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 FOR RESPONDENT

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BRIEF FOR RESPONDENT

Respondent Todd Heath respectfully urges this Court to affirm the Seventh Circuit's decision holding that requests for money from the federal E-rate program constitute "claims" under the False Claims Act.

PRELIMINARY STATEMENT

The False Claims Act (FCA) imposes civil liability on anybody who presents a false or fraudulent "claim" for payment or approval. A claim includes "any request or demand … for money or property … whether or not the United States has title to the money or property," that is 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 the "Government … provides or has provided any portion of the money or property requested or demanded." 31 U.S.C. § 3729(b)(2)(A). By these plain terms, the FCA protects federal programs however the Government structures or funds them—as long as claims are presented to a Government employee, officer, or agent, or the Government provides any portion of the money.

The E-rate program resembles other Government programs that the FCA protects. Congress and the Federal Communications Commission (FCC) created E-rate, a federal telecommunications subsidy program for schools and libraries, and funded it using the Universal Service Fund (USF), which the Government funds through mandatory levies on telecommunications carriers. Needy schools and libraries, as well as the carriers that supply them with subsidized services,

request money from the E-rate program's administrator, the Universal Service Administrative Company (USAC), which disburses USF funds on the FCC's behalf. The FCC oversees the program, which exists solely to advance a Government interest: ensuring Americans' access to telecommunications services. Fraud on the program undermines that interest.

Petitioner argues that two features take the E-rate program outside the FCA's scope. First, USF funds were held in a private account in USAC's name, as opposed to Treasury accounts. Second, the FCC ordered most (but not all) of the funds in the USF to be transferred there directly by the carriers. Petitioner thus argues that the Government did not "provide" any money to USAC, and that USAC is not the Government's "agent." To prevail, petitioner must win both arguments.

The Seventh Circuit correctly rejected these arguments by straightforwardly applying the FCA's plain text to the factual record. As the lower court recognized, the Government provides all of USAC's money because that money is only in the USF due to Government mandates, to be used for a Government program, controlled by a Government agency. The fact that the Government did not itself collect, bank, and then transfer all that money to USAC is not dispositive. Regardless, the Government *did* collect, bank, and then transfer approximately $100 million to USAC during the relevant period—"providing" money under any reasonable understanding of the term. The Seventh Circuit also correctly held that USAC—an entity appointed by the FCC to administer the USF's claims process—is an agent of the United States for FCA purposes. This Court should affirm.

STATEMENT OF THE CASE

I. Legal Background

A. The Universal Service Fund and the E-rate Program

1. In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Congress sought to promote nationwide access to telecommunications services. Pet. App. 1a-2a. The Government pursued this goal by subsidizing access in high-cost and economically disadvantaged areas using the USF, a subsidy fund created by the FCC.

The FCC created four programs within the USF, including one "to enhance access for schools and libraries to advanced telecommunications and information services," *FCC* v. *AT&T Inc.*, 562 U.S. 397, 400 (2011), "in rural and economically disadvantaged areas," Pet. App. 1a-2a. This is the E-rate program.

The E-rate program allows schools and libraries to "receive federal subsidies for 20 to 90 percent of charges on a sliding scale." Pet. App. 2a-3a (citing 47 C.F.R. § 54.505(b) & (c)). Subsidy amounts (called "discounts") are set by FCC regulation, based on three variables: (1) the type of service; (2) the percentage of students in the school or school district eligible for the national school lunch program (a proxy for economic disadvantage); and (3) whether the area is classified as rural or urban, with rural schools receiving higher discounts. *See* 47 C.F.R. § 54.505(c). Additional subsidies are available for Tribal libraries. *Id*. § 54.505(g).

Under the FCC's rules, E-rate discounts can be paid in two ways. Either the carrier can provide discounted service and then claim money from the E-rate program to make itself whole—or the school/library

can pay the carrier full price, and then claim the discount amount from the E-rate program. *See* 47 C.F.R. § 54.514(c).

2. The USF, including the E-rate program, is funded through mandatory contributions from telecommunications carriers. Congress provided that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis," to the FCC's universal service efforts. 47 U.S.C. § 254(d). The FCC, in turn, promulgated a regulation providing that "telecommunications carriers," among others, "must contribute to the universal service support mechanisms." 47 C.F.R. § 54.706(a). Contribution amounts are generally calculated "on the basis of [a carrier's] projected collected interstate and international end-user telecommunications revenues." *Id*. § 54.706(b). Every quarter, the FCC determines how much carriers must contribute based on revenue estimates in carriers' regulatory filings. *See id*. § 54.709(a); *see also* JA6. Carriers may—and most do—pass these costs on to their customers as a line item on their phone bill. *See* 47 C.F.R. § 54.712.

Independently, the Government transfers funds from the Treasury to the USF. These transfers take two forms. First, if a carrier does not timely contribute to the USF, the FCC may "pursue enforcement action," 47 C.F.R. § 54.713(c), as may the Treasury if the funds remain unpaid, JA36-37. These efforts are conducted pursuant to the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, a statute that applies to "funds … owed to the United States," 31 U.S.C. § 3701(b)(1). When collection efforts occur, it is made clear to debtors that "[t]hese unpaid amounts

are … a debt owed to the United States." JA36 & n.3. Although the procedures varied slightly over the years, recovered USF funds were held either in the FCC's accounts or in the Treasury before being transferred to the USF. JA40-43 (describing flows of funds). From "July 2003 through January 2015," "approximately $50 million" were "received by the FCC and Treasury" and then "transferred back into the USF" this way. JA38.

Second, "federal law enforcement efforts on USF cases, such as civil settlements by the U.S. Department of Justice or restitution paid by criminal defendants," resulted in "approximately $50 million" being transferred from the Treasury to the USF "[f]rom September 2004 through January 2015." JA38.

As the Seventh Circuit accordingly recognized, "[o]ver years relevant to this case, from 2003 to 2015, the Universal Service Fund received more than $100 million directly from the U.S. Treasury." Pet. App. 23a. Petitioner "has not raised any factual dispute on this point." *Ibid*.

3. The FCC "appointed" the non-profit USAC to administer "the federal universal service support mechanisms." 47 C.F.R. § 54.701(a). USAC "did not exist until the FCC required its creation for a specific federal purpose, namely, to administer the USF." JA7 n.5. FCC regulations substantially control USAC's structure and operations.

On the front end, in addition to directing the creation of USAC and giving USAC its mission, the FCC appoints or approves USAC's CEO and board members. *See* 47 C.F.R. §§ 54.701(b), 54.703, 54.704(b). The FCC also directs USAC's mission—"collecting" and

"disbursing universal service support funds," 47 C.F.R. § 54.702(b)—by specifying eligibility criteria, *id*. §§ 54.501-.502, subsidy amounts, *id*. § 54.505, and annual caps, *id*. § 54.507. The FCC imposes other requirements, too, like the requirement for USAC to create and maintain a website, *id*. § 54.702(f), and follow Government accounting conventions, *id*. § 54.702(e), (n).

The FCC also controls USAC's budget. Every quarter, USAC must submit its budget to the FCC; until the FCC approves that budget, USAC cannot "disburse[] funds under the federal universal service support mechanisms." 47 C.F.R. § 54.715(c). FCC regulations require USAC's expenses to be "commensurate with the administrative expenses of programs of similar size," *id*. § 54.715(a), and set the compensation scale for USAC employees, *id*. § 54.715(b). The approved budget describes the only USF funds that USAC may spend on itself. It must disburse the remaining money to beneficiaries according to the FCC's regulations.

The FCC also has interim control over USAC. In addition to the quarterly budget approval process described *supra*, the FCC, on a quarterly basis, determines the "contribution factor," which determines how much USAC must bill carriers. 47 C.F.R. § 54.709(a). By default, excess contributions are carried forward—but the FCC "may instruct the Administrator to treat excess contributions in a manner other than" that. *Id*. § 54.709(b). If contributions are insufficient, USAC must "request authority from the [FCC] to borrow funds commercially"; it cannot borrow on its own. *Id*. § 54.709(c). And when statutory or regulatory ambiguities arise, the FCC, not USAC, resolves them. *Id*.

§ 54.702(c). The FCC can also simply send letters to USAC telling it what to do. *See Universal Service Fund General Management and Oversight*, FCC, https://www.fcc.gov/universal-service-fund-general-management-and-oversight (last visited Sept. 19, 2024) (cataloguing letters sent since 2006).

The FCC can also control specific payments. Thus, it can direct USAC to "suspend or delay discounts, offsets, and support amounts provided to a carrier." 47 C.F.R. § 54.707(a). And after funds are disbursed, if an aggrieved party challenges USAC's decision, the FCC resolves the challenge after de novo review. *See id*. §§ 54.719-.725. As the FCC's website shows, it routinely exercises this authority. *See E-Rate – Schools & Libraries USF Program*, FCC, https://www.fcc.gov/general/e-rate-schools-libraries-usf-program (last visited Sept. 19, 2024) (daily register describing and linking the FCC's supervisory orders).

Finally, the FCC can terminate USAC as the administrator of the USF because USAC serves by virtue of FCC regulation that the agency can change.

4. This case arises out of violations of a specific E-rate statutory requirement known as the lowest corresponding price rule. 47 U.S.C. § 254(h)(1)(B). Under this rule, telecommunications carriers must provide qualifying "services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties." *Id*. The implementing regulation requires service providers not to charge schools and libraries "a price above the lowest corresponding price for supported services," 47 C.F.R. § 54.511(b), and defines "lowest corresponding price" as "the lowest price

that a service provider charges to non-residential customers who are similarly situated" to a school or library "for similar services," *id*. § 54.500.

This price protection is important because the E-rate program's subsidies are calculated as a percentage of the non-discounted price (between 20 and 90 percent depending on economic need and rural or urban status). Accordingly, if carriers were permitted to charge inflated prices to schools and libraries on the front end, both the E-rate program and the customers would overpay.

As an illustration, imagine a hypothetical in which a provider's lowest corresponding price for a service is $1,000 for a school that is entitled to a 90 percent E-rate subsidy. If the provider charged correctly, the E-rate program would pay $900, the school would cover $100, and the provider would receive $1,000. But if the provider violated the lowest corresponding price rule and instead charged $1,500, the E-rate program would wrongly pay $1,350, the school would wrongly pay $150, and the provider would receive $1,500. The lowest corresponding price rule thus protects *both* the E-rate program *and* schools and libraries from price gouging by carriers.

B. The False Claims Act

The False Claims Act imposes liability on anyone who knowingly presents a false or fraudulent claim for payment or approval. 31 U.S.C. § 3729(a)(1)(A).

From 1986 through May 19, 2009, the FCA defined a "claim" to "include[]":

> [A]ny request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or

> other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c) (1986).

In 2009, Congress clarified the Act's definition of "claim." In Section 4 of the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617—entitled "Clarifications To The False Claims Act To Reflect The Original Intent Of the Law"—Congress amended the definition of "claim" to read:

> (2) the term "claim"—
>
> (A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—
>
> (i) is presented to an officer, employee, or agent of the United States; or
>
> (ii) 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—
>
> (I) provides or has provided any portion of the money or property requested or demanded; or
>
> (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded;

31 U.S.C. § 3729(b)(2)(A). This definition became effective on May 20, 2009, and still applies today.

II. Facts and Procedural History

1. From 2002 to 2015, petitioner Wisconsin Bell provided telecommunications services to "at least hundreds" of schools and libraries under the E-rate program and "submitted reimbursement claims directly" to the USF. Pet. App. 3a-4a. Schools and libraries that received petitioner's services also "submitted claims to the FCC requesting reimbursement." *Id.* at 3a.

Over that period, petitioner violated the lowest corresponding price rule by offering schools and libraries the "highest prices 'whenever possible.'" Pet. App. 4a. Despite being "aware" of the lowest corresponding price rule, petitioner consciously decided not to "put into place any mechanism to comply with it, until 2009." *Ibid*. Petitioner only began to "develop[] a plan for complying with the rule" after "its parent company settled a Department of Justice and FCC investigation of its E-rate practices in Indiana." *Id*. at 4a-5a. Even then, petitioner considered lowest corresponding prices "as just one factor among many in deciding what price" to charge E-rate customers. *Id*. at 5a.

Petitioner thus knowingly overcharged *both* the E-rate program *and* economically disadvantaged schools and libraries for telecommunications services. These unlawful overcharges caused petitioner to receive more USF funds than it otherwise would have, harming the E-rate program.

2. In 2008, respondent filed this *qui tam* lawsuit alleging that petitioner "submitted false claims and caused others to submit false claims for more money than was allowed to be charged, as well as expressly

and implicitly false certifications of compliance with E-rate program rules." Pet. App. 5a.

Petitioner sought to dismiss the complaint on the ground that the E-rate program "involves only private, not federal, funds." D. Ct. Doc. 97, at 1.

Alongside respondent's opposition, the United States submitted a statement of interest and declarations from the Chief Financial Officer of the FCC and the Chief Financial Officer and Vice President of Finance at USAC. *See* JA34-43. The Government represented that "all the funds collected by USAC, held by the USF, and expended at the direction of the FCC in support of the E-rate program are federal funds 'provided by' the United States." JA30.

The district court denied petitioner's motion to dismiss, explaining that the Government "made the funds" for the E-rate program "available" by "requir[ing] the common carriers to pay." D. Ct. Doc. 126, at 3. The district court also concluded that "USAC is an 'agent' of the United States," an independent basis for respondent proceeding regarding conduct occurring after May 20, 2009. *Id.* at 6.

3. After seven more years of litigation, the district court granted summary judgment to petitioner on other grounds. Pet. App. 51a-60a. Respondent successfully appealed, with the Seventh Circuit holding that he "identified enough specific evidence of discriminatory pricing to allow a reasonable jury to find that Wisconsin Bell, acting with the required *scienter*, charged specific schools and libraries more than it charged similarly situated customers." *Id.* at 33a. Thus, the Seventh Circuit recognized specific instances in which petitioner charged schools and libraries more—often

hundreds more per month—than it charged similarly situated customers. *Id*. at 40a. It noted respondent's expert's report, which showed that petitioner overcharged schools and libraries "every single year." *Id*. at 41a.

The Seventh Circuit also held that a reasonable jury could find scienter, explaining that petitioner "admit[ted] that it knew of the lowest corresponding price rule at the rule's inception," but made either no effort or only ineffectual efforts to comply with it. Pet. App. 45a-46a. The court further held that petitioner's fraud was material because "[d]raining the program's resources through higher prices for services affects the government's ability to subsidize services for schools and libraries across the country." *Id*. at 49a.

4. Petitioner unsuccessfully sought rehearing *en banc*, contending that the FCA does not cover claims to the E-rate program. Pet. App. 61a-62a. The Seventh Circuit issued an amended opinion rejecting that argument as a matter of law. *Id*. at 19a-31a. "[T]hree independent paths" led to that conclusion. *Id*. at 20a.

First, during the "years relevant to this case," the USF "received more than $100 million directly from the U.S. Treasury." Pet. App. 23a. Those funds came "directly from the U.S. Treasury" following "collections of delinquent debts to the [USF], along with penalties and interest, as well as civil settlements and criminal restitution payments collected by the Treasury." *Ibid*. The U.S. government thus "provide[d]" some "portion" of the money in question, which is all the statute requires. *Id*. at 22a.

Second, the Government also provided money by establishing "an entire statutory and regulatory

scheme designed to distribute funds through" the "federal [E-rate] program." Pet. App. 29a. The program exists due to a congressional mandate, implemented by FCC regulations—without which "carriers would not have made any payments" into the program. *Id*. at 26a-27a. The E-rate program's funds are even "recognize[d]" as a "permanent indefinite federal appropriation" by the FCC and U.S. Government Accountability Office (GAO). *Id*. at 27a.

Third, petitioner presented false claims to USAC, an agent of the United States. Pet. App. 24a. The court concluded that "[a]ll of the USAC's actions are subject to the ultimate control of the principal, the FCC, acting as part of the United States government." *Id*. at 25a (citing 47 C.F.R. § 54.702(b)). The "statute and regulations leave no room to deny that the FCC controls the USAC." *Id*. at 24a-25a. Thus, "all reimbursement claims subject to the 2009 amendment are subject to the Act." *Id*. at 25a.

5. This Court granted certiorari.

SUMMARY OF ARGUMENT

This is an easy case. The E-rate program is a quintessential Government program to subsidize telecommunications services for needy American schools and libraries. Like so many other Government programs, the Government funds E-rate using money taken from the private sector—and then controls the distribution of that money to Government-designated beneficiaries. This is exactly the sort of program the False Claims Act protects from fraud, and requests for money from the program fall neatly within the statutory definition of a "claim."

First, the Government provides at least a portion—and really all—of the money claimed from the E-rate program. The entire program only exists, and only has money, because the Government made it so. Thus, the FCC ordered telecommunications carriers to pay money to USAC for the USF. The FCC sets the contribution factor (which determines the amounts due), and commands that those payments happen. When carriers do not pay, the FCC, Treasury Department, and Department of Justice initiate enforcement actions to collect money owed to the United States. That money is deposited in Government bank accounts before being transferred to the USF to fund Government programs, including E-rate.

Through these mechanisms, the Government provides at least a portion of the money claimed from the E-rate program. Under even the narrowest dictionary definition of the word "provide," the Government provided the $100 million that Government agencies transferred from Government bank accounts to the USF. And under the best reading of the word "provide," which includes "make available," the Government provides *all* of the money in the USF through regulations and orders that determine who must pay, how much they must pay, and what will happen if they do not pay. Under either interpretation of "provide," all of petitioner's false claims are actionable.

Petitioner's argument to the contrary is untenable. Petitioner urges this Court to adopt a narrow reading of "provide," hacking off part of the accepted definition to suit its own policy preferences. Thus, petitioner asks the Court to hold that the Government only "provides" money when it supplies or furnishes that money from Government accounts. But even that

crabbed reading of the statute cannot get petitioner home because the Government supplied the USF with approximately $100 million that federal agencies transferred to the USF directly from the Treasury. So petitioner invents an additional requirement: the money the Government supplies must also satisfy petitioner's idiosyncratic conception of "public money." This is an impossible reach textually because the definition of a claim refers to "money," not "public money." Indeed, it expressly applies "whether or not the United States has title to the money," 31 U.S.C. § 3729(b)(2)(A), refuting any suggestion that liability requires the Government to provide public money. Petitioner's argument also fails because USF funds *are* "public money" as that term is ordinarily and technically understood.

Second, for claims to the E-rate program on or after May 20, 2009, the Court can affirm on the additional basis that the claims were presented to USAC, which is an agent of the United States. USAC's relationship with the Government satisfies each element of the common law of agency: the FCC appointed USAC to act on its behalf in administering the USF, and USAC does so under the FCC's direction and control. Petitioner's response distorts the law of agency beyond recognition.

ARGUMENT

I. The Government Provides Funds Claimed Through the E-rate Program

Both the current definition of "claim" and the 1986 version include requests or demands for money or property made to a contractor, grantee, or other recipient when the Government "provides" "any portion of the money or property" requested or demanded. 31 U.S.C. § 3729(b)(2)(A); 31 U.S.C. § 3729(c) (1986). The parties agree that "provides" has the same meaning under both versions. *See* Pet'r Br. 5, 17-18 (treating "provide" in both definitions as synonymous). And petitioner does not dispute that the definition's other elements are met. Thus, it does not dispute that USAC is a "recipient," nor that money claimed from the E-rate program is spent on the Government's behalf, or to advance a Government program or interest.

Instead, petitioner argues that the Government does not "provide" money to USAC because, for most of the funds, the Government does not collect money from carriers, put that money into its own accounts, and then transfer the money to USAC—but instead orders carriers to pay USAC directly, bypassing Government bank accounts. Confronted with the inconvenient fact that the Government *did* collect, bank, and then transfer approximately $100 million to USAC, petitioner argues that those funds don't count because they are not "public money." These arguments are wrong.

A. The Government Provides Money to the E-rate Program by Transferring Money to the Universal Service Fund from the U.S. Treasury

1. The easiest and most straightforward path to affirmance is to hold that the Government provided at least a portion of the money claimed from the E-rate program during the relevant time period by transferring $100 million from Government accounts to the USF. Pet. App. 23a. The FCC and Treasury collected approximately $50 million in debts pursuant to the Debt Collection Improvement Act, deposited those funds in Government bank accounts, and then transferred that money to the USF. JA38, 42-43. Additionally, Government agencies including the Department of Justice collected another $50 million through civil settlements and criminal restitution, deposited those funds in Treasury accounts, and then transferred them to the USF. JA38, 43. As the Seventh Circuit recognized, these transfers came "directly from the U.S. Treasury." Pet. App. 23a.

Because the FCA's definition of "claim" applies if the Government provides "any portion" of the money, these transfers resolve the question presented in respondent's favor. Indeed, even the Fifth Circuit, whose decision purportedly split with the decision below, recognized that "the Government 'provides any portion' of the money requested … when United States Treasury dollars flow to the defrauded entity." *United States ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379, 383 (5th Cir. 2014). The Fifth Circuit held that this standard was not satisfied only because it did not know about the $100 million in Treasury transfers. *See* Pet. App. 23a. Had the Fifth Circuit been equipped with all the

facts, there would be no circuit split. Based on the record, this Court can answer the question presented and resolve the split simply and straightforwardly.

2. Petitioner never disputes that the Government transferred $100 million to the USF during the relevant time period. Pet. App. 23a. Nor does it argue that the quantity or the timing of the transfers are somehow insufficient to meet the statutory definition. Instead, petitioner argues that even though the Government transferred $100 million to the USF from its own accounts, the Government did not "provide" that money because the money was not "public money." Pet'r Br. 30-31.

Petitioner's argument has no basis in the statutory text. Indeed, petitioner's argument clashes directly with petitioner's own reading—*i.e.*, that "the government 'provides' money for FCA claim purposes only if the government itself supplies that money," Pet'r Br. 18—because here, the Government collected money that was owed to it and supplied that money to USAC.

Petitioner's attempt to narrow "money" to mean "public money" is baseless. The FCA's definition of a "claim" never mentions "public money"—even though more than twenty sections of Title 31, where the FCA is located, do. *See, e.g.*, 31 U.S.C. §§ 712, 719, 1346, 3301-3302, 3303(b), 3304-3305, 3321-3322, 3324, 3326(a), 3327, 3329-3330, 3522, 3526-3527, 3532, 3541(a), 3545. As petitioner explains when making a similar argument (at 23-24), that contrast is telling: had Congress wanted to limit the FCA to public money, it certainly knew how. But Congress conspicuously omitted "public money" from the FCA. Under settled rules of statutory construction, "this Court may

not narrow a provision's reach by inserting words Congress chose to omit." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020).

The current definition of a claim not only omits "public money," it expressly applies "whether or not the United States has title to the money" in question, as long as "the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest." 31 U.S.C. § 3729(b)(2)(A). Congress thus covered all money and property provided by the Government for use in Government programs—not just "public money."

This clarifying language was added in 2009—but nothing in the 1986 definition suggests a narrower scope. The 1986 definition does not, for example, limit the "money" that counts to "public money." Moreover, Congress explained that the 2009 amendment was a "clarification[] to the False Claims Act to reflect the original intent of the law," Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. at 1621 (capitalization altered). The Court should accordingly interpret "provide" and "money" in both versions of the definition to mean the same thing. Petitioner never argues otherwise. In fact, throughout this entire litigation, petitioner has treated the scope of the "provide" prong the same in both versions of the definition. *See* Pet'r Br. 5 (describing the 2009 definition as "[m]uch like the 1986 amendment"); *id*. at 17-33 (discussing the "provide" prong without ever suggesting that the two versions of the definition cover different types of money); Cert. Pet. 21-24 (same); C.A. Reh'g Pet. 7, 11 (discussing only the 2009 definition when discussing the "provide" prong); C.A. Pet'r Br. 69

(arguing that the 2009 provide prong "replicates the pre-2009 definition").

Textually, the question whether the Government provided money to USAC by transferring $100 million from the Treasury to USAC is not a close one. The remainder of this section addresses petitioner's atextual responses. But the Court can also summarily reject those arguments as inconsistent with the statutory text.

3. Petitioner's main argument is that "[i]t's just common sense that the government can't supply funds that were never public money in the first place." Pet'r Br. 30. Not so. If I hand $100 to somebody, common sense holds that I provided $100. It does not matter how I came to possess the money. Whether I earned it, borrowed it, or recovered it from a person who stole it, I then provided the money by transferring it to the recipient. Petitioner's notion, that what happened *before* the Government provides money somehow determines whether the Government provided money, is the less intuitive proposition—and one without basis in *any* dictionary definition of "provide," all of which look to the act of providing, and not to how the provider came to possess or control whatever was provided.

Petitioner argues that when the post office delivers a birthday card containing $20, it is grandma, and not the post office, that provided the money. Pet'r Br. 30. That is correct—but that conclusion does not turn on whether the $20 properly belonged to grandma. Whether she got it from the bank, borrowed it from a friend, or nicked it from grandpa's wallet while he napped, she nevertheless provided $20.

The reason we think of grandma, and not the post office, as the provider is because she is the one who chose to send the money, and the post office merely helped her effectuate her choice. In the USF context, Government agencies are not merely transporting money that private debtors chose to pay; instead, the Government is initiating enforcement actions to force recalcitrant debtors to pay, collecting the money pursuant to procedures governing debts "owed to the United States," 31 U.S.C. § 3701(b)(1), depositing the money in Government accounts, and then transferring the money to USAC—not because the private payors told the Government to send the money there, but because that is how the Government itself structures its debt recovery procedures. Here, the Government chose to send money to USAC from its own accounts, thereby providing the money as a matter of common sense.

4. Money the Government recovers for the E-rate program also is public money. This Court itself described E-rate funds as "federal assistance," "federal funds," and "public funds," that Congress can condition using its "spending power." *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 199, 210, 212, 214 (2003) (Rehnquist, J.) (plurality opinion). Other Justices described E-rate funds as "Government subsidies," *id.* at 215 (Breyer, J., concurring); *id.* at 231 (Souter, J., dissenting) ("the Government's subsidies"), and "Government funding," *id.* at 225 (Stevens, J., dissenting). That is true in both the practical and the technical sense.

As the Government itself explained below, E-rate funds "are federal funds, provided by the United States and dedicated to a federal mission, and should

be treated as such by this Court, with all statutory protections intact." JA3. That is because the USF is, at its core, a Government fund. A Government agency established the USF to fulfill a Congressional command. The fund exists only to promote a Government policy objective. The Government sets all the rules by which money goes into and out of the fund. And USF funds "are a permanent appropriation accounted for in the United States' budget as federal funds." JA17; Pet. App. 27a.

Carriers contribute money to the USF only because Congress and the FCC require them to do so. *See* 47 C.F.R. § 54.706; 47 U.S.C. § 254(d). Just like many of the Government's most well-known revenue-raising mechanisms—including taxes, levies, and duties—these contributions are not voluntary, and the carriers retain no interest in the funds after they are contributed. Instead, the money is solely devoted to funding Government programs. Everybody would describe money that the Government takes from private parties to fund Government programs as public money.

Petitioner acknowledges that circuit courts have compared E-rate levies to taxes when considering the constitutionality of the USF. Pet'r Br. 28. Petitioner downplays these decisions by saying that Congress did not call these levies a tax. That is true—but Congress's choice of label does not matter because the concept of public money is plainly broader than revenue raised using the taxing power. What matters is that E-rate levies, like taxes, are "a common federal funding mechanism created by Congress and entitled to protection from fraud." JA18-19. Tellingly, although courts and judges evaluating the validity of the USF have reached

conflicting opinions, no judge on either side of that debate has concluded that the money the Government provides to the E-rate program is not public money.

The money recovered by the FCC and the Treasury in debt collection proceedings, or by the Department of Justice in civil or criminal proceedings is even more clearly Government money than ordinary E-rate contributions. The Government forcibly collects it, deposits it in its own accounts, and then deploys it to fund a Government program. Indeed, the statute governing these debt collections applies because the money is "owed to the United States." 31 U.S.C. § 3701(b)(1). That is just another way of saying that it is Government money.

To the extent fiscal law is relevant to the FCA, the Government's treatment of the USF weighs in respondent's favor because the Government treats USF money as public money. USF funds are a permanent federal appropriation, accounted for as such in the President's and the FCC's budgets. JA17-18. The GAO "agree[s] with FCC's conclusion" that "USF constitutes a permanent indefinite appropriation." U.S. Gov't Accountability Off., GAO-05-151, *Telecommunications: Greater Involvement Needed by FCC in the Management and Oversight of the E-rate Program* 47 (2005). The GAO further determined that USAC's funding commitment letters issued to E-rate beneficiaries constitute "obligations" of the United States because they create "*a legal liability of the government*." *Id*. at 52 (emphasis added). Congress also enacted legislation specifically exempting USAC from the Anti-Deficiency Act, *see* Universal Service Antideficiency Temporary Suspension Act, Pub. L. No. 108-494, § 302, 118 Stat. 3986, 3998 (2004), which only makes sense if USF

funds are Government money, because the Anti-Deficiency Act only applies to federal funds. *See* 31 U.S.C. § 1341. In 2018, the Office of General Counsel of the Office of Management and Budget further confirmed that funds collected for the USF are "public moneys" under the Miscellaneous Receipts Act, determining that its prior contrary conclusion was incorrect. Off. of Mgmt. & Budget, Off. of Gen. Couns., Opinion Letter (Apr. 18, 2018), *available at* https://www.fcc.gov/sites/default/files/OMB-Legal-Opinion-USF-2018.pdf. Accordingly, USF funds are public money in every sense.

The case law petitioner cites for the contrary conclusion (at 30-32) is simply inapposite. None of these cases are about the 1986 or the 2009 definition of a "claim" in the FCA. None address the meaning of "provide." And none concern the USF or USAC. It is telling just how far petitioner had to reach to find anything to cite—and even more telling that petitioner still came up empty.

The only FCA case petitioner cites is *United States v. Cohn*, 270 U.S. 339 (1926), a criminal case where the purported offense was lying to a customs collector to get him to release imported cigars. No customs duty was owed, but the importer nevertheless tricked the collector into releasing the cigars prematurely. The Court held that merely claiming possession of goods that were being temporarily held by the Government, which had no interest in those goods, was not a "claim upon or against" the Government. *Id*. at 345-46. That case has no bearing on this one—as USF funds look nothing like cigars stuck in customs, the private importer bears no resemblance to the FCC-controlled

USAC, and the statute in 1926 did not define the word "claim."

Other cases petitioner cites involve facts and legal issues far afield from this one. For example, *Branch v. United States*, 100 U.S. 673 (1879), and *United States v. Aiello*, 912 F.2d 4 (2d Cir. 1990), are non-FCA cases that merely stand for the proposition that while courts are still resolving whether the Government is entitled to money it obtained through forfeitures, the money is not *yet* the Government's money. Here, however, no pending litigation cast a cloud over the Government's collections, and no court had jurisdiction over the money. Instead, the collection process had run its course, and the Government lawfully deposited the money in the Treasury and then provided it to USAC.

In *Emery v. United States*, 186 F.2d 900 (9th Cir. 1951) (cited at Pet'r Br. 32), the court held that when the United States recouped restitution for rent overcharges, and a court ordered that the money should be "disbursed by the United States Government to the renters who were the victims," the Government could pay that money forward to the affected tenants without an appropriation from Congress because the money was "held by the Government in trust for these tenants." *Id*. at 902. It is unclear whether this case is relevant *at all* because the lawsuit in *Emery* was not to collect debts owed to the United States, and a court ordered the Government to disburse the funds to the tenants. Moreover, once the money left the Government's hands, it was clearly no longer Government money because it belonged to the tenants to do as they wished with it. USAC, by contrast, does not receive funds solely or even principally for its own benefit;

those funds are to sustain and administer a Government program, subject to continued Government oversight. The money thus remains Government money even in USAC's hands.

Even assuming *Emery*'s relevance, the case shows, at most, that an annual congressional appropriation may not be necessary for the Government to provide money collected through enforcement actions to USAC. That does not mean that *when* the Government provides money to USAC, courts should pretend that it has not done so. Indeed, the court in *Emery* never held or even suggested that the Government was not "providing" money to the tenants by paying them. It plainly was.

5. A recurring theme in petitioner's brief is that E-rate funds cannot be Government funds because fraud on the E-rate program does not cause the Government to suffer any financial loss—and therefore does not implicate the FCA's purpose. This is incorrect for two reasons.

First, petitioner misconstrues the FCA's purpose. As this Court has explained, "in all statutory construction cases, we assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013) (cleaned up). This Court should "give the law's terms their ordinary meaning," and not artificially narrow them based on "policy-talk." *Niz-Chavez v. Garland*, 593 U.S. 155, 171 (2021).

The FCA's text does not condition—and never has conditioned—liability on the Government suffering financial loss. As Congress recognized when it amended the statute in 1986, "[t]he United States is entitled to

recover … solely upon proof that false claims were made, without proof of any damages." S. Rep. No. 99-345, at 8 (1986). Thus, the statute imposes liability on anybody who presents (or causes another to present) a false or fraudulent claim—even if the Government does not pay the claim. *See* 31 U.S.C. § 3729(a)(1)(A). Similarly, the 2009 definition of a "claim," which applies "whether or not the United States has title to the money or property," 31 U.S.C. § 3729(b)(2)(A), clearly indicates that no financial loss to the Government is required.

To the extent legislative history is probative, it also contradicts petitioner's description of the statutory purpose. Congress explained that "[e]ven in the cases where there is no dollar loss," fraud undermines the "integrity" of Government programs and "erodes public confidence in the Government's ability to efficiently and effectively manage its programs." S. Rep. No. 99-345, at 3. Petitioner never disputes that E-rate is a Government program—and so the FCA's purposes are implicated by fraud on the program, even absent financial loss.

Second, fraud on the E-rate program *does* cause financial loss to the Government: the loss of E-rate funds. As explained in the Statement of the Case, petitioner's fraudulent overcharging caused the USF to pay too much in subsidies. Those fraud losses depleted the USF, undermining the Government's ability to supply the desired benefits. *See* Pet. App. 49a. This is even more obviously true vis-à-vis the funds that the Government had to recover via enforcement actions: fraud causing the expenditure of those funds negated the resources the Government spent to recover them, wasting even more federal dollars.

Petitioner responds that losses to the USF are not losses to the Government. But this argument is circular because it depends on the Court accepting petitioner's conclusion that USF funds are not Government funds in any sense. For the reasons given *supra*, USF funds are Government funds in the sense that matters: they are collected pursuant to Government mandate and used to fund a Government program. The same is clearly true of funds the Government obtained pursuant to its debt collection and enforcement efforts, which are, by statute, "funds … owed to the United States." 31 U.S.C. § 3701(b)(1).

To be sure, a loss to the USF may not affect the general Treasury because the USF has a dedicated funding source. But so what? A loss to one Government program is still a loss to the Government. As the Government explained below, the Government often funds permanent appropriations without tapping general revenues. JA17-18. For example, the Medicare Hospital Insurance Trust Fund is not funded by general revenues. *See How is Medicare funded?*, Medicare.gov, https://www.medicare.gov/about-us/how-is-medicare-funded (last visited Sept. 20, 2024). But fraud on the Medicare hospital benefit is surely a loss to the Government, which the FCA is designed to redress. *See* S. Rep. No. 99-345, at 21-22 (explaining specifically why false claims to Medicare are actionable).

Finally, it does not matter that the FCC can replenish the E-rate program's funds through borrowing or increased subsequent contributions. The same is true of almost every Government program because the Government can always borrow more, or raise taxes or other collections to make up for fraud losses. But those

are the outcomes the FCA seeks to ameliorate by stopping fraud.

* * *

Most of the foregoing is not essential to the key point: when the Government obtains funds, deposits those funds in Government accounts, and then transfers those funds to a recipient to pay claims to a Government program, the Government "provides" the funds under the ordinary meaning of that term. There is no need to probe whether the funds constitute "public money," nor any other ancillary question. This Court can affirm on this ground alone.

B. The Government Provides Money to the E-rate Program by Requiring Contributions to the Universal Service Fund

The Court can also affirm on the broader ground that the Government provided essentially *all* of the E-rate program's money by creating the USF and mandating contributions to it.

1. As this Court has recognized, "[t]o 'provide' means to supply, furnish, *or make available*." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 676 (2020) (emphasis added) (citing Webster's Third New Int'l Dictionary 1827 (2002); American Heritage Dictionary 1411 (4th ed. 2000); 12 Oxford English Dictionary 713 (2d ed. 1989)). Here, as the Seventh Circuit explained, "the government's fingerprints appear at almost every step leading up to [E-rate] funds being made available," and "an entire statutory and regulatory scheme designed to distribute funds through a federal program is sufficient" to "say that the government 'provided' funds."

Pet. App. 29a. That is a correct application of the ordinary meaning of "provide," and this Court should adopt it.

2. Petitioner does not dispute that if the definition of "provide" includes "make available," then the Government provided money to the E-rate program by creating the program and requiring carriers to contribute money to it. Petitioner even admits that "one meaning of the term 'provide' is 'to make available.'" Pet'r Br. 23 (dictionary citation omitted). But petitioner argues against that ordinary meaning because "[t]he money in the E-rate program is coming entirely from the private carriers." *Ibid*. According to petitioner, "[t]hat's what matters, because the whole point of the FCA is to protect the public fisc." *Ibid*. Petitioner therefore argues that "provide" must be read only to mean "supply" or "furnish," and not "make available," to prevent the FCA from protecting Government programs that are funded by private money.

Petitioner's argument fails. First, this argument is a naked appeal to narrow the plain meaning of "provide" based on petitioner's intuitions about statutory purpose. As explained *supra* pp. 26-27, petitioner's description of the FCA's purpose clashes with both the statutory text and the legislative history by focusing myopically on financial loss, which Congress did not require.

Petitioner tries to pretend it is still engaged in textualism by resorting to part of the definition of "provide," *i.e.*, "supply." This is a thin veneer because there is no material difference between "supply" and "make available." In fact, the first definition of the verb "supply" in Merriam-Webster is "to make available for use:

provide." *Supply*, Merriam-Webster, https://www.merriam-webster.com/dictionary/supply (last visited Sept. 20, 2024). The first definition in the American Heritage Dictionary is the same. *Supply*, American Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=supply (last visited Sept. 20, 2024). And the first definition in the Oxford English Dictionary is "[t]o make (something needed or wanted) available to someone; to provide, esp. for someone's use or consumption." *Supply*, Oxford English Dictionary, https://www.oed.com/search/dictionary/?scope=Entries&q=supply (last visited Sept. 20, 2024). Thus, even if the Court does as petitioner asks and reads "provide" to mean "supply," that is just another way of saying that "provide" means "make available."

What becomes clear, then, is that petitioner is not merely asking this Court to read "provide" to mean "supply," but is instead asking the Court to read "provide" to mean "directly supply," or "supply public money," or "supply from the Treasury," or something like that. But the dictionary definitions of "provide" only discuss the act of providing, *i.e.*, supplying or making available; they never discuss the manner in which providing must occur, nor what must be provided. Petitioner made that part up to suit its policy and pocketbook preferences.

Petitioner argues that this extra-textual limitation is important to avoid reading the statute too literally. Pet'r Br. 23. For support, petitioner cites a 1931 case holding that the National Motor Vehicle Theft Act should not have been construed to include aircraft because "in everyday speech 'vehicle' calls up the picture of a thing moving on land." *McBoyle v. United States*,

283 U.S. 25, 26 (1931). That logic does not apply here because, in everyday usage, it is quite easy to "provide" something by making it available, even indirectly, and even without first possessing the thing provided. For example, if I promised to provide food for a meeting, and then sought to fulfill that promise by asking my office manager to order pizza delivery from a restaurant, nobody would accuse me of having broken my promise to provide food because I had not cooked the meal myself and delivered it with my own hands. Nor would it matter whether I paid for the pizza with my own money, my firm's money, or a friend's money. Similarly, if I provided a payment by ordering a bank to mail a cashier's check to the payee, nobody would say that I did not provide the payment merely because the check was drawn on the bank's funds (as opposed to my own) nor because the bank sent the check instead of me. In both cases, my responsible role in making food or money available would suffice.

The common-usage point is even stronger in the context of the Government, which funds essentially all of its programs using money that was private before the Government commandeered it through levies, taxes, duties, penalties, or other mandates. In ordinary speech, most people would say that when the Government passes a law requiring private parties to pay money to support a Government program, the Government has provided money to that program—because that is how the Government often funds programs.

Petitioner also argues that the Court should prefer its interpretation because Congress could have said that claims include "requests for money that the government 'provided *for*'" had it intended respondent's

interpretation. Pet'r Br. 23-24. But the word "provide" already encompasses "make available" without adding "for," so there was no need for Congress to use different language to enact that meaning. To the extent alternative formulations are relevant, the much better argument is that if Congress had wanted to adopt *petitioner's* interpretation, it could have said "directly provides," or "provides public money," or "provides from the Treasury." Those alternative formulations might warrant deviating from the plain meaning of "provide" as "make available." But, of course, Congress did not use any of those alternatives.

Petitioner argues that statutory context supports reading "provide" narrowly to include only situations in which the Government supplies its own funds. Actually, the plain text of the statute forecloses that interpretation. Specifically, the definition of "claim" expressly applies "whether or not the United States has title to the money or property" claimed. 31 U.S.C. § 3729(b)(2)(A). Reading "provide" to incorporate an implicit limitation that the funds provided must first belong to the Government would negate that language. As explained *supra*, this language equally describes the scope of the 1986 definition (which includes no language limiting the type of money the Government must provide).

Tellingly, petitioner never even mentions this critical statutory language. Instead, petitioner skips over it to focus on less probative features of the statute. For example, petitioner argues (at 19) that because the statute refers to "grantee[s]" and "recipient[s]," it necessarily refers to a direct transaction between the Government and those receiving parties. Not so. The statute establishes that the Government must provide

money or property to a recipient. But that does not establish *how* the Government may provide funds, let alone imply any kind of direct transaction. The cashier's check example, *supra*, illustrates the point: even though the bank sends its own funds, the bank customer nevertheless provides them, and the payee is nevertheless clearly a "recipient" of the funds. The pizza example works, too: everybody who eats is a "recipient" of the food—even though I provided it via orders to third parties.

Petitioner's references to verb tense and to the inclusion of reimbursement (at 20, 24-25) are similarly unpersuasive. By specifying that the FCA covers situations in which the Government provides, has provided, or will reimburse money or property, Congress merely clarified that it does not matter *when* the Government provides money. It said nothing that precludes the Government from providing money by making it available. And whether the Government provides money by transferring its own funds or by ordering third parties to contribute to a Government program, none of those terms is rendered superfluous.

3. The broader context of Government spending and fiscal practice also weighs against petitioner's efforts to narrow the meaning of "provide." Petitioner argues that "provide" should not be read to include "make available" because "[t]he money in the E-rate program is coming entirely from the private carriers." Pet'r Br. 23. But the same could be said of every program funded with taxpayer dollars, because the money for those programs comes entirely from private taxpayers. Indeed, almost *all* the money the Government spends was private money before the Government ordered private parties to pay it to a Government fund.

Thus, it cannot be dispositive that the funds the Government mandated for the E-rate program originated with private sources.

It also cannot be dispositive that the Government routed the funds straight to the USF instead of requiring an unnecessary detour through the Treasury. The Government deemed it more efficient to direct the funds where they are needed—*i.e.*, to the entity disbursing funds to beneficiaries. The fact that the Government chose a more efficient structure should not deprive the E-rate program of a critical tool for preventing and redressing fraud. The FCA "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). Indeed, had the E-rate program been structured to direct contributions to Treasury accounts, the Government's interest in the program would remain the same.

In fact, we know this to be true because, as petitioner admits, the USF's accounts were moved to the Treasury in 2018. Pet'r Br. 9 n.6. The FCC's Chairman contemporaneously explained that "the transfer of the Fund to the Treasury will not affect the programmatic use of the funds" because "where [USF] monies are held has no effect on the statutory requirement to devote them to connecting all Americans." D. Ct. Doc. 279-8, at 2-3. He further explained that "[i]n fiscal-law terms, the [USF] is a 'special fund,'" which is simply the accounting device used "where the law requires that collections from a specified source be used to finance a particular program." *Id*. at 3 & n.18. The Chairman's comments make clear that the USF has

always been a Government fund—wherever its bank accounts resided.

This context exposes the logical weakness of petitioner's position. By focusing on who transferred the money to whom, petitioner elides the key fact: the only reason those funds moved is that the Government decided to exercise its lawful power to make that money available for the E-rate program. By doing so, the Government provided those funds—even if it never touched them.

4. Casting about for something eye-catching, petitioner argues that its interpretation is necessary to alleviate constitutional concerns about the FCA. That is wrong.

With respect to Article III, a loss of public money is not the basis for a *qui tam* relator's standing. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 777-78 (2000), this Court held that there was "no room for doubt that a *qui tam* relator under the FCA has Article III standing." The robust historical record showed the ubiquity of *qui tam* statutes in early America. *See id.* at 776-77. Many of those statutes authorized suit even though the Government suffered no loss. For example, the Slave Trade Act of 1794, Pub. L. No. 3-11, 1 Stat. 347, created a *qui tam* cause of action against any person or vessel used in the slave trade—even though the slave trade did not cost the United States public funds. And that statute was hardly alone. *See, e.g.*, *Stevens*, 529 U.S. at 777 n.6 (enumerating early *qui tam* statutes, including laws allowing suit for failure to file a census return, harboring runaway seamen, unlicensed trading with Indian tribes, and receipt of stolen goods).

That history is "well nigh conclusive" against petitioner's argument here. *Id*. at 777.

In any event, petitioner has no straight-faced argument that fraud on the E-rate program does not cause the Government to suffer a cognizable injury in fact—even if the Government does not directly transfer the money. Such fraud depletes Government resources and hinders the Government in its provision of assistance to needy beneficiaries. That is enough to support both the Government's and relator's standing under *Stevens*. *See* 529 U.S. at 774.

Petitioner's fleeting reference to Article II (at 26) fares no better. Petitioner never argues that the FCA violates Article II (it does not)—and petitioner does not and cannot explain why reading "provide" to mean "make available" would aggravate its perceived Article II issue—because it could not. The statute unambiguously applies "whether or not the United States has title to the money," 31 U.S.C. § 3729(b)(2)(A), and so *if* Article II concerns were implicated by whether the statute applies to private money (and they are not), no interpretation of "provide" can change that. Accordingly, petitioner's cryptic paragraph has no bearing on the straightforward statutory questions before the Court.

* * *

In sum, the ordinary and best interpretation of the word "provide" covers situations in which money is available to a Government program due to a Government mandate—even if the Government does not itself transfer the money or hold title to it. Nothing petitioner says compels a different result.

II. The Universal Service Administrative Company Acts as an "Agent" of the United States When it Processes Claims to the E-rate Program

In 2009, Congress amended the False Claims Act to clarify that a "claim" includes any request for money "presented to an … agent of the United States." 31 U.S.C. § 3729(b)(2)(A)(i). For claims presented on or after May 20, 2009, this definition applies because USAC acts as an agent of the United States when it processes claims to the E-rate program.

Indeed, this ought to be obvious. The FCC directed the creation of USAC for one reason: to administer the USF's programs, including E-rate. And sure enough, administering the USF is the *only thing* USAC does. Thus, when USAC receives, evaluates, and pays E-rate claims, it is merely fulfilling the function delegated to it by the Government, in the manner prescribed by the Government's regulations, under the supervision of a Government agency, using funds that are only available because of the Government's actions, for the Government's benefit. If USAC is not an agent of the United States, it is hard to imagine an entity that would be.

A. USAC Meets the Common Law Definition of an Agent

An agency relationship "arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006); *see Meyer v. Holley*, 537 U.S. 280, 286 (2003).

Each element is present here. *See* Pet. App. 24a-25a; JA 50. The FCC manifested its assent when it "appointed" USAC to be the "Administrator of the federal universal service support mechanisms," subject to the FCC's review and oversight. 47 C.F.R. § 54.701(a); *see also* Pet. App. 24a; JA7 n.5; JA50.

USAC acts exclusively on the FCC's behalf when administering the E-rate program. Indeed, USAC *only* administers the USF, including E-rate. Every dollar properly disbursed by USAC furthers the FCC's statutory duty "to preserve and advance universal service." 47 U.S.C. § 254(d); *see* 47 C.F.R. § 54.1(b). And if USAC failed to collect or disburse funds, that would hinder the FCC's statutory obligation.

USAC's actions also affect the Government's rights. USAC is empowered to bill and collect funds from telecommunications carriers, and to distribute those funds to eligible beneficiaries. *See* 47 C.F.R. § 54.702(b). After USAC bills carriers, those "companies owe the United States legally enforceable debts." Pet. App. 25a. The Government then has the right to "collect on these debts." *Ibid.*; *see, e.g.*, 47 C.F.R. § 54.713(c).

The FCC has the power to control USAC's actions. As explained *supra* pp. 5-7, the agency exercises robust front-end and interim control, including appointing or approving USAC's management, approving USAC's quarterly budget, setting the quarterly contribution factor, setting reimbursement amounts, clarifying legal questions, reviewing disbursement decisions, and making other discretionary decisions about the program. The Government can also terminate USAC as the USF's administrator.

The Government has weighed in on this question, explaining that when USAC pays claims from the USF, "USAC is no more than an agent of the United States." JA22. In support the Government cited the same considerations recited *supra*. And tellingly, neither the Government nor USAC have ever disclaimed any such agency relationship.

Because USAC is an "agent of the federal government," "all reimbursement claims subject to the 2009 amendment are subject to the Act." Pet. App. 25a. The Seventh Circuit's judgment should be affirmed.

Petitioner resists this straightforward application of agency law by arguing that "an entity is an 'agent of the United States' *only* when it can bind the government *and* is subject to the government's day-to-day control." Pet'r Br. 35 (emphasis added). As the Seventh Circuit held, petitioner "misunderstands agency law." Pet. App. 25a.

B. Ability to Bind the Principal Is Not a Prerequisite to Agent Status

Petitioner's argument that an agent must have power to bind its principal (Pet'r Br. 35) finds no support in the common law or this Court's precedents.

1. Petitioner's "power-to-bind requirement" has no basis in the common law. The Restatement contemplates the opposite, providing an illustrative example: "Agents *who lack authority to bind* their principals to contracts nevertheless often have authority to negotiate or to transmit or receive information on their behalf." Restatement (Third) of Agency § 1.01 cmt. c (2006) (emphasis added). That makes sense: a principal may empower an agent to take certain actions on

its behalf, including actions short of binding the principal. Here, the United States empowered USAC to receive, process, and pay E-rate claims on the Government's behalf, thus fulfilling the obvious role of an agent under the FCA.

Petitioner (at 35) gestures to the Restatement's discussion of actual versus apparent authority for Government agents. That discussion stands for the unremarkable proposition that third parties may not hold the Government accountable for acts that exceed an agent's actual authority. *See* Restatement (Third) of Agency § 2.03 cmt. g. So, if USAC exceeded its mandate by, for example, interpreting ambiguous statutory provisions, 47 C.F.R. § 54.702(c), a third party could not enforce USAC's interpretation against the Government. But this discussion has no bearing on whether the power to bind is a necessary requirement of a principal-agent relationship.

2. This Court has never imposed a power-to-bind requirement either. Instead, this Court has adopted the Restatement's rule that an agent must "act on [the principal's] behalf." *Meyer*, 537 U.S. at 285-86 (emphasis removed); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 392-93 (1982). The cases petitioner cites do not suggest that power to bind is the *sine qua non* of an agency relationship. Indeed, they are far better authority for the contrary proposition.

For example, petitioner argues that "a person isn't an agent when the government hasn't delegated actual authority to affect the government's legal obligations." Pet'r Br. 36. In support, petitioner cites *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), and *Heckler v. Community Health Services of Crawford*

County, Inc., 467 U.S. 51 (1984). In both cases, Government agents erroneously gave third parties benefits that the law did not permit (crop insurance in *Merrill*, and Medicare funds in *Heckler*). In each case, the Court held that the Government was not bound by its agents' actions because the agents lacked authority to commit the Government to unlawful action. But the Court *never* held that the agents' inability to bind the Government vitiated the agency relationship. On the contrary, the Court repeatedly referred to the relevant entities as the Government's agents. *See Merrill*, 332 U.S. at 382-83; *Heckler*, 467 U.S. at 53, 60, 63. These cases accordingly show that an agent need not always have authority to bind the Government, *i.e.*, the opposite of petitioner's rule.

Petitioner's citation (at 36) to *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941) is similarly unavailing. There, the question was whether contractors buying lumber for a Government project were immune from state taxation because the Government, and not the contractors, was the *de facto* lumber purchaser. But the underlying contract expressly stated that when purchasing materials, the contractor should "not bind or purport to bind the Government or the Contracting Officer." *Id*. at 11. The Court thus held that the contractors did not have "the status of agents of the Government to enter into contracts or to pledge its credit." *Id*. at 13. Petitioner wrenches snippets out of context to argue that without the power to bind, contractors cannot have "the status of agents." But the Court was clearly commenting on the relationship created by the *specific contract* at issue. It was not making a new general rule of agency law.

The case petitioner cites (at 36) that is most damning to petitioner's position is *Department of Employment* v. *United States*, 385 U.S. 355 (1966). That case held that the American National Red Cross was a federal instrumentality immune from state taxation, referencing multiple features of the Red Cross's relationship with the Government. *Id*. at 358-59. Three things about *Department of Employment* stand out.

First, the Court never mentioned "power to bind." So the case does not support petitioner's rule.

Second, the question before the Court was *not* whether the Red Cross was an agent under traditional agency principles. Instead, as this Court later explained, deeming an entity to be a tax-exempt federal instrumentality requires "*more* than the invocation of *traditional agency notions*." *United States v. New Mexico*, 455 U.S. 720, 735-36 (1982) (emphasis added). Accordingly, even if petitioner showed that USAC could not meet the test in *Department of Employment*, that would prove nothing about whether USAC is an agent.

Third, the only appellate court that has considered the question has determined that USAC meets the demanding instrumentality test. *See Assurance Wireless USA, LP v. Dep't of Revenue*, 544 P.3d 471, 474 (Wash. 2024). Among other factors, the court emphasized that "USAC was created for the express purpose of effectuating the government's telecommunications policy objectives and the FCC played a significant role in its creation." *Id*. at 483. The court expressly considered the features of the Red Cross discussed in *Department of Employment* and held that "[w]e see many of these same characteristics present in the relationship between USAC and the FCC." *Id*. at 484. Because USAC satisfies even the demanding

agency-plus test for being a federal instrumentality, it satisfies the agency test *a fortiori*.

3. "Statutory context" does not dictate a different outcome. *Contra* Pet'r Br. 36-38. Petitioner invokes *noscitur a sociis* to argue that "agent of the United States" should be interpreted to share a common attribute with neighboring terms: "officer" and "employee," which petitioner suggests have the power to bind the Government. *Id*. at 37. But the word "agent" has a settled common law meaning—and there is no need to put any additional gloss on it by referencing surrounding terms.

Moreover, when, as here, "the relevant limiting characteristic" of a list is not apparent, courts should not use *noscitur a sociis* to cherry-pick a characteristic that allows them to impose arbitrary limitations on the text. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008). Otherwise, the canon becomes nothing more than a clever mechanism for courts to limit statutes using their own policy preferences. That, of course, is precisely what petitioner is trying to do.

But two can play that game. If the Court were to shade the word "agent," petitioner cannot identify any principled basis to use *its* power-to-bind gloss instead of a different one. For example, the Court could just as easily say that "agent" should be interpreted to include any person who the Government authorizes to pay claims on the Government's behalf. That would be a shared attribute with employees and officers in the list (thus satisfying *noscitur a sociis*), would make sense in context (because the statute speaks of employees, officers, and agents to whom claims are "presented"), and would achieve the statute's purpose of stopping

fraud. Under that interpretation, all of petitioner's arguments fall by the wayside because the Government plainly designated USAC to pay E-rate claims. Indeed, this reading is stronger than petitioner's because not all Government employees have the power to bind the Government—and so it would make little sense to read a "power to bind" requirement into the statute merely because it mentions "employees."

Petitioner's argument that an agent's inability to "bind the United States" turns it into a "contractor" (Pet'r Br. 37-38) also falls flat. Contractors have contracts; and agents need not. Moreover, many contractors are distinct from agents because, as petitioner points out, they may have far more independence. *See* Pet'r Br. 41-42.

4. The "FCA's history," Pet'r Br. 38, does not move the needle in petitioner's favor. Nothing in the cited history suggests that an entity created by the Government, through the FCC, to implement a statutory directive is not an "agent." *Id*. at 38-40. Petitioner tries to argue that the 2009 amendment limits "agent" to "instrumentalities with the power to bind the United States in disposing public funds." *Id*. at 39. By its terms, however, the amendment clarified that the FCA extends to claims against an "agent of the United States" for "money or property" "whether or not the United States has title to the money or property." 31 U.S.C. § 3729(b)(2)(A)(i).

C. The FCC Exercises Sufficient Control Over USAC to Support an Agency Relationship

Petitioner also errs in arguing that agency law requires the FCC to exercise greater control over USAC's operations than it does.

1. An "'essential element of agency is the principal's right to control the agent's actions.'" *Hollingsworth* v. *Perry*, 570 U.S. 693, 713-14 (2013); *see also Meyer*, 537 U.S. at 285-86; *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 392-93. This requirement is flexible, and the "content or specific meaning of the right varies" based on context. Restatement (Third) of Agency § 1.01 cmt. c. Under any circumstance, however, it suffices if "the principal initially states what the agent shall and shall not do, in specific or general terms," and also "has the right to give interim instructions or directions to the agent once their relationship is established." *Id*. cmt. f. Those instructions need not be granular. "Thus, a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment." *Id.* cmt. c.

As explained *supra* pp. 5-7, USAC is subject to the FCC's front-end and interim control. "All 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." Pet. App. 25a. It was not USAC's obligation "to comply with federal law," as petitioner suggests (at 45-46), but rather the comprehensive "statutory framework and implementing regulations" left "no room to deny that the FCC control[led] the USAC." Pet. App. 24a-25a. Among other things, the

FCC can exercise control over USAC's resolution of specific claims by suspending or delaying payments to carriers, 47 C.F.R. § 54.707(a), and by reviewing USAC's decisions de novo, *id*. §§ 54.719-.725. It can also instruct USAC through supervisory letters.

2. Petitioner tries to escape that straightforward conclusion by urging this Court to narrow principal-agent relationships to only those circumstances where a principal exercises "day-to-day control." Pet'r Br. 3, 42. This argument fails.

The Restatement sections cited *supra* show that the common law permits looser control arrangements than petitioner describes—where day-to-day decisions may be left in the agent's hands. Instructions up front, combined with the power to exercise interim control, suffice.

Petitioner cites no decision from this Court or any other holding that "day-to-day control" is required. Instead, petitioner misleadingly represents that *Hollingsworth* stands for the proposition that "day-to-day control" is "one of the 'most basic features of an agency relationship.'" Pet'r Br. 45. But that was not the holding. Instead, this Court merely explained that a "basic feature[] of an agency relationship" was "missing"—"'the principal's right to control the agent's actions.'" *Hollingsworth*, 570 U.S. at 713. That's all. There is no mention of any "day-to-day" control requirement.*

* Although petitioner does not cite them, some of this Court's cases hold that the Government must have more granular control before it can be held vicariously liable for a contractor's or grantee's torts under the Federal Tort Claims Act (FTCA). *See United States v. Orleans*, 425 U.S. 807, 814 (1976); *Logue v.*

Even if there were a day-to-day control requirement, USAC is subject to the FCC's day-to-day control as described *supra*. Petitioner's only concrete response is to cherry-pick certain tools that the FCC lacks (such as the inability to initially "review reimbursement grants," Pet'r Br. 45)—but petitioner offers no explanation (because it cannot) for why the absence of one tool overwhelms the presence of the many others the FCC has at its disposal. Nor does petitioner explain why the power of *initial* review matters when considered against the FCC's power of *ultimate* review of USAC's decisions. Petitioner's initial-review point also fails on its own terms because USAC must resolve reimbursement requests based on the FCC's rules, and can act only when the answer under the FCC's rules is clear. If "the Commission's rules are unclear, or do not address a particular situation," USAC must "seek

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United States, 412 U.S. 521, 527 (1973). Those cases are distinguishable because they do not address agency relationships writ large, but instead only master-servant relationships, which are narrower. *See* Restatement (Second) of Agency § 1 cmt. d (1958) (explaining the distinction). A master-servant relationship is a species of agency relationship that exposes the master to greater liability for the servant's torts—but agency relationships in general do not require the principal to have "control over the [agent's] physical conduct." *Ibid.*; *see also, e.g.*, *Green v. H&R Block, Inc.*, 735 A.2d 1039, 1051 (Md. 1999) ("[T]he level of control a principal exercises over an agent is less than the level of control a master has over a servant."). In any event, the level of control the Government exercised over the contractors' operations in those cases was far less than the FCC's control over USAC. *See, e.g.*, *Orleans*, 425 U.S. at 818 ("the local entities here in question have complete control over operations of their own programs with the Federal Government supplying … oversight only to assure that federal funds not be diverted to unauthorized purposes.").

guidance from the Commission" before acting. 47 C.F.R. § 54.702(c).

D. Petitioner's Remaining Arguments Fail

Petitioner concludes by suggesting that the history of USAC and the E-rate program demonstrates that Congress "intended" for there to be no principal-agent relationship between the FCC and USAC. Pet'r Br. 46-49. But this discussion is largely a sideshow, from which petitioner draws the wrong lesson.

1. Petitioner goes to great lengths to show that USAC is not itself a federal agency or government-controlled corporation. But "agent of the United States" obviously does not refer to federal agencies. Otherwise, Congress would have said "agency," not "agent." Moreover, Congress has made it abundantly clear that it wants the FCA to protect federal programs administered by non-government entities.

2. If anything, the history of USAC and the E-rate program confirms that USAC is an agent of the FCC.

The Telecommunications Act of 1996 did not prescribe a structure for administering the E-rate program. So the FCC ordered the National Exchange Carrier Association (NECA) to establish an independent, "unaffiliated, not-for-profit corporation[]" to "administer[] significant portions" of the E-rate program. Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service, 12 FCC Rcd. 18400, 18416, 18431 (July 18, 1997); *see id.* at 18430-36. That corporation was known as the Schools and Libraries Corporation. In the same directive, the FCC ordered NECA to create USAC to serve as "an independently functioning, not-for-profit subsidiary" to administer

universal service programs for high-cost areas and low-cost individuals and "perform billing and collection functions" for the E-rate program. *Id*. at 18415.

The GAO had no issue with the FCC's order that NECA establish USAC as a subsidiary to perform administrative functions. *See generally* U.S. Gov't Accountability Off., GAO/T-RCED/OGC-98-84, *Telecommunications: FCC Lacked Authority to Create Corporations to Administer Universal Service Programs* (1998). But the GAO *did* take issue with the FCC's order that NECA create an independent Schools and Libraries Corporation; the GAO determined that this violated the Government Corporation Control Act. *Id.* at 4-5.

Congress responded by instructing the FCC to "propose a revised structure for the administration" of universal service programs, including the E-rate program. S. 1768, 105th Cong. 2d Session (Calendar No. 326), at 52 (1998); *see* H.R. Rep. No. 105-504, at 87 (1998) (Conf. Rep.). Congress wanted the FCC to create an entity whose authority was "limited" to "ministerial acts" to implement the universal service programs. S. 1768, at 52-53. That entity was also to be prohibited from "interpret[ing] the intent of the Congress…" or "any rule promulgated by the Commission in carrying out the programs." *Id.* at 53.

The FCC did exactly that. It responded by "consolidating all of the administrative responsibilities" for the E-rate program into USAC. Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service, 13 FCC Rcd. 25058, 25064 (Nov. 20, 1998). To alleviate Congress's concerns, the FCC "emphasize[d]

that USAC's function … [would] be exclusively administrative." *Id.* at 25067. The FCC also confirmed that it would "*retain[] ultimate control* … through its authority to establish the rules governing" the E-rate program and "its review of administrative decisions." *Id.* at 25067-68 (emphasis added).

Thus, to the extent the history of USAC's creation has any probative value, it tilts in favor of finding that USAC is an agent of the FCC, acting on its behalf to administer the E-rate program. In the 25 years since the FCC directed USAC to administer the E-rate program on its behalf, Congress has not disturbed that arrangement.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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