IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA
ex rel. TODD HEATH

Plaintiff,

v.

WISCONSIN BELL, INC.,

Defendant

Case No. 2:08-cv-000876-LA
(Lead Case No. 2:08-cv-00724-LA)

Judge Lynn Adelman

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

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every geographic region of the country. A principal function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. It regularly files *amicus* briefs in cases raising issues of concern to the nation's business community, including cases involving the False Claims Act ("FCA").

The Chamber and its members have a substantial interest in the correct interpretation of the FCA—and specifically in ensuring that when companies engage in business with other private entities, involving exclusively private money where the Government can suffer no financial loss, companies should not be subject to the FCA's "essentially punitive" liability scheme. *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784 (2000). Here, Relator and the Department of Justice seek an award of damages in favor of the Government (together with a substantial bounty for Relator) for fraud purportedly committed against what all agree is a private company, the Universal Services Administrative Company ("USAC"), involving funds consisting entirely of contributions from other private entities and maintained in the private Universal Services Fund ("USF"). Such a ruling would be contrary to the holdings of both of the courts to have addressed the issue and would create inconsistent exposure of FCA liability for businesses, including the Chamber's members, based on the

[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, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

happenstance of the jurisdiction in which the case is filed.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The central questions in this case are (1) whether the Government "provides" or "reimburse[s]" funds a private corporation pays under E-Rate using contributions from private companies, such that requests for payment constitute "claims" subject to FCA liability, 31 U.S.C. § 3729(c) (2008); and (2) whether USAC is "the United States" or "the Government," such that requests for payment made to it are "presented[] to an officer or employee of the United States," *id.* § 3729(a)(1) , used "to get" "the Government" to pay or approve the request, *id.* § 3729(a)(2), or used to "avoid, or decrease an obligation to pay . . . the Government," *id.* § 3729(a)(7). Because it is uncontested that USAC is not a governmental agency but a private corporation wholly owned by a telecommunications trade association, and USF is wholly funded by contributions from telecommunications carriers, not taxpayer funds or other monies received from the Government, submissions to USAC are not covered by the FCA.

To argue around this fundamental flaw, Relator and the Justice Department assert the Government "provides . . . the money" in the sense that Congress created the statutory and regulatory structure under which private parties pay, and the FCC regulates USAC. But neither the Justice Department nor Relator cite any other provision of Title 31 that uses "provides" in that sweeping and idiosyncratic sense (Title 31 instead uses "provide *by law for*" for that purpose). Nor have they cited *a single case* that gives the term that meaning. For good reason: That proposed reading is so broad it would render the neighboring term "reimburse" surplusage and would subject to punitive FCA liability a vast array of purely private transactions. And for all their talk of USAC funds being "federal" for purposes of unrelated statutory and constitutional provisions, the responsive briefs can cite *no opinion* extending the FCA to cases

involving neither Treasury funds nor payments made by a unit of the federal Government. This Court should not be the first in the Act's 152-year history to extend the FCA to a private corporation disbursing private funds.

At bottom, Relator and the Justice Department seek to revisit the political bargain struck when Congress created E-Rate in 1996. Congress did not provide the FCC authority to create or designate a governmental entity to administer E-Rate, appropriate Government funds to the E-Rate programs, or provide for E-Rate funds to be maintained on the books of the Treasury. There is no basis for allowing the Government to obtain through litigation funds that were never its to lose under a statute enacted 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, 551-52 (1943).

II. Relator makes only a half-hearted effort to address whether the Government "provides" USF funds (and does not discuss other issues involving the pre-amendment statute at all). Instead, he prefers to stake his claim on the supposedly "clarifying" nature of the 2009 FCA amendments. Although the False Claims Act's definition of "claim" was amended in 2009 to extend the FCA to submissions made to a governmental "agent," the new definition is explicitly non-retroactive and, as the Justice Department concedes (U.S. Br. 7 n.6), does not currently apply to this case. Even if this Court permits Relator to file a Second Amended Complaint, as the Justice Department inadvertently confirms, U.S. Br. 18 (noting USAC cannot make policy or administer statutes or rules), USAC does not come within the meaning of an "agent."

BACKGROUND

E-Rate is funded with disbursements from the USF and is administered by USAC. 47 C.F.R. § 54.701(a). USAC is a private corporation registered in Delaware, with a single shareholder: the National Exchange Carrier Association, Inc. ("NECA"), a telecommunications

trade association.[2] NECA's "board of directors and membership consist entirely of industry participants, *see* 47 C.F.R. § 69.602, it acts exclusively as an agent for its members, and it has no authority to perform any adjudicatory or governmental functions." *Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1245-46 (10th Cir. 1999).

Congress and the FCC purposefully structured E-Rate so USF would not receive any governmental monies. H.R. 2267, 105th Cong. § 614(a) (1st Sess. 1997) (USF funds "administered by an independent, non-Federal entity," "not deposited into the Federal Treasury," and "not available for Federal appropriations"); *see also infra* pp. 11-18. Telecommunications companies transfer fees directly to USAC, 47 U.S.C. § 254(d), and USAC deposits those funds into a private bank account, *see* 47 C.F.R. § 54.702(b)—a step that any "agent of the Government receiving money for the Government from any source" ordinarily would be *prohibited* from doing. *See* Miscellaneous Receipts Act, 31 U.S.C. § 3302(a), (b) ("[A]n official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury" and "shall keep the money safe without . . . depositing the money in a bank"). USAC then pays those fees to companies in the telecommunications industry in exchange for products and services used to supply certain beneficiaries, including underprivileged and underserved schools and libraries needing telecommunications and computer equipment. *See In re Incomnet, Inc.*, 463 F.3d 1064, 1066-67 (9th Cir. 2006); 47 U.S.C. § 254(d); 47 C.F.R. § 54.706; *id.* § 54.702(b). If USAC faces a financial shortfall, rather than turning to the U.S. Treasury, as governmental entities commonly would do, it must seek *private* credit through commercial markets, 47 C.F.R. § 54.709(c), to be repaid from additional revenues from telecommunications companies.

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[2] *About USAC, Who We Are*, USAC, http://www.usac.org/about/about/who-we-are/default.aspx (last visited Feb. 8, 2015).

Like the telecommunications industry as well as many other industries, USAC is regulated by the government (here, the FCC). USAC, however, is not a government entity, the FCC "has no ability to control the USF through direct seizure or discretionary spending," and USAC is responsible for determining "if, when, and how it disburses universal service funds to beneficiaries." *Incomnet*, 463 F.3d at 1071.

ARGUMENT

Wisconsin Bell's submissions to USAC did not constitute "claims" actionable under the pre-2009 FCA because the Government does not "provide[]" or "reimburse" any portion of the money paid under the E-Rate program, as required for an actionable false "claim" under the pre-2009 FCA, in 31 U.S.C. § 3729(c) (2008). Even if the Court permits Relator to amend his complaint to seek relief under the post-2009 FCA, his claims would fail because USAC lacks the power to bind the FCC that would make it a governmental "agent."

I. The Government Neither "Provides" Nor "Reimburse[s]" USF Funds Under the FCA

Under the pre-2009 FCA, a false "claim" is actionable only "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(c) (2008) (emphasis added). Because the Government neither "provides" nor "reimburse[s]" the USF funds that USAC administers, those funds are not subject to the FCA. The only two other cases to have addressed this issue agree. *See U.S. ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379 (5th Cir. 2014); *U.S. ex rel. Lyttle v. AT&T Corp.*, No. 2:10-1376, 2012 WL 6738242 (W.D. Pa. Nov. 15, 2012).[3]

[3] During the *Shupe* appeal, the *Lyttle* court rebuked DOJ for trying to expunge unfavorable precedent as part of a settlement. Mem. Order 1, *U.S. ex rel. Lyttle v. AT&T Corp.*, No. 2:10-cv-1376 (W.D. Pa. Nov. 13, 2013), ECF No. 112 (denying DOJ's request to vacate earlier opinions and criticizing it for a "lack of candor . . . in failing to fully disclose the true reasons for the

A. "Provides" Connotes Direct Provision of Government Funds, Not Merely Establishing a Scheme Through Which Funds Are Transferred

1. The Justice Department's Proposed Reading of "Provides" Conflicts with the Term's Ordinary Meaning and the Statutory Context

The ordinary meaning of the term "provides" is "[to] furnish[] [or] supply," *American Heritage College Dictionary* 1102 (3d ed. 1993), or "[t]o supply (someone *with* something)," *Webster's New World Dictionary* 1083 (3d college ed. 1988), connoting a direct connection between the item being provided and the entity providing it. The Government "provides" funds when it "furnish[es]" or "suppl[ies]" some "portion of the money . . . requested" by paying it from governmental accounts. *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004).

This understanding is confirmed by statutory context. The pre-2009 FCA applies to requests for payment "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(c) (2008) (emphasis added). Congress's decision to pair "provides" with "reimburse" supports the conclusion that it only sought to cover the direct provision of funds. *See United States v. Taylor*, 640 F.3d 255, 263 (7th Cir. 2011) ("we usually define [words] in reference to the terms they appear with"). "Reimburse" also carries the connotation of direct funding ("[t]o repay (money spent)," *American Heritage College Dictionary* 1471), albeit less directly than "provides." The Justice Department's reading, however, would render the FCA's use of "reimburse" surplusage: Had Congress meant "provides" to connote making funds available in *any* sense, there would have been no point to separately cover "reimburse[ment]." *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1272 (7th Cir. 1993) ("a court should not construe a statute in a way that makes words . . .

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request"—namely, *Shupe*, in which "defendants/appellants . . . ha[d] cited the *Lyttle* matter in their opening appellate briefs.").

redundant, or superfluous") (internal quotation marks omitted).

The Government's reading is likewise impossible to square with the FCA's damages provisions. All of the potential bases for FCA liability identified in § 3729(a) implicate "liab[i]l[ity] to the United States Government" for civil penalties "plus 3 times the amount of *damages which the Government sustains* because of the [defendant's] act. " 31 U.S.C. § 3729(a) (emphasis added). But it is impossible for "the Government [to] sustain" damages because of fraud against a private entity and a private fund. The Government's brief acknowledges as much: Even if fraud causes a funding shortfall, USAC borrows money commercially to be repaid from future telecom-company collections. *See* U.S. Br. 5 (shortfall "require[s] more money from telephone companies in future quarters"). Although the FCA does not require that the Government actually sustain losses (that is, it prohibits even *unsuccessful* fraud), it clearly contemplates that fraud is actionable only if the public fisc is at risk of loss.[4]

It is not plausible to say that the Government "provides" money by having established, years earlier, a system of private funding; rather, it would be natural to say that the Government "provided *for*" such funding through the statutory and regulatory structure. And indeed, Title 31 consistently uses "provide for" or "provide by law for" when referring to action taken under a program. *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 in the State . . . ."). The Justice Department can cite *no other provision of law* that gives "provides" the idiosyncratic meaning it now proposes; and *amicus curiae* is aware of no instance where Title 31 uses "provide" to refer

[4] *E.g.*, *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (FCA only remedies fraud "that might result in financial loss to the Government"); *U.S. ex rel. Garg v. Covanta Holding Corp.*, 478 F. App'x 736, 742 (3d Cir. 2012) (no FCA claim where "[w]ith or without [the] alleged fraud, the treasury of the United States would be in the same position").

to provision through a program established by legislation or regulation.[5] There is no reason to believe that Congress departed from that consistent usage in the FCA alone.

The Government can cite *no decision of any court* that has adopted its reading of "provide." Courts have repeatedly refused to apply the FCA to private funds—even where administered by federal entities that oversaw their distribution or when distributed in furtherance of a federal program. Instead, what matters is whether the Government's funds are at risk. *See, e.g.*, *Shupe*, 759 F.3d 379; *Lyttle*, 2012 WL 6738242; *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 183 (3d Cir. 2001) (FCA does not cover false claims to bankruptcy court, although federal bankruptcy judge oversaw distribution in furtherance of federal program of administering bankruptcy estates); *U.S. ex rel. Costner v. URS Consultants, Inc.*, 153 F.3d 667, 671, 677 (8th Cir. 1998) (FCA does not cover fraud against trust fund established to "meet [private party's] environmental cleanup responsibilities under [its] Consent Decree" with the Environmental Protection Agency (internal quotation marks omitted)); *U.S. ex rel. Fellhoelter v. Valley Milk Prods., LLC*, 617 F. Supp. 2d 723, 729-30 (E.D. Tenn. 2008) (FCA does not cover privately held funds paid by milk producers and distributed to other private parties under federal agricultural marketing orders); *U.S. ex rel. Adams v. Wells Fargo Bank, N.A.*, No. 2:11-cv-535, 2013 WL

[5] *See, e.g.*, 31 U.S.C. § 705(c)(8) (Inspector General shall "provide copies of all reports to the Audit Advisory Committee"); *id.* § 1112(f) (Director of Office of Management and Budget "shall provide State and local governments with fiscal, budget, and program information"); *id.* § 1537(a)(1) (federal Government employee "may provide services to the District of Columbia government"); *id.* § 9105(b) ("a Government corporation shall provide to the Comptroller General . . . all books, accounts, [and] financial records"); *id.* § 9106(b) ("A Government corporation shall provide [officials] a copy of the management report when it is submitted to Congress.").

6506732, at *1 (D. Nev. Dec. 11, 2013) (Government concedes, and court holds, that pre-2009 FCA did not apply to congressionally created Fannie Mae and Freddie Mac).[6]

2. *Shupe* Correctly Interprets the FCA to Protect *Government* Funds

The Justice Department contends that *Shupe* "read into the FCA the requirement that funds come from the U.S. Treasury," U.S. Br.19, and thus would not protect such self-funded governmental bodies as the U.S. Postal Service and the Federal Housing Administration ("FHA"). *Id.* at 10-11. That characterization does not even survive superficial review of *Shupe*. That decision explicitly held that the federal "[g]overnment 'provides any portion' of the money requested . . . when United States Treasury dollars flow to the defrauded entity *or if the false claim is submitted to a Government entity*." *Shupe*, 759 F.3d at 383 (emphasis added). The Justice Department simply ignores the italicized portion of the holding. *Shupe* explicitly held the FCA covered (1) the expenditure of U.S. Treasury funds by *either* governmental agencies or private entities, *see id.* at 383-84 (citing *U.S. ex rel. DRC, Inc v. Custer Battles, LLC*, 562 F.3d 295, 303-04 (4th Cir. 2009) ("So long as 'any portion of the claim is or will be funded by U.S. money given to the [private] grantee, the full claim satisfies the definition of claim [under the FCA]." (emphasis omitted))), as well as (2) "entities that do not receive [Treasury] funds, but nevertheless are covered by the FCA because of their status as Government entities," *id.* at 384.

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[6] *U.S. ex rel. Sanders v. American-Amicable Life Ins. Co. of Tex.*, 545 F.3d 256 (3d Cir. 2008), is not to the contrary. The Government errs in suggesting that the service members' ability to choose whether to participate in the savings plan there made the FCA inapplicable. U.S. Br. 7-8. The court clearly said that what mattered was that governmental funds were not at risk: "It follows that the alleged fraud could not cause the government, as opposed to the defrauded military personnel, to suffer any economic loss. Therefore, the District Court correctly held that no claim was made against the government; as a result, the FCA is inapplicable." *Sanders*, 545 F.3d at 259-60. "Only those actions . . . which have the purpose and effect of causing the United States to pay out money it is not obligated to pay . . . are properly considered 'claims.'" *Id.* at 260 (quoting *Costner*, 153 F.3d at 677).

Shupe thus correctly held that "the FCA[] appli[es] to 'instances of fraud that might result in financial loss to the Government.'" *Id.* at 385 (quoting *Sanders*, 545 F.3d at 259). What is *not* covered are private entities that dispense exclusively private funds, such as USAC (and USF). *See Shupe*, 759 F.3d 379; *Lyttle*, 2012 WL 6738242.

3. The 2009 FCA Amendments Shed No Light On An Earlier Congress's Intent

The 2009 FCA amendments do not, as the Justice Department argues, U.S. Br. 11-12, offer persuasive guidance about the meaning of the pre-amendment statute enacted nearly a quarter century earlier. As the Supreme Court has frequently (and recently) reaffirmed, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (same); *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1268 (2014) (same); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356 (1998) (same); *accord U.S. ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 881 n.15 (D.C. Cir. 1999) (it is "quite illogical" "to interpret [subsequent] legislative action as a declaration of what a[n earlier] Congress . . . intended").

The Government cites *Loving v. United States*, 517 U.S. 748, 770 (1996), for the proposition that subsequent legislation "clarifying the intent of an earlier statute is entitled to great weight." U.S. Br. 11 (citing *Loving*, 517 U.S. at 770). But the Seventh Circuit has questioned the "continued vitality of the *Loving* line"—and given "rather little" weight to subsequent legislation—in light of the Supreme Court's more recent decisions holding that subsequent legislation is not illuminating. *Long*, 173 F.3d at 881 n.15 (Supreme Court's application of *Loving* "has been rather inconsistent"; "we are unaware of any Supreme Court holding in which a subsequent declaration has been used, not to discern the current meaning of a statute post-declaration, but instead to interpret the meaning of a statute *prior to the*

declaration"). The Supreme Court has not, to our knowledge, reaffirmed *Loving*'s statement in the *two decades* since. Moreover, the 2009 FCA *legislation* does not state that it is "clarifying" existing law, as opposed to changing it; the Government's only source for its "clarifying" status is a *committee report*. U.S. Br. 11. *See Middleton v. City of Chicago*, 578 F.3d 655, 664 (7th Cir. 2009) (finding "observations regarding a prior legislature's intent is of marginal utility at best" where legislation itself "does not mention clarification"). Whatever weight subsequent *legislation* may have, a statement in "a Committee Report by a later Congress . . . is not a legitimate tool of statutory interpretation" because it sheds no authoritative light on an earlier Congress's intent. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011).

B. By Congressional Design, USAC Is Not the Government and Money Distributed from USF Is Not Provided By the Government

1. Congress Did Not Authorize the FCC to Create a Government Entity to Manage USF and Does Not Consider USF To Be Government Funds

Congress explicitly rejected the FCC's request to structure the USF program as a governmental entity. In 1997, to implement the USF, the FCC attempted to create two corporations to administer E-Rate, but the GAO issued a legal opinion declaring those in violation of the Government Corporation Control Act of 1948, 31 U.S.C. § 9102, which prohibits agencies from creating a corporation absent congressional authorization.[7] The FCC explicitly requested congressional authorization to establish governmental entities, which Congress never granted. H.R. Rep. No. 105-504, at 87 (1998) (Conf. Rep.); Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579, Report to Congress, 13 FCC Rcd. 11810, 11818 (May 8, 1998). Because Congress never authorized the FCC to create a federal entity to manage

[7] *Telecommunications: FCC Lacked Authority to Create Corporations to Administer Universal Service Programs, Testimony Before the Subcomm. On Telecomms., Trade & Consumer Prot., Comm. on Commerce*, 105th Cong. 13-14 (1998) (App. I to the statement of Robert P. Murphy, General Counsel, U.S. Gov't Accounting Office), GAO/T-RCED/OGC-98-84

the USF funds, the FCC could only appoint a private third-party to that role: USAC, wholly owned by another private entity (NECA, itself owned by a trade group, *see supra* pp. 3-4). The Government cannot have it both ways—structuring E-Rate so as not to put governmental funds at risk, while maintaining that the Justice Department can use the FCA to seek windfall "recovery" (*U.S. ex rel. Chovanec v. Apria Healthcare Group, Inc.*, 606 F.3d 361, 364 (7th Cir. 2010)) of private funds that were never the Government's to lose.

Members of Congress have confirmed that USF funds are not federal. When it was enacted, the Senate Minority Leader said that USF involved "no federal tax dollars." *E.g.*, 143 Cong. Rec. at S8214 (daily ed. July 29, 1997) (statement of Sen. Daschle). At the time of the Balanced Budget Act of 1997, the Senate passed a "sense of the Senate" resolution stating that "universal [service] contributions are administered by an independent, non-federal entity and are not deposited into the Federal Treasury and . . . [are] not available for Federal appropriations." H.R. 2267, 105th Cong. § 614 (1st Sess. 1997); 143 Cong. Rec. S8213-01, S8214 (daily ed. July 29, 1997) (statement of Sen. Gregg); Pub. L. No. 105-119, § 623, 111 Stat. 2440, 2521 (1997); *see also Permanently Exempting the Universal Service Fund from Portions of the Anti-Deficiency Act*: *Hearing on S. 241 Before the S. Comm. on Commerce, Science and Transportation*, 109th Cong. 49 (2005) (statement of Sen. Snowe) (USF funds "obviously [are] not an appropriation"); 151 Cong. Rec. S749 (daily ed. Feb. 1, 2005) ("USAC, in administering the USF, does not receive any appropriated funds from Congress.") (statement of Sen. Snowe).[8]

[8] *Telecommunications: Application of the Antideficiency Act and Other Fiscal Controls to FCC's E-Rate Program*: *Testimony Before the S. Comm. on Commerce, Science and Transportation*, 109th Cong. 6 n.13 (2005) (statement of Patricia A. Dalton, Managing Director Physical Infrastructure Issues 6 n.13 (2005) ("Dalton Statement") (citing letter from Mr. Robert G. Damus, OMB General Counsel to Mr. Christopher Wright, FCC General Counsel (April 28, 2000)), GAO-05-546T, *available at* http://www.gao.gov/assets/120/111480.pdf.

2. USAC's Actions Confirm It Is Not a Federal Entity and USF Funds Are Not Federal

USAC's actions reflect its consistent position that it is not a federal entity and that the USF funds it disburses are not federal dollars. USAC has stated that "USAC is not a federal government agency or department or a government controlled corporation as that term is defined in sections 9101-02 of Title 31 of the United States Code."[9] USAC requests for quotations notice details explicitly state, "THIS IS NOT A PROCUREMENT BY A FEDERAL AGENCY, GOVERNMENT CORPORATION, GOVERNMENT CONTROLLED CORPORATION OR OTHER ESTABLISHMENT IN THE EXECUTIVE BRANCH OF THE UNITED STATES GOVERNMENT."[10] USAC's form requests for quotations also state that "USAC is not a Federal agency, a government corporation, a government controlled corporation or other establishment in the Executive Branch of the United States Government." USAC is not a "contractor to the federal government."[11] USAC affirmed this understanding in a letter to the FCC saying that "USAC is not a federal agency, government-controlled corporation or other entity of the federal government." Letter from D. Scott Barash, Acting Chief Executive Officer, USAC, to Steven VanRoekel, FCC Managing Director, 8-9 (Mar. 15, 2011) (attached as Ex. A). If USAC borrows money, it does so from private sources of credit rather than turning to the U.S. Treasury. 47 C.F.R. § 54.709(c). While the Miscellaneous Receipts Act provides that "an official or agent of the Government receiving *money for the Government from any source* shall deposit the money in the Treasury," 31 U.S.C. § 3302(b), and may not "deposit[]" "public money . . . in a bank," 31 U.S.C. § 3302(a), USAC holds USF funds in private banks.

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[9] *About USAC, Procurement*, USAC, http://goo.gl/9kWScm (last visited Feb. 9, 2015).

[10] *E.g., USAC Request for Quotes for WAC Halogen Lighting and Installation*, Federal Business Opportunities (Aug. 31, 2012), http://goo.gl/Do9sTv (last visited Feb. 9, 2015).

[11] *E.g., USAC Request for Quotes, VMware 2015 Software Support Renewal*, USAC (Feb. 23, 2015), http://goo.gl/Nc3mkw (last visited Feb. 25, 2015).

3. Budget Labels Do Not Support the Conclusion That the Government "Provides" USF Funds

While the Justice Department labors to establish that the FCC and Office of Management and Budget consider USF funds federal for bookkeeping purposes, U.S. Br. 13-16, it acknowledges elsewhere that the FCA's application is not "dependent upon the bookkeeping devices used for their distribution." U.S. Br. 9 (quoting *Marcus*, 317 U.S. at 544). In any event, whether the funds are deemed "federal" (or "appropriated") in *other* contexts sheds little light on whether the Government "provides" or "reimburses" under the FCA.

To the extent budget classifications have any relevance,[12] the proposed FY2013 budget acknowledges the "question" about whether the "Universal Service Fund" should "be included in the budget" because of the "murky" "dividing line between the Government and the private sector," but included it although it is "not . . . obvious" that it should be because of policy that budget documents be "comprehensive." Office of Mgmt. & Budget, Fiscal Year 2013, Analytical Perspectives, Budget of the U.S. Government 131 (2012) ("2013 Budget"). That proposed budget discusses the USF together with numerous entities that apparently have *never* been subject to FCA actions. *See id.* (*e.g.*, Telecommunications Development Fund, Federal Financial Institutions Examination Council, and Electric Reliability Organizations). The same document noted that USAC is "significantly controlled by non-Federal individuals" and receives "non-Federal funding," explaining that "[g]enerally, entities that receive a significant portion of funding from non-Federal sources and that are not controlled by the Government are treated as non-budgetary." *Id.* at 153.

[12] Even government agencies disagree about how to treat non-governmental entities like USAC. *See, e.g.*, 2013 Budget at 152 (noting OMB treats Fannie Mae and Freddie Mac—like USAC, "private companies with Boards of Directors and management responsible for their day-to-day operations"—as "non-budgetary private entities," but the Congressional Budget Office treats them as "budgetary Federal agencies").

Moreover, Executive Branch entities have said in other contexts that USF funds are nonfederal. *See* Dalton Statement, *supra* note 8, at 6 n.13 ("[t]he Universal Service Fund . . . does not constitute public money") (citing letter from Mr. Robert G. Damus, OMB General Counsel to Mr. Christopher Wright, FCC General Counsel (April 28, 2000)); *id.* at 11 n.22 ("OMB and FCC" have concluded "the [USF] funds were not public monies").

4. Federal Regulation and Oversight of Private Funds Does Not Mean that the Government "Provides" Them

The Justice Department contends that because the FCC provides oversight and "governing regulations," to USAC, the funds it disburses are therefore federal. U.S. Br. 5-6, 16. But as *Shupe* explained, "'While we recognize that the FCC does hold substantial power over [USF] indirectly, essentially by overseeing USAC, we also recognize that it has no ability to control the USF through direct seizure or discretionary spending.'" 759 F.3d at 386 (quoting *Incomnet*, 463 F.3d at 1071). And though the FCC created USAC's lone shareholder, NECA, the FCC "made clear that NECA acted exclusively as an agent for its members." *Id.* at 386-87 (quoting *Farmers Tel. Co.*, 184 F.3d at 1250).

The Justice Department does not explain how regulation transforms private funds administered by a private company into government-"provide[d]" or government-"reimburse[d]" funds. Even if the FCC has authority to review USAC's decisions for compliance with governing law, they retain their character as private property. *E.g.*, *Hutchins*, 253 F.3d at 182-83 (false submissions to bankruptcy court not subject to FCA, though bankruptcy judge determines correctness of disbursements). The approximately 200 volumes of the Code of Federal Regulations broadly regulate commerce. If Congress had intended FCA liability to depend on whether a private entity was federally regulated, it would have said so—and would have indicated what degree of regulation triggers the FCA's "punitive" liability scheme. *Vermont*

Agency of Natural Resources, 529 U.S. at 784. The Justice Department's argument would sweep in a host of private transactions undertaken by private entities in regulated industries that have no connection to the public fisc and have never been considered subject to FCA enforcement.

The Department's assertion that "the FCC has the authority, and the responsibility, to recoup E-Rate funds that are improperly disbursed" (U.S. Br. 16) does not remedy the lack of textual or other legal support for its position. Even crediting the FCC's self-serving (and untested) views of its authority, the cited FCC orders do not demonstrate that the Government "provide[d]" or "reimburse[d]" funding, 31 U.S.C. § 3729(c) ; the orders principally direct *USAC* (not the FCC) to "seek repayment of . . . funds" relating to "discounts for ineligible services"—i.e., payments that would "violate a federal statute." *In the Matter of Changes to the Bd. of Dirs. of the Nat'l Exch. Carrier Ass'n, Fed.-State Joint Bd. on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, FCC 99-291, 17 Communications Reg. (P&F) 1192 ¶¶ 1, 7 & n.14 (Oct. 8, 1999). The FCC emphasized that USAC payments do "not involv[e] payments from the Treasury," but rather "a Congressionally authorized fund." *Id.* ¶ 7. To the extent the orders even contemplate a role for the FCC, they invoke the *possible* use of the Debt Collection Improvement Act—which encompasses funds not "provide[d]" by the United States. *See, e.g.*, 31 U.S.C. § 3701(b)(1)(D) ("any amount the United States is authorized by statute to collect for the benefit of any person"); *id.* § 3701(b)(1)(F) ("any fines or penalties assessed by an agency"). Authority to require USAC to recover unlawful payments (or to *assist* USAC in doing so) says nothing about whether the United States "provides" funds.[13]

[13] For similar reasons, the Government's last-minute submission that it collects telecom company arrearages for USF and clears them through the Treasury (*see* U.S. Supp. Br.) is immaterial. The fact that the Government collects a private debt for the benefit of a private entity does not make it "government money," even if it briefly passes through the Treasury for administrative convenience.

It is likewise unremarkable that the FCC is authorized to collect fees from the USF and USAC as part of its auditing function. Private entities routinely defray their regulators' expenses; the Securities and Exchange Commission ("SEC"), for example, collects fees "to recover the costs . . . for supervising and regulating the securities markets." *"SEC Fees"—Section 31 Transaction Fees*, SEC https://www.sec.gov/answers/sec31.htm. In short, while USAC may be subject to considerable regulation, that does not distinguish it from a host of private industries that have never been subject to the FCA.

Finally, it is irrelevant that a federal entity had a role in the creation of USAC and the USF. U.S. Br. 4, 6 n.5. The same is true of a vast array of private 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 those organizations has close ties to the Government: 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 FCA, because although they are federally established and supervised, they are private entities financed with private funds. The same is true of USAC.

5. Discussion of Federal Funding in Other Contexts Is Irrelevant

Unable to cite any on-point precedent to counter the decisions that have squarely addressed the issue before the Court—both of which held that the FCA does not apply to USAC or USF, *see Shupe*, 759 F.3d 379; *Lyttle*, 2012 WL 6738242—the Justice Department collects

cases addressing unrelated legal issues that in passing refer to E-Rate as "federal." U.S. Br. 8-9 & n.7. Examining the lone case the Justice Department discusses in the text raises questions about the relevance of the cases it relegates to a footnote. U.S. Br. 8-9 & n.7. Whether the First Amendment prohibits Congress from conditioning access to E-Rate funds is distinct from whether requests for reimbursement submitted to USAC are actionable under the FCA. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 199 (2003). There is no reason to believe those unrelated cases have any relevance here. Thus, although Amtrak, "nominally a private corporation, must be regarded as a Government entity for First Amendment purposes," *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383 (1995), that does not mean that the Government "provide[s]" Amtrak's funding for purposes of the FCA. *See Totten*, 380 F.3d at 493 (Roberts, J.) (false claim to Amtrak not actionable under FCA because Government did not "provide" relevant funds). Thus, whether E-Rate is "federal" for purposes of some other legal inquiry sheds little light on the question actually before the Court.

II. USAC Is Not an Agent of the Government Under the Post-2009 FCA

In 2009, Congress amended the FCA's definition of "claim" to include any "request or demand . . . for money" that is "presented to an officer, employee, *or agent* of the United States," or is "made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, *and* if the United States Government" "provides" or "will reimburse" any portion of that money or property. 31 U.S.C. § 3729(b)(2)(A) (2012) (emphasis added). Relator's current complaint does not raise claims subject to the post-2009 FCA. Even if Relator is permitted to amend his complaint to raise post-2009 FCA claims, his action would fail because USAC is not a government "agent."

A. USAC Cannot Be the Government's "Agent" Because It Lacks Power to Bind the FCC

The FCA does not define the term "agent." "Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

"Not all relationships in which one person provides services" that another person wishes performed "satisfy the definition of agency." Restatement (Third) of Agency § 1.01 cmt. c (2006). Thus, in giving the term "agent" its "well-established and long-standing common-law meaning," federal courts have relied on the Restatement to hold that "[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. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (quoting Restatement (Second) of Agency § 12 (1958)). Those courts have explained that "proof of actual or apparent authority to act on behalf of the principal is *necessary* to establish that a person acts as an agent . . . ." *Id.* (emphasis added) (citation omitted); *accord United States v. Schaltenbrand*, 930 F.2d 1554, 1560 (11th Cir. 1991). The Government *itself* has argued elsewhere that the power to bind is an essential aspect of being a governmental "agent." *See Cent. Freight Lines, Inc. v. United States*, 87 Fed. Cl. 104, 110 (2009).

In other contexts, Congress has explicitly authorized private entities to be "agents of the United States," with authority to enter into contracts that bind the Government. *See, e.g.*, 42 U.S.C. § 4071 (authorizing insurance companies to act as "fiscal agents" and obligate the United States); 12 U.S.C. § 266 (designation of state-chartered banks as "fiscal agents of the United States"). It is telling that Congress made no comparable authorization here.

USAC did not, through its actions in collecting contributions to the USF and disbursing such funds or otherwise, have the ability to affect "the legal relations between the [United States Government] and third persons.'" *O'Neill*, 220 F.3d at 1360; *Schaltenbrand*, 930 F.2d at 1560. *Farmers Tel. Co.* addressed the agency status of NECA, the parent entity of USAC that has a similar origin. 184 F.3d at 1245-46. *Farmers Telephone Co.* explained that "[a]lthough NECA was established by the FCC, its board of directors and membership consist entirely of industry participants, *see* 47 C.F.R. § 69.602, it acts *exclusively as an agent for its members*, and it has no authority to perform any adjudicatory or governmental functions," nor any "authority to issue binding interpretations of FCC regulations." *Id.* at 1245-46, 1250-51 (emphasis added) (citing 47 C.F.R. § 69.603). The court found no "evidence, statute, or regulation suggesting that NECA has the ability to bind the FCC to its interpretation of an FCC regulation, much less that NECA's interpretation is binding on all regulated entities absent a contrary FCC interpretation." *Id.* at 1251. As a result, the court held, an NECA interpretation of an FCC regulation "did not affect [the carriers'] legal rights and obligations under the pertinent FCC regulations." *Id.*

So too here. Under FCC regulations, USAC may not "make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress." 47 C.F.R. § 54.702(c). USAC's Board of Directors "consist[s] entirely of industry participants," *Farmers Tel. Co.*, 184 F.3d at 1250, as well as non-federal representatives of libraries, schools, and some state regulators. 47 C.F.R. § 54.703(b). USAC has no authority to exercise governmental functions. *See* Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 5, 112 Stat. 2382 (codified at 31 U.S.C. § 501 Note). USAC lacks authority to bind the FCC, and USAC's actions and interpretations do not affect third-party "legal rights and obligations . . . ." *Farmers Tel. Co.*, 184 F.3d at 1251.

B. USAC Does Not Act on the Government's Behalf or Subject to Its Control

USAC, like NECA, "acts exclusively as an agent for its members," which include no federal entities (*see supra* pp. 3-4), "and it has no authority to perform any . . . governmental functions." *Farmers Tel. Co.*, 184 F.3d at 1245-46 (citing *In re MTS & WATS Mkt. Structure*, 97 F.C.C. 2d 682, 755 (1983)). Accordingly, "USAC is neither an agent nor a mere conduit for [the Government]," but acts on its own account, not only in paying claims, but also in formal legal matters such as "fil[ing] its own proof of claim [in bankruptcy] as a creditor for . . . universal service obligations owed under the Telecommunications Act." *Incomnet*, 463 F.3d at 1073; *accord id.* at 1074 ("USAC is not simply holding funds in the USF as the FCC's agent").

The FCC regulations addressing USAC do not contain the kind of express designation that the entity is acting "on behalf of" the Government that courts have found necessary to render other private entities "agents" of the United States under the FCA. Under Medicare, for example, non-governmental intermediaries adjudicate claims but the Government itself ultimately provides the funds to reimburse beneficiaries for medical expenses.[14] Here, by contrast, the Government "has no ability to control the USF through direct seizure or discretionary spending," because "USAC takes legal title to the contributions it receives from carriers" and "deposits the USF into its own bank accounts," and USAC, "as administrator of the USF, has discretion over if, when, and how it disburses universal service funds to beneficiaries . . . ." *Incomnet*, 463 F.3d at 1071-73; *accord id.* at 1075-76 (USAC "takes control

[14] *See, e.g.*, 42 C.F.R. § 421.5(b) ("Intermediaries and carriers act *on behalf of* [Center for Medicare Services] in carrying out certain administrative responsibilities that the law imposes" (emphasis added)); *United States v. Aguillon*, 628 F. Supp. 2d 542, 547 (D. Del. 2009) (citing § 421.5 for proposition that reimbursement requests to Medicare carriers are presented to "an agent of the United States").

over the funds" and "decides if, when, and how it disburses funds"); *see also* U.S. Br. 18 (noting lack of authority).

Although USAC—like countless other private entities—is subject to federal regulation with respect to certain aspects of its operations, it and its parent NECA are hardly functionaries subject to the FCC's plenary control. Indeed, NECA has, in its own name, sued its purported master to challenge interpretations that adversely affected the USF. *Nat'l Exch. Carrier Ass'n, Inc. v. FCC*, 253 F.3d 1, 3 (D.C. Cir. 2001) (per curiam). There is no authority to support the sweeping proposition that any degree of federal regulation transforms a private entity into a government agent.[15] Such a rule would have radical effects given the pervasive scope of the modern federal regulatory state, potentially transforming entities Congress plainly intended to be private into "state actors," and thereby subjecting them to the very strictures—and a host of unforeseen constitutional and legal consequences—it sought to avoid.

[15] *Amicus* disagrees with *Lyttle*'s conclusion that NECA qualified as an "agent" of the Government. *Lyttle*, 2012 WL 6738242, at *18. *Lyttle* acknowledged that "agent" must be given its "ordinary . . . meaning" and that under the Restatement, an agent has authority to "bind[]" the principal. *Id.* at *16 (citation and internal quotation marks omitted). The court declined to apply those principles because "no non-governmental entity has the power to 'bind' the United States . . . ." *Id.* at *18. The court overlooked statutes such as those discussed above authorizing non-governmental entities to bind the United States. *Lyttle* also concluded that NECA acts on behalf of the FCC because FCC regulations it. The court failed to address, however, why the degree of federal regulation present here is sufficient to render NECA a government "agent."

CONCLUSION

This Court should grant the Defendant's motion to dismiss.

Dated: February 25, 2015

Respectfully submitted,

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