No. 23-1127

In the Supreme Court of the United States

WISCONSIN BELL, INC., PETITIONER

v.

UNITED STATES, EX REL. TODD HEATH

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a strong interest in the question presented here, which is fundamental to the scope of False Claims Act liability. The Chamber's members, many of which are subject to complex regulatory schemes, have successfully defended against myriad False Claims Act cases in courts nationwide arising out of government contracts, grants, and federal program participation. The Chamber and its members therefore have a vested interest in the statute's correct interpretation—and specifically, in ensuring that when companies enter into arrangements with other private entities involving exclusively private money, they are not subject to the Act's "essentially punitive" regime of treble damages and penalties, *Vt. Agency of Nat. Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 784 (2000), which is designed to protect against (and to remedy) fraud on the public fisc. The sweeping construction of a "claim" adopted here by the

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

court of appeals would unmoor the False Claims Act from both its common-law roots and the statutory text, expanding it to reach a staggeringly broad swath of private transactions, with potentially devastating effects across a wide range of industries.

SUMMARY OF ARGUMENT

The fundamental purpose of the False Claims Act is to "provide for restitution to the government of money taken from it by fraud." *U.S. ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551 (1943). The injury that a False Claims Act suit seeks to remedy is "exclusively to the Government," and includes both an "injury to the Government's sovereignty arising from violation of its laws" and "an injury to its proprietary interests resulting from a fraud." *U.S. ex rel. Polansky* v. *Exec. Health Res., Inc.*, 599 U.S. 419, 425 (2023) (quotation marks and citation omitted). The False Claims Act therefore makes violators liable to the Government for "3 times the amount of damages *which the Government sustains*," plus mandatory per-claim penalties. 31 U.S.C. § 3729(a) (emphasis added). The Act does not reach private transactions between private parties involving solely private money—or at least, it did not until the court of appeals' decision in this case. This Court should restore the Act to its proper, limited role.

Congress cabined "essentially punitive" False Claims Act liability in a number of ways, including, most basically, through the statutory definition of the term "claim." The Act "is not an all-purpose antifraud statute." *Universal Health Servs., Inc.* v. *U.S. ex rel. Escobar*, 579 U.S. 176, 194 (2016) (quotation marks omitted). It imposes liability only "on those who present or directly induce the submission of false or fraudulent claims." *Id.* at 182. As relevant here, the Act defines "claim" as a request or demand (1) for money "provide[d]" by "the United States Government," or (2) that meets certain other criteria and

is "presented to an officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2).

Despite the False Claims Act's clear focus on fraudulent requests for Government funds and fraudulent requests presented to the Government or its agents, the court of appeals held that submissions made to a private entity involving purely private funds can trigger liability. That holding cannot be squared with the statutory text or the common-law principles that animate the Act. In holding that the Government "provides" the funds administered by Universal Services Administrative Company ("USAC"), the decision below looked not to whether the Government is the source of those monies—as dictionary definitions of "provide" require—but to other indicia of Government involvement in USAC's functions. Regulating the expenditure of money—or even telling someone else to spend it—is not the same thing as providing it.

The court of appeals alternatively relied on an incomplete understanding of "agency" that finds no basis in the common law. USAC is not an agent of the Government because it lacks the power to bind the Government or otherwise alter its legal relationships. Its roles involve advising the Federal Communications Commission ("FCC") on the funding necessary to achieve certain objectives and administering a pool of money contributed by other private entities. By regulation, USAC is specifically prohibited from acting in ways that could alter the Government's relationship with third parties, such as by interpreting ambiguous requirements.

Courts must interpret statutory text according to its plain meaning. And when the text incorporates common-law terms, as the False Claims Act does, it must be interpreted consistently with the common law. In holding that False Claims Act liability (which, in a *qui tam* suit like this one, includes a substantial bounty for a private

relator) can flow from alleged misrepresentations to a private entity administering funds contributed by other private entities, the court of appeals violated cardinal principles of statutory construction. If allowed to stand, that interpretation would both expand the reach of the False Claims Act beyond what Congress intended and make it more difficult for Americans to know when they are engaged in a transaction that might trigger punitive liability. This sort of uncertainty about the Act's scope increases costs throughout the marketplace—and, ultimately, for the American public, whom the Act exists to serve. This Court should reverse.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION IS WRONG

A. Subsidies Paid Out By The E-Rate Program Are Not "Provided" By The Federal Government

It is undisputed that USAC is a private corporation wholly owned by a telecommunications trade association and that the Universal Service Fund ("USF") is wholly funded by contributions from telecommunications carriers, not by taxpayer funds. Telecommunications companies transfer fees directly to USAC, 47 U.S.C. § 254(d), and, during the period relevant to this suit, USAC deposited those funds into a private bank account.[2] USAC then pays those fees to private providers, which in turn provide products and services to nonfederal beneficiaries, including underprivileged and underserved schools and libraries. See *In re Incomnet, Inc.*, 463 F.3d 1064, 1066–1067 (9th Cir. 2006); 47 U.S.C. § 254(d); 47

[2] Several years after the period relevant for this case, the funds were moved within the Treasury. See Pet. Br. 9 n.6. Nevertheless, to this day the funds are not comingled with federal monies. To the contrary, USAC "keep[s] separate accounts for the amounts of money collected and disbursed" to participants in the various universal service programs. 47 C.F.R. § 54.702(h).

C.F.R. §§ 54.706, 54.702(b). If USAC faces a financial shortfall, rather than turning to the U.S. Treasury as governmental entities commonly would, it must seek private credit through commercial markets and repay the debt from additional revenues that it collects from telecommunications companies. 47 C.F.R. § 54.709(c).

A request or demand for money constitutes a "claim" under the False Claims Act "if the United States Government *provides* * * * or * * * will reimburse * * * any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(b)(2)(A)(ii) (emphasis added). Because the Government does not "provide" the funds for subsidies paid under the E-Rate program, the court of appeals erred in holding that submissions to USAC constitute "claims" under the False Claims Act.

1. Because the Act does not define the term "provides," this Court "look[s] first to the word's ordinary meaning" as defined in dictionaries, with regard to "the provision's 'entire text,' read as an 'integrated whole.'" *Schindler Elevator Corp.* v. *U.S. ex rel. Kirk*, 563 U.S. 401, 407–408 (2011) (quoting *Graham Cnty. Soil & Water Conserv. Dist.* v. *U.S. ex rel. Wilson*, 559 U.S. 280, 290, 293 (2010)) (construing previous version of False Claims Act's public disclosure bar). Here, those tools of statutory construction demonstrate that the term "provides," as used in the False Claims Act, means to supply. For the Government to "provide" funds, therefore, it must be the *source* of those funds. It is not enough for the Government to set rules governing how the funds may be collected or used or to serve as a conduit for their distribution.

When Congress first incorporated the term "provide" in the definition of "claim" in 1986 (which was retained with the 2009 amendments), the term "provide" was commonly understood to have a specific and limited

meaning.[3] *Merriam-Webster*, for example, defined "provide" primarily as "to supply," giving the example "provided new uniforms for the band." *Provide*, Merriam-Webster's Collegiate Dictionary 1001 (11th ed. 2006); *Provide*, Merriam-Webster's Collegiate Dictionary 940 (10th ed. 1993).[4] That example is instructive. Say a school board announces a program under which the school band will be renamed in honor of a local business if that business purchases new uniforms for the band. Ordinary English speakers would say that the *business*, not the school board, is providing the uniforms. This would remain true even if, as one would expect, the school board set rules governing the uniforms' appearance (mandating

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[3] See Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1622–1623 (2009); False Claims Amendments Act of 1986, Pub. L. No. 99–562, § 2, 100 Stat. 3153 (1986).

[4] *Merriam-Webster*, like some other dictionaries, includes "to make available" as another potential definition of "provide." Like "supply," "make available" also ordinarily denotes persons supplying their *own* property or services, rather than requiring someone else to provide theirs. See, *e.g.*, the Free Dictionary, https://bit.ly/46H8Bid (providing as examples, "She made her assistance available to me"; "I made my car available to Bob"; "We'll make all of our resources available to you"). Thus, that definition also accords with Congress's intent to use the False Claims Act to target fraud involving Government expenditures.

Even if "make available" were arguably broader than "supply," there is no reason to believe that it would support interpreting the False Claims Act to extend to fraud involving alleged losses that pose no risk to the public fisc. The Act's context is key in determining the meanings of the words used in it. See *Dubin* v. *United States*, 599 U.S. 110, 118 (2023) (explaining that when a word "takes on different meanings depending on context," proper interpretation "look[s] not only to the word itself, but also to the statute and the surrounding scheme, to determine the meaning Congress intended" (cleaned up)); see also *infra* at 8–9 (describing different formulations Congress uses when it intends broader meanings of "provide").

that they be purchased in certain colors and sizes) and required that they be delivered by the start of the school year. By contrast, one would say the board "provided" the uniforms if it used district funds to purchase them. Under the E-Rate program, the Government regulates USAC's administration of USF funds much as the school board regulates the procurement of uniforms, but it does not provide them.

This conclusion also follows from the purpose and structure of the False Claims Act. As this Court has long recognized, "the chief purpose of the [Act] was to provide for restitution to the government of money taken from it by fraud, and * * * to make sure that the government would be made completely whole." *Marcus*, 317 U.S. at 551–552. Given that purpose, it only makes sense for "provide" to refer to money that is the Government's to lose. Moreover, the definition of "claim" looks to whether funds are provided by the Government only if the request for payment is submitted to someone other than "an officer, employee, or agent of the United States." 31 U.S.C. § 3279(b)(2)(A). The role of "provides" in this definition, therefore, is to extend the False Claims Act's reach to situations where parties "are paid with *Government funds*" even though they do not "deal directly with the Federal Government"—which courts had held to be outside the pre-2009 Act's scope. See S. Rep. No. 111–10 at 10–11 (2009) (emphasis added); see also *U.S. ex rel. Garbe* v. *Kmart Corp.*, 824 F.3d 632, 638 (7th Cir. 2016) (explaining that 2009 amendment to definition of "claim," while rejecting prior interpretations that required "specific intent to defraud the government," retained "Congress's intent that [False Claims Act] liability attach to any false claim made to an entity

implementing a program with *government funds*" (emphasis added)).[5]

Congress's use of "provide" in other contexts further demonstrates that that term requires the Government to be the source of funds, not a mere funding conduit. For instance, the Social Security Act's anti-assignment provision makes money "due from, or payable by, the United States * * * subject to * * * withholding" in order "to enforce the legal obligation of the individual to *provide* child support or alimony." 42 U.S.C. § 659(a) (emphasis added). In that context, Congress recognized that the child-support debtor is the money's source and is therefore the one providing it to the lawful recipient, while the United States is simply facilitating that person's transfer by withholding the money. By contrast, when Congress wants to speak more broadly about "government involvement," Pet. App. 27a, it uses "provide for" or similar formulations. See, *e.g.*, 31 U.S.C. § 6707(a) ("A state government may *provide by law for* the allocation of amounts among units of general local government * * *." (emphasis added)); 30 U.S.C. § 1472(e) ("If an international deep seabed treaty is not in effect * * * amounts in the [Deep Seabed Revenue Sharing] Trust Fund shall be available for such purposes as Congress may hereafter *provide by law*." (emphasis added)); 42 U.S.C. § 297n-1(b) (if Department of Health and Human Services establishes a joint student-loan fund with a nursing school, it must "*provide for* deposit in the fund of * * * the Federal capital contributions to the fund; * * * contributions * * * by such school * * * [and]

[5] Some recipients of support may include public entities (i.e., schools, libraries, or hospitals, typically operated by local governments). But the material point is that the funds the USF distributes are entirely private and federal funds are not at risk. It is not material whether reimbursement flows to a service provider or to the customer.

collections of principal and interest on loans made from the fund" (emphasis added)).

2. The court of appeals did not adopt (or even consider) the plain meaning of the term "provides." Instead, it created a sweepingly broad, atextual definition that turned on an *ad hoc* evaluation of the extent of Government's involvement in creating or regulating the program. The court held, "based on the structure and governance of the Fund and the E-Rate program," that "the federal government's role in establishing and overseeing the E-Rate program is sufficient to apply the False Claims Act here." Pet. App. 26a. But the False Claims Act's definition of "claim" does not look to the "degree of government involvement" in a program generally. If the request or demand is not presented to an officer, employee, or agent of the United States, the statute requires the Government to be involved in one very specific way in order to impose treble-damages liability: the Government has to supply the funds at issue.

Particularly alarming is the court of appeals' endorsement of the district court's rationale that because "the carriers would not have made any payments" "in the absence of [a Government] requirement," the Government must be providing the money. Pet. App. 27a. There are myriad situations in which there is a Government requirement that one private party give money to another, and allowing False Claims Act liability to arise from those transactions would completely unmoor the Act from its limited function of combatting fraud against the Government. See *infra* at 20–21.

3. The court of appeals offered two additional rationales for its conclusion that the Government "provides" the money USAC distributes. Neither rationale holds water.

First, citing two witness declarations, the court relied on the fact that certain monies the fund received from

"collections of delinquent debts" passed through the U.S. Treasury. Pet. App. 23a. But these are private funds provided by private parties; the Government merely acts as a conduit for their transmission. The debts at issue were always owed to USAC, and were merely "transferred to [Treasury]" for collection purposes before being recovered and, once recovered, "transferred back into the [Fund]." Dist. Ct. Dkt. 112 at 2–3, 4 (Declaration of then-CFO of USAC). In other words, Treasury was simply acting as USAC's debt collector.

The collections were conducted "pursuant to the * * * Debt Collection Improvement Act ("DCIA")," *id.* at 2, see also Dist. Ct. Dkt. 113 at 1, which establishes procedures for Treasury to collect delinquent "debt[s] or claim[s] owed to the United States," 31 U.S.C. § 3711(g)(1)(A). But the DCIA "defines claim more expansively" than the False Claims Act. *Blanca Tel. Co.* v. *FCC*, 991 F.3d 1097, 1114 (10th Cir. 2021). It includes, for example, "any amount the United States is authorized by statute to collect for the benefit of any person," 31 U.S.C. § 3701(b)(1)(D), whereas "the False Claims Act limited a claim to money that the United States provides any portion of," *Blanca Tel. Co.*, 991 F.3d at 1114. The use of Treasury as a debt collector under DCIA—an entirely different statutory scheme with its own, much broader, definition of "claim"—therefore says little about whether the collected money is a "claim" as defined in the False Claims Act.

Moreover, USAC's history of using Treasury's debt-collection services is inconsistent at best, suggesting it is more a matter of expedience than anything else. As the same declarations on which the court of appeals relied show, USAC (which the FCC created in 1997 to serve as the Fund's administrator) did not have Treasury collect any of its debts until 2003, did not do so for all its debts until two years later, and even since then, has not done so

without interruption. Dist. Ct. Dkt. 112 at 3–4. That the Government often (but not always) acts as a conduit for the transmission of private funds from one private entity to another does not turn the funds in the E-Rate program into government money.

Second, the court of appeals relied on the fact that some "settlements and criminal restitution payments" assertedly passed through the Treasury on their way to the Fund. See Pet. App. 23a. By their very nature, these are payments the Government requires private parties to make to other private parties, not payments made by the Government itself. Thus, the payments are "provided" by the entity that supplied the funds—not the Government.

Criminal restitution is a payment "ma[d]e" by "the defendant." 18 U.S.C. § 3663(a)(1)(A). A person owing restitution must pay it "as specified by the Director of the Administrative Office of the United States Courts," either to the clerk of the court or via another "procedure[] or mechanism[] within the judicial branch" of the Government. *Id.* § 3611; 28 U.S.C. § 604(a)(18). And regardless of who the court-ordered recipient is, the United States is authorized to "enforce[]" *any* "order of restitution * * * by all * * * available and reasonable means." 18 U.S.C. § 3664(m)(1)(A). As the Justice Department explains, restitution is a process by which the "*offender* may be ordered to reimburse *victims*," and it is "*his or her* * * * obligation[]" to do so. *Restitution Process*, Criminal Div., U.S. Dep't of Just. (updated Oct. 10, 2023) (emphases added), https://bit.ly/3yxfBla. The Government's role is simply to "disburse[] money to victims as it receives payments from the defendant." *Ibid.* In short, USAC's receipt of restitution payments via the Government does not situate it differently than any other victim of a federal crime. The restitution money it receives is not transformed into federal funding. If the mere disbursement of "settlements and criminal restitution

payments" constitutes "providing" funds under the Act, then every business transaction with a crime victim who has received restitution could turn into a hidden minefield of treble damages liability, as long as a relator could identify some way in which the restitution "advance[d] a Government * * * interest," 31 U.S.C. § 3729(b)(2)(A)(ii). See generally 18 U.S.C. § 3664(m)(1)(A) (permitting any criminal restitution order to be "enforced by the United States").

Further, the debt collection and settlement and restitution examples share a common feature: they involve a long chain of events starting with some third party's wronging USAC (civilly or criminally), followed by litigation that culminates in a court's ordering relief, followed by the United States' assisting with securing that relief and ultimately remitting those private funds to USAC. If the Government's role in the process means it is providing the money, there is no way of knowing whether a transaction may be subject to the False Claims Act until that process has been completed. That sort of indeterminacy cannot be what Congress intended when it chose the straightforward term "provide."

B. USAC Is Not An "Agent Of The United States" Because It Cannot Alter The United States' Legal Rights and Duties

The second ground on which the court of appeals held that submissions to USAC are "claims" under the False Claims Act is that USAC is an "agent of the United States." Pet. App. 24a; see 31 U.S.C. § 3729(b)(2)(A)(i). To reach this conclusion, the court applied an incomplete test of agency that did not take account of a bedrock common-law requirement for there to be an agency relationship: the putative agent must be able to affect the legal rights and duties of the principal. Because USAC lacks that power, it cannot be considered an agent of the United States.

1. It is well established that the False Claims Act has "common-law roots." *U.S. ex rel. Schutte* v. *SuperValu Inc.*, 598 U.S. 739, 749 (2023). "In the absence of statutory text to the contrary," it is proper to "assume that 'Congress intends to incorporate the well-settled meaning' of * * * a common-law term" in the Act. *Id.* at 751 (quoting *Escobar*, 579 U.S. at 187). Here, Congress used the term "agent" without qualification, see 31 U.S.C. § 3729(b)(2)(A)(i), thereby "'brin[ging] the old soil' with [it]." *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471, 484 (2023) (quoting *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013)).

"As defined by the common law, the concept of agency posits a consensual relationship in which one person * * * acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person." *Restatement (Third) of the Law of Agency* § 1.01 cmt. c (2006) ("*Third Restatement*"). As multiple courts of appeals have held, this concept is an integral part of the definition of agency under federal common law. *United States* v. *Hoskins*, 44 F.4th 140, 151 (2d Cir. 2022) ("[A] hallmark of a principal-agent relationship is that an agent can bind principals to certain legal commitments."); *U.S. ex rel. Bias* v. *Tangipahoa Par. Sch. Bd.*, 816 F.3d 315, 325 (5th Cir. 2016) (quoting *Third Restatement* § 1.01 cmt. c) ("[T]he common law definition of 'agency' anticipates 'a consensual relationship in which one person * * * acts as a representative * * * of another * * * with power to affect the legal rights and duties of the other person.'"); *UC Health* v. *NLRB*, 803 F.3d 669, 679 (D.C. Cir. 2015) ("[T]he ability to stand in the principal's place is fundamental to the existence of an agency relationship at all."); *O'Neill* v. *Dep't of Hous. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (quoting *Restatement (Second) of the Law of Agency* § 12 (1958)) (holding that "the well-settled common-law meaning" of

agency includes that an agent "has the authority to 'alter the legal relations between the principal and third persons'"). One party's "control" over another is not dispositive: "[C]ontrol alone does not establish an agency relationship; an agent must 'act[ ] on behalf of [the principal] with power to affect the legal rights and duties of the [principal].'" *Fisher* v. *Le Vian Corp.*, 815 F. App'x 170, 171 (9th Cir. 2020) (mem.) (quoting *Third Restatement* §1.01 cmt. c) (alterations in *Fisher*)).[6]

The rule that only a party capable of binding another person can be deemed an agent of that person is long settled. It has been reflected in all three editions of the Restatement of the Law of Agency. Indeed, the very first sentence of the Second Restatement's discussion of "Essential Characteristics of Relation" reads: "An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself." *Restatement (Second) of the Law of Agency* § 12 (1958); see also *Restatement (First) of the Law of Agency* § 12 (1933) (similar). Nearly two centuries ago, this Court explained that in order for a bill of credit to violate the constitutional prohibition on state-issued money, the issuing banks (among other things) "must have the power to bind the state; they must act as agents." *Briscoe* v. *Bank of Com. of Ky.*, 36 U.S. (11 Pet.) 257, 318 (1837). State courts have likewise long recognized this core principle of agency law. See, e.g., *Steele* v. *Lawyer*, 91 P. 958, 961 (Wash. 1907) ("The distinguishing features of the agent are his representative character and his derivative authority."); *Williams* v. *Kelly*, 2 Conn. 218, 221 (1812) ("One position, which, in substance is found in all our elementary writers on this

[6] This Court in recent years has relied on Section 1.01 of the Third Restatement in determining agency principles under federal law. *Percoco* v. *United States*, 598 U.S. 319, 329–330 (2023); *Hollingsworth* v. *Perry*, 570 U.S. 693, 713–714 (2013).

subject * * * is, that the master [of a ship], as agent for the owners, can bind them.").[7]

Accordingly, the requirement that an agent be able to alter its principal's legal rights and duties with respect to third parties was a "background principle" of agency law when Congress amended the False Claims Act to permit liability for requests for payment submitted to the Government's agents.[8] See *Minerva Surgical, Inc.* v. *Hologic, Inc.*, 594 U.S. 559, 572 (2021) (looking to whether common law recognized relevant principle at time of statutory enactment). Nothing in the False Claims Act is inconsistent with this common-law principle.

2. USAC lacks the "power to affect the legal rights and duties of" the United States. Under well-established principles, the putative principal's "grant of authority is the measure of the [putative] agent's power." *N. Assur. Co. of London* v. *Grand View Bldg. Ass'n*, 183 U.S. 308, 361 (1902). Because governments act through laws, the operative question is whether there is a "law which authorizes [USAC] to bind the [Government]." *Briscoe*, 36 U.S. (11 Pet.) at 320. Here, the record is clear that FCC's regulations do not grant USAC the power to do anything that could fairly be considered as altering the United States' legal rights or duties.

The regulatory boundaries of USAC's role are most notable for what they say USAC cannot do. USAC is specifically precluded from engaging in activities that could alter legal rights or duties between the Federal

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[7] Not every agent can alter *all* of its principal's legal rights and duties; agency can be limited in scope to certain areas or responsibilities. See *Third Restatement* § 1.01 cmt. c (noting some agents "lack the authority to bind their principals to contracts"). But an agency relationship does not exist unless the putative agent can alter at least *some* of the principal's rights or duties.

[8] See Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1622–1623 (2009).

Government and third parties, such as "mak[ing] policy," or "interpret[ing] unclear provisions of the statute or rules." 47 C.F.R. § 54.702(c). Its assigned roles are far more limited; they include the ability to bill[] contributors, collect[] contributions * * *, and disburs[e] universal service support funds." *Id.* § 54.702(b).

None of these functions alters the Government's legal rights or duties with respect to any third party. They all involve actions that USAC takes with respect to money that private telecommunications companies owe to *it*, and over which *it* takes title and keeps separate from general Treasury funds. See *Incomnet*, 463 F.3d at 1072 ("USAC takes legal title to the contributions it receives from carriers"); see also *id.* at 1074 (noting that the FCC "has no ability to control the [USF] through direct seizure or discretionary spending").[9] Therefore, "USAC is not simply holding funds in the USF as the FCC's agent." *Ibid.* When USAC issues bills or disburses the money it receives, these are actions it takes in its own name with respect to *its own* money—or in other words, it is altering *its own* legal rights and duties, not the government's. As the Government explained below, telecommunications companies are "obligated to make contributions *to the* [*fund*]," not to the Government generally. See Dist. Ct. Dkt. 113 at 2 ¶ 3 (emphasis added).

That is not the sort of relationship Congress had in mind when it amended the statutory definition of "claim"

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[9] To be sure, "whether or not the United States has title to" funds is not dispositive of whether those funds can be subject to the Act. 31 U.S.C. § 3729(b)(2)(A). The question of title is relevant here for a different purpose: determining whether USAC's transactions with respect to funds in the USF make it an "agent of the United States." See *id.* § 3729(b)(2)(A)(i). That the United States never has title to USF funds does not alone resolve the Act's applicability, but it does mean that the cited transactions do nothing to make USAC the Government's agent.

to include payment requests submitted to agents of the United States. To the contrary, it sought to capture "agent[s] acting on the Government's behalf" "to disburse *Government* funds." 155 Cong. Rec. E1295, E1298 (2009) (Statement of Rep. Berman) (emphasis added). That makes sense because the False Claims Act exists to protect the public fisc. When an entity cannot alter the Government's legal rights or duties—that is, when it does not meet the common-law definition of agency—it is unclear how a misrepresentation to that entity could harm the Government fisc.

3. The Seventh Circuit reached a contrary conclusion by relying on an incomplete understanding of agency. See Pet. App. 24a. The court relied almost entirely on a single Second Circuit case relating to the Federal Reserve where it was undisputed that "the profits on [the relevant Federal Reserve] loans accrue entirely to the United States Treasury." *U.S. ex rel. Kraus* v. *Wells Fargo & Co.*, 943 F.3d 588, 598 (2d Cir. 2019). Perhaps because of the lack of dispute on that point, *Kraus* did not address whether the Federal Reserve could be the United States' agent only if it could alter the United States' legal relationship to debtholders, even though on other occasions, the Second Circuit itself has properly held that agency requires an ability to bind the principal. See *Hoskins*, 44 F.4th at 149, 151.

II. THE SEVENTH CIRCUIT'S EXPANSIVE CONSTRUCTION OF "CLAIM" WOULD HAVE WIDE-REACHING AND SERIOUS RAMIFICATIONS

False Claims Act suits reach a broad cross-section of businesses, individuals, nonprofits, and governmental entities that interact with the Federal Government.[10]

[10] See, *e.g.*, *U.S. ex rel. Lesnik* v. *ISM Vuzem d.o.o.*, --- F.4th ---, No. 23-16114, 2024 WL 3748978 (9th Cir. Aug. 12, 2024) (visas for automobile-plant workers); *Miller* v. *U.S. ex rel. Miller*, --- F.4th ---

Suits brought under the Act expose parties to protracted litigation and potentially crippling liability, generally at the instigation of self-interested private relators seeking a *qui tam* bounty. The Seventh Circuit's expansive construction of "claim" opens the door to punitive False Claims Act liability in myriad transactions between purely private parties, profoundly increasing the risk of doing business, to the detriment of the business community, the Government, and the public.

No. 22-1615-cv, 2024 WL 3658830 (2d Cir. Aug. 6, 2024) (credit cards); *U.S. ex rel. Angelo* v. *Allstate Ins. Co.*, 106 F.4th 441 (6th Cir. 2024) (car insurance); *U.S. ex rel. Zotos* v. *Town of Hingham*, 98 F.4th 339 (1st Cir. 2024) (municipal road design); *U.S. ex rel. Vt. Nat'l Tel. Co.* v. *Northstar Wireless, LLC*, 34 F.4th 29 (D.C. Cir. 2022) (telecommunications services); *U.S. ex rel. Schweizer* v. *Canon, Inc.*, 9 F.4th 269 (5th Cir. 2021) (office equipment); *United States* v. *Sanford-Brown, Ltd.*, 840 F.3d 445 (7th Cir. 2016) (higher education); *Bias*, 815 F.3d 315 (public school JROTC programs); *U.S. ex rel. Steury* v. *Cardinal Health, Inc.*, 735 F.3d 202 (5th Cir. 2013) (medical manufacturing); *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc.* v. *Westchester County*, 712 F.3d 761 (2d Cir. 2013) (housing); *U.S. ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163 (10th Cir. 2010) (waste disposal); *United States* v. *Sci. Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010) (consulting); *U.S. ex rel. Pritzker* v. *Sodexho, Inc.*, 364 F. App'x 787 (3d Cir. 2010) (public school lunches); *Grand Union Co.* v. *United States*, 696 F.2d 888 (11th Cir. 1983) (food stamps); *U.S. ex rel. TZAC, Inc.* v. *Christian Aid*, No. 17-cv-4135, 2021 WL 2354985 (S.D.N.Y. June 9, 2021) (charitable aid organization); *U.S. ex rel. Shemesh* v. *CA, Inc.*, No. 09-cv-1600, 2015 WL 1446547 (D.D.C. Mar. 31, 2015) (software development); *United States* v. *Americus Mortg. Corp.*, No. 12-cv-02676, 2014 WL 4273884 (S.D. Tex. Aug. 29, 2014) (mortgage lending); *U.S. ex rel. McLain* v. *Fluor Enters., Inc.*, 60 F. Supp. 3d 705 (E.D. La. 2014) (disaster relief); *U.S. ex rel. Landis* v. *Tailwind Sports Corp.*, 51 F. Supp. 3d 9 (D.D.C. 2014) (athletic sponsorship).

A. The Seventh Circuit's Decision Eliminates Essential Limitations on False Claims Act Liability

The False Claims Act was enacted in 1863 and signed into law by President Lincoln "to prevent and punish frauds upon the Government of the United States." Cong. Globe, 37th Cong., 3d Sess. 348 (1863) (statement of Sen. Wilson). A "'series of sensational congressional investigations' prompted hearings where witnesses 'painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war.'" *Escobar*, 579 U.S. at 181–182 (quoting *United States* v. *McNinch*, 356 U.S. 595, 599 (1958)). "For sugar, [the Government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories." *U.S. ex rel. Newsham* v. *Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989) (quoting 1 Fred A. Shannon, The Organization and Administration of the Union Army, 1861–1865, at 54-56 (1965)). The "chief purpose" of the False Claims Act, therefore, was "to provide for restitution to the government of money taken from it by fraud." *Marcus*, 317 U.S. at 551.

With False Claims Act suits now increasingly targeting regulatory violations, this Court has rightly expressed "concerns about fair notice and open-ended liability." *Escobar*, 579 U.S at 192. Limiting the Act principally to transactions with Government employees or agents and expanding it to include other transactions only if the Government provides (or reimburses) the money, helps to cabin liability and ensure meaningful, predictable boundaries.

1. The Seventh Circuit's conclusion that the Government "provides" funds where it "has a high degree of involvement" in an entity's operations would stretch a statute focused on fraud against the Government beyond recognition. There are many entities that Congress has chartered to further federal goals, including the American Red Cross, the Future Farmers of America, the Boy Scouts, the Veterans of Foreign Wars, and the American Legion. Each of these organizations has close ties to the Government and is subject to various levels of federal oversight. The American Red Cross, 36 U.S.C. § 300101, reports to the Department of Defense and Congress annually and has a chairman approved by the President and an advisory council appointed by the President, *id.* § 300104(a)(3)(A)(i), (d)(2)(A); the Future Farmers of America's board includes five federal officials, *id.* § 70904; and the Boy Scouts, *id.* § 30908, the Veterans of Foreign Wars, *id.* § 230107, and the American Legion, *id.* § 21708, all must report to Congress annually. But no one would suggest that such entities are subject to the Act, because they are private entities financed with private funds.

The wide range of federally created entities, consisting of "private, nonprofit corporations, institutes, banks, funds, foundations, and other organizations" that "are privately owned," underscores the need for clarity here. See U.S. Gov't Accountability Off., GAO-10-97, *Federally Created Entities: An Overview of Key Attributes* 17–22 (2009). The court of appeals' amorphous "involvement" standard would reject the straightforward question of whether an entity gets its money from the Government—and thus whether fraud on it might harm the Government—and replace it with a wide-ranging, fact-intensive inquiry into how deeply "[t]he federal government's involvement," Pet. App. 29a, affects its operations.

The Seventh Circuit's reliance on the Government's status as USAC's debt collector raises additional concerns about expanding the False Claims Act's scope. Any private plaintiff who prevails in a federal lawsuit can enlist the assistance of a U.S. Marshal to collect the judgment. See 28 U.S.C. §§ 566(a), (c); Fed. R. Civ. P. 69(a)(1). When a Marshal orders someone to remit money by virtue of a federal-court judgment, and then passes that money along to its rightful recipient, she is performing a function quite like Treasury's function with respect to USAC. But no one would say that the Marshal is providing the money.

If the Seventh Circuit's broad view is accepted, a statute enacted to address flagrant acts of fraud harming the federal Treasury could instead be used to reach all kinds of transactions with only tangential relationships to the Government. Even worse, it would encourage private relators to pursue punitive treble damages for private arrangements between private entities involving private funds that were never the Government's to lose—much less to recoup.

2. Hewing closely to the common-law understanding of agency also plays an important role in cabining False Claims Act liability. If agency no longer requires that the putative agent have the power to bind the Government, then all sorts of entities that engage in conduct encouraged by (or in furtherance of the policy goals of) the Government but who cannot act on its behalf could suddenly be swept within the Act's ambit. Under the Seventh Circuit's test, that could well be enough to permit liability, thereby opening untold avenues to *qui tam* suits based on alleged misrepresentations by one private entity to another. Numerous entities are likewise private corporations established by the Government for Government purposes but, despite having a Government-established mission, do not act on the Government's behalf. See, *e.g.*, 49 U.S.C. § 24301. Maintaining the

straightforward, well-established definition of agency means they qualify as agents only if at minimum they can affect the Government's legal relationships—a limitation that is both readily assessed and relevant to the goals of the False Claims Act.[11]

B. The Unbounded False Claims Act Liability Endorsed By The Seventh Circuit Imposes Needless Costs On American Businesses—And Raises Constitutional Concerns

The breadth and uncertainty of False Claims Act liability under the Seventh Circuit's decision would increase the costs of doing business for broad swaths of the U.S. economy, and the American public—which ultimately winds up bearing the cost of such wasteful litigation.

1. Since 1986, an "army of whistleblowers, consultants, and, of course, lawyers" has been released onto the False Claims Act landscape. 1 John T. Boese, *Civil False Claims and* Qui Tam *Actions*, at xxi (4th ed. 2011). Over that period, more than 22,700 False Claims Act actions have been filed, nearly 16,000 of them *qui tam* suits. U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1986-Sept. 30, 2023*, at 3 (2023), https://bit.ly/4cC09lw. "But only about 10 percent of non-intervened cases result in recovery" for the Government. *U.S. ex rel. Hunt* v. *Cochise Consultancy, Inc.*, 887 F.3d 1081, 1087 (11th Cir. 2018), aff'd, 587 U.S. 262 (2019); Ralph C. Mayrell, *Digging Into FCA Stats: In-House Litigation Budget Insights,* Law360 (July 13, 2021), https://bit.ly/3hUp89K.

Meritless *qui tam* actions are "downright harmful" to the business community. See *Wilson*, 559 U.S. at 298.

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[11] Congress appropriates funds to some federally created entities. But doing so implicates the "provides" prong of the definition of "claim," not the agency prong. See 31 U.S.C. § 3729(b)(2)(A).

Businesses face the specter of treble damages and civil penalties of up to $27,894 per false claim, which can quickly mushroom for the many businesses that deal in numerous smaller transactions rather than a small number of larger ones. Civil Monetary Penalties Inflation Adjustment, 89 Fed. Reg. 9764 (Feb. 12, 2024); 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). And simply *defending* a False Claims Act case requires a "tremendous expenditure of time and energy." Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require that All* Qui Tam *Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1, 11 n.66 (2007).[12]

The ubiquity and expense of *qui tam* suits are especially worrisome because, as three members of this Court recently observed, "there are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation." *Polansky*, 599 U.S. at 442 (Kavanaugh, J., concurring) (alteration adopted); *id.* at 451 (Thomas, J., dissenting) ("In short, there is good reason to suspect that Article II does not permit private relators to represent the United States' interests in [False Claims Act] suits.").

The practice of allowing self-appointed relators to bring *qui tam* suits is questionable enough when they are seeking to collect funds taken from the Government, where the practice at least has the "theoretical justification for relator standing" this Court relied on in *Stevens*—that relators are litigating under Congress's "partial assignment of the Government's damages claim" under the False Claims Act. *Stevens*, 529 U.S. at 778, 773. But permitting relators to wield the False Claims Act's

[12] This case, which Relator filed sixteen years ago, is an unfortunate example of this point.

"essentially punitive" treble-damages hammer in the Government's name to pursue claims of fraud involving purely private parties and no potential financial loss to the Government is far more suspect. Since the Founding, that function has been exclusively reserved to government officials and never ceded to private parties. See *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) (Constitution vests in "the Executive Branch * * * exclusive authority and absolute discretion to decide whether to prosecute a [criminal] case").

2. The Seventh Circuit's vague and expansive standards would also lead to protracted litigation about what constitutes a "claim." By contrast, the straightforward, easy-to-apply definitions advocated by Petitioners would help courts weed out meritless cases earlier and more efficiently.

That is especially important in an area of law where the mere existence of allegations (however tenuous) "can do great damage to a firm." *U.S. ex rel. Grenadyor* v. *Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1105 (7th Cir. 2014). "[T]he mere presence of allegations of fraud may cause [federal] agencies to question the contractor's business practices," Canni, *supra*, at 11, and trigger burdensome satellite litigation, such as shareholder derivative suits, *e.g.*, *In re Stericycle Sec. Litig.*, 35 F.4th 555, 558 (7th Cir. 2022). And a finding of False Claims Act liability can result in suspension and debarment from government contracting, see 2 C.F.R. § 180.800(a)—"equivalent to the death penalty" for many contractors, Ralph C. Nash & John Cibinic, *Suspension of Contractors: The Nuclear Sanction*, 3 Nash & Cibinic Rep. ¶ 24 (Mar. 1989), as well as exclusion from participation in federal healthcare programs, see 42 U.S.C. § 1320a-7(b).

Relators are thus keenly aware that mere allegations, regardless of merit, can "be used to extract settlements."

Sean Elameto, *Guarding the Guardians: Accountability in* Qui Tam *Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 824 (2012). Punitive liability and the potential that lawsuits will drag on for years—and in this case, decades—create intense pressure to settle even "questionable claims." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011); see also *Smith* v. *Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (discovery costs alone "can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak"); *Haroco, Inc.* v. *Am. Nat'l Bank & Tr. Co. of Chi.*, 747 F.2d 384, 399 n.16 (7th Cir. 1984) (noting the "*in terrorem* settlement value that the threat of treble damages may add to spurious claims"), aff'd, 473 U.S. 606 (1985).

Overly broad or vaguely defined boundaries for False Claims Act liability can thus be doubly pernicious. They can expose a wide swath of businesses and individuals to expensive, reputation-risking litigation and the settlement pressures that come along with it. And they deny those same businesses and individuals the ability to know with confidence whether a court might later find that the entity they are dealing with actually counts as an "agent" of the Government or as a recipient of funds "provided" by the Government.

Adhering to the plain meaning of "provide" and the common-law meaning of "agent" will mitigate these substantial costs. Congress chose these terms because they draw appropriate, and easily discernable, boundaries for liability under an Act addressed specifically to fraud that puts federal money at risk.

CONCLUSION

For these reasons, and those in petitioner's brief, the decision below should be reversed.

Respectfully submitted.

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