No. 23-1127

IN THE

Supreme Court of the United States

WISCONSIN BELL, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL. TODD HEATH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether reimbursement requests submitted to the E-rate program are "claims" under the False Claims Act.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus curiae in important False Claims Act cases. *See, e.g.*, *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419 (2023); *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016).

WLF's Legal Studies Division also regularly publishes papers on FCA issues. *See, e.g.*, Stephen A. Wood, Res Judicata *in* Qui Tam *Litigation: Why Government Should Be Bound by Judgments in Non-Intervened Cases*, WLF WORKING PAPER (Apr. 22, 2021); Douglas W. Baruch et al., *In False Claims Act Cases, Government Must Provide Full Discovery Regarding Materiality*, WLF LEGAL OPINION LETTER (Dec. 6, 2018).

INTRODUCTION

The FCA has taken on a life of its own in recent years. Enacted during the Civil War, the statute began as an important, but limited, tool against government procurement fraudsters and wartime opportunists. Today, the opportunists are often not the targets of the statute, but rather its putative enforcers: enterprising relators have weaponized the FCA into a vehicle for debilitating lawsuits over just

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* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission.

about anything that arguably touches—even remotely—the federal fisc.

Companies operating in the shadow of the FCA's "essentially punitive" treble-damages regime face a constant threat of "open-ended liability" without fair notice of the legal requirements they are claimed to have violated. *Escobar*, 579 U.S. at 182, 192. The Court has therefore warned that, in the FCA context, respect for basic due process demands "strict enforcement" of the FCA's "rigorous" requirements. *Id.* at 192.

Here, an opportunistic relator who tried to get Federal Communications Commission officials imprisoned for agreeing with Wisconsin Bell's interpretation of the lowest corresponding price regulation sued for alleged FCA violations. His arguments conflicted with the FCA's plain text, which shows that Wisconsin Bell did not submit any "claims" to the United States. Still, the Seventh Circuit agreed with the relator. Because that decision is wrong, this Court should reverse and help Americans retain access to key telecommunications services.

STATEMENT

I. STATUTORY FRAMEWORK

For the past 28 years, the Schools and Libraries Universal Service Support (E-rate) program has provided eligible schools, libraries, and consortia with discounted telecommunications services. During the relevant timeframe, the program was funded entirely by telecommunications providers through the

Universal Service Fund. The Universal Service Administrative Company—a private corporation—administers the Fund. This includes managing the application process, disbursing funds, and ensuring regulatory compliance.

USAC disburses funds in two ways. First, recipients may pay a provider's bill and then seek reimbursement from USAC. Second, recipients may pay a provider the discounted rate and then have the provider seek reimbursement from USAC.

Congress sometimes forces telecommunications carriers to "provide [eligible] services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties." 47 U.S.C. § 254(h)(1)(B). This means they must charge "the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services." 47 C.F.R. §§ 54.500, 54.511(b). There are, however, no black-and-white rules when deciding whether customers and eligible recipients are similarly situated. In fact, the FCC has repeatedly declined requests to clarify that regulatory requirement.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Todd Heath learned about the E-rate program while running two companies that assisted schools with their telecommunications billing. He began accusing providers, including Wisconsin Bell, of not complying with the price requirement. Over the past

fifteen years, he has filed hundreds of "frivolous" complaints against Wisconsin Bell and other providers. *Cf.* Letter from Lynn L. Dorr, Sec'y, Pub. Serv. Comm'n of Wisc., to Allan J. Kehl, Cnty. Exec., Kenosha Cnty., (Feb. 20, 2003) (describing Heath's interpretation of the lowest corresponding price provision as "frivolous").

Having convinced no government that it was being overcharged by Wisconsin Bell and other companies, Heath then began accusing the government of fraud. He even claimed that FCC officials "should be indicted for crimes against the American people[and] stripped of their position and all future benefits." The Tele. Co., Reply Comment Letter on Modernizing the E-Rate (Oct. 17. 2013), https://perma.cc/P94C-MVPH. Besides trying to get FCC officials thrown in jail, Heath sued Wisconsin Bell and others under the FCA. The District Court granted Wisconsin Bell summary judgment, finding that no genuine issue of material fact existed about falsity or scienter.

The Seventh Circuit reversed. It found genuine issues of material fact on both falsity and scienter. It also declined to affirm on the alternative basis that Heath failed to prove materiality. The Seventh Circuit reasoned that E-rate reimbursement requests submitted to USAC are "claims" for FCA purposes. This holding openly split with the Fifth Circuit's decision in *United States ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379 (5th Cir. 2014) (per curiam). This Court granted certiorari to resolve the circuit split.

SUMMARY OF ARGUMENT

I.A. Affirming the Seventh Circuit's decision would harm disabled Americans. Relay services that help disabled people communicate are structured similarly to E-rate. Under the Seventh Circuit's decision, claims for reimbursement by relay service providers could lead to FCA liability, which would decrease the supply of companies willing to offer those crucial services and increase the cost of providing relay services.

B. Disabled Americans would not be the only ones injured if this Court affirms. Poor and rural Americans would also suffer. USAC administers three other programs that are covered by the FCA under the Seventh Circuit's decision. Companies that provide telecommunication services for rural residents, rural health care providers, and low-income consumers would all be open to FCA liability. This would lead to higher costs for the programs as businesses increase their bids to offset the potential for FCA liability.

C. Under the Seventh Circuit's reasoning, Fannie Mae and Freddie Mac are perhaps agents of the United States for FCA purposes. This means that innocent homebuyers and lenders could face possible FCA liability for one error on a form. This would raise mortgage costs for all Americans and place homeownership out of reach for many Americans.

II. The FCA has been on the books for over 160 years. That whole time, it has covered only fraud that costs the government money. Here, Wisconsin Bell's alleged fraud did not cost the treasury a penny. Yet

the Seventh Circuit said that does not matter and that Wisconsin Bell could face treble damages and criminal liability. This Court should reject that holding, which departed from the FCA's text and history.

ARGUMENT

I. AFFIRMING WOULD HAVE DEVASTATING CONSEQUENCES FOR UNDERSERVED AMERICANS.

The Court's answer to the question presented will have wide-ranging implications for services provided to all Americans. But affirming would hurt underserved Americans the most. First, the test for whether the United States "provides" funds has wide-ranging implications for many programs that provide key services to underserved Americans. Second, who is an agent of the United States for FCA purposes will affect how the housing market operates across the country. This Court should not upend services for Americans by interpreting the FCA in a way that conflicts with both its text and history.

A. Affirming Would Injure Disabled Americans.

Many older Americans remember seeing some payphones with special keyboards attached. These were not used to tweet or text a friend. Rather, they were integral to ensuring that "hearing-impaired and speech-impaired persons in the United States" could communicate using telecommunications devices "to the extent possible and in the most efficient manner." 47 U.S.C. § 225(b)(1). Congress created

telecommunications relay services—"telephone transmission services that provide the ability for" hearing-impaired and speech-impaired individuals "to engage in communication by wire or radio with one or more individuals, in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio." *Id.* § 225(a)(3).

There are at least nine types of relay services. Each service caters to people with different disabilities or different communications preferences:

- Text-to-voice — A disabled person calls an operator who "then makes a voice telephone call to the other party to the call, and relays the call back and forth between the parties by speaking what a text user types, and typing what a voice telephone user speaks." *Telecommunications Relay Service – TRS*, FCC, https://perma.cc/6RCM-H4WJ.

- Non-English language relay services — The same as text-to-voice but in Spanish, French, or another foreign language. *See id.*

- Voice carry over — Used mainly by senior citizens, "a person with a hearing disability" calls the operator and speaks directly to the other party while the operator provides text responses. *Id.*

- Hearing carry over — Those with speech disabilities call an operator and type their parts of the conversation, which the operator

relays to the other party. The other party then speaks normally to the caller. *See id.*

- Speech-to-speech — A person with a speech disability calls an operator who "repeats what the caller says in a manner that makes the caller's words clear and understandable to the called party." *Id.*

- Captioned telephone service — People with limited hearing "use[] a special telephone that has a text screen to display captions of what the other party to the conversation is saying." *Id.* Unlike voice carry over, the operator "repeats or re-voices what the called party says. Speech recognition technology automatically transcribes the [operator's] voice into text, which is then transmitted directly to the [caller's] captioned telephone text display." *Id.*

- Internet protocol relay service — The same as text-to-voice except that the disabled person uses the internet to communicate with the operator rather than a traditional phone. *See id.*

- IP captioned telephone service — This system uses the internet so hearing-impaired individuals can "both listen to, and read the text of, what the other party in a telephone conversation is saying." *Id.*

- Video relay service — Designed for those who use American Sign Language, the caller communicates with the operator using ASL.

> The operator then speaks with the other person, relaying the caller's messages. *See id.*

These different types of relay service are the only way that many Americans can communicate with others. Because the disabilities that require using a relay service are highly correlated with other disabilities, many users are unable to leave their abodes. The relay services provide them with their main means of outside communication.

Relay services are critical to the disabled community. In June 2024, the TRS Fund paid for an estimated 57,867,000 minutes of relay services. *See Interstate TRS Fund Performance Status Report: June 2024*, Rolka Loube Saltzer Assocs., https://perma.cc/PDP2-BXHK. This means that relay services were provided for the equivalent of over 964,000 hours or over 40,000 days. Assuming that each operator is working 40 hours per week, it means that it required the equivalent of over 6,000 full-time workers to fulfill the need. And because the operators need a break and there are maximum answering times for the different relay services, the actual number of operators employed by relay-service providers is much higher.

Many of the disabled individuals who rely on relay services would be unable to afford the high costs associated with providing those services, which can run over $400 per hour. *See Interstate TRS Fund Performance Status Report*, *supra*. But cost is not a barrier for those needing relay services.

Users need not pay to use relay services. Rather, "[r]elay providers recover their costs from a

fund, called the 'TRS Fund,' to which all interstate telecommunications providers contribute." *Lyttle v. AT&T Corp.*, 2012 WL 6738242, *2 (W.D. Pa. Nov. 15, 2012) (citing 47 U.S.C. § 225(d)(3)(B); 47 C.F.R. § 64.604(c)(5)(iii)), *adopted*, 2012 WL 6738149 (W.D. Pa. Dec. 28, 2012). That fund is administered by Rolka Loube, a private company. This structure is much like the E-rate program. The only difference is that Rolka Loube—not USAC—controls the money via a direct payment to the providers.

"[P]roviders submit monthly requests for reimbursement for the total number of minutes of each type of TRS service that they provided in the prior month," certifying that "minutes submitted to [Rolka Loube] for compensation were handled in compliance with section 225 of the Communications Act and the [FCC's] rules and orders." *Lyttle*, 2012 WL 6738242 at *2 (cleaned up). This process is like the E-rate program. The only difference is that rather than certifying the lowest corresponding price, the provider is certifying compliance with a different regulatory requirement.

Given this statutory framework, the *Lyttle* court held that when "money [i]s put into a fund and taken out of it by private parties," the United States does not "provide" that money for FCA purposes. 2012 WL 6738242 at *21. The court reached this holding despite the United States's "requir[ing] that such money be paid" and the program's being "included in the federal budget." *Id.* Still, the *Lyttle* court applied incorrect reasoning like the Seventh Circuit's here and held that Rolka Loube is an agent of the United States because it "collect[s] and disburse[s] TRS funds on behalf of the FCC, pursuant to federal law and

act[s] on the FCC's behalf and subject to its control." *Id.* at *18.

Like USAC, Rolka Loube cannot bind the United States when it comes to disposing of federal funds. Similarly, both USAC and Rolka Loube are not subject to the government's day-to-day control. As Wisconsin Bell persuasively explains (at 35-42), both are necessary for an entity to be an agent of the United States.

There is no meaningful daylight between the TRS Fund's administration and the E-rate program's. So if this Court affirms, any provider that incorrectly certifies to Rolka Loube that it is complying with the FCC's relay service regulations can face FCA liability for submitted claims. That means both treble civil damages and criminal liability.

The few companies that provide most of the relay services in America will have to choose between two options, if this Court affirms. First, the companies may choose to exit the relay services market. This will mean that disabled Americans will lack access to a key communications tool. Second, the companies may just require higher reimbursement rates to compensate for the risk of treble FCA damages. As noted above, these funds come from telecommunications providers. So if relay service providers require higher reimbursement rates to continue operating, that will mean higher bills for all Americans. In short, affirming the Seventh Circuit's decision will only help the plaintiffs' bar while hurting disabled Americans and the pocketbooks of all Americans.

B. Affirming Would Injure Poor And Rural Americans.

Besides the E-rate program, USAC administers three other funds. Under the Seventh Circuit's reasoning, requests for reimbursement for all three programs are "claims" for FCA purposes. This greatly expands the potential for FCA liability far beyond what Congress intended.

1. Congress decided that "[c]onsumers in all regions of the Nation, including * * * those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications." 47 U.S.C. § 254(b)(3). This means that rural consumers must be able to obtain "services[] that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." *Id.*

To comply with this directive, the FCC established the High Cost Fund, which "provided direct financial support to telecommunications providers in areas where local rates would otherwise be unaffordable for some consumers." Daniel A. Lyons, *Narrowing the Digital Divide: A Better Broadband Universal Service Program*, 52 U.C. Davis L. Rev. 803, 819 (2018) (cleaned up). The High Cost Fund eventually transitioned to a program that distributes money through at least sixteen different funds.

Funding for the High Cost Program comes from the same pool of money used for E-rate. In other

words, the High Cost Program is funded by telecommunications providers through the Universal Service Fund. And like E-rate, USAC administers all the funds under the High Cost Program.

The largest High Cost Program fund is the Connect America Fund Broadband Loop Support program (CAF-BLS). This fund allows telecommunications providers to recover any difference between costs associated with providing voice and broadband services and receipts for providing those services.

CAF-BLS helps many Americans obtain affordable telephone and broadband services. For example, in 2023 alone telecommunications providers got reimbursed for deployments at 1,228,412 locations. *See Connect America Fund Broadband Map*, USAC, https://perma.cc/44BJ-PTMP.

Unlike the E-rate program, there is no option for consumers to pay the full cost of the broadband services that they receive and then request reimbursement from USAC. Instead, providers receive the funds after providing the necessary services and filing the necessary paperwork with USAC.

CAF-BLS is expensive. In 2023, for example, it cost over $1.133 billion to subsidize services at the 1,228,412 locations nationwide. *See Connect America Fund Broadband Map*, *supra*. That is over $922 per location for the year, or more than $75 per month for each location. Thus, the potential damage under the Seventh Circuit's decision here is enormous.

If this Court adopts Heath's argument, telecommunications providers could face treble damages for all reimbursements under CAF-BLS. Of course, companies would not bear the risk of these treble damages alone. Rather, they would pass on the increased cost to consumers. This could mean that all Americans would face higher telephone and internet bills. Plaintiffs' lawyers may not feel the sting of a higher bill, but rural consumers would feel the pinch of the rising costs.

2. Besides making telecommunications services available in rural areas, Congress also requires that services be made available to "low-income consumers." 47 U.S.C. § 254(b)(3). To comply with this directive, the FCC established the Lifeline Program, which provides direct financial support to telecommunications providers who give discounted services to low-income individuals.

Lifeline's funding comes from the same pool of money used for E-rate. In other words, Lifeline is funded by telecommunications providers through the Universal Service Fund. And like E-rate, USAC administers Lifeline.

Lifeline is even bigger than CAF-BLS. In the first quarter of 2024, providers received direct financial assistance to help 3,075,987 poor individuals receive telecommunications services. *See Lifeline National Verifier Quarterly Eligibility Data*, USAC, 5, https://perma.cc/AQ8X-EVRN.

Given that so many Americans participate in Lifeline, almost every Lifeline provider errs and seeks reimbursement for at least one ineligible individual.

Under the Seventh Circuit's rule, these providers face treble damages and criminal penalties for every violation of the Lifeline regulations. *Cf.* 47 C.F.R. § 54.420(a) (requiring providers seek reimbursement only for services used by eligible individuals).

Again, if providers confront the possibility of treble damages and criminal prosecution for errantly seeking reimbursement for people ineligible for Lifeline, they must factor that liability exposure into their pricing. This would mean higher rates for all Americans, and the possibility that poorer Americans would be unable to afford their discounted bills. There is no reason for this Court to adopt an atextual reading of the FCA that would harm our country's most vulnerable.

3. Finally, Congress directed that telecommunications providers must "provide telecommunications services which are necessary for the provision of health care services * * * to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State." 47 U.S.C. § 254(h)(1)(A). Telecommunications providers are "entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation." *Id.*

Rural health care providers solicit bids for services and then award the bids based on FCC-mandated criteria. *See* 47 C.F.R. § 54.622. The rural

health care provider pays the prevailing urban rate in that State. Service providers can then recover the difference between the prevailing rural rate and the prevailing urban rate from the Rural Health Care Fund. *See id.* § 54.606(a).

The funding for the Rural Health Care Fund comes from the same pool of money used for E-rate. In other words, the Rural Health Care Fund is funded by telecommunications providers through the Universal Service Fund. And like E-rate, USAC administers the two programs under the Rural Health Care Fund. Service providers invoice USAC for the difference calculated under Section 54.606(a).

In fiscal year 2023, USAC received over 43,000 requests for disbursements from the Rural Health Care Fund. *See RHC Commitments and Disbursements*, USAC, https://tinyurl.com/pe82nzxm (last visited Aug. 15, 2024).

As with the E-rate program, an error in submitting an invoice could lead to FCA liability if this Court affirms. That includes both treble civil damages and criminal penalties. The unavoidable result of this potential liability is fewer bidders. The lack of bidders for these services is already a problem. Over half of the requests for disbursement during fiscal year 2023 had either 0 or 1 bidder. *See RHC Commitments and Disbursements*, *supra*. If the Court affirms, that number would significantly increase as fewer companies would be willing to bid to provide telecommunications services to rural health care providers.

Fewer bidders means that USAC would have to pay more for the services because there would be no competition. The increased cost would mean higher charges for all telecommunications providers. Of course, the telecommunications providers would have to raise rates to cover their increased contribution to the Fund. Again, this may not affect the large hospital conglomerates, but it would hurt small, rural healthcare providers.

C. Affirming Would Make Homeownership Impossible For Many Americans.

The Seventh Circuit's decision stretches far beyond government programs like Lifeline or relay services. Under its definition of "agent," any claim submitted to Fannie Mae or Freddie Mac is also covered by the FCA.

"Fannie Mae and Freddie Mac are two of the Nation's leading sources of mortgage financing. When the housing crisis hit in 2008, the companies suffered significant losses, and many feared that their troubling financial condition would imperil the national economy." *Collins v. Yellen*, 594 U.S. 220, 226 (2021). To assuage these concerns, Congress "created the Federal Housing Finance Agency (FHFA), an independent agency tasked with regulating the companies and, if necessary, stepping in as their conservator or receiver." *Id.* at 226-27 (cleaned up). FHFA "is tasked with supervising nearly every aspect of the companies' management and operations. For example, the Agency must approve any new products that the companies would like to offer. It may reject acquisitions and certain

transfers of interests the companies seek to execute." *Id.* at 230 (citations omitted).

In the Seventh Circuit's view, USAC can be an agent of the United States even if it lacks "final power to" "make policy, interpret unclear provisions of the statute or rules, [] interpret the intent of Congress," "or to alter the federal government's legal obligations." Pet. App. 25a (cleaned up). All that matters is that "[a]ll of [] USAC's actions are subject to the ultimate control of the principal, the FCC, acting as a part of the United States government." *Id.*

Again, FHFA "is tasked with supervising nearly every aspect of the companies' management and operations." *Collins*, 594 U.S. at 230. This is far more control than the FCC has over USAC. No provision of federal law allows the FCC to step in and serve as conservator or receiver for USAC if financial difficulty looms. So too for Rolka Loube and the relay service. FHFA's ability to serve as receiver or controller is the ultimate type of control. So under Heath's interpretation of the FCA, Fannie Mae and Freddie Mac are agents of the United States.

This unavoidable consequence of the Seventh Circuit's decision is wrong. As the Ninth Circuit said, "Fannie Mae and Freddie Mac are private companies, albeit companies sponsored or chartered by the federal government." *United States ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1260 (9th Cir. 2016). Thus, they are not "agents" of the United States for FCA purposes. *See id.*

The United States's amicus brief in *Adams* is also helpful. It argued that because Fannie Mae and

Freddie Mac "are not part of the federal government, * * * claims made upon [them] do not fall within the first definition of 'claim' set out in the amended FCA, which requires a request or demand be 'presented to an officer, employee, or agent of the United States.'" Br. of the United States as Amicus Curiae Supporting Neither Party at 14, *Adams*, 813 F.3d 1259 (No. 14-15031).

If this Court affirms, mortgage companies and borrowers nationwide could face treble damages and imprisonment because Fannie Mae and Freddie Mac may be agents of the United States for FCA purposes. This Court should reject this atextual and ahistorical interpretation of the FCA and hold that companies like USAC are not agents of the United States for FCA purposes.

Otherwise, it would be harder for most Americans to buy a house and make it impossible for many to live the American dream. "[T]he federal government directly or indirectly guarantee[s] about 70 percent of single-family mortgage originations." U.S. Gov't Accountability Off., GAO-19-239, *Housing Finance: Prolonged Conservatorships of Fannie Mae and Freddie Mac Prompt Need for Reform*, highlights (Jan. 2019). About 25% of mortgages are directly insured by the Federal Housing Administration, Department of Veterans Affairs, or another federal agency. *See id.* at 15. Fannie Mae and Freddie Mac insure about 61% of the remaining mortgages. *See id.* at highlights.

Some of the mortgages that Fannie Mae and Freddie Mac insure would not exist absent the government's backing. For example, Home Possible

loans are available from Freddie Mac with only 3% down. *Home Possible*, Freddie Mac, https://perma.cc/MJ7B-4RTH. And that 3% downpayment need not come from the borrower. It can "come from a variety of sources, including family, employer-assistance programs, secondary financing, and sweat equity." *Id.*

No rational company would offer competitive interest rates to a borrower who cannot put 3% down to buy a home. Yet many mortgage companies do so because Freddie Mac insures such mortgages. Home Possible loans thus allow many people to realize the American dream of homeownership. But if the mortgage companies knew that they could face treble damages and criminal penalties for an incorrect certification to Freddie Mac, they would be less likely to participate in such programs. Or if they did participate, they may offer the product to fewer customers and raise rates for some borrowers. Again, the burden would fall hardest on those who are unable to handle the increased costs.

This Court's decision will thus have broad implications far beyond the E-rate program. From allowing poor Americans to get telecommunications services to providing affordable internet for rural healthcare providers to ensuring that many Americans can become homeowners, myriad programs rely on private companies' participation. These companies would be less likely to participate in the programs if they could face treble damages and criminal penalties for small errors. The Court can avoid this mischief by applying the FCA's text as written and holding that the FCA covers only expenditures that threaten the federal fisc.

II. THE FCA'S HISTORY SHOWS THAT IT COVERS ONLY CLAIMS WHERE THE GOVERNMENT CAN LOSE MONEY.

During the Civil War, government contractors were becoming "proverbially and notoriously rich." 1 Fred A. Shannon, *The Organization and Administration of the Union Army, 1861-1865*, 54-56 (1965). The frauds they committed were brazen. For example, one huckster sold blind, useless mules to the military for $119 each—about $2,950 today. *False Claims Act Amendments: Hearings before the Subcomm. on Admin. L. and Governmental Rels. of the H. Comm. on the Judiciary*, 99th Cong. 1 (1986) (statement of Rep. Dan Glickman). And "[t]he manufacturers of Colt's revolvers had been receiving $25 for a revolver that would ordinarily sell in the open market for $14.50." *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 n.2 (N.D. Cal. 1989).

So at President Lincoln's urging, Congress enacted the FCA to help catch government procurement fraudsters and wartime opportunists. *See* False Claims Act, ch. 67, 12 Stat. 696 (1863). As the bill's sponsor explained, it was based on "the old-fashioned idea of holding out a temptation, and setting a rogue to catch a rogue." Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863) (statement of Sen. Howard). In other words, the entire purpose of the FCA was to motivate people to blow the whistle on fraud costing the government money. The purpose was not to give a windfall for those who might catch private fraud.

For the next eight decades, the FCA remained a useful tool in the government's ongoing battle against fraudsters. But when World War II arrived, a different type of problem arose—opportunistic plaintiffs. These "'[p]arasitic' suits were often brought based solely on public or quasi-public information from criminal indictments. After a criminal indictment came out, there was a rush to the Courthouse to file a civil suit and recover the qui tam bounty." *Newsham*, 722 F. Supp. at 609 n.3. So in 1943, Congress amended the FCA to ban suits based on information that the government already had in its possession. *See* Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608, 609.

The amended FCA then served our nation well for another four decades. Fraudsters were kept in check, and opportunistic plaintiffs were prevented from receiving a windfall for suing based on publicly available information. But in the 1980s Congress held detailed hearings on the FCA to determine whether it was still accomplishing its stated goals. Those hearings led to the statute's overhaul in 1986, the result of which remains the FCA's core today.

The 1986 amendments' purpose was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. 99-345, 1, *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5266. Although it was "difficult to estimate the exact magnitude of fraud in Federal programs and procurement," the spike in fraud cases against "some of the largest Government contractors" in the early 1980s led Congress to believe "that the problem [wa]s severe." *Id.* at 1-2, 1986 U.S.C.C.A.N. at 5266. For example, "[i]n 1984, the Department of

Defense conducted 2,311 fraud investigations, up 30 percent from 1982. Similarly, the Department of Health and Human Services ha[d] nearly tripled the number of entitlement program fraud cases referred for prosecution over the [prior] 3 years." *Id.* at 2, 1986 U.S.C.C.A.N. at 5267.

Of course, fraud was not just limited to those agencies. "The Department of Justice [] estimated fraud [w]as draining 1 to 10 percent of the entire Federal budget. Given the spending level in 1985 of nearly $1 trillion, fraud against the Government could [have been costing] taxpayers anywhere from $10 to $100 billion annually." S. Rep. 99-345 at 3, 1986 U.S.C.C.A.N. at 5268 (footnote omitted). Congress concluded that the reason fraud was so pervasive among government contractors was that "there [were] serious roadblocks to obtaining information as well as weaknesses in both investigative and litigative tools." *Id.* at 4, 1986 U.S.C.C.A.N. at 5269.

Congress's solution to the problem was to increase deterrence through better investigative and litigative tools. One of those tools was to increase the penalties for FCA violations from double damages to treble damages. This 50% increase in the potential penalty for fraudulent behavior, Congress thought, would help deter fraud among contractors.

The entire discussion in 1986 was about how Congress could root out fraud against the government. It was the $10 to $100 billion annually that was being diverted from the federal fisc that led Congress to enact substantial FCA amendments in 1986. Nothing in the text of those amendments or the

legislative history even hints at allowing recovery for frauds against private corporations for which the government is not liable.

Heath, however, asks this Court to allow FCA suits against companies and individuals for alleged fraud against a private corporation. Even if every allegation in his complaint is true, the government did not lose one penny because of the alleged fraud. Rather, a private company may have lost some money when it made E-rate reimbursements.

Another part of the FCA's structure also suggests that it is not meant to cover claims for which the government loses nothing. The government may intervene in an FCA suit and fully control the litigation. *See* 31 U.S.C. § 3730(b)(4)(A). This includes dismissing the suit over the relator's objection. *See id.* § 3730(c)(2)(A); *Polansky*, 599 U.S. at 438. The reason that the government can intervene and litigate a suit is because the FCA's purpose is to recover money that the government lost because of fraud. This is a continuation from the 1863 legislation, which made it the "duty" of DOJ to go after fraudsters to "recover[]" the "damages" done to the United States. False Claims Act, § 5, 12 Stat. at 698.

In sum, the entire purpose of the FCA, from the time it was enacted in 1863 until now, is to detect and deter fraud that cost the United States money. It is not meant as a way for profiteers like Heath to file parasitic suits. Congress, in fact, has disapproved of suing contractors just to recover money for relators. Yet that is exactly what the Seventh Circuit's decision here permits. This Court should not allow the FCA to be used as a tool for relators to get rich. Rather, it

should reverse the Seventh Circuit's decision and ensure that the FCA protects the federal fisc—not plaintiffs' attorneys' bank accounts.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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