

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 OF THE SOUTHERN EDUCATION
FOUNDATION, THE SCHOOLS, HEALTH &
LIBRARIES BROADBAND COALITION,
INNOVATEEDU, DIGITAL PROMISE,
AND TNTP, INC. AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are organizations advocating for the interests of schools, students, libraries, and their patrons nationwide that depend on the E-Rate program to provide telecommunications access. Schools and libraries consistently identify lack of reliable access to the internet as a significant concern for the students and library patrons they represent and serve. The initial price and subsidies provided by E-Rate are essential for schools and libraries to afford telecommunications services, and *amici* believe that applying the False Claims Act to claims submitted through the E-Rate program furthers access to those services. On behalf of E-Rate beneficiaries, *amici* are uniquely positioned to share with the Court what it is like to participate in the E-Rate program, and the stakes of financial losses to the program.

The Southern Education Foundation is a non-profit organization established in 1867 to support public education for newly emancipated individuals and their children in the war-torn South. Today, the Southern Education Foundation continues to be devoted to advancing equitable education practices for Black and low-income students in the region through research, advocacy, and leadership development.

The Schools, Health & Libraries Broadband (SHLB) Coalition is an incorporated 501(c)(3) public interest organization with over 300 members who share the goal of promoting open, affordable, high-quality broad-

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

band for anchor institutions and their communities. Its members include representatives of schools, libraries, healthcare providers and telehealth networks, state broadband offices, private sector companies, state and national research and education networks, and consumer organizations. A complete list of members is available at Schools, Health & Libraries Broadband (SHLB) Coalition, Our Members, <https://www.shlb.org/our-members>.

InnovateEDU catalyzes education transformation by bridging gaps in data, policy, practice, and research to center the needs of the field in accelerating innovation towards an equitable, inclusive and radically different future for all learners.

Digital Promise is a global nonprofit working to expand opportunity for each learner. The organization works with educators, researchers, technology leaders, and communities to design, investigate, and scale up innovations that empower learners, especially those who have been historically and systematically excluded.

TNTP, Inc. is a national nonprofit organization that brings research, policy, and consulting together to reimagine America's public education system.

SUMMARY OF ARGUMENT

The Seventh Circuit's decision below applied the plain meaning of the statutory text to an undisputed fact in the summary judgment record. The Seventh Circuit correctly held that because (a) the pre-2009 version of the False Claims Act "reached false claims submitted 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,'" and (b) the Universal Service Fund

received more than \$100 million directly from the U.S. Treasury during the time period relevant to this case, “fraudulent claims on the Fund were ‘claims’ within the meaning of the False Claims Act under both the pre- and post-2009 statutory definitions of a ‘claim.’” *United States ex rel. Heath v. Wisconsin Bell, Inc.*, 92 F.4th 654, 667 (7th Cir. 2024).

As Respondent’s Brief explains, the decision of the Seventh Circuit is correct both as a matter of pure statutory interpretation and on the undisputed record in this case, which is distinguishable from the record on which the Fifth Circuit decided a similar statutory question. *See United States ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379 (5th Cir. 2014). *Amici* write separately to provide three additional points in support of affirming the judgment of the Seventh Circuit.

First, the E-Rate program is a government program that was designed to effectuate Congress’ intent to provide universal access to telecommunications services through the paired statutory mechanisms of the lowest corresponding price rule and federally provided cost subsidies. As the legislative history demonstrates, the E-Rate program was part of Congress’ overarching goal of universal access and specifically recognized the critical importance of the internet to educational and informational equity for both children and adults.

Second, Petitioner’s narrow view of the E-Rate claims submission process inaccurately portrays these claims as ones for private funds alone. The Universal Service Fund is in fact public money, as Respondent’s Brief explains. Regardless, the full lifecycle of an E-Rate claim implicates public funds at all stages of the process. Overcharging or other misconduct at any

stage creates the foreseeable consequence of misappropriation of public funds at several other stages. *Amici*—who represent the interests of those who regularly submit these claims and depend financially on the subsidies and reimbursements they receive—explain how the process works and the full scope of the E-Rate program’s impact on the public funds that sustain our nation’s schools and libraries.

Third, amici confirm that the False Claims Act is an essential tool to maintain the integrity and solvency of the E-Rate program. As this Court has repeatedly held, the False Claims Act cannot be used to impose legal liability on inadvertent and trivial compliance missteps. *Amici* acknowledge concerns of over-deterrence but explain here that the Seventh Circuit’s plain-language interpretation of the statute does not give rise to abuse. To the contrary, continuing to apply False Claims Act liability to claims submitted through the E-Rate program will incentivize good behavior and will not result in liability disproportionate to misconduct, therefore increasing the reach and impact of the program per Congress’ intent.

ARGUMENT

I. The E-Rate program is a government program that was designed by Congress to ensure access to education through our schools and libraries for millions of people, primarily students in our public schools.

Congress guaranteed the benefits of telecommunications access for all Americans through two kinds of institutions that have long been the foundation of the communities they serve: schools and libraries. Congress did so by pairing federally mandated subsidies with a requirement that telecommunications providers give

schools and libraries their most competitive prices. Consistent with Congress' efforts to prevent fraud, waste, and abuse in any and all federal programs, the lowest corresponding price rule ensures that Americans receive the tremendous educational and informational benefits of telecommunications access in a cost-effective manner, particularly as demand for faster connectivity grows with the integration of technology in learning environments. This prevents service providers from taking advantage of public funds and ensures that these funds equitably benefit the greatest number of Americans possible.

Applying False Claims Act liability to fraudulent claims for reimbursement submitted through the E-Rate program makes sense both under the plain language of the False Claims Act itself and under the plain language of the Telecommunications Act of 1996. It also adheres to the clear intent of Congress expressed by that language. The E-Rate program serves its intended purpose of universal access only where its funds are used as efficiently as possible and protected from waste.

a. Congress created the E-Rate program to head off a “digital divide” by making telecommunications access affordable for all.

Shortly after the dawn of the Internet Age, Congress understood the critical importance of the internet to learning and memorialized this understanding in legislation designed to subsidize information access for all while preventing fraud, waste, or abuse of these subsidies. In 1995, Congress recognized the rich world of opportunity that the internet represented and sought to prevent a digital divide between urban and rural residents and communities with means and

those without.² “Universal service”—or providing access to “advanced telecommunications and information technologies and services to *all Americans*”—was a key purpose of the Telecommunications Act of 1996 and a “fundamental concern” of early bill drafters.³ Members of Congress were concerned that then-existing regulations impeded access to technology for rural and low-income consumers and proposed new methods of charging customers so that providers were not incentivized to provide services only in areas where it was easiest to recoup costs.⁴

Section 254 of the Telecommunications Act of 1996 responded to these concerns by ensuring universal access to information for all Americans through schools and libraries. In Section 254, Congress gave the Federal Communications Commission (FCC) authority to require that common carriers provide universal service for certain institutions and directed the FCC to base its policies on principles of equity, including that “[q]uality services should be available at just, reasonable, and affordable rates,” “[a]ccess to advanced telecommunications and information services should be provided in all regions,” and “[e]lementary and secondary schools

² See H. Rep. No. 104-204(I), at 5 (1995) (“The bill directs the FCC and the Joint Board to base their policies on several principles. Among others, these include: providing quality services at just, reasonable, and affordable rates; providing access to advanced telecommunications and information services in all regions of the nation; and, providing consumers in rural and high cost areas access to services comparable to those provided in urban areas.”).

³ See S. Rep. No. 104-23, at 1–2, 4 (1995) (emphasis added) (“1. Universal service and local competition. . . The need to protect and advance universal service is one of the fundamental concerns of the Committee in approving the Telecommunications Competition and Deregulation Act of 1995.”).

⁴ See H. Rep. No. 104–204(I), at 107–8 (1995).

and classrooms, health care providers, and libraries should have access to advanced telecommunications services.” 47 U.S.C. § 254(b).⁵ Section 254(h)—a provision proposed by a bipartisan group of legislators—requires that telecommunications providers shall, upon request, “provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties.”⁶ This subsection is the legislative anchor of the E-Rate program.

The lowest corresponding price rule, whose intentional violation is at issue in *Heath*, is one of the key tools through which Congress’ intent regarding equitable access has been implemented. As part of the Telecommunications Act of 1996, Congress created the Federal–State Joint Board, which remains active, to make recommendations to the FCC regarding universal service mechanisms.⁷ That Board recommended the Education Rate, or “E-Rate,” as one such mechanism.⁸ The E-Rate is comprised of two complementary

⁵ See S. Rep. No. 104–23 (1995), at 5, 25 (“Section 103 also establishes a new section 253 of the 1934 Act to clearly articulate the policy of Congress that universal service is a cornerstone of the Nation’s communications system. This new section is intended to make explicit the current implicit authority of the FCC and the States to require common carriers to provide universal service.”).

⁶ FCC, *E-Rate and Education (A History)*, available at <https://www.fcc.gov/general/e-rate-and-education-history> (last visited Sept. 29, 2024).

⁷ 47 U.S.C. § 254(a).

⁸ *Supra* note 6.

features: (1) the lowest corresponding price and (2) a discount.

The initial price is determined through the lowest corresponding price rule, an integral part of the FCC's original vision for how the E-Rate program would operate. "[T]he lowest corresponding price, defined as the lowest price charged to similarly situated non-residential customers for similar services, constitute[s] the ceiling for the competitively bid pre-discount price."⁹ As a threshold condition for participation in the program, service providers must provide schools and libraries a price for services that is, at maximum, the lowest that any similarly situated entity would pay for similar services.¹⁰ The lowest corresponding price rule is necessary to deter service providers from increasing their rates to take advantage of the subsidies provided to schools and libraries.

The discount is provided (by subsidy) only after the lowest corresponding price has been obtained. Once the school or library is receiving telecommunications services, it (or its service provider) may submit bills to the Fund at issue in *Heath* for reimbursement. The reimbursement amount is primarily based on the level of poverty in the area where the school or library is located. Ultimately, E-Rate allows schools and libraries to receive telecommunications services at a discounted rate of 20 to 90 percent of the agreed-upon price,

⁹ Universal Service, 61 Fed. Reg. 232, available at <https://www.govinfo.gov/content/pkg/FR-1996-12-02/pdf/96-30381.pdf> (last visited Sept. 27, 2024).

¹⁰ 47 C.F.R. § 54.500.

which is, at most, the lowest corresponding price.¹¹ The lowest corresponding price rule ensures that the funds available through the E-Rate program stretch as far as possible. This benefits the public fisc both because schools' and libraries' underlying budgets can cover more needs, as discussed further below, and because the pool of funds available for E-Rate subsidies is public money in and of itself, as addressed in Respondent's Brief.

b. The lowest corresponding price rule must be enforced for the E-Rate program to serve its intended purpose.

The lowest corresponding price rule must be enforced to carry out the purpose for which Congress passed Section 254 regarding universal service. Universal service, by means of the E-Rate program, makes the internet available to over 54 million students and the library patrons of 12,597 libraries.¹² Nearly three-quarters of E-Rate applicant survey respondents, who represent schools and libraries, report that insufficient internet access at home was a significant issue in their community.¹³ It is easy to take for granted all that the internet offers in daily life: the ability to attend school and work, research and complete homework, search for and apply to jobs, seek healthcare information, communicate with teachers and submit assignments,

¹¹ See 47 C.F.R. §§ 54.503 and 54.505. A more detailed discussion of the E-Rate program structure is included below.

¹² FCC, *The Universal Service Fund: How it impacts the United States* (Aug. 8, 2024), available at <https://docs.fcc.gov/public/attachments/DOC-404602A1.pdf> (last visited Sept. 27, 2024).

¹³ *E-Rate Trends Report*, Funds for Learning, at 21 (2023), available at <https://fundsforlearning.app.box.com/s/ceg461we448krjt9jkqhtb93nr1rrt64> (last visited Sept. 27, 2024).

find supportive resources, and so much more. By making the internet available to individuals who may not otherwise have access, the E-Rate program facilitates learning and provides access to a wide range of resources.

The E-Rate program has ensured telecommunications access for historically disadvantaged populations and is therefore a powerful tool to combat racial, socioeconomic, and geographic inequities. Nationally, 18 percent of school-age children lacked internet access at home as of 2019.¹⁴ The problem is most prevalent for school-age children in large cities (21 percent) and in rural areas (24 percent).¹⁵ Black students are more likely than their peers to lack internet access at home.¹⁶ Black, Hispanic, and American Indian children are significantly more likely to attend high-poverty schools.¹⁷ Because high-poverty and rural schools generally receive more E-Rate funding than schools in wealthier or urban areas, if schools and libraries were forced to shoulder the full cost of providing

¹⁴ U.S. Dept. of Educ., *Condition of Education*, Nat'l Ctr. for Educ. Stat. (2023), available at <https://nces.ed.gov/programs/coe/indicator/lfc> (last visited Sept. 27, 2024). "Internet access" here refers to fixed broadband access, which excludes internet access provided exclusively through mobile phones.

¹⁵ *Id.*

¹⁶ Jinghong Cai, *Black Students in the Condition of Education 2020*, Nat'l Sch. Boards Ass'n (June 23, 2020), available at <https://www.nsba.org/Perspectives/2020/black-students-condition-education> (last visited Sept. 27, 2024).

¹⁷ See U.S. Dept. of Educ., *Fast Facts: Brown v. Board of Education*, Nat'l Ctr. for Educ. Stat. (2024), available at <https://nces.ed.gov/fastfacts/display.asp?id=1257> (last visited Sept. 27, 2024). "High-poverty schools" refers to those where 75 percent or more of the student body is eligible for free or reduced-price lunch.

internet access, students of color, low-income individuals, and those living in rural areas would suffer disproportionately.¹⁸ This has been the experience of certain schools and libraries overcharged by unscrupulous providers within the E-Rate program, as demonstrated by the *Heath* summary judgment record.

The E-Rate program remains necessary to finish closing the digital divide. Educational outcomes in the United States remain unequal between our rich and poor, and urban and rural, communities.¹⁹ Black students suffer disproportionately.²⁰ Seventy years after this Court ordered school desegregation in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the country has yet to close the gap in the education outcomes of Black students and White students.²¹ The pandemic exacerbated this achievement gap such that students in high-poverty areas experienced greater learning losses than those in high-income areas.²²

¹⁸ USAC, *Discount Matrix* (January 2024), <https://www.usac.org/wp-content/uploads/e-rate/documents/samples/Discount-Matrix.pdf> (last visited Sept. 27, 2024).

¹⁹ See Carrie Spector, *School Poverty—Not Racial Composition—Limits Educational Opportunity, According to New Research From Stanford*, Stanford Graduate Sch. of Educ. (2019), available at <https://ed.stanford.edu/news/new-evidence-shows-school-segregation-leads-racial-achievement-gap-it-school-poverty-not-racial> (last visited Sept. 27, 2024).

²⁰ *Supra* note 16.

²¹ See generally THE ENDURING LEGACY OF *RODRIGUEZ*: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY, (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015); *Black Students in the Condition of Education 2020*, Nat'l Sch. Boards Ass'n (2020), available at <https://www.nsba.org/Perspectives/2020/black-students-condition-education>.

²² See Elizabeth Ross, *Despite Progress, Achievement Gaps Persist During Recovery from Pandemic*, Harv. Graduate Sch. of

Students of color lost more ground than others.²³ Importantly, however, Black students are now recovering at faster rates—once again making progress on closing the achievement gap.²⁴ Exempting E-Rate reimbursement requests from False Claims Act liability would amount to abandonment of the lowest corresponding price rule and would threaten this educational progress by drastically increasing the cost of broadband access and other telecommunications products, at the expense of taxpayers and our most vulnerable children.

II. In the real world, the E-Rate claims submission process involves federal funds.

a. The E-Rate reimbursement process requires the submission of numerous “claims” within the meaning of the False Claims Act.

Federal funds are at stake in each of the six steps that schools, libraries, and telecommunications providers must follow to receive payment from the E-Rate program. And each of those six steps requires these entities to submit “claims” satisfying the plain

Educ. (Jan. 31, 2024), available at <https://www.gse.harvard.edu/ideas/news/24/01/despite-progress-achievement-gaps-persist-during-recovery-pandemic> (last visited Sept. 27, 2024).

²³ Maria V. Carbonari, et al., *Impacts of Academic Recovery Interventions on Student Achievement in 2022–23* (2024), Ctr. for Educ. Policy Rsch, Harv. Univ., at 4, https://cepr.harvard.edu/sites/hwpi.harvard.edu/files/cepr/files/road_to_recovery_report_june_2024_v6.pdf?m=1720814843 (last visited Sept. 27, 2024).

²⁴ Erin Fahle, et al., *The First Year of Pandemic Recovery: A District-Level Analysis, Education Recovery Scorecard* (January 2024), at 8, available at <https://educationrecoverycorecard.org/wp-content/uploads/2024/01/ERS-Report-Final-1.31.pdf> (last visited Sept. 27, 2024).

meaning of that term as used within the False Claims Act. The process is administered by the Universal Service Administrative Company (USAC), a creature and agent of the federal government; the money USAC distributes is provided by the federal government; and the process is governed by federal law and closely overseen by the Federal Communications Commission.

The money USAC distributes is provided by the federal government, as Respondent’s Brief describes.²⁵ Each quarter, the FCC sets the percentage that telecommunications companies must pay into the Fund so as not to face statutory penalties and potential enforcement actions by the FCC.²⁶ Most of the Fund comes from money paid by telecommunications companies, and the rest—a non-trivial \$100 million during the years relevant to this case—is paid into the Fund directly from the United States Treasury. (And since 2017, the entire Fund has been part of the U.S. Treasury.²⁷) USAC is paid from the Fund to collect the payments and process E-Rate subsidy requests on behalf of the FCC.²⁸ Once the

²⁵ See Respondent’s Brief.

²⁶ 47 C.F.R. §§ 54.709(a) and 54.713 (“The Commission may also pursue enforcement action against delinquent contributors and late filers and assess costs for collection activities in addition to those imposed by [USAC].”).

²⁷ Benjamin Herold, *E-Rate, Other Universal-Service Funds to Be Transferred to U.S. Treasury*, Educ. Week (Aug. 8, 2017), available at <https://www.edweek.org/technology/e-rate-other-universal-service-funds-to-be-transferred-to-u-s-treasury/2017/08> (last visited Sept. 27, 2024).

²⁸ See Respondent’s Brief in Opposition at 4–5; 47 C.F.R. §§ 54.709(a), 54.713 (“The Commission may also pursue enforcement action against delinquent contributors and late

money is in the Fund, it is unquestionably the property of the federal government and disbursements from the Fund are therefore “provided by” the Government.

Federal law governs the process that schools and libraries must follow to receive bids for telecommunications products and services and obtain reimbursements. First, eligible schools or libraries identify goods or services they need and submit a request for competitive bids to the USAC. *See* 47 C.F.R. § 54.503(c). The school or library requesting a bid must certify an FCC Form 470, a Description of Services Requested and Certification.²⁹ Eligible services are categorized into two categories. Category One includes data transmission services and/or internet access; Category Two includes internal connections, managed internal broadband services, and basic maintenance of internal connections.³⁰ Second, service providers place bids for the requests, and the school or library is required by federal law to choose the most cost-effective bid. *See* 47 C.F.R. § 54.511(a). In choosing the most cost-effective bid, the school or library must follow the E-Rate program competitive bidding rules and any other state and local contract and procurement rules and regulations.³¹

filers, and assess costs for collection activities in addition to those imposed by [USAC].”).

²⁹ USAC, *E-Rate Application Process: Step 1: Competitive Bidding*, <https://www.usac.org/e-rate/applicant-process/competitive-bidding/> (last visited Sept. 23, 2024).

³⁰ USAC, *E-Rate Application Process: Eligible Services List*, <https://www.usac.org/e-rate/applicant-process/before-you-begin/eligible-services-list/> (last visited Sept. 23, 2024).

³¹ USAC, *E-Rate Application Process: Step 2: Selecting Service Providers*, <https://www.usac.org/e-rate/applicant-process/selecting-service-providers/> (last visited Sept. 23, 2024).

Third, the school or library applies for E-Rate program discounts by filing an FCC Form 471, which provides USAC with information about the services or equipment requested and the entities receiving the services or equipment. *See* 47 C.F.R. § 54.504(a). FCC Form 471 requires information such as, for schools, the number of students eligible for the National School Lunch Program, and for libraries, the square footage, the main branch, and the entity number of the public school district in which the library is located.³² Fourth, USAC reviews submitted FCC Form 471 for compliance with the federal government’s established E-Rate program rules and objectives and is empowered to request additional information from applicants to determine compliance with the federally established program requirements.³³ After the review process is completed, USAC issues a Funding Commitment Decision Letter containing USAC’s funding determination.³⁴

Fifth, the school or library can begin receiving services.³⁵ After receiving the Decision Letter and services have started, the school or library must file an FCC Form 486 certifying that (1) discounted services have started and invoicing can begin; (2) the school or library is in compliance with the Children’s Internet Protection Act or the Act does not apply; and (3) for funding year 2014 and earlier, if applicable, the school or library received approval of its technology plan. *See*

³² USAC, *E-Rate Application Process: Step 3: Applying for Discounts*, <https://www.usac.org/e-rate/applicant-process/applying-for-discounts/> (last visited Sept. 26, 2024).

³³ USAC, *E-Rate Application Process: Step 4: Application Review*, <https://www.usac.org/e-rate/applicant-process/application-review/> (last visited Sept. 23, 2024).

³⁴ *Id.*

³⁵ *Id.*

47 C.F.R. § 54.520(c). USAC will review the FCC Form 486 and, if it is approved, will issue an FCC Form 486 Notification Letter.³⁶

In the sixth, and final, step, the school or library determines whether any additional funds are necessary to meet their total telecommunications costs. There are two methods of invoicing and receiving reimbursement from USAC. If certain prerequisites are met, the school or library may submit an invoice directly to USAC and receive funds directly from USAC.³⁷ *See* 47 C.F.R. § 54.514. To do this, the school or library must pay the service provider in full before submitting any invoice and before being reimbursed by USAC.³⁸ Alternately, the service provider submits the invoice to USAC to receive reimbursement for the subsidized portion of costs.³⁹ Then the school or library pays the service provider directly for the non-discounted portion of costs for approved eligible equipment or services and any costs for the ineligible portion of equipment or services.⁴⁰

In the first five steps of the claims submission process, the federal government—via the FCC—is integrally involved in determining eligibility for the E-

³⁶ USAC, *E-Rate Application Process: Step 5: Starting Services*, <https://www.usac.org/e-rate/applicant-process/starting-services/> (last visited Sept. 23, 2024).

³⁷ USAC, *E-Rate: Two Methods of Invoicing*, <https://www.usac.org/e-rate/two-methods-of-invoicing/> (last visited Sept. 23, 2024).

³⁸ *Id.*

³⁹ USAC, *E-Rate Application Process: Step 6: Invoicing*, <https://www.usac.org/e-rate/applicant-process/invoicing/> (last visited Sept. 23, 2024); USAC, *E-Rate: Two Methods of Invoicing*, <https://www.usac.org/e-rate/two-methods-of-invoicing/> (last visited Sept. 23, 2024).

⁴⁰ *Id.*

Rate program and approving funding levels. And in the sixth step, the federal government pays a substantial portion of a participating school or library's telecommunications bill. For all the reasons stated in the Seventh Circuit's opinion and in Respondent's Brief, the Fund is an agent of the U.S. Government, and this agency relationship is made clear by the integral role of government regulations—and regulators—throughout the E-Rate claims submission process. The necessary and foreseeable consequence of a misrepresentation at any stage of this process, such as whether a quoted rate complies with the lowest corresponding price rule, is the misuse of federal funds. As explained in the sixth step, schools and libraries are responsible for paying the non-discounted portion of costs, as well as any ineligible expenses. Any fraud in the form of overcharging schools and libraries will therefore have far-reaching ramifications, including by necessitating a larger direct outlay from USAC to reimburse subsidized expenses. Also, and as explained further below, money is fungible, so to the extent a school or library must overpay for one line item in its budget (such as paying too much for telecommunications services due to fraud), that is less money available for other critical needs. Schools, in particular, receive significant federal funding—for example, about 95 percent of U.S. school districts are eligible for Title I funding—and therefore federal and, of course, state and local dollars are at stake for any telecommunications expenses that are not directly reimbursable.⁴¹

⁴¹ Nora Gordon & Sarah Reber, *Title I of ESEA: How the Formulas Work* (Jan. 24, 2023), All4Ed, <https://all4ed.org/publication/title-i-of-esea-how-the-formulas-work/> (last visited Sept. 27, 2024).

b. Schools and libraries rely on the lowest corresponding price rule combined with subsidies to afford telecommunications access.

i. The lowest corresponding price rule is critical because schools and libraries cannot afford to overpay.

Compliance with the lowest corresponding price rule is a threshold requirement for schools, libraries, and service providers alike to have access to E-Rate program participation. The E-Rate program is designed to provide lower prices for schools or libraries based on the level of poverty where they are located and whether they are in a rural or urban area.⁴²

Only after obtaining a price that meets the requirements of the lowest corresponding price rule may service providers or eligible schools or libraries submit a claim for reimbursement to the Universal Service Fund via USAC. Through the reimbursement process, eligible schools and libraries receive discounts ranging from 20 percent to 90 percent of the pre-discount price. 47 C.F.R. § 54.505(b) & (c). The discounts available to a particular school or library are determined by indicators of poverty and high cost. 47 C.F.R. § 54.505(b). Service providers may submit claims for subsidies only if they have submitted an annual certification to USAC and, by extension, the FCC that they are complying with E-Rate rules, including the lowest corresponding price rule.⁴³

⁴² FCC, *E-Rate—Schools & Libraries USF Program*, <https://www.fcc.gov/general/e-rate-schools-libraries-usf-program> (last visited Sept. 23, 2024).

⁴³ See USAC, *E-Rate: Service Provider Process: Step 3: Winning the Bid: FCC Form 473 Filing*, <https://www.usac.org/e-rate/>

With many demands made on the limited budgets available to schools and libraries, the E-Rate program's discount and subsidy provisions are both critical to these institutions' ability to afford telecommunications access. Schools are facing significant budget crises due to the end of COVID relief funds and declining student enrollment, among other things.⁴⁴ The final round of federal COVID relief funds, called Elementary and Secondary School Emergency Relief (ESSER), is set to end this year.⁴⁵ ESSER funds, which totaled about \$190 billion, represented about a quarter of total annual pre-COVID K-12 revenues.⁴⁶ The loss of ESSER funding is more pronounced in high-poverty districts because ESSER funds were distributed based on the share of free-lunch-eligible students districts served.⁴⁷ High-poverty districts received more dollars

service-providers/step-3-winning-the-bid/fcc-form-473-filing/ (last visited Sept. 29, 2024); USAC, *E-Rate: Service Provider Process: Step 5: Invoicing*, <https://www.usac.org/e-rate/service-providers/step-5-invoicing/> (last visited Sept. 29, 2024).

⁴⁴ Sarah Mervosh and Madeleine Ngo, *Why U.S. Schools are Facing Their Biggest Budget Crunch in Years*, *The New York Times* (June 26, 2024), available at <https://www.nytimes.com/2024/06/26/us/schools-budget-cuts-pandemic-aid.html> (last visited Sept. 27, 2024).

⁴⁵ Joanna Lefebvre and Sonali Master, *Expiration of Federal K-12 Emergency Funds Could Pose Challenges for States*, *Ctr. on Budget and Policy Priorities* (Feb. 28, 2024), <https://www.cbpp.org/research/state-budget-and-tax/expiration-of-federal-k-12-emergency-funds-could-pose-challenges-for> (last visited Sept. 27, 2024).

⁴⁶ Samuel Pittman, *End of Pandemic Funding for Schools Requires States and Districts to Plan*, *Pew Charitable Trusts* (Aug. 14, 2024), <https://www.pewtrusts.org/en/research-and-analysis/articles/2024/08/14/end-of-pandemic-funding-for-schools-requires-states-and-districts-to-plan> (last visited Sept. 27, 2024).

⁴⁷ Marguerite Roza and Katherine Silberstein, *The ESSER fiscal cliff will have serious implications for student equity*, *Brookings*

per student than the national average in total ESSER funding, among other things.⁴⁸ For rural schools that often face staffing challenges, ESSER funds were used to retain staff.⁴⁹ With budget cuts likely on the horizon due to the loss of ESSER funds, maintaining discounted rates for telecommunications service is especially critical for the 106,000 schools nationwide that participate in the E-Rate program.⁵⁰

Leaders at schools and libraries have been clear about the importance of these subsidies to their ability to afford internet access. The E-Rate program covers approximately 80 percent of the cost of broadband services, providing subsidies to thousands of schools and libraries.⁵¹ The subsidies have a significant impact on stretched school and library budgets. Without the E-Rate, millions of students and library patrons would likely have less access to the learning opportunities and resources available through access to the internet due to the increased cost of telecommunications for schools and libraries. In a recent survey, the vast majority of E-Rate funding applicant respondents

(Sept. 12, 2023), <https://www.brookings.edu/articles/the-esser-fiscal-cliff-will-have-serious-implications-for-student-equity/> (last visited Sept. 27, 2024).

⁴⁸ *Supra* note 46.

⁴⁹ *Id.*

⁵⁰ *Supra* note 12.

⁵¹ In FY 2023, the E-Rate discount covered \$1.67 billion toward the cost and applicants contributed \$470 million. *E-rate Trends Report*, Funds for Learning, at 21 (2023), available at <https://fundsforlearning.app.box.com/s/ceg461we448krjt9jkqhtb93nr1rrt64> (last visited Sept. 27, 2024).

reported that they connect more students or library patrons as a result of E-Rate funding (86 percent), enjoy faster connection because of the funding (88 percent), and find E-Rate funding vital to their internet connectivity goals (95 percent).⁵² Dozens of survey respondents—36 percent of whom were in rural areas and 64 percent in urban areas—emphasized the critical support that E-Rate provides for them.⁵³ Respondents wrote that “[w]ithout [E-Rate], significant financial obstacles would remain—grateful for every dollar received,” “the only reason our school can even come close to keeping up with our internet needs,” the program “has been a major help for our small school district,” the program “has been crucial in helping our schools access higher speed internet at an affordable rate,” the program “enables us to offer our students a quality education,” and “we could not function without it,” among the dozens of comments expressing gratitude.⁵⁴ A representative of an Arkansas school district reported that the E-Rate program was vital to the success of their school in a small rural community.⁵⁵

Thanks to the E-Rate program, nearly all school districts—99 percent—and *all* U.S. libraries have broadband service.⁵⁶ In 1996, when the E-Rate program was created, only 14 percent of schools and 28

⁵² *Id.* at 12–13.

⁵³ *Id.* at 24.

⁵⁴ *Id.* at 28–41.

⁵⁵ *Id.* at 22.

⁵⁶ As of 2020. *State of the States, Education Superhighway*, 3 (2019), available at <https://www.educationsuperhighway.org/wp-content/uploads/2019-State-of-the-States-Full-Report-Education-SuperHighway.pdf>; *E-rate and Universal Service*, Am. Library Ass’n, available at <https://www.ala.org/advocacy/erate> (last visited Sept. 27, 2024).

percent of libraries had basic internet access.⁵⁷ Rural areas in particular struggled to gain operational access, even when they paid “astronomical fees.”⁵⁸ Nearly three-quarters of school districts nationwide have now met the FCC’s current minimum internet connectivity target of 100 megabits per 1,000 users, transforming the learning environments of students nationwide.⁵⁹ However, there is more work to be done. Most schools still do not meet the FCC’s long-range goal of gigabit service (1,000 megabits per 1,000 users).⁶⁰ The E-Rate program remains essential because the demand for faster internet access keeps growing.

⁵⁷ FCC, *E-Rate: Universal Service Program for Schools and Libraries*, available at <https://www.fcc.gov/general/universal-service-program-schools-and-libraries-e-rate> (last visited Sept. 29, 2024); *E-rate and Universal Service*, Am. Library Ass’n, available at <https://www.ala.org/advocacy/erate> (last visited Sept. 27, 2024).

⁵⁸ Benjamin Herold, *The Slowest Internet in Mississippi: Rural schools still struggle to get connected*, Educ. Week (Nov. 19, 2015), available at <https://www.edweek.org/technology/the-slowest-internet-in-mississippi-rural-schools-still-struggle-to-get-connected/2015/11> (last visited Sept. 27, 2024).

⁵⁹ *2023 Report on School Connectivity*, Connect K-12, at 3 (2023), available at https://s3.amazonaws.com/connected-nation/898e8ecb-8046-4850-af4b-b89b12c1a4a1/Connect_K12_Connectivity_Report_2023_FINAL.pdf (last visited Sept. 27, 2024).

⁶⁰ FCC, *Statement of Chairwoman Jessica Rosenworcel* (March 14, 2024), available at <https://docs.fcc.gov/public/attachments/DOC-401205A2.pdf> (last visited Sept. 27, 2024).

ii. Schools and libraries have been overcharged by providers not observing the lowest corresponding price rule.

The concern that telecommunications providers may overcharge schools and libraries is not merely academic. Both the record in *Heath* and in other matters illustrate that a significant number of schools and libraries nationwide have been overcharged, often by substantial amounts. In this case alone, Heath submitted evidence—which was not really disputed on summary judgment—that the total amount of overcharges was tens of millions of dollars, affecting hundreds of Wisconsin schools and libraries.⁶¹

On this record, Wisconsin Bell violated the lowest corresponding price rule repeatedly and intentionally, overcharging both the E-Rate program and individual schools and libraries thousands of times.⁶² Contrary to the requirements of the program and the certifications Wisconsin Bell made to the government, it instead offered widely varying prices for Integrated Services Digital Network—Primary Rate Interface circuits, a common telecommunications product that allows multiple voice and data channels to be carried over traditional phone lines.⁶³ For example, the Bruce Guadalupe Community School in Milwaukee had a subsidy rate of 90%, which indicates that the school

⁶¹ See ECF 19, Appellant’s Br. at 20–21 (citing Doc. 31, SOF 49–51; Doc. 279-11, Webber Report at 114; Doc. 308, Webber Decl. ¶ 34; Doc. 290, Ex. 4, Dehler Decl. ¶ 5, Ex. U, Webber Report; Doc. 290, Dehler Decl. ¶ 2, attaching Ex. H, Webber Report). “ECF” here indicates the Seventh Circuit docket. “Doc.” indicates citations to the E.D. Wis. docket.

⁶² See ECF 19, Appellant’s Brief at 17 (citing Doc. 319, SOF 49–86; Doc. 308, Webber Decl. ¶ 41).

⁶³ See ECF 19, Appellant’s Br. at 17.

was in a high-poverty area.⁶⁴ But the prices Wisconsin Bell charged the school were its highest month-to-month tariff prices—more than three times higher than the price charged to a non-residential customer for the same service.⁶⁵ The record contains numerous similar examples.

Wisconsin Bell overcharged libraries, too, in violation of the lowest corresponding price rule. For example, it entered into a three-year contract with Milwaukee Public Library for OPT-E-MAN ethernet circuits for \$26,500 per month.⁶⁶ The prices charged to the Milwaukee Public Library reflected only a 7.5% discount off Wisconsin Bell's tariff pricing even though the library was a large purchaser of the circuits and had entered into a multi-year contract for those services.⁶⁷ By comparison, the Madison Metro School District was a much smaller purchaser of the same circuits, but received much better pricing—a 74% discount—even though Wisconsin Bell incurred more than \$244,165 for new capital to provide the district with the circuits and there was no evidence Wisconsin Bell incurred comparable costs to provide the library with the circuits.⁶⁸

Wisconsin Bell did not even train its staff on what the lowest corresponding price rule was, let alone how to comply with it, and instead instructed sales

⁶⁴ ECF 19, Appellant's Br. at 18 (citing Doc. 319, SOF 75, 78–80).

⁶⁵ ECF 19, Appellant's Br. at 18 (citing Doc. 319, SOF 76, 78–80, 83).

⁶⁶ ECF 19, Appellant's Br. at 19 (citing Doc. 319, SOF 66, 69; Doc. 308, Webber Decl. ¶¶ 14–17).

⁶⁷ ECF 19, Appellant's Br. at 19 (citing Doc. 319, SOF 69; Doc. 308, Webber Decl. ¶¶ 14–17).

⁶⁸ ECF 19, Appellant's Br. at 19–20 (citing Doc. 319, SOF 70–73; Doc. 308, Webber Dec. ¶¶ 16, 37, 39).

representatives to offer the highest prices. *See Heath*, 92 F.4th at 658 (describing testimony of Wisconsin Bell employees, and Petitioner’s admission that “there was no difference between the way it treated pricing contracts with schools and libraries versus with private businesses or any other customers”).

The problem is not limited to Wisconsin. To name just one other example, in 2016, the FCC found that AT&T overcharged two Florida school districts by so much that they faced some of the highest telecommunications rates in the state—magnitudes *higher* than many other customers in Florida, in direct contradiction of the lowest corresponding price rule.⁶⁹ Additional examples are described *infra*, Section III(a).

c. Money spent unnecessarily on telecommunications access is money that cannot be used for other essential purposes.

Every dollar that is unnecessarily spent on telecommunications services—whether due to fraudulent overcharges or lack of funds for subsidies—is money that must be sacrificed from another of the many essential purposes that schools and libraries serve, especially in disadvantaged communities. Such schools require more funds per student to overcome issues of poverty—and school funding that is spent effectively has the power to improve outcomes for low-income students, including increased test scores, graduation rates, and even earnings in adulthood.⁷⁰ Medium- and

⁶⁹ FCC, *FCC Plans to Fine AT&T \$106,425 for Overcharging Schools in Florida* (July 27, 2016), available at <https://docs.fcc.gov/public/attachments/DOC-340434A1.pdf> (last visited Sept. 27, 2024).

⁷⁰ C. Kirabo Jackson, et al., *The Effects of School Spending on Educational and Economic Outcomes*, Nat’l Bureau of Econ. Rsch.,

high-poverty school districts are spending, respectively, \$700 and \$3,078 per student less than what is required for students to achieve national average test scores.⁷¹ The average school participating in the E-Rate program received between \$1,464 to \$9,391 for Category 2 products and services alone.⁷² To put that in perspective, a school can provide lunch to a student for a full school year for between \$495 and \$540.⁷³ The E-Rate program frees up funds to provide other needed resources to disadvantaged students.

Similarly, the E-Rate program enables libraries to allocate funds toward essential community services. Like schools, libraries serve a wide variety of needs. These needs extend beyond access to hard-copy reading materials. Libraries help people access government and support services, offer academic programs for children, and offer adult programs like literacy classes or financial literacy programs.⁷⁴ Technology services are critical to the mission of a modern library: more

at 3, 39, (Jan. 2015), available at https://www.nber.org/system/files/working_papers/w20847/w20847.pdf (last visited Sept. 27, 2024).

⁷¹ Sylvia Allegretto, Emma García, and Elaine Weiss, *Public education funding in the U.S. needs an overhaul*, Econ. Policy Inst. (July 12, 2022), <https://www.epi.org/publication/public-education-funding-in-the-us-needs-an-overhaul/> (last visited Sept. 27, 2024).

⁷² *E-rate Schools*, Ctr. for Public Educ. (2020), available at <https://www.nsba.org/-/media/NSBA/File/cpe-e-rate-schools-report-march-2020.pdf> (last visited Sept. 27, 2024).

⁷³ *School Lunch Debt Statistics*, Educ. Data Initiative, <https://educationdata.org/school-lunch-debt> (last visited Sept. 23, 2024).

⁷⁴ *Public Library Services for Strong Communities Report: Results from the 2022 PLA Annual Survey*, Am. Library Ass'n (2023), https://www.ala.org/sites/default/files/pla/content/data/PLA_Services_Survey_Report_2023.pdf (last visited Sept. 27, 2024).

than half of libraries circulate technology for off-site use, offer online job and employment resources, offer e-books and audiobooks, and offer access to library materials and homework help through mobile apps.⁷⁵ In the wake of the pandemic, libraries have even become a key conduit for telehealth services.⁷⁶

III. Every dollar counts.

a. The False Claims Act has been—and must remain—an essential enforcement tool to recoup monies wrongfully charged to schools and libraries by telecommunications providers.

The application of False Claims Act liability to claims for reimbursement submitted through the E-Rate program is not new. Indeed, the False Claims Act has long helped to ensure E-Rate program integrity and compliance—and to recover funds on behalf of schools and libraries that were overbilled.

Both federal authorities and *qui tam* whistleblowers have investigated and reported E-Rate fraud and have recouped significant funds using the False Claims Act, and related fraud statutes, as enforcement tools. In one such example, AT&T Technical Services Corp. paid the Department of Justice \$8.2 million to settle False Claims Act allegations, after a federal investigation

⁷⁵ *National survey finds libraries play expanded role in digital equity, bridging gaps in access to technology*, Am. Library Ass'n (Aug. 31, 2021), <https://www.ala.org/news/press-releases/2021/08/national-survey-finds-libraries-play-expanded-role-digital-equity-bridging> (last visited Sept. 27, 2024).

⁷⁶ Sossity Chiricuzio, *Public Libraries Tackle Telehealth Challenges*, *Library Journal* (Feb. 8, 2022), <https://www.libraryjournal.com/story/Public-Libraries-Tackle-Telehealth-Challenges> (last visited Sept. 27, 2024).

contended that AT&T had “engaged in non-competitive bidding practices for E-rate contracts,” “claimed and received E-rate funds for goods and services that were ineligible for the program’s discounts,” overbilled schools and libraries participating in the program, and even facilitated kickbacks from E-Rate funds, all within the E-Rate program in Indiana.⁷⁷ A few months later, DOJ recouped \$1.4 million from AT&T Missouri to settle a False Claims Act suit alleging fraudulent violations of E-Rate program requirements in the Kansas City, Missouri school district.⁷⁸ As in *Heath*, the Missouri case was filed by a *qui tam* whistleblower who also worked in the telecommunications industry.⁷⁹ In 2019, two individuals in Columbus, Ohio were criminally convicted under the False Claims Act for diverting nearly \$4 million in E-Rate reimbursements from local public and Catholic schools.⁸⁰ In a recent case in Rockland County, New York, defendants billed \$35 million to (and received at least \$14 million from) the E-Rate program for services and equipment that

⁷⁷ See DOJ, *AT&T Technical Services Corp. to Pay U.S. More than \$8.2 Million to Settle False Claims Involving the E-Rate Program*, Office of Public Affairs, (Feb. 13, 2009), available at <https://www.justice.gov/opa/pr/att-technical-services-corp-pay-us-more-82-million-settle-false-claims-involving-e-rate> (last visited Sept. 27, 2024).

⁷⁸ See DOJ *AT&T Missouri Agrees to Settle False Claims Act Lawsuit Involving E-Rate Program*, Office of Public Affairs (Oct. 13, 2009), available at <https://www.justice.gov/opa/pr/att-missouri-agrees-settle-false-claims-act-lawsuit-involving-e-rate-program> (last visited Sept. 27, 2024).

⁷⁹ *Id.*

⁸⁰ See, DOJ, *Two plead guilty to wrongdoing in connection to federal E-rate schools program*, U.S. Attorney’s Office, S.D. Ohio (Nov. 7, 2019), available at <https://www.justice.gov/usao-sdoh/pr/two-plead-guilty-wrongdoing-connection-federal-e-rate-schools-program> (last visited Sept. 27, 2024).

were mostly not provided to a group of schools serving low-income children.⁸¹

The False Claims Act is plainly necessary to deter misconduct seeking to take advantage of E-Rate funds and to repair damage to the public fisc caused by such misconduct. In each of these cases, E-Rate was readily recognized as a government program and the defendants' alleged or confirmed misconduct as an intentional misrepresentation to misappropriate public funds.

b. Continuing to apply False Claims Act liability to claims submitted through the E-Rate program will enhance, rather than diminish, the reach of the program.

An amicus brief submitted by the Washington Legal Foundation on behalf of Petitioner argues that the application of False Claims Act liability to claims for reimbursement submitted through the E-Rate program will increase telecommunications prices for schools and libraries and will ultimately reduce access to information for these critical public institutions and the populations they serve. In particular, that brief posits that providers will be forced to price in liability that will be triggered by even the most trivial error. As *amici* here have shown, this parade of horrors is both factually and legally incorrect.

Continuing to apply False Claims Act liability to the E-Rate program—as has been the case since its inception in 1996—will only incentivize service providers to

⁸¹ See DOJ, *Seven Defendants Sentenced For Defrauding Federal Program That Provided Technology Funding For Rockland County Schools*, U.S. Attorney's Office, S.D.N.Y. (Feb. 28, 2023), available at <https://www.justice.gov/usao-sdny/pr/seven-defendants-sentenced-defrauding-federal-program-provided-technology-funding> (last visited Sept. 27, 2024).

comply with Congress' design. As alleged in *Heath*, Wisconsin Bell was already overcharging schools and libraries, thus reducing their access to services, by failing to follow the lowest corresponding price rule. The threat of civil and criminal liability will incentivize telecommunications providers to follow the rule as written, therefore providing schools and libraries with the most affordable rate possible. Legal liability deters misbehavior and encourages people and organizations to conform to the underlying rules. Deterring misbehavior like the kind committed by Wisconsin Bell, especially through enforcement tools that allow money to be returned to the public fisc for its intended use, is an important mechanism of keeping the E-Rate program both functional and affordable.

Telecommunications providers have an extremely simple and fail-safe way to avoid False Claims Act liability: Don't commit fraud.

By definition, fraud under the False Claims Act requires both scienter and materiality. As this Court has recently held, the False Claims Act requires that a defendant acted with "either actual knowledge, deliberate ignorance, or recklessness" of the falsity of the claim submitted. *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 750 (2023). And the falsity of the claim must be material, a "demanding" standard under the False Claims Act. *See Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 194 (2016). As this Court explained, this is precisely because "[t]he False Claims Act is not an all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Id.* (citation and internal quotation marks omitted).

Where telecommunications providers are making good-faith efforts to comply with the lowest corresponding

price rule and other critical components of the E-Rate scheme, they have nothing to fear from the False Claims Act.

CONCLUSION

For these reasons, in addition to those set forth in the Brief for Respondent Heath, this Court should affirm the decision of the Seventh Circuit Court of Appeals.

We, the representatives of students, schools, libraries, and their patrons served by the E-Rate program, have the most at stake should the statutory design of the program be compromised. We are unanimous in our desire to preserve and expand the reach of the E-Rate program to continue to strengthen the education system and access to learning and information for students and library patrons, many of whom otherwise would not have this access. False Claims Act liability must continue to attach to claims submitted through the program, which will only enhance access and therefore increase equity.

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