gov't Accountability Off., B-321729, *Office of Natural Resources Revenue—Disbursement of Mineral Royalties* 4 (Nov. 2, 2011), bit.ly/3ygBFAk (concluding that the government sometimes "receive[s] money that is not 'money for the Government,' such as when the government has received the money for the benefit of another").

Collected debts, civil settlements, and criminal restitution owed to the Administrative Company are private money, even if the government plays a role in returning that money to its rightful owner—the Administrative Company.

* * *

The government provides money for FCA claim purposes only if it supplies that money, exposing itself to the risk of financial loss that's the hallmark of FCA liability. Because the government never supplies any of its own money to the Fund, and because there's no possible loss to the United States through fraud or abuse, E-rate reimbursement requests aren't FCA claims under the provides prong of the statute's claim definition.

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

The judgment also should be reversed under the alternative claim definition that covers post-2009 requests presented to an "officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2)(A)(i). All agree that the Administrative Company isn't an "officer" or "employee" of the United States. The Company isn't an "agent" of the United States, either.

Text, context, and history establish that an entity is an agent of the United States only when it (1) can bind the government, and (2) is subject to the government's close control. The Administrative Company doesn't satisfy either criterion.

A. The FCA follows the traditional two-part test for agency.

The FCA's other definition of a "claim" is "any request or demand * * * for money or property" that "is presented to an officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2)(A)(i). Heath has never argued that the Administrative Company is a government "officer" or "employee." *E.g.*, Br. in Opp. 13 n.2. So his position rises and falls with the scope of the word "agent."

The deep common-law roots of the term "agent" bring along the "old soil" of agency principles. *Taggart* v. *Lorenzen*, 587 U.S. 554, 560 (2019) (citation omitted). This Court follows the "settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses" in the FCA. *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 187 (2016) (citation omitted). Here, the FCA doesn't define "agent" or otherwise suggest that Congress intended an "unusual modification" of traditional agency-law principles. *Meyer* v. *Holley*, 537 U.S. 280, 286 (2003). So this Court should look to "'the general common law of agency,'" as it has done for the term "agent" in other federal statutes. *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754 (1998) (citation omitted).

The Restatement of Agency is "a useful beginning point for a discussion of general agency principles." *Ellerth*, 524 U.S. at 755. And since its publication, the Restatement (Third) of Agency has guided the Court's application of these principles. See, *e.g.*, *Percoco* v. *United States*, 598 U.S. 319, 329-30 (2023).

The Restatement identifies two critical requirements for an agency relationship. The first is that the agent must have authority to "act on the principal's behalf," meaning the "power to affect the legal rights and duties of the other person." Restatement (Third) of Agency § 1.01 & cmt. c, at 17-18 (2006) (Restatement). The second is that the agent must be "subject to the principal's control," which includes the principal's "right to give interim instructions." *Id.* § 1.01 & cmt. f(1), at 17, 26. So under the traditional principles of agency law enshrined in the FCA, an entity is an "agent of the United States" only when it can bind the government and is subject to the government's day-to-day control.

1. An agent can't act on behalf of the United States unless it has power to bind the United States.

The first requirement of agency—that the agent is "act[ing] on [a] principal's behalf"—requires that the agent has the "power to affect the *legal rights and duties of the other person*." Restatement § 1.01 & cmt. c, at 17-18 (emphasis added); see *Meyer*, 537 U.S. at 286. Agency law is "all about delegations," which means that the principal must delegate "'actual authority to take action designated or implied in the principal's manifestations to the agent.'" *Biden* v. *Nebraska*, 600 U.S. 477, 513 (2023) (Barrett, J., concurring) (quoting Restatement § 2.02(1), at 89). No delegation of power to bind means no authority to act on behalf of the supposed principal.

The power-to-bind requirement applies with full force to government agents. In the context of sovereigns, actual—not apparent—authority is required. Restatement § 2.03 cmt. g, at 126. That's why this

Court has recognized nominally private entities as government instrumentalities or agents when federal law empowers the private entity to incur legal obligations for the government or to do something only a sovereign could otherwise do. See, *e.g.*, *Dep't of Emp.* v. *United States*, 385 U.S. 355, 358-59 (1966). But a person isn't an agent when the government hasn't delegated actual authority to affect the government's legal obligations. See *Fed. Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947); see also *Heckler* v. *Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63-64 & n.17 (1984).

This Court has insisted on the power to bind when identifying agents of the United States. Before the Court restricted intergovernmental tax immunity to "demands [made] directly on the Federal Government," *United States* v. *New Mexico*, 455 U.S. 720, 735 (1982), it often applied "traditional agency rules in determining the tax-immunity status of federal contractors," *id.* at 732-33. The United States argued in one case, for example, that a tax on lumber purchased by federal contractors was unconstitutional because of the government's "very extensive control" over the contractors. *Alabama* v. *King & Boozer*, 314 U.S. 1, 13 (1941). But this Court held that "however extensively the Government may have reserved the right to restrict or control the action of the contractors," the contractors lacked "the status of agents of the Government" because they couldn't "bind the Government" by entering into a contract on its behalf or "pledg[ing] its credit" for the purchase price. *Ibid.*

In two ways, statutory context confirms the common-law requirement that an agent of the United

States must have the power to bind the government. See *Saxon*, 596 U.S. at 455.

First, the *noscitur a sociis* canon supports the conclusion that an entity is an "agent of the United States" only when the agent exercises delegated authority to bind the United States. That canon teaches that when "several items in a list share an attribute," the statute is often best read to require remaining items to "possess[] that attribute as well." *Beecham* v. *United States*, 511 U.S. 368, 371 (1994). As this Court recently explained, this interpretive principle "'avoid[s] ascribing to one word a meaning so broad that it is inconsistent with' 'the company it keeps.'" *Fischer*, 144 S. Ct. at 2183-84 (citation omitted).

Here, the word "agent" brings up the rear in a list of "an officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2)(A)(i). An officer exercises "significant authority pursuant to the laws of the United States." *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 13 (2021) (citation omitted). The United States also employs "lesser functionaries" that are themselves "subordinate to officers" when they act on behalf of the United States. *Buckley* v. *Valeo*, 424 U.S. 1, 126 n.162 (1976) (per curiam). And the United States sometimes relies on non-employee "agent[s]" to assist officers and employees with specialized tasks. *E.g.*, *Auffmordt* v. *Hedden*, 137 U.S. 310, 327 (1890) (customs appraisers). The common thread is that the United States delegates power to its officers, employees, and agents to act on behalf of the government.

Second, the contrast between the agent and provides prongs of the FCA's claim definition underscores that an entity qualifies as an agent of the United

States only when the entity can bind the United States. Recall that the provides prong defines a claim as any request to a "contractor, grantee, or other recipient" for money that the "United States Government" provided. 31 U.S.C. § 3729(b)(2)(A)(ii). Ordinary rules of statutory interpretation instruct that the word "agent" must mean something different from "contractor, grantee, or other recipient" to prevent the definitions from collapsing on each other. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

An agent's power to bind the United States in responding to requests for money ensures that each prong has its own work to do. Note that Congress omitted from the agent prong the requirement, applicable to contractors, grantees, and other recipients, that the United States "provides," "has provided," or "will reimburse" the money. 31 U.S.C. § 3729(b)(2)(A)(ii)(I)-(II). Because contractors lack power to obligate the United States to pay a claim, see, *e.g.*, *King & Boozer*, 314 U.S. at 13, a claim made to a contractor can't expose the United States to financial loss unless the government provides or reimburses money to the contractor. But there's no reason to ask whether the United States "provided" funds to *itself*—to the officer, employee, or agent with power to dispose of federal funds. After all, the government "can act only through agents." *Hollingsworth* v. *Perry*, 570 U.S. 693, 710 (2013) (citation omitted). The agent prong, unlike the provides prong, applies when the United States directly pays a claim, so a false request could cause the United States to suffer damages under the FCA's remedial provision. 31 U.S.C. § 3729(a)(1).

The FCA's history bolsters the textual and structural evidence that an entity must have the power to

bind the United States to qualify as its agent. See *Snyder*, 144 S. Ct. at 1955. The statute originally prohibited false claims made "upon or against the Government of the United States, or any department or officer thereof." § 1, 12 Stat. at 696. In *Rainwater*, this Court held that a government corporation qualified as the "Government" under the FCA when distributing funds that were "provided by congressional appropriation," with any shortfalls coming "out of the public treasury" and "any gains" going back "to that treasury." 356 U.S. at 591-92.

The 2009 amendment, which introduced the word "agent" alongside "officer" and "employee," carried forward decisions like *Rainwater* that extended the FCA to non-traditional instrumentalities with the power to bind the United States in disposing public funds. § 4(a), 123 Stat. at 1622-23 (codified as 31 U.S.C. § 3729(b)(2)(A)(i)). Courts already used the phrase "agent of the United States" to describe the scope of the FCA's pre-2009 liability provisions. *E.g.*, *Hutchins* v. *Wilentz, Goldman & Spitzer*, 253 F.3d 176, 182 (3d Cir. 2001); *Young-Montenay, Inc.* v. *United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994). And the Senate Report reflects a desire to continue to cover claims for "money or property, any part of which is provided by the Government," when a person deals with "an agent acting *on the Government's behalf*." S. Rep. No. 111-10, at 11 (emphasis added).

Because traditional agency principles establish that an agent acts on the government's behalf only when it has the power to bind the government, the 2009 amendment embraced decisions like *Rainwater* that defined who counts as the "Government" under

the FCA. See *Helsinn Healthcare S.A.* v. *Teva Pharms. USA, Inc.*, 586 U.S. 123, 131 (2019).

Despite all this, the court of appeals jettisoned the power to bind as an unnecessary "extra requirement[ ]" for agency. Pet. App. 25a. It reasoned that the Administrative Company could be an agent—even if the Company "cannot alter the United States' legal obligations"—so long as its "actions are subject to the ultimate control of the principal," purportedly the FCC. *Ibid.* So the court of appeals effectively held that an entity is an agent of the United States whenever the government has a right to control its actions. That is wrong.

This Court has already rejected the argument that power to control alone can establish an agency relationship. In *King & Boozer*, the Court applied this principle in holding that a contractor who lacked the power to bind wasn't an agent of the United States. 314 U.S. at 13. And in *Meyer*, the Court left no doubt that "the 'right to control' is insufficient by itself, under traditional agency principles, to establish a principal/agent or employer/employee relationship." 537 U.S. at 291. In shearing the power to bind from the two-part test, the court of appeals impermissibly departed from traditional principles of agency law without any basis in the FCA or this Court's decisions.

2. An agent must be subject to interim instructions through the federal government's day-to-day control.

A person isn't an agent, either, "unless the person on whose behalf action is taken has the *right to control the actor*." Restatement § 1.01 cmt. f(1), at 26 (em-

phasis added). This Court has recognized that a person isn't a government agent unless the government has the "right to control" the person. *Hollingsworth*, 570 U.S. at 713 (citation omitted). And the principal's power to control includes "the right to give interim instructions or directions to the agent once their relationship is established." Restatement § 1.01 cmt. f(1), at 26.

Statutory context elaborates on the United States' necessary power to control. In our constitutional system of government, any exercise of delegated executive authority by officers and employees must be subject to the overriding control of a principal officer—and, ultimately, the President. See *Arthrex*, 594 U.S. at 14-17; *Buckley*, 424 U.S. at 126 n.162. That principle applies with even greater force to agents exercising delegated authority lower down the food chain. See *supra* p. 37.

The power of interim control also makes sense of the FCA's distinction between agents and contractors. The Restatement explains that "[t]he power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents." Restatement § 1.01 cmt. f(1), at 26. Even if contractors agree to follow many terms and conditions that prescribe or limit their choices, the contractor isn't an agent unless the principal "has an interim right to give instructions." *Id.* at 26-27; see *id.* § 8.09 cmt. c, at 358. Requiring proof of the United States' power to control an agent through interim instructions prevents ordinary contractors and grantees from being wrongly treated as agents—ensuring that the provides prong of the claim definition does independent

work from the agent prong. See *Fischer*, 144 S. Ct. at 2183.

The FCA's history tells the same story. In *Rainwater*, this Court stressed that the requests for money were FCA claims because they were presented to "a wholly owned government corporation" that existed "within the Department of Agriculture" and operated subject to the Government Corporation Control Act. 356 U.S. at 591. The close controls imposed by the Government Corporation Control Act, when combined with the corporation's authority to dispose of "public funds," established that the corporation was "a part of 'the Government of the United States' for purposes of the False Claims Act." *Id.* at 592.

* * *

Text, context, and history all confirm that for an entity to qualify as an "agent of the United States," (1) the entity must have the power to bind the government, *and* (2) the government must have the power to control the entity on a day-to-day basis. Both requirements are essential—and neither is satisfied here.

B. The Administrative Company isn't an agent of the United States.

The Administrative Company isn't an "agent of the United States" because (1) the Company has no power to bind the United States, and (2) the United States has no power to control the Company day-to-day. That's a feature, not a bug, of Congress's and the FCC's decision to use a "private corporation owned by an industry trade group," not a government instrumentality, to administer the program. *Shupe*, 759 F.3d at 387.

1. The Administrative Company can't bind the federal government.

An agent has the power to bind the United States only when federal law grants actual authority to act on behalf of the United States. See *supra* pp. 35-36. Here, the FCC expressly deprived the Administrative Company of the power to "make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress." 47 C.F.R. § 54.702(c). The Company can't obligate federal funds or otherwise alter the United States' legal rights when processing reimbursement requests, either. If the Company promises to reimburse beneficiaries more than the amount that private carriers have contributed, the Company must turn to private funding sources to make up any shortfall. *Id.* § 54.709(c). The Company's actions don't expose the public fisc to any risk of financial loss—the harm that led Congress to equip the FCA with onerous treble-damages and civil-penalty provisions in the first place.

If the Administrative Company acts on anyone's behalf, it's the carriers—not the United States. The Company's sole shareholder is the National Exchange Carrier Association, a private industry group. 47 C.F.R. § 54.5. The Association "acts exclusively as an agent for its members, and it has no authority to perform any adjudicatory or governmental functions." *Shupe*, 759 F.3d at 386-87 (quoting *Farmers Tel. Co.* v. *FCC*, 184 F.3d 1241, 1246 (10th Cir. 1999)). The same goes for the Company, which bills carriers for their contributions and disburses funds back out to them as well as schools and libraries—actions that don't bind the United States in any way. 47 C.F.R. § 54.702(b).

The court of appeals wrongly dispensed with the power to bind in its agency analysis. See *supra* p. 40. While it offered three reasons that the Administrative Company supposedly still acts on behalf of the FCC, those rationales don't hold up to scrutiny because none demonstrates that the Company can bind the FCC as agency law requires.

First, the court of appeals concluded that the FCC's "creati[on]" of the Company "manifested its assent for the [Company] to act on the government's behalf." Pet. App. 24a (citing 47 C.F.R. § 54.701(a)). But the government has had a hand in the creation of many private companies that don't exercise the power to bind the United States, like Fannie Mae and Freddie Mac. *United States ex rel. Adams* v. *Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1260 (9th Cir. 2016); see, *e.g.*, *Sec. Inv. Prot. Corp.* v. *Barbour*, 421 U.S. 412, 415-16 (1975) (discussing congressionally created "nonprofit, private membership corporation" that distributes private assets upon failure of a broker-dealer).

Second, the court of appeals determined that even if the Company can't bind the United States, the Company still somehow "alters the relationships between the United States and third parties" when billing carriers for contributions and distributing funds to eligible recipients. Pet. App. 25a. But carriers owe money to—and beneficiaries make claims on—the Company, not the United States. See *supra* pp. 27-28.

Third, the court of appeals suggested that the Company alters the relationships between the United States and third parties because the Company has pe-

riodically assigned its claims for delinquent contributions to the FCC and the Treasury for debt collection. Pet. App. 25a. But if anything, the power to bind in that situation runs in the *opposite* direction, as the United States has collected debts on the Company's behalf. J.A. 37-38, 41-43; see *supra* pp. 31-32.

By design, the requisite power to bind the United States is absent here. That alone prevents the Company from acting as an agent of the United States.

2. The government can't exert day-to-day control over the Administrative Company.

The United States also lacks the requisite day-to-day control over the Administrative Company—one of the "most basic features of an agency relationship." *Hollingsworth*, 570 U.S. at 713.

The Company "has discretion over if, when, and how it disburses universal service funds to beneficiaries." *Shupe*, 759 F.3d at 386 (quoting *Incomnet*, 463 F.3d at 1071). Although the FCC can review denials of reimbursement upon request of an "aggrieved" party, the FCC can't directly review grants of reimbursement requests and must rely instead on investigations or audits. 47 C.F.R. § 54.719(b); see *id.* §§ 0.13, 54.717. The FCC also can't exercise the nuclear option to "control the [private contributions] through direct seizure or discretionary spending." *Shupe*, 759 F.3d at 386 (quoting *Incomnet*, 463 F.3d at 1071). So on a day-to-day basis, the Company acts on its own in ruling on reimbursement requests.

The court of appeals didn't dispute that the FCC can't directly review reimbursement grants or seize funds in the Company's possession. It held that the

Company was an agent of the United States nonetheless because the Company must follow "the statutory framework and implementing regulations" when billing carriers and reimbursing beneficiaries. Pet. App. 24a-25a. But an obligation to comply with federal law can't possibly be enough to make someone an agent of the United States. See Restatement § 1.01 cmt. f(1), at 26. Nor is the FCC's "right to veto" reimbursement denials (but not reimbursement grants) tantamount to "the right to give affirmative directives that action be taken, which is integral to the right of control within common-law agency." *Id.* at 28. Although everyone must follow the law, that doesn't mean that all law-abiders are agents of the United States.

If the federal government's power to set the terms of a federal program and exercise some back-end review were enough for an agency relationship, most contractors and grantees would be transformed into agents. That can't be right. Contractors and grantees have to jump through compliance hoops under federal law for the government to provide or reimburse funds to them. See, *e.g.*, *Allison Engine*, 553 U.S. at 666 (Navy contractors). But if contractors' and grantees' obligation to follow federal law made them agents of the United States, then the agent prong would subsume the provides prong, obliterating the distinction between the two definitions of FCA claims. See *supra* p. 38.

3. The lack of an agency relationship between the Administrative Company and the United States is by design.

The absence of an agency relationship here is just what Congress intended when it struck the bargain that resulted in the E-rate program sitting outside the

federal government. By funding universal service through private contributions, Congress avoided the political heat of funding the program with federal tax dollars and protected the program from the government budgetary process. 47 U.S.C. § 254(d); see *supra* pp. 6-9. The use of "an independent, non-federal entity" ensured that the United States would be unable to "manipulate, modify, or impair universal service support." 143 Cong. Rec. at S8214 (Sense of the Senate resolution). If the Administrative Company were subordinated to the FCC as its agent, that compromise could have unraveled.

The Government Corporation Control Act further explains why the FCC went outside the Executive Branch for an E-rate program administrator. Out of concern about the growth and "lack of accountability" of government-controlled corporations, Congress in 1945 dissolved existing corporations that federal agencies had created under state law, prohibited their creation "without specific congressional authorization," and brought newly created corporations under the Act "within the existing Government structure," barring a statutory exception. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 389-90 (1995). The Act dictates that "[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action." 31 U.S.C. § 9102. As this Court explained in *Rainwater*, the Act's close budgetary, auditing, and fiscal controls mean that "little more than a corporate name" distinguishes a government-controlled corporation "from the ordinary government agency" covered by the False Claims Act. 356 U.S. at 592.

The FCC learned about the Government Corporation Control Act the hard way. The FCC instructed the Carrier Association to create not only the Administrative Company as an "independently functioning not-for-profit subsidiary" that would "assure significant industry-wide representation in the administration" of universal service programs, but also two freestanding corporations to manage the E-rate and Rural Health Care programs. Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service, 12 FCC Rcd. 18400, 18401-02 (July 18, 1997).

The GAO determined that the FCC had violated the Act in attempting to establish two corporations to "act as its *agents* in carrying out functions assigned by statute to the Commission."[8] But the GAO didn't question the legality of the FCC's use of the Carrier Association "as a *neutral*, third-party administrator" or the FCC's direction to the Carrier Association "to create an *independently* functioning not-for-profit subsidiary," the Administrative Company.[9]

After the GAO opinion, Congress instructed the FCC to "propose a new structure for the implementation of universal service programs." H.R. Rep. No. 105-504, at 87 (1998) (Conf. Rep.). The FCC then asked Congress for statutory authorization to create entities under the Government Corporation Control Act to administer the universal service programs. 13 FCC Rcd. at 11819. But Congress didn't grant such

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[8] Gen. Acct. Off., GAO/T-RCED/OGC-98-84, *Telecommunications: FCC Lacked Authority to Create Corporations to Administer Universal Service Programs*, *supra*, at 13 (emphasis added).

[9] *Id.* at 18-20 (emphases added).

authority. So the FCC stuck with the Administrative Company, which the FCC sought to justify under the GAO opinion given the Company's status as a "subsidiary" of the Carrier Association, itself "an independent, nonprofit organization." Changes to the Board of Directors of the National Exchange Carrier Association, Inc., 13 FCC Rcd. 25058, 25065-66 (Nov. 20, 1998). Taking its cue, the Company officially and correctly represents that it "is not a federal government agency or department or a government controlled corporation."[10]

Notably, the question presented here doesn't implicate the ongoing debate over whether the Administrative Company is unconstitutionally exercising delegated government authority. See *Consumers' Rsch.*, 2024 WL 3517592, at *19. By enacting the Government Corporation Control Act and withholding authority from the FCC to establish a government-controlled corporation, Congress made clear that the Administrative Company is—and must be—a private entity. Cf. *Rainwater*, 356 U.S. at 591-92. That was a policy call "within Congress's control." *Totten*, 380 F.3d at 492 (quoting *Lebron*, 513 U.S. at 392). While the statutory issues in this case don't hinge on the outcome of any non-delegation concerns swirling around the Administrative Company, those concerns make the agency issue here, if anything, even more clean cut. If the United States can't constitutionally delegate authority to the Company, then the Company certainly can't be an agent of the United States.

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[10] Universal Serv. Admin. Co., *Procurement*, bit.ly/4cjRYuY (last visited Aug. 12, 2024).

* * *

Congressional and executive policy choices have consequences. By striking a bargain to set up a privately financed program independent of the public fisc, Congress ensured that the program's administrator couldn't bind the United States to pay any requests for reimbursement from the E-rate program. And by choosing a private subsidiary of a private industry group as the administrator to avoid running afoul of the Government Corporation Control Act, the FCC ensured that the administrator wouldn't be subordinated to its close control. As a result, the Administrative Company isn't an agent of the United States by design.

Neither the E-rate program's funding mechanism nor its administrator can expose the United States to any risk of financial loss. Without that risk, there is no basis for hauling out the heavy artillery of the FCA, which for over a century and a half has been aimed at protecting the public fisc.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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August 13, 2024

STATUTORY APPENDIX

TABLE OF CONTENTS

Page

31 U.S.C. § 3729 .... 1a

31 U.S.C. § 3729 (2008) 5a

31 U.S.C. § 3729

False claims.

(a) Liability for certain acts.

(1) In general.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and

improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

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

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

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

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

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

(B) does not include requests or demands for money or property that the Government has paid to

an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption from disclosure.—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3729 (2008)

False claims.

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.