No. 23-1127

IN THE

Supreme Court of the United States

WISCONSIN BELL, INC.,

Petitioner,

v.

UNITED STATES, EX REL. TODD HEATH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DRI–CENTER FOR LAW AND PUBLIC POLICY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether reimbursement requests submitted to the E-Rate program are "claims" under the False Claims Act, even though: 1) there is no potential harm to the federal fisc; 2) the Universal Service Fund is administered by a private company that does not qualify as an "agent" of the United States; and 3) the program involves private, not public, funds.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

STATUTES

Page

Page

OTHER AUTHORITIES

Page

RULES

STATEMENT OF INTEREST[1]

Amicus curiae DRI–Center for Law and Public Policy is the policy arm of a more than 12,000-member international association of defense lawyers who represent individuals, corporations, and local governments involved in civil litigation. DRI and its Center for Law and Public Policy also work with affiliated state and local defense organizations in every state and in Canada. DRI has long advocated for procedural reforms that: (1) promote fairness in the civil justice system, (2) reduce the costs and burdens associated with litigation, and (3) advance predictability and efficiency in litigation.

This case concerns the False Claims Act, and specifically, whether reimbursement requests submitted to the E-Rate program qualify as "claims" under the Act, 31 U.S.C. § 3729. The Seventh Circuit's decision, which contradicts the nature and purpose of the False Claims Act, holds that the Act applies to submissions made to a *private* company paying out *private* funds. Not only is the Seventh Circuit's decision incorrect, but it has potentially ruinous consequences for individuals and companies interacting with government-adjacent private actors.

DRI's interest in this case stems from its members' representation of clients who routinely interact with government-adjacent, albeit private, entities. DRI's

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1. Under Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents were given timely notice of *amicus curiae*'s intent to file this brief as required under Rule 37.

interest further stems from its members' need to protect their clients and to ensure that the bounds of False Claims Act are not impermissibly expanded beyond requests for money "provided" by the federal government or made to an "agent" of the United States, as explicitly set forth by Congress.

SUMMARY OF ARGUMENT

DRI writes in support of Petitioner Wisconsin Bell, Inc.'s position that reimbursement requests submitted to the E-Rate program do not qualify as "claims" under the False Claims Act. This position is supported by the decisions of several circuit courts of appeals, including the Fifth Circuit's decision in *U.S. ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379 (5th Cir. 2014). *Shupe* directly addressed the E-Rate program and whether the government "provides any portion of " the funds requested under the program. *Shupe* held that because there are no federal funds involved in the program, and because the administrator of the program is not a government entity, "the Government does not 'provide[] any portion of ' the requested money under the FCA." *Id.* at 388.

This Court should adopt the approach in *Shupe* and the majority of circuit opinions on the issue and reverse the Seventh Circuit's outlier decision in this case. The Seventh Circuit: 1) improperly applies the False Claims Act to allegations of fraud that do not and could not result in financial loss to the federal government, 2) holds that a private company qualifies as an "agent" of the federal government, thereby improperly expanding the reach of the False Claims Act to government-adjacent private actors, and 3) holds that the government "provided" the

E-rate funds even though the funds are private funds and there is no possible harm to the public fisc.

The Seventh Circuit's holding on the agency issue is particularly troubling because it opens the floodgates to a new set of claims whenever a defendant seeks private funds from a private entity, albeit one "established or overseen" by the federal government.

Significantly, the reach of the Seventh Circuit's opinion is not limited to the E-Rate program. Rather, the opinion permits application of the False Claims Act to a host of additional interactions with government-adjacent entities, including federally chartered private corporations.

As one example, the Seventh Circuit's far-reaching definition of agency encompasses interactions with Fannie May and Freddie Mac—two of the nation's leading sources of mortgage financing which are private companies, albeit sponsored or chartered by the federal government. But this contradicts *U.S. ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259 (9th Cir. 2016), wherein the Ninth Circuit held that claims presented to Fannie May and Freddie Mac were not presented to an officer, employee, or agent of the United States than thus could not give rise to liability under the False Claims Act.

The potential to apply the False Claims Act to purely private losses turns the False Claims Act on its head and directly contradicts the bounds set by Congress when it enacted the law. Permitting the False Claims Act to reach private transactions expands the False Claims Act well beyond its intended role of "secur[ing] restitution for the government of money taken from it by fraud[.]"

§ 10:49. Nature and purpose of False Claims Act, 5B Fed. Proc., L. Ed. § 10:49. Contrary to the Seventh Circuit's holding, the False Claims Act was not designed to reach every kind of fraud, and the Act is not an all-purpose anti-fraud statute. *Id.* As Wisconsin Bell explained in its Petition, if the Seventh Circuit's opinion is permitted to stand, allowing the False Claims Act to reach not only transactions in which the federal government has a financial stake, but also transactions in which the government arguably has some "regulatory interest," the reach of the False Claims Act would become almost boundless. This is not what Congress intended when it enacted the False Claims Act.

For these reasons, and as discussed in further detail below, the Seventh Circuit's decision should be reversed.

ARGUMENT

REIMBURSEMENT REQUESTS SUBMITTED TO THE E-RATE PROGRAM ARE NOT "CLAIMS" UNDER THE FALSE CLAIMS ACT BECAUSE: 1) THERE IS NO POTENTIAL HARM TO THE FEDERAL FISC; 2) THE UNIVERSAL SERVICE FUND IS ADMINISTERED BY A PRIVATE COMPANY THAT DOES NOT QUALIFY AS AN "AGENT" OF THE UNITED STATES; AND 3) THE PROGRAM INVOLVES PRIVATE, NOT PUBLIC, FUNDS

A. Liability under the False Claims Act is limited to instances of fraud that may result in financial loss to the government

In general, it has been widely recognized that liability under the False Claims Act is limited to fraudulent

activity which might result in financial loss to the federal government. In *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176 (3d Cir. 2001), the Third Circuit explained that "[t]he False Claims Act seeks to redress fraudulent activity which attempts to or actually causes economic loss to the United States government." *Id.* at 184. As a result, "submission of false claims to the United States government for approval which do not or would not cause financial loss to the government are not within the purview of the False Claims Act." *Id. See also U.S. ex rel. Sanders v. Am.-Amicable Life Ins. Co. of Texas*, 545 F.3d 256, 259 (3d Cir. 2008).

Similarly, in *Costner v. URS Consultants, Inc.*, 153 F.3d 667 (8th Cir. 1998), the Eighth Circuit held that only actions by the claimant "which have the purpose and effect of causing the United States to pay out money it is not obligated to pay," or actions which "intentionally deprive the United States of money it is lawfully due," are properly considered "claims" under the False Claims Act. *Id.* at 677. And in *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999), the Fourth Circuit held that "the False Claims Act at least requires the presence of a claim—*a call upon the government fisc*—for liability to attach." *Id.* at 785 (emphasis added).

Further, in *U.S. ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379 (5th Cir. 2014), the Fifth Circuit specifically addressed whether, in the context of the E-Rate program, the False Claims Act extends to requests submitted to the [Universal Service Administrative Company] for reimbursement from the [Universal Service Fund]." *Id.* at 382. In reaching its holding that the government does not "provide any portion of " the requested money under the

False Claims Act, *id.* at 388, the Fifth Circuit reasoned, in line with the opinions of the Third, Fourth, and Eighth Circuits cited above, that courts have limited the Act's application to "instances of fraud that might result in financial loss to the Government." *Id.* at 385.

As Wisconsin Bell explained in its Petition, the E-Rate program is funded by *private* money—funding for the program comes from the Universal Service Fund, and the money in the Fund derives from the contributions of private telecommunications carriers. *See* Pet. 7. *See also* 47 U.S.C. § 254(d); 47 C.F.R. § 54.706(a)-(b). The Universal Service Fund is administered by the Universal Service Administrative Company ("Administrative Company"), which is a private, non-profit corporation. *See* Pet. 7. *See also* 47 C.F.R. §§ 54.701(a), 54.702. The Universal Service Fund is insulated from the public fisc—the fees deposited by the Administrative Company into the Universal Service Fund are received directly from private telecommunications carriers. *See* Pet. 7. *See also* 47 C.F.R. §§ 54.701(b), 54.706(a)-(b). And if additional funds are needed, the Administrative Company acquires those funds through private sources. *See* 47 C.F.R. § 54.709(c) ("If the contributions received by the Administrator in a quarter are inadequate . . . the Administrator shall request authority from the Commission to borrow funds commercially, with such debt secured by future contributions.").

As a result, the Universal Service Fund holds private, not public money. This was confirmed by the Office of Management and Budget, which concluded in an April 28, 2020 opinion letter that "the Universal Service Fund does not constitute public money pursuant to the Miscellaneous

Receipts Statute, 31 U.S.C. § 3302, and is appropriately maintained outside the Treasury by a non-governmental manager." See Off. of Mgmt. & Budget, Exec. Off. of the President, Opinion Letter on the Status of the Universal Service Fund 3 (April 28, 2020), bit.ly/49udXwN.[2]

Despite this, the Seventh Circuit held that the federal government's role in "establishing and overseeing" the E-Rate program is enough to apply the False Claims

2. The Universal Service Fund was moved from a private bank account to the Treasury in 2018. *See* Pet. 8 n.4. But that move occurred after the events alleged in this case—in this case, Heath seeks to recover only for reimbursement requests made between 2002 and 2015. Pet. 9 n.5. And as explained in Wisconsin Bell's Reply Brief in support of the Petition, the transfer of the funds to the Treasury does not automatically convert E-Rate funds into public money. Reply in Support of Pet. 2. Such a conclusion conflicts with the Office of Management and Budget's prior conclusion that those funds are *not* public money and can therefore be stored in a private bank account instead of the Treasury. *See* Off. of Mgmt. & Budget, Exec. Off. of the President, Opinion Letter on the Status of the Universal Service Fund 3 (April 28, 2020), bit.ly/49udXwN. And while the Office of Management and Budget apparently changed its mind in 2014, concluding that funds in the Universal Service Fund "are federal resources and should enjoy the same rigorous management practices and regulatory safeguards as other federal programs[,]" *see* U.S. Gov't Accountability Off., GAO-17-538, *Telecommunications: Additional Action Needed to Address Significant Risks in FCC's Lifeline Program* 23 (May 2017), bit.ly/3Wq46FA, the Office of Management and Budget's flip-flop on the status of E-Rate funds does not resolve the status of E-Rate reimbursement requests under the False Claims Act. Rather, it highlights the importance of a decision from this Court determining the legal status of reimbursement requests for E-Rate funds. DRI–Center for Law and Public Policy maintains, consistent with the Office of Management and Budget's determination in 2000, that the Universal Service Fund does not constitute public money.

Act in this case. Pet. App. 26a. The Seventh Circuit's holding improperly expands the reach of False Claims Act to a program that does not involve federal funds. As the Fifth Circuit correctly explained in *Shupe*, "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. Although the Administrative Company "came about through the actions of Congress and the FCC, and the FCC retains some oversight and regulation, it is explicitly a private corporation owned by an industry trade group." *Id.* at 387. And the money in the Universal Service Fund is "provided by *private* telecommunication providers because of a mandatory contribution scheme established by the FCC and Congress[.]" *Id.* at 387–88 (emphasis added). As a result, absent the potential for financial loss to the government, False Claims Act liability cannot be imposed in this case.

B. The Universal Service Fund is administered by a private company that does not qualify as an "agent" of the United States, and the Seventh Circuit's opinion improperly expands the reach of the False Claims Act to government-adjacent private actors

1. The Administrative Company is not an agent of the federal government

The False Claims Act "imposes significant penalties on anyone who 'knowingly presents . . . a false or fraudulent *claim* for payment or approval' to the Federal Government, 31 U.S.C. § 3729(a)(1)(A)." *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 176 (2016) (emphasis added). In 2009, the False Claims Act was amended to define a

"claim" as including not only a request for payment made to a "contractor, grantee, or other recipient" if the federal government "provides or has provided any portion of the money or property requested[,]" but also a request for payment "presented to an officer, employee, or agent of the United States[.]" 31 U.S.C. §§ 3729(b)(2)(A)(i) and (ii). In the Seventh Circuit's opinion, the Court held that all reimbursement requests subject to the 2009 amendment implicate the False Claims Act because the Administrative Company "is an agent of the federal government." Pet. App. 25a. That holding is incorrect for several reasons.

First, "[a]n agent acting on behalf of his principal has the authority to 'alter the legal relations between the principal and third persons[.]'" *O'Neill v. Dep't of Hous. & Urb. Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000). But Congress has not authorized the Administrative Company to alter the legal relations between the United States Government and third persons. In fact, under 47 C.F.R. § 54.702(c), the Administrative Company "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress." And the Administrative Company may not exercise governmental functions. *See* FEDERAL ACTIVITIES INVENTORY REFORM, PL 105–270, October 19, 1998, 112 Stat. 2382 (31 U.S.C. § 501 note defining "inherently governmental function").

Stated simply, the Administrative Company "is not simply holding funds in the [Universal Service Fund] as the FCC's agent." *In re Incomnet, Inc.*, 463 F.3d 1064, 1074 (9th Cir. 2006). Rather, the Administrative Company "holds dominion over the [Universal Service Fund,]" *Shupe*, 759 F.3d at 386, and "has discretion over

if, when, and how it disburses universal service funds to beneficiaries[.]" *Id.* By contrast, the government (i.e., the Federal Communications Commission), "has no ability to control the [Universal Service Fund] through direct seizure or discretionary spending." *Id.*

Further, the sole shareholder of the Administrative Company—the National Exchange Carrier Association—"act[s] exclusively as an agent for its members and had no authority to perform any adjudicatory or governmental functions." *Shupe*, 759 F.3d at 386–87, citing *Farmers Telephone Co., Inc. v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999).

Thus, where the Administrative Company, not the government, holds dominion over the Universal Service Fund, and where the Administrative Company's sole shareholder acts as an exclusive agent for its members and not as an agent of the government, the Seventh Circuit's holding is incorrect. The Administrative Company does not qualify as an "agent of the United States" for purposes of the False Claims Act.

2. The Seventh Circuit's holding that the Administrative Company qualifies as an "agent" of the federal government improperly expands the reach of the False Claims Act to government-adjacent private actors

In the Brief in Opposition to the Petition, Heath asserted that the Seventh Circuit's "narrow opinion" concerning the E-Rate program "does not expand the reach of the False Claims Act." Brief in Opp. 21. This is incorrect.

The Seventh Circuit's amended opinion spends only two pages on the agent issue, relying on *United States v. Wells Fargo & Co.*, 943 F.3d 588 (2d Cir. 2019). Pet. App. 24a-25a. In *Wells Fargo*, the Second Circuit held that Federal Reserve Banks "act as 'agents of the United States' within the meaning of the [False Claims Act] when extending emergency credit[.]" *Wells Fargo*, 943 F.3d at 601. But the holding of *Wells Fargo* is very narrow. The Court clarified: "Our conclusion . . . does not bear on the question of whether the [Federal Reserve Banks] may or may not be agents in other contexts, nor do we conclude that the [Federal Reserve Banks] are agents within the [False Claims Act] in any other context." *Id.* The Court confirmed that it reached its conclusion that Federal Reserve Banks acts as "agents of the United States" "on a narrow reading where we confine ourselves only to the circumstances at hand . . . . " *Id.* at 598.

In addition to its narrow holding, the facts of *Wells Fargo* are distinguishable from this case. In *Wells Fargo*, the Federal Reserve Banks were "required to remit all their excess earnings to the United States Treasury[.]" *Id.* at 604. As a result, "a bank's failure to pay the applicable amount of interest on a loan from a [Federal Reserve Bank] injure[ed] the public fisc[.]" *Id.* at 605. Thus, in *Wells Fargo*, where the defendants' alleged underpayment of interest reduced Federal Reserve Bank earnings, such underpayment also "dollar for dollar reduced the sums the [Federal Reserve Banks] transferred to the Treasury." *Id.* at 601. By sharp contrast, in this case, as explained above, the reimbursement requests did not result in injury to the public fisc because the Universal Service Fund houses private, not public, funds.

The Seventh Circuit's holding also opens the door to application of the False Claims Act to transactions with private, government-adjacent entities. But this was not the intent of Congress when enacting the False Claims Act. DRI's lawyers and their clients will potentially be subject to False Claims Act liability even though they are private entities and the funds are private, not public. This overly expansive approach makes potential liability not only reach far beyond what Congress intended but will render unpredictable.

In *United States ex rel. Angelo v. Allstate Ins. Co.*, 106 F.4th 441 (6th Cir. 2024), the Sixth Circuit recognized this issue, stating: "As a threshold matter, we note our sister circuits' concerns with assigning False Claims Act liability for payments owed to [Medicare Advantage Organizations], which are private entities, and not the government." *Id.* at 450, citing *United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497, 504 (3d Cir. 2017); *United States ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1260–61 (9th Cir. 2016). In *Petras*, a case involving the Small Claims Administration, the defendants argued that the reverse False Claims Act claim failed "because the Small Business Administration was not the 'Government' when it was acting as the receiver for L Capital, a private entity." *Petras*, 857 F.3d at 502. In holding that the Small Business Administration did not qualify as the government for purposes of the False Claims Act, *id.* at 504, the Third Circuit reasoned that "[a]s a general matter, when a federally chartered – but private – entity is placed into receivership, the relevant federal agency, acting as receiver, . . . usually 'steps into the private status of the entity' and does not retain any federal authority." *Id.* at 503–04 (3d Cir. 2017).

Further, in *Adams*, the Ninth Circuit held that claims presented to the Federal National Mortgage Association (Fannie May) and the Federal Home Loan Mortgage Corporation (Freddie Mac) were not presented to an officer, employee, or agent of the United States and thus could not give rise to liability under the False Claims Act. *See Adams*, 813 F.3d at 1260. In reaching that holding, the Court explained that Fannie Mae and Freddie Mac "*are private companies*, albeit companies sponsored or chartered by the federal government." *Id.* at 1259 (emphasis added). That holding—that sponsorship or charter by the federal government is not enough to permit the imposition of False Claims Act liability—shows that the Seventh Circuit's reliance on the federal government's role in "establishing and overseeing" the E-Rate program in this case, Pet. App. 26a, is not a sufficient basis for application of the False Claims Act. *See also Ali Poorsina v. Bank of America, N. A., et al.*, No. 23-CV-06644-PHK, 2024 WL 3012803, at *7 (N.D. Cal. June 14, 2024) ("The Complaint alleges that Defendant[s] . . . colluded with Fannie Mae and Freddie Mac to engage in alleged fraud. . . . However, Fannie Mae and Freddie Mac are not 'officers, employees, or agents' of the federal government for purposes of the False Claims Act because they are private companies.").

The erroneous nature of the Seventh Circuit's holding—that False Claims Act liability may be imposed whenever the federal government plays a role in "establishing and overseeing" an entity or program, *see* Pet. App. 26a—is even further highlighted by an analysis of other government-adjacent entities. For example, the United States Olympic Committee ("Olympic Committee") is a federally chartered corporation. 36 U.S.C. § 220502(a).

Under the Seventh Circuit's holding, the Olympic Committee's federal charter could implicate the False Claims Act. However, such an imposition of liability would be improper, because the Olympic Committee "is entirely privately funded . . . [and] does not receive governmental funding." *See About the U.S. Olympic & Paralympic Committee*, https://www.usopc.org/about-the-usopc (last visited August 11, 2024).

Like the Olympic Committee, the Boy Scouts of America and the Veterans of Foreign Wars of the United States are also federally chartered corporations. *See* 36 U.S.C. § 30901(a), 36 U.S.C. § 230101(a). The Seventh Circuit's broad and sweeping test for imposition of False Claims Act Liability—looking at whether the federal government establishes and oversees the entity or program or has a "sufficiently close nexus" to the entity or program, *see* Pet. App. 26a—could lead to False Claims Act liability in the context of transactions with these entities as well. In fact, there are *dozens* of congressionally chartered organizations under Title 36. *See* Ronald C. Moe, Congressionally Chartered Corporate Organizations (Title 36 Corporations) What They Are and How Congress Treats Them, Fed. Law., July 1999, at 35 ("There are currently some 93 nonprofit corporations listed in Title 36 of the U.S. Code."). The Seventh Circuit's holding opens the door to liability in the context of transactions with any of these federally chartered entities.

But such a broad and sweeping test for application of the False Claims Act cannot be permitted in light of the true nature of these corporations. While these Title 36 corporations are congressionally chartered, "[c]hartered corporations listed in Title 36 are not

agencies of the United States and the charter does not assign the corporate bodies any governmental attributes." Congressionally Chartered Corporate Organizations, at 35, 36. In chartering these patriotic, charitable, and professional organizations, Congress "does not make these organizations 'agencies of the United States' or confer any powers of a governmental character or assign any benefits." *Id.* at 35, 37. While the congressional charter may imply that Congress "approves of the organization and is somehow overseeing its activities, [that] is not the case." *Id.*

As the Sixth Circuit noted in *Angelo*, applying the False Claims Act to transactions with *private* entities, as the Seventh Circuit's holding does in this case, is concerning where those private entities *are not the government. See Angelo*, 106 F. 4th at 450. While the Administrative Company is a private entity, the Seventh Circuit's holding assigns the Administrative Company "agent" status, holding that it qualifies as an agent of the federal government. *See* Pet. App. 25a. This is a dangerous precedent to set. Permitting the Administrative Company to qualify as an "agent" under 31 U.S.C. § 3729, despite its status as a private entity, would mean that any other private entity could also qualify as an "agent" for purposes of the False Claims Act if the entity simply has some tie to the federal government. This is not what Congress intended when it enacted the False Claims Act. Rather, as the Fifth Circuit in *Shupe* properly held, the reach of the False Claims Act is limited to "'instances of fraud that might result in financial loss *to the Government*.'" *Shupe*, 759 F.3d at 385 (emphasis added). *See also Universal Health*, 579 U.S. at 176 (the False Claims Act imposes "significant penalties on anyone who 'knowingly presents

. . . a false or fraudulent claim for payment or approval' *to the Federal Government*[.]" (Emphasis added)).

As Wisconsin Bell's Petition properly warned, the Seventh Circuit's misunderstanding of "claim" under the False Claims Act "has potentially ruinous consequences for individuals and companies dealing with government-adjacent entities." Pet. 29. Under the Seventh Circuit's ruling, "federally chartered nonprofits furthering federal goals . . . may be subject to punishing [False Claims Act] liability . . . *even though they are private entities financed with private funds*[.]" *Id.* This is not what Congress intended. As the Court in *Shupe* recognized, mere government supervision is not enough. *See Shupe*, 759 F.3d at 385 ("Courts differentiate between entities that are the Government and those that are not *by looking at their statutes rather than the extent of Government supervision*." (Emphasis added)).

The Seventh Circuit's holding—that government involvement in establishing and overseeing a program is enough to trigger application of the False Claims Act—must be reversed to ensure that liability under the False Claims Act remains within proper bounds and does not become limitless.

C. Because there are no federal funds involved in the E-Rate program, the Court in *Shupe* correctly held that the Government does not "provide" any portion of the requested funds

Both the pre and post-2009 definitions of "claim" under the False Claims Act define a "claim" as including situations when the government "provides any portion

of " the requested money. The False Claims Act's pre-amendment definition defined "claim" in relevant part as: "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 . . . . " 31 U.S.C. § 3729(c) (2008). The post-amendment definition of "claim" includes similar language, stating that the term "claim" means "any request or demand . . . for money or property . . . that . . . s made to a contractor, grantee, or other recipient . . . and if the United States Government—provides or has provided any portion of the money or property requested or demanded[.]" 31 U.S.C. § 3729(b)(2)(A)(ii)(I).

In *Shupe*, the Fifth Circuit addressed the issue of "when the Government 'provides any portion of ' requested money, [so] as to trigger the protection of the False Claims Act[.]" *Shupe*, 759 F.3d at 382. While the opinion involved the pre-2009 version of the False Claims Act, because the key term "provides" is also reproduced in the amended statute, the rule extracted from *Shupe* "will influence the reach of the False Claims Act current and past." *Id.* at 383. The Court in *Shupe* ultimately held that "[b]ecause there are no federal funds involved in the [E-Rate] program, and [the Administrative Company] is not itself a government entity, we agree that the Government does not 'provide[] any portion of' the requested money under the FCA." *Id.* at 388.

The Court in *Shupe* correctly recognized that if Congress wanted the False Claims Act to apply to the Administrative Company (which is "explicitly a private corporation owned by an industry trade group[,]" *id.* at

387) or to the Universal Service Fund, "it could have made it clear in § 3729 or administered these funds through a governmental entity." *Id.* at 388. But it did not.

In *Lyttle v. AT & T Corp.*, No. CIV.A. 2:10-1376, 2012 WL 6738242 (W.D. Pa. Nov. 15, 2012), report and recommendation adopted, No. CIV.A. 2:10-1376, 2012 WL 6738149 (W.D. Pa. Dec. 28, 2012), cited in *Shupe*, the realtor alleged that defendant AT&T violated the False Claims Act "by submitting false requests for reimbursement for a telecommunications relay service known as Internet Protocol Relay[.]" *Id.* at *1. When analyzing whether the United States "provides" any portion of telecommunications relay service funds under the amended version of the False Claims Act (31 U.S.C. § 3729(b)(2)(A)(ii)(I)), the court explained that "if the United States or a relator is relying upon the definition of the term 'claim' that requires that money be 'provided' by the government . . . the money must actually be provided by the government such that the false claim *causes financial loss to the government*." *Id.* at *20 (emphasis added).

Thus, even though the telecommunications relay service fund is included in the federal budget, *id.* at 19, the court nevertheless held that the money was not "provided" by the United States. *See Id.* at *21. In support, the court explained that the United States failed to identify a case in which held that "although money was put into a fund and taken out of it by private parties, the United States nevertheless 'provided' the funds because it required that such money be paid or because the program is included in the federal budget." *Id.* In the absence of such authority, the court correctly held that it "cannot supply a special

meaning to the word 'provide' to conclude that payments from the [telecommunications relay service] Fund cause economic loss to the United States Treasury." *Id.*

The same reasoning applies in this case. The Seventh Circuit's opinion concluded that because funds "pass through" the Treasury before being transferred into the E-Rate program's private account, the Treasury literally "provides" money to the E-Rate program. Pet. App. 30a. But, as explained in detail in section "A" above, the test for implication of the False Claims Act is not simply whether the funds pass through the Treasury; rather, the test is whether a request seeks public money, and therefore risks "financial loss to the Government." *Shupe*, 759 F.3d at 385. Not all funds that pass through the treasury are public money.

For example, while overpayment of federal income taxes results in money being physically received by the United States, the money "does not legally belong to [the United States]; consequently, overpayments may be refunded without appropriation." Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1396 n.67 (1988). Further, "funds held by the United States in escrow or in other trust arrangements in the course of litigation do not belong to the United States." *Id.* In other words, the public fisc is not implicated in these circumstances. *Id.*

Similarly, here, while the Seventh Circuit relied on the fact that the Treasury "collects unpaid debts owed to the E-rate program, as well as criminal restitution payments and civil settlements stemming from the program[,]" Pet. App 29a-30a, those funds are private money and do not implicate False Claims Act liability. The

mere fact that funds pass through the Treasury does not automatically mean that the funds are public funds. *See*, *e.g.*, *In re Schoeneweis*, 265 B.R. 419, 425 (Bankr. W.D. Pa. 2001) ("The mere fact that the Commonwealth keeps the funds in a separate account in its treasury does not necessarily entail that they are 'public' in the requisite manner."). Plain and simple, if the private debt collections, civil settlements, and criminal restitution funds that temporarily passed through the Treasury became "public money," the Miscellaneous Receipts Statute would have required that the funds be kept in the Treasury and not in the private bank account that held the Universal Service Fund during the events at issue in this case. *See* 31 U.S.C. § 3302(a)-(b). 31 U.S.C. § 3302(a)(3) specifically states that "an official or agent of the United States Government having custody or possession of public money shall keep the money safe without . . . depositing the money in a bank[.]"

In holding that the government "provides" the funds requested when the funds simply pass through the Treasury, Pet. App. 30a, the Seventh Circuit overlooked the critical component of False Claims Act liability – that the False Claims Act "is only intended to cover instances of fraud 'that might result in financial loss to the Government.'" *Hutchins*, 253 F.3d at 183. In *Sanders*, even where Sanders argued that "the funds at issue were in fact government property until they were disbursed to the defendants[,]" *Sanders*, 545 F.3d at 260, the Third Circuit held that such a contention did not change its conclusion that it was the defrauded military personnel, not the government, that "provided" the money to the defendants. *Id.* The Court explained that "[n]othing in

the plain language of § 3729(c) suggests that the federal government 'provides' funds when it simply releases the salary of its employees . . . . " *Id. See also Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998) ("only those actions . . . . which have the purpose and effect of causing the United States to pay out money it is not obligated to pay, or . . . . intentionally deprive the United States of money it is lawfully due, are properly considered 'claims' within the meaning of the [False Claims Act].").

Thus, the mere passage of private funds through the Treasury cannot implicate False Claims Act liability because there is no risk of financial loss to the government. *See Shupe*, 759 F.3d at 385. The Seventh Circuit's application of the False Claims Act to private funds is incorrect and inconsistent with the purpose of the Act.

"The chief purpose of the penalty provided by the False Claims Act is to secure restitution for the government of money taken from it by fraud[.]" § 10:49. Nature and purpose of False Claims Act, 5B Fed. Proc., L. Ed. § 10:49. The Act "was not designed to reach every kind of fraud[,]" and it "is not an all-purpose antifraud statute[.]" *Id.* The Seventh Circuit's application of the False Claims Act to submissions made to a *private* entity paying out *private* funds sets a dangerous precedent. Stated simply, where the request for funds is not made to a government officer, employee, or agent, and where the government does not provide the money requested, the fraud alleged is not the type of fraud covered under the False Claims Act.

CONCLUSION

For the reasons stated above, *Amicus Curiae* DRI–Center for Law and Public Policy respectfully requests that this Court reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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