No. 23-1127

IN THE

Supreme Court of the United States

WISCONSIN BELL, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA
EX REL. TODD HEATH,

Respondent.

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

BRIEF IN OPPOSITION

DOUGLAS P. DEHLER
JOSEPH D. NEWBOLD
CHRISTA D. WITTENBERG
O'NEIL, CANNON, HOLLMAN, DEJONG & LAING S.C.
111 East Wisconsin Avenue, Suite 1400
Milwaukee, WI 53202

DAVID J. CHIZEWER
Counsel of Record
ROGER A. LEWIS
HARLEEN KAUR
GOLDBERG KOHN LTD.
55 East Monroe Street, Suite 3300
Chicago, IL 60603
(312) 201-4000
david.chizewer@goldbergkohn.com

Counsel for Respondent Todd Heath

329260

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The federal E-rate program provides subsidies to help eligible schools and libraries afford telecommunications and internet services. The program was established by Congress and is administered by the Universal Service Administrative Company, which acts solely pursuant to authority granted by the FCC. *See* 47 U.S.C. § 254; 47 C.F.R. §§ 54.702(b), (n). The E-rate program is funded through payments that telecommunications carriers are mandated to make into the Universal Service Fund. USAC collects money into the Fund, and may spend it solely as directed by the FCC. Prior to 2018, some of the money in the Fund—at least $100 million since the program's inception—flowed directly from the United States Treasury through the government's collection of debts, settlements, and restitution payments. Since 2018, all of the money in the Fund has been kept in the Treasury.

Before 2009, the False Claims Act defined a "claim" to include any request for money "if the United States Government *provides any portion* of the money" requested. 31 U.S.C. § 3729(c) (1986) (emphasis added). In 2009, Congress clarified the definition to also include requests for money presented to an "agent of the United States" regardless of whether the government provided any portion of the money. 31 U.S.C. § 3729(b)(2)(A)(i) (as amended effective May 20, 2009).

The questions presented are:

1. Under the False Claims Act definition of "claim," whether the government "provides any portion" of E-rate funds, given that they are collected and dispensed entirely by government mandate and a portion of the funds flow directly from the United States Treasury.

2. Under the post-2009 False Claims Act, whether requests for E-rate funds are "claims" for the additional reason that USAC acts as an agent of the United States in administering the funds.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

CONSTITUTIONAL PROVISIONS

Page

STATUTES, RULES AND REGULATIONS

Page

OTHER AUTHORITIES

Cited Authorities

Page

STATEMENT OF THE CASE

For over a decade, Petitioner Wisconsin Bell deliberately ignored a federal mandate requiring it to provide schools and libraries with favorable pricing for telecommunications services. Rather than comply, Wisconsin Bell chose to overcharge schools and libraries, especially those that most needed the favorable pricing. Because the federal government heavily subsidizes telecommunications services for schools and libraries through its E-rate program, the United States was directly harmed by Wisconsin Bell's overcharges. A unanimous Seventh Circuit decision from Judges Hamilton, Easterbrook and Lee concluded that Wisconsin Bell must stand trial under the False Claims Act for overcharging the federal E-rate program.

Now, Wisconsin Bell asks this Court to rescue it from the consequences of its decision to ignore the favorable-pricing mandate, arguing that the government did not actually provide any of the funds for its own multibillion-dollar program so as to trigger False Claims Act liability. In an attempt to obtain review, Wisconsin Bell argues there is a circuit split involving an obsolete definition of "claim" in the pre-2009 version of the False Claims Act. Wisconsin Bell is wrong, both as to the existence of a circuit split on the questions presented, and the importance of the questions beyond the narrow reach of this case. This case does not qualify for the Court's review under Rule 10(a).

First, the circuits are not in conflict on the law. Rather, as the Seventh Circuit made clear below, there were dispositive differences in the factual record and legal

arguments presented here as compared to those presented to the Fifth Circuit in *United States ex rel. Shupe v. Cisco Systems, Inc.*, 759 F.3d 379 (5th Cir. 2014). Pet. App. 23a. On the law, the circuit courts agreed that False Claims Act liability is triggered when "even a drop" of money from the United States Treasury flows to the defrauded entity. *Shupe*, 759 F.3d at 383; Pet. App 22a. The United States government demonstrated in sworn testimony below that at least $100 million in E-rate funds, far more than a drop, have flowed to the federal E-rate program directly from the United States Treasury, a fact that Wisconsin Bell did not dispute. Pet. App. 23a. By contrast, the record before the Fifth Circuit did not include any such factual showing, legal argument, or admission. As the Seventh Circuit explained, the Fifth Circuit decided *Shupe* "without the benefit of [this] critical evidence and legal arguments available to us in this case." Pet. App. 19a.

If the Fifth Circuit had been presented with the same undisputed facts, arguments and admissions establishing the flow of E-rate funds from the Treasury, there is no reason to believe it would have decided the issue differently than the Seventh Circuit. Furthermore, no other circuit court has addressed the questions presented in the 25-plus years since Congress created the E-rate program, let alone disagreed with the conclusion reached by the Seventh Circuit based on its correct application of the undisputed facts to settled law.

Second, even if there were a circuit split, it would be of little importance beyond the dispute here. This case involves a statutory definition of "claim" that Congress changed in 2009. Filed in 2008, this is a rare legacy False Claims Act case involving the E-rate program that still

turns, in part, on the statute's pre-2009 definition. As the Fifth Circuit recognized, that definition was *already* "an outdated version of the False Claims Act" when *Shupe* was decided some ten years ago. *Shupe*, 759 F.3d at 383. Furthermore, because the United States Treasury has held *all* E-rate funds since 2018, the particular issue that the Seventh Circuit and Fifth Circuit decided differently (*e.g.*, whether the Treasury provided *any* funds, even a drop) is now resolved in the affirmative beyond a shadow of a doubt for future cases. This case is a poor vehicle for testing the reach of the False Claims Act to the E-rate program, or any other government program.

This is particularly true given that, even under the pre-2009 definition, Wisconsin Bell is simply wrong, ignoring the fundamental nature of E-rate funding, which is available solely due to a government mandate to fund and implement a federal program created by Congress. The Seventh Circuit properly rejected Wisconsin Bell's tortured reasoning and did not diverge from other circuit decisions in doing so. There is no reason for this Court to revisit a decision of such narrow scope that is consistent with the law in other circuits.

The petition should be denied.

I. Factual Background

Relator Todd Heath ("Heath") alleges that Wisconsin Bell intentionally chose to disregard a clear federal mandate requiring it to give preferential pricing to schools and libraries for services funded by the E-rate program. The questions presented by Wisconsin Bell's petition ask if requests for money presented to the Fund pursuant to

the E-rate program are "claims" giving rise to potential False Claims Act liability.

Contrary to Wisconsin Bell's suggestion, E-rate is not some private charity that is generously funded by members of the telecommunications industry. It is a federal government program established by Congress to collect and distribute billions of dollars annually. The program would not (indeed, could not) exist but for the federal legislation that established it in 1996. *See* 47 U.S.C. § 254. When USAC administers E-rate funds, it unquestionably does so in furtherance of a clear governmental objective, subject to the full control of the FCC, on behalf of the United States.

Congress passed the relevant part of the Telecommunications Act of 1996 (the "Act") to speed the introduction of advanced telecommunications and information services for the benefit of schools, libraries and students across the country. *See* 47 U.S.C. § 254(b)(6). In doing so, Congress imposed the "lowest corresponding price" requirement at issue here, which mandates that participating carriers like Wisconsin Bell bill schools and libraries at rates "less than" those charged to others for "similar services." 47 U.S.C. § 254(h)(1)(B).

Under the Act, Congress required the FCC to create the E-rate program with moneys obtained from the Fund, a dedicated "Federal universal service support mechanism[ ]." 47 U.S.C. § 254(a)(1). As the United States stated below in sworn declarations, "[e]ach quarter, the FCC sets the percentage to be applied to telephone companies' interstate end-user revenues to determine the amount they *must pay* into the [Fund], or be subject to

statutory penalties and potential lawsuits by the FCC." D. Ct. Doc. 106 at 5 (Jan. 7, 2015) (emphasis added) (citing 47 C.F.R. §§ 54.709(a) and 54.713 ("The Commission may also pursue enforcement action against delinquent contributors and late filers, and assess costs for collection activities in addition to those imposed by [USAC]."). USAC is paid from the Fund "to collect all contributions and to process *on behalf of* the FCC the thousands of requests annually for subsidies by schools and libraries under the E-rate Program." *Id.* (citing 47 C.F.R. §§ 54.701, 54.702(b) and (c)) (emphasis added).

The government's sworn declarations also establish that USAC administers the Fund solely at the FCC's direction. The FCC "provides all governing regulations, audits USAC's records" using moneys from the Fund, and "makes final decisions as to applications for subsidies if USAC denies the support." *Id.* (citing 47 C.F.R. §§ 54.702(b), (c) and 54.719 ("Any person aggrieved by an action taken by a division of the Administrator . . . may seek review from the [FCC]. . . ."). "Violations of E-rate rules and false statements on E-rate forms are punishable under Title 18 U.S.C. § 1001." *Id.* at 3. *See also* 47 C.F.R. § 54.702(n) (requiring USAC to account to the government for all financial transactions as required for "federal agencies").

Further, E-rate funds are a "*permanent appropriation* accounted for in the United States' budget as federal funds." *Id.* at 13-14 (citing U.S. Government Budget for Other Independent Agencies and FCC Financial Statement Audit) (emphasis added). In 2005, the General Accounting Office confirmed that E-rate funds are "permanent indefinite appropriations" subject to the

Antideficiency Act's prohibition against government agencies making obligations beyond their budgetary resources. *See* U.S. Gov't Accountability Off., GAO 05-546T, *Telecommunications: Application of the Antideficiency Act and Other Fiscal Controls to FCC's E-Rate Program* 8-10 (Apr. 11, 2005), http://www.gao.gov/assets/120/111480.pdf.[1] Thus, the United States' declarations and submissions below establish that the Fund is "not owned by USAC"; rather, it is comprised of "federal funds, provided by the United States and dedicated to a federal mission." D. Ct. Doc. 106 at 3.

When telecommunications companies fail to make the federally mandated payments into the Fund or when moneys are improperly disbursed, and USAC is unable to collect, USAC refers carriers' E-rate debts either to the FCC or to the United States Treasury for collection. D. Ct. Doc. 112, ¶¶ 6-8 (Feb. 18, 2015); D. Ct. Doc. 113, ¶¶ 5-8 (Feb. 18, 2015). Upon referral, "the FCC and the U.S. Treasury work to collect these debts," depositing successful collections into the United States Treasury before remitting them to the Fund. D. Ct. Doc. 111 at 2-3 (Feb. 18, 2015). "Since July 2003, the FCC and the U.S. Treasury have together collected and deposited into the [Fund] approximately $50 million" from carriers' debt payments. *Id.* at 2 (citing D. Ct. Doc. 112, ¶ 9). Federal law enforcement efforts in E-rate cases have "resulted in

1. The Miscellaneous Receipts Act cited by Wisconsin Bell, Pet. at 7-8, is irrelevant to the budget and appropriations process, and, in any event, may not apply to the Fund for the simple reason that "another law," *e.g.*, the Telecommunications Act, provided for the moneys to be collected into the Fund, not into the Treasury. 31 U.S.C. § 3302(a). Moreover, Wisconsin Bell's point is moot now that all Fund moneys are held in the United States Treasury.

another $50 million being deposited into the [Fund]." *Id.* at 3 (citing D. Ct. Doc. 112, ¶ 10). "Before being deposited into the [Fund], this money was stored in U.S. Treasury accounts." *Id.* at 3 (citing D. Ct. Doc. 113, ¶ 8). In fact, since 2018, the United States Treasury has held the *entirety* of the Fund, not just the portion from collection and law enforcement efforts. Pet. at 8, n. 4.

Contrary to Wisconsin Bell's suggestion, the FCC never sought to directly administer the E-rate program. Pet. at 13. Because the Act "is silent on how the [FCC] is to administer the universal service programs, including the programs for schools and libraries and rural health care providers," the FCC originally sought to create *three* entities, USAC and two corporations, that would "carry out governmental functions in connection with the Commission's responsibilities." U.S. Gov't Accountability Office, GAO/T-RCED/OGC-98-84, *Telecommunications: FCC Lacked Authority to Create Corporations to Administer Universal Service Programs* 7, 13 (Mar. 31, 1998), bit.ly/4ciPj52. The FCC ultimately designated USAC as the permanent administrator because Congress directed the FCC to revise the structure of the universal support program to "consist of a single entity." Rep. in Response to Senate Bill 1768 & Conf. Rep. on H.R. 3579, 13 F.C.C. Rcd. 11810-11 and n.2 (1998). USAC exists solely because the FCC created it and the FCC clearly directs its conduct, with Congress' blessing.

II. Procedural History

In denying Wisconsin Bell's motion to dismiss, the district court rejected the argument that claims on the billions of dollars in the E-rate program do not involve

government funds subject to the False Claims Act, a decision the Seventh Circuit later deemed "persuasive." *United States ex rel. Heath v. Wisconsin Bell, Inc.*, 111 F. Supp. 3d 923, 926-28 (E.D. Wis. 2015); D. Ct. Doc. 126 at 3-6 (Jul. 1, 2015); Pet. App. 19a.

After discovery, Wisconsin Bell moved for summary judgment on various grounds, including a second attempt to persuade the district court to adopt its government funds argument. D. Ct. Doc. 277 at 59 (Mar. 17, 2021). The district court awarded summary judgment to Wisconsin Bell on other grounds, not reaching the funds issue anew. Pet. App. 58a.

On Heath's appeal, the Seventh Circuit reversed the award of summary judgment to Wisconsin Bell, and remanded for trial. In doing so, it rejected, *inter alia*, Wisconsin Bell's alternative ground for affirmance based on its government funds argument. Initially, the Seventh Circuit reserved for the jury the question of whether "government funds were involved in the payments at issue." *Id.* 50a. Subsequently, citing Wisconsin Bell's disclaimer of any disputed facts on the issue in its petition for rehearing *en banc*, the Seventh Circuit resolved the issue as a matter of law against Wisconsin Bell in an amended decision. *Id.* 31a. Because it is undisputed that "Treasury funds have flowed directly to the Universal Service Fund administered by USAC," the Seventh Circuit held that false claims on E-rate funds are subject to the False Claims Act as a matter of law. *Id.*

REASONS FOR DENYING THE PETITION

When the United States "provides any portion" of the money requested, including "even a drop" of United States Treasury money to the defrauded entity, False Claims Act liability arises. There is no disagreement among the circuit courts on this fundamental principle. Only the Seventh Circuit had a full record before it regarding the money that flows from the United States Treasury directly to the Fund, and it properly applied the law to these undisputed facts. The purported circuit split asserted by Wisconsin Bell is illusory.

Even if there were a split, it would be an exceedingly narrow one involving an outdated version of the False Claims Act applied to pre-2009 fraud on the E-rate program. This case is likely one of a very few cases impacted. Nor is there risk of confusion from inconsistent circuit decisions in the current E-rate marketplace; only one circuit court, the Seventh Circuit, has decided the issue under the current False Claims Act.

Finally, it is virtually axiomatic that funds collected and disbursed pursuant to Congressional mandate by a federal agency and its agent in pursuit of a clear federal governmental objective are subject to the False Claims Act. There is no reason for the Boy Scouts of America, U.S. Special Olympics, and similar organizations that receive federal funding, but are not created, controlled and administered by the United States and its agents and who are not actively collecting and distributing funds under government mandate, to be concerned about potential False Claims Act liability. For the reasons stated herein, this case is a poor vehicle for testing these settled principles.

I. The Seventh Circuit's Decision Does Not Conflict with the Decision of the Fifth Circuit, or Any Other Circuit, on the Law.

Before 2009, the False Claims Act defined a "claim" subject to statutory liability as "any request or demand . . . made to a contractor, grantee, or other recipient *if the United States Government provides any portion of the money or property which is requested or demanded*." 31 U.S.C. § 3729(c) (1986) (emphasis added). The Fraud Enforcement and Recovery Act of 2009, P.L. 111-21, amended the False Claims Act's definition of "claim" to include, *inter alia*, requests or demands *either* (i) "*presented to an officer, employee, or agent of the United States*"; *or* (ii) "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 has provided any portion of the money or property requested or demanded*." 31 U.S.C. § 3729(b)(2) (as amended effective May 20, 2009) (emphasis added).

Thus, both before and after the 2009 amendments, a "claim" subject to the False Claims Act is made whenever the federal government "provides any portion" of the money or property in question. After 2009, Congress clarified the definition of "claim" by including language relevant to this case but not to *Shupe* (which was decided under the old definition)—namely, where a request or demand for money is presented to an officer, employee, or agent of the government. The Seventh Circuit and Fifth Circuit are not in conflict on either of these bases for False Claims Act liability.

First, the circuit courts are expressly aligned in interpreting the "provides any portion" language. In its 2014 decision in *Shupe*, the Fifth Circuit held that "the Government 'provides any portion' of the money requested when the Government has given even a drop of treasury money to the defrauded entity." *Shupe*, 759 F.3d at 383 (citing *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295, 303-04 (4th Cir. 2009) and *United States ex rel. Shank v. Lewis Enterprises, Inc.*, No. 04-CV-4105, 2006 WL 1207005, at *7 (S.D. Ill. May 3, 2006)). In the decision below, the Seventh Circuit expressly followed *Shupe* in holding that "[t]he portion need not be large. Even 'a drop of treasury money' given to the defrauded entity will establish liability under the False Claims Act." Pet. App. 22a (citing *Shupe*, 759 F.3d at 383). Wisconsin Bell entirely fails to acknowledge that the two decisions actually agree on this fundamental legal principle.

The Seventh Circuit explained that the Fifth Circuit did not have "the benefit of critical evidence and legal arguments" in deciding *Shupe*, Pet. App. 19a, and this difference negated any conflict between the decisions:

> The details are set forth in the briefs and supporting affidavits from FCC and USAC financial officials supplementing the United States' statement of interest. See ECF 111, 112, & 113. Over years relevant to this case, from 2003 to 2015, the Universal Service Fund received more than $100 million directly from the U.S. Treasury: approximately $50 million in collections of delinquent debts to the Fund, along with penalties and interest,

> and another $50 million in settlements and criminal restitution payments collected by the Treasury. Wisconsin Bell has not raised any factual dispute on this point.
>
> The $100 million means that some portion of the Universal Service Fund is comprised of government funds. That means that fraudulent claims on the Fund were "claims" within the meaning of the False Claims Act under both the pre and post 2009 statutory definitions of a "claim." ***This reasoning does not conflict with the reasoning of Shupe, which acknowledged the "any portion" language and cases, 759 F.3d at 383–84, but apparently without having learned about the $100 million in the Universal Service Fund that came directly from Treasury accounts.***

Pet. App. 23a (emphasis added).

Given that the Fifth Circuit did not have the "benefit" of the "critical evidence" submitted in this case, *id.* 19a, the fact that the circuits came out differently does not establish a circuit split; rather, the courts simply applied identical legal reasoning to different facts. Indeed, the Fifth Circuit suggested that if E-rate funds *do* come from the Treasury, this fact alone would be sufficient to subject claims submitted to the E-rate program to the False Claims Act. *Shupe*, 759 F.3d at 383 ("[E]ven a drop of treasury money to the defrauded entity" is sufficient). The Seventh Circuit agreed, holding that the undisputed fact that "the U.S. Treasury provides a portion of the funds" comprises one of three independent "paths" for

applying the False Claims Act to claims made on the E-rate program. Pet. App. 22a-23a.

A second point of departure from *Shupe* identified by the Seventh Circuit resulted from the difference in temporal scope between the two cases. Again, this did not involve any conflict in legal reasoning, or create a circuit split. The Seventh Circuit held that "[t]he 2009 amendment to reach fraudulent claims submitted to agents of the federal government applies at least to Heath's claims of fraud subject to that amendment because the USAC acts as an agent of the federal government." Pet. App. 30a. The Fifth Circuit in *Shupe* did not address the 2009 amendment, or the "agent" prong first introduced within it, because that case only involved the pre-amendment definition, an "outdated version of the False Claims Act." 759 F.3d at 383. Wisconsin Bell acknowledges as much. Pet. at 18 ("[T]he Fifth Circuit was applying the pre-2009 version of the [False Claims Act], which didn't contain the 'agent of the United States' language. . . ."). The post-2009 definition applies here because, unlike in *Shupe*, some of the false claims at issue were submitted after 2009. Pet. at 9 n.5. The Seventh Circuit's holding that USAC is an "agent of the federal government," a second path to False Claims Act liability identified by the court, was thus not even addressed in *Shupe*, let alone in conflict with the Seventh Circuit.[2] Pet. App. 25a, 30a.

2. In *Shupe*, the Fifth Circuit considered whether USAC is itself "a government entity" under the pre-2009 definition, *i.e.*, "[t]he relevant version of § 3729(a)" in *Shupe*. 579 F.3d at 387. It found that USAC is not "the government" for this purpose. *Id.* at 385-87. But that is an entirely different question than the one prompted by the new prong in the post-2009 definition: whether an organization like USAC is "an agent" of the government, an issue

Finally, the Seventh Circuit found a third point of departure from *Shupe*, and a third independent path to liability. The Seventh Circuit held that the government "provides" funds to a defrauded entity under the False Claims Act whether the funding is provided directly or indirectly, "straightaway" or "in less direct ways." Pet. App. 30a. Even if the E-rate program did not directly receive Treasury funds, the Seventh Circuit held that "the federal government can be deemed to 'provide' money for purposes of the False Claims Act by maintaining an active role in its collection and distribution, as is the case here." *Id.* 30a-31a (citing False Claims Act cases and authority, including the Second Circuit's decision in *United States ex rel. Kraus v. Wells Fargo & Co.*, 943 F.3d 588 (2d Cir. 2019), which post-dates *Shupe).*

This point does not conflict with *Shupe*, either. In *Shupe*, the Fifth Circuit was under the incorrect impression from the sparse record before it that government funds are entirely "untraceable" to the E-rate program. It limited its discussion to programs "that do not receive federal funds" at all. *Shupe*, 759 F.3d at 384.

None of the other circuit decisions cited by Wisconsin Bell conflict with the Seventh Circuit's decision on these issues. Rather, the Third Circuit and Eighth Circuit addressed fraud on programs where no money whatsoever flows from the United States Treasury, and the government does not maintain an active role in collection and distribution of funds, unlike the federal E-rate program. Pet. at 19-21. *See*, *e.g.*, *United States ex*

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that the Fifth Circuit did not consider, and the Seventh Circuit resolved correctly.

rel. Sanders v. American-Amicable Life, 545 F.3d 256, 259 (3d Cir. 2008) (insurance fraud impacting military service members' pay checks not subject to False Claims Act); *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 184 (3d Cir. 2001) (false legal bills submitted in U.S. Bankruptcy Court to be paid by bankrupt entities not subject to False Claims Act); *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998) (no False Claims Act liability for fraud on a private trust fund that "had no nexus to the United States" and "[n]o federal funds were ever intermingled with that fund").

In *Wells Fargo*, the Second Circuit actually found False Claims Act liability where the Treasury did *not* touch the funds in the federal program (an emergency loan program administered by Federal Reserve Banks). 943 F.3d at 602. The Seventh Circuit did not diverge from the Second Circuit in *Wells Fargo*, as Wisconsin Bell contends, but followed it. Pet. App. 29a ("[I]n *Wells Fargo* and here, the government's fingerprints appear at almost every step leading up to those funds being made available. . . . [A]n entire statutory and regulatory scheme designed to distribute funds through a federal program is sufficient [under the False Claims Act.]").

Accordingly, there is no conflict between the decisions of the Seventh Circuit and Fifth Circuit, or any other circuit court, to justify this Court's review under Rule 10(a).

II. Even if There Were a Circuit Split, the Question of Whether Claims on the E-Rate Program Are Subject to the Pre-2009 False Claims Act Is Narrow, Outdated and of Little Significance Outside This Dispute.

If there is a conflict between the circuits, it is cabined to the pre-2009 definition of "claim" in the False Claims Act as applied to the E-rate program specifically. These restrictions limit the universe of actions potentially impacted by the supposed conflict to very old False Claims Act cases involving fraud on the E-rate program. There are unlikely to be more than a few such cases, including this one, pending anywhere on the federal docket. Limitations periods have long-since run on any new False Claims Act actions arising from the pre-2009 period. *See United States ex rel. Hunt v. Cochise Consultancy*, 587 U.S. __, 139 S. Ct. 1507, 1510 (2019) (under the limitations provisions of the False Claims Act, 31 U.S.C. § 3731, no action may be brought more than 10 years after the alleged violation).

Congress' addition of the new language in the 2009 amendments—clarifying that requests or demands submitted to *agents* of the government give rise to FCA liability—makes *Shupe*'s ruling (based on the old pre-2009 FCA definition) even less meaningful. In *Shupe*, the Fifth Circuit did not consider the post-2009 definition of "claim," so it never reviewed USAC's status as an "agent" in the context of the new statutory language. In contrast, the Seventh Circuit carefully examined the nature of USAC's delegated authority (as outlined in FCC regulations) and properly determined that USAC is acting as an agent of the FCC when it collects, deposits, and disburses E-rate

funds on behalf of the FCC to implement the multibillion-dollar federal E-rate program.[3] No future False Claims Act case involving the E-rate program will need to look to *Shupe* for guidance when only the Seventh Circuit's decision has applied the current definition of "claim" to this federal program.

Moreover, as Wisconsin Bell acknowledges, since 2018, the entirety of the Universal Service Fund has been collected into and distributed from the United States Treasury, including all $4.5 billion available for distribution in 2024. Pet. at 8, n.4 (citing D. Ct. Doc. 277-1 at 2); 28. Any court reviewing the *current* operation of the E-rate program in a False Claims Act case will find that the federal government provides at least "a drop" of E-rate funds given that the United States Treasury now provides *every single dollar distributed by the program*.

Indeed, *Shupe*'s reach has proved to be narrow. While the Fifth Circuit predicted ten years ago that "the rule extracted from our opinion will influence the reach of the False Claims Act current and past" because the "provides

3. The Seventh Circuit's finding that USAC is an agent of the government under the "agent of the United States" prong is supported by the jurisprudence of other circuits. The Seventh Circuit expressly followed *Wells Fargo*'s interpretation and application of the three-factor test for agency, holding that the Act and FCC regulations "leave no room to deny that the FCC controls the USAC." Pet. App. 24a-25a (citing *Wells Fargo*, 943 F.3d at 598 ("Federal Reserve Banks extended emergency loans to banks as 'agents of the United States' within meaning of False Claims Act")). Because "[a]ll of the USAC's actions are subject to the ultimate control of the principal, the FCC, acting as a part of the United States government," USAC is "an agent of the federal government." Pet. App. 25a.

any portion" language appears in both the "outdated" and "now amended" statute, 759 F.3d at 383, only a handful of False Claims Act decisions have cited *Shupe*, and none since 2018 (other than decisions in this case).

Among the few that did, one was the rare E-rate case with pre-2009 roots. *See United States ex rel. Futrell v. E-Rate Program, LLC*, No. 4:14-CV-02063-ERW, 2017 WL 3621368, at *4 (E.D. Mo. Aug. 23, 2017) (rejecting *Shupe* and following the district court's decision in *Heath*, "The Court concludes the money in the E–Rate Program was *provided* to the program by the Government and is protected by the FCA.") (emphasis added). Another simply cited *Shupe*'s non-controversial "even a drop" language that was adopted, not disagreed with, by the Seventh Circuit here. *See United States ex rel. Wuestenhoefer v. Jefferson*, 105 F. Supp. 3d 641, 668, 676 (N.D. Miss. 2015). While the district court in the *Wells Fargo* litigation cited *Shupe* in two early decisions, both decisions were subsequently reversed by the Second Circuit without reference to *Shupe*, further demonstrating its limited reach. *See United States ex rel. Kraus v. Wells Fargo & Co.*, 117 F. Supp. 3d 215, 227 (E.D.N.Y. 2015), *reversed by Bishop v. Wells Fargo & Co.*, 870 F.3d 104 (2d Cir. 2017); *United States ex rel. Kraus v. Wells Fargo & Co.*, No. 11 CIV. 5457 (BMC), 2018 WL 2172662, at *8 (E.D.N.Y. May 10, 2018), *reversed by Wells Fargo*, 943 F.3d at 602.

Nor is this case a proper vehicle for testing the Seventh Circuit's decision on issues outside the purported circuit split. The Seventh Circuit held that the False Claims Act should apply if "an entire statutory and regulatory scheme designed to distribute funds through a federal program" is implicated, even where no Treasury funds are involved.

Pet. App. 29a. This case would be a particularly poor one for testing this principle, as it is undisputed that United States Treasury funds *are* provided directly to the E-rate program.

Regardless, the Seventh Circuit's point is consistent with other circuit court decisions and the settled law of this Court. For decades, this Court has warned against the False Claims Act being construed narrowly, *United States v. Neifert-White Co.*, 390 U.S. 228, 232-33 (1968), and has recognized that the False Claims Act "does not make the extent of [government funds'] safeguard dependent upon the bookkeeping devices used for their distribution." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943), *superseded by statute on other grounds*, FCA of 1943, ch. 377, 57 Stat. 608, 609, *as recognized in Schindler Elevator Corp. v. Kirk*, 563 U.S. 401 (2011).

For example, false claims for United States Postal Service funds are protected by the False Claims Act even though the Postal Service is a "self-funding" agency whose money does not pass through the United States Treasury. *See*, *e.g.*, *United States v. Hicks*, No. 05-4189-GPM, 2008 WL 1990436, at *2-3 (S.D. Ill. May 5, 2008) (citing *Baker v. Runyon*, 114 F.3d 668, 670 (7th Cir. 1997)). Even though the Federal Housing Administration is self-sufficient and its funds are raised from, and paid to, premium-paying homeowners without any assistance from the United States Treasury, the False Claims Act applies to fraudulent inducement of FHA insurance payments. *See*, *e.g.*, *United States v. Eghbal*, 548 F.3d 1281 (9th Cir. 2008); *United States v. Hibbs*, 568 F.2d 347 (3d Cir. 1977). Claims for payment from the federal Medicare program are actionable under the False Claims Act even though

private taxpayers pay mandatory contributions into the Medicare Trust Fund, a non-Treasury account, and the government routinely dispenses those funds to private insurance companies for payment to other private parties (healthcare providers). *See*, *e.g.*, *United States v. Mackby*, 261 F.3d 821, 824-26 (9th Cir. 2001) (explaining Medicare payment structure and noting that it is undisputed that a claim for Medicare payment triggers the False Claims Act). *See also Wells Fargo*, 943 F.3d at 602 (citing the district court decision in *Heath* in holding that "the FCA nowhere limits liability to requests involving 'Treasury Funds'"). That the federal E-rate program receives funds *directly* from the United States Treasury unlike the entities in these cases makes the application of the False Claims Act even more clear.

Simply put, when requesting funds from a multibillion-dollar government program created by Congress to fulfill a federal objective, intentionally overcharging that program subjects the requestor to False Claims Act liability. Every dollar claimed falsely is a dollar lost to the government objective mandated by Congress. Overcharging the Fund is no more "revenue neutral" to the government than overcharging any other program established by Congress under federal control and administration. If E-rate funds merely "pass through" the Treasury to the Fund, as Wisconsin Bell claims, so too do *all* tax revenues that reside, temporarily, in the United States Treasury before appropriation to government programs.

Wisconsin Bell knowingly overcharged and caused claims to be paid from the federal E-rate program in excess of mandatory pricing limits, thereby reducing the availability of limited E-rate funds for lawful claimants. The Seventh Circuit correctly decided that Wisconsin Bell should face a trial under the False Claims Act under these circumstances. Its narrow opinion concerning overcharges to the federal E-rate program does not expand the reach of the False Claims Act. Review is not warranted.[4]

4. In its Petition, Wisconsin Bell mentions "separation of powers concerns," and refers to Articles II and III of the United States Constitution. *See* Pet. at 30. These arguments were not made in the district court or the Seventh Circuit (until Wisconsin Bell first raised them in its motion for rehearing *en banc*), and were not addressed by either court. Accordingly, such issues would not be properly before the Court even if Wisconsin Bell's petition were granted. *See* Sup. Ct. Rule 15; *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 38 (2015) ("Absent unusual circumstances—none of which is present here—we will not entertain arguments not made below.").

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

Douglas P. Dehler
Joseph D. Newbold
Christa D. Wittenberg
O'Neil, Cannon, Hollman,
DeJong & Laing, S.C.
111 East Wisconsin Avenue,
Suite 1400
Milwaukee, WI 53202

David J. Chizewer
Counsel of Record
Roger A. Lewis
Harleen Kaur
Goldberg Kohn Ltd.
55 East Monroe Street,
Suite 3300
Chicago, IL 60603
(312) 201-4000
david.chizewer@
goldbergkohn.com

Counsel for Respondent Todd Heath

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