No. 22-1515

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.* TODD HEATH,

Relator-Appellant,

v.

WISCONSIN BELL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 2:08-cv-00724-LA (Hon. Lynn Adelman)

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC

Andrew R. Varcoe
Maria C. Monaghan
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Christian D. Sheehan
John P. Elwood
Jayce L. Born
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
T: (202) 942-5000
F: (202) 942-5999
christian.sheehan@arnoldporter.com

Counsel for Amicus Curiae

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1515

Short Caption: United States ex rel. Heath v. Wisconsin Bell, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Arnold & Porter Kaye Scholer LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Christian D. Sheehan Date: 09/06/2023

Attorney's Printed Name: Christian D. Sheehan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 601 Massachusetts Ave. NW

Washington, DC 20001

Phone Number: (202) 942-5000 Fax Number: (202) 942-5999

E-Mail Address: christian.sheehan@arnoldporter.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1515

Short Caption: United States ex rel. Heath v. Wisconsin Bell, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Arnold & Porter Kaye Scholer LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ John P. Elwood Date: 09/06/2023

Attorney's Printed Name: John P. Elwood

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 601 Massachusetts Ave. NW

Washington, DC 20001

Phone Number: (202) 942-5000 Fax Number: (202) 942-5999

E-Mail Address: john.elwood@arnoldporter.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1515

Short Caption: United States ex rel. Heath v. Wisconsin Bell, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Arnold & Porter Kaye Scholer LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Jayce L. Born Date: 09/06/2023

Attorney's Printed Name: Jayce L. Born

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 601 Massachusetts Ave. NW

Washington, DC 20001

Phone Number: (202) 942-5000 Fax Number: (202) 942-5999

E-Mail Address: jayce.born@arnoldporter.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1515

Short Caption: United States ex rel. Heath v. Wisconsin Bell, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Arnold & Porter Kaye Scholer LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Andrew R. Varcoe Date: 09/06/2023

Attorney's Printed Name: Andrew R. Varcoe

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 1615 H Street NW

Washington, DC 20062

Phone Number: (202) 463-5337 Fax Number:

E-Mail Address: avarcoe@USChamber.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1515

Short Caption: United States ex rel. Heath v. Wisconsin Bell, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Arnold & Porter Kaye Scholer LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Maria C. Monaghan Date: 09/06/2023

Attorney's Printed Name: Maria C. Monaghan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 1615 H Street NW

Washington, DC 20062

Phone Number: (202) 463-5337 Fax Number:

E-Mail Address: mmonaghan@USChamber.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

TABLE OF CONTENTS

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities iv

Statement of Interest 1

Introduction 2

Argument 4

I. Wisconsin Bell's Submissions to USAC Do Not Constitute "Claims" Under the FCA as a Matter of Law 4

II. The Panel's Holding Would Have Wide-Reaching and Serious Ramifications 6

Conclusion 11

Certificate of Compliance 13

Certificate of Service 14

TABLE OF AUTHORITIES

Page(s)

Cases

U.S. ex rel. Adams v. Wells Fargo Bank N.A.,
No. 2:11-cv-535, 2013 WL 6506732 (D. Nev. Dec. 11, 2013).....10

U.S. ex rel. Costner v. URS Consultants, Inc.,
153 F.3d 667 (8th Cir. 1998) 9

Farmers Tel. Co. v. FCC, Inc.,
184 F.3d 1241 (10th Cir. 1999) 4

U.S. ex rel. Fellhoelter v. Valley Milk Prods., L.L.C.,
617 F. Supp. 2d 723 (E.D. Tenn. 2008).....10

U.S. ex rel. Garbe v. Kmart Corp.,
824 F.3d 632 (7th Cir. 2016) 5

U.S. ex rel. Garg v. Covanta Holding Corp.,
478 F. App'x 736 (3d Cir. 2012) 6, 10

Hutchins v. Wilentz, Goldman & Spitzer,
253 F.3d 176 (3d Cir. 2001) 9

In re Incomnet, Inc.,
463 F.3d 1064 (9th Cir. 2006) 4, 5

U.S. ex rel. Kraus v. Wells Fargo & Co.,
943 F.3d 588 (2d Cir. 2019) 10, 11

U.S. ex rel. Marcus v. Hess,
317 U.S. 537 (1943).....3

Masters v. Hesston Corp.,
291 F.3d 985 (7th Cir. 2002) 5

United States ex rel. Newsham v. Lockheed Missiles & Space Co.,
722 F. Supp. 607 (N.D. Cal. 1989).....7

Page(s)

Cases—Continued

U.S. ex rel. Shupe v. Cisco Sys., Inc.,
759 F.3d 379 (5th Cir. 2014) 6

U.S. ex rel. Totten v. Bombardier Corp.,
380 F.3d 488 (D.C. Cir. 2004).....9

United States v. McNinch,
356 U.S. 595 (1958).....6

United States v. Neifert-White Co.,
390 U.S. 228 (1968).....6

Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens,
529 U.S. 765 (2000).....2, 11

Statutes

31 U.S.C.
§ 3729(c) (2008) 2, 5

36 U.S.C.
§ 21708.....7
§ 30908.....7
§ 70904.....7
§ 230107 7
§ 300101.....7
§ 300104(a)(3)(A)(i) 7
§ 300104(d)(2)(A).....7

47 U.S.C.
§ 254(d).....4, 5

Page(s)

Regulations

47 C.F.R.
§ 54.701(a) 4
§ 54.702(b) 4, 5
§ 54.706 5
§ 54.709(c) 5

Legislative Materials

H.R. 2267, 105th Cong. § 614(a) (1st Sess. 1997) 4

Other Authorities

About USAC, *Who We Are,* USAC, https://www.usac.org/about/ (last visited Aug. 30, 2023) 4

1 F. Shannon, *The Organization and Administration of the Union Army*, 1861-1865 (1965) 7

U.S. Gov't Accountability Off., GAO-10-97, Federally Created Entities: An Overview of Key Attributes 17-22 (2009) 8

STATEMENT OF INTEREST[1]

Pursuant to Federal Rule of Appellate Procedure 29, the Chamber of Commerce of the United States of America (the "Chamber") submits this brief in support of defendant-appellee and its petition for rehearing en banc.

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

The Chamber and its members have a strong interest in the correct interpretation of the FCA—and specifically in ensuring that when companies enter arrangements involving exclusively private money where the Government can suffer no financial loss, those companies are not subject to the FCA's "essentially punitive"

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

regime of treble damages and penalties. *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784-85 (2000). Here, Relator seeks an award of damages in favor of the Government (together with a substantial bounty for Relator) for fraud purportedly committed against what all agree is a private company, the Universal Service Administrative Company ("USAC"), involving funds consisting entirely of contributions from other private entities and maintained in the private Universal Service Fund ("USF"). The panel's holding that it is for a jury to decide whether those funds are subject to the FCA is incorrect and risks creating inconsistent exposure to FCA liability for businesses, including the Chamber's members, based on the happenstance of the jurisdiction in which the case is filed.

INTRODUCTION

One of the rehearing petition's central questions is whether the panel correctly concluded that there was sufficient evidence from which a reasonable jury could determine that the Government "provides" or "reimburse[s]" funds that a private corporation pays under the E-Rate program using contributions from private companies, such that requests for payment constitute "claims" subject to FCA liability, 31 U.S.C. § 3729(c) (2008). The Chamber respectfully submits that the panel erred. It is uncontested that USAC is a private corporation wholly owned by a telecommunications trade association, not a government entity, and that USF is wholly funded by contributions from telecommunications carriers, not by taxpayer

funds or other monies received from the Government. Thus, the panel should have concluded that submissions to USAC are not covered by the FCA *as a matter of law*.

The United States' Statement of Interest and accompanying declarations to the district court in this case, which the panel held created a genuine issue of material fact for trial, Op. 18, do not change that conclusion. The Government argued that it "provides . . . the money" only in the sense that Congress created the statutory structure under which private parties pay funds into the USF and through which the FCC regulates USAC. *See* Doc. 106 at 7.[2] There is no basis to apply this sweeping definition of "provides" to the FCA, which would permit the Government to obtain through litigation funds that were never its to lose under a statute enacted to "provide for restitution to the government of money taken from it by fraud," *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943). Such a broad reading would have serious and wide-ranging ramifications, subjecting to punitive FCA liability a vast array of purely private arrangements and extending the FCA past its limits. Rehearing is warranted.

[2] As in the Rehearing Petition, "Doc." refers to an entry on the district court docket.

ARGUMENT

I. Wisconsin Bell's Submissions to USAC Do Not Constitute "Claims" Under the FCA as a Matter of Law

E-Rate is funded with disbursements from the USF and is administered by USAC. 47 C.F.R. § 54.701(a). USAC is a private corporation registered in Delaware, with a single shareholder: the National Exchange Carrier Association, Inc. ("NECA"), a telecommunications trade association.[3] Like the telecommunications industry (and many other industries), USAC is regulated by the government—here, the FCC. *See, e.g.*, *In re Incomnet, Inc.*, 463 F.3d 1064, 1071 (9th Cir. 2006).

Congress and the FCC purposefully structured E-Rate so the USF would not receive any governmental monies. H.R. 2267, 105th Cong. § 614(a) (1st Sess. 1997) (USF funds "administered by an independent, non-Federal entity," "not deposited into the Federal Treasury," and "not available for Federal appropriations"). Telecommunications companies transfer fees directly to USAC, 47 U.S.C. § 254(d), and USAC deposits those funds into a private bank account, *see* 47 C.F.R. § 54.702(b). USAC then pays those fees to companies in the telecommunications industry, and the telecommunications companies in turn provide products and

[3] *About USAC*, *Who We Are,* USAC, https://www.usac.org/about/ (last visited Aug. 30, 2023); *see also Farmers Tel. Co. v. FCC, Inc.*, 184 F.3d 1241, 1245-46 (10th Cir. 1999); *In re Incomnet, Inc.*, 463 F.3d 1064, 1071 (9th Cir. 2006).

services to certain beneficiaries, including underprivileged and underserved schools and libraries needing telecommunications and computer equipment. *See Incomnet*, 463 F.3d at 1066-67; 47 U.S.C. § 254(d); 47 C.F.R. § 54.706; *id.* § 54.702(b). If USAC faces a financial shortfall, rather than turning to the U.S. Treasury as governmental entities commonly would do, it must seek *private* credit through commercial markets to be repaid from additional revenues from telecommunications companies, 47 C.F.R. § 54.709(c).

Under the provision of the FCA that the panel applied, a false "claim" is actionable "if the United States Government *provides* . . . or . . . will reimburse . . . any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c) (2008) (emphasis added). This case thus turns on the meaning of "provides" and whether it encompasses privately held funds like the USF that do not affect the public fisc. This question of statutory interpretation presents a purely legal issue that the panel should have decided. *See U.S. ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 645 (7th Cir. 2016) ("[T]he interpretation of contractual and regulatory terms is generally a question of law."); *Masters v. Hesston Corp.*, 291 F.3d 985, 989 (7th Cir. 2002) ("The interpretation of a statute is a question of law.").

Rather than interpret the term "provides," however, the panel summarily concluded that the Government's Statement of Interest filed in the district court—which contains almost exclusively legal argument about the meaning of

"provides"—created an issue of fact for the jury. But there are no factual issues; the disputed issues are entirely legal. The panel should have concluded that the FCA does not reach the funds at issue here, because there is no possible injury to the public fisc. *See, e.g.*, *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (FCA only remedies fraud "that might result in financial loss to the Government"); *U.S. ex rel. Garg v. Covanta Holding Corp.*, 478 F. App'x 736, 742 (3d Cir. 2012) (no FCA claim where "[w]ith or without [the] alleged fraud, the treasury of the United States would be in the same position"). Indeed, the only other appellate court to consider whether the FCA covers requests submitted to USAC for reimbursement from the USF held that it does not. *See U.S. ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379, 387-88 (5th Cir. 2014). Thus, the full Court should grant appellee's petition and hold as a matter of law that Wisconsin Bell's submissions to USAC are not "claims" under the FCA.

II. The Panel's Holding Would Have Wide-Reaching and Serious Ramifications

The FCA was adopted during the Civil War in response to allegations of fraud against the government. *United States v. McNinch*, 356 U.S. 595, 599 (1958). Private contractors supporting the Union Army were accused of flagrantly defrauding the federal treasury: "For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols,

the experimental failures of sanguine inventors, or the refuse of shops and foreign armories." *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989) (quoting 1 F. Shannon, *The Organization and Administration of the Union Army*, 1861-1865, at 54-56 (1965)).

In its Statement of Interest, the Government contended that because USAC is federally established and subject to FCC oversight and regulation, it "provides" federal funds. *See* Doc. 106 at 18. If that broad position were accepted, it would expand the FCA to reach a staggeringly broad swath of private transactions, with potentially devastating effects across a wide range of industries. Indeed, there are many entities that Congress has chartered to further federal goals, including the American Red Cross, the Future Farmers of America, the Boy Scouts, the Veterans of Foreign Wars, and the American Legion. Each of these organizations has close ties to the government and is subject to various levels of federal oversight. The American Red Cross, 36 U.S.C. § 300101, reports to the Department of Defense and Congress annually and has a chairman approved by the President and an advisory council appointed by the President, *id.* § 300104(a)(3)(A)(i), (d)(2)(A); the Future Farmers of America's board includes five federal officials, *id.* § 70904; and the Boy Scouts, *id.* § 30908, the Veterans of Foreign Wars, *id.* § 230107, and the American Legion, *id.* § 21708, all must report to Congress annually. But no one would suggest

that such entities are subject to the FCA, because they are private entities financed with private funds.

Moreover, there are government-sponsored enterprises like Fannie Mae and the Federal Home Loan Mortgage Corporation ("Freddie Mac") that are "federally chartered," "quasi-public entities for specific public policy purposes"; numerous federally funded research and development centers that are "private entities" that "executive branch entities . . . have established to meet long-term federal research needs" but that "generally are operated by their private entity administrators under pertinent state laws," like the National Defense Research Institute and the Center for Naval Analyses. And, perhaps most relevant here, dozens of other federally created entities that do not neatly fit in a single category but consist of "private, nonprofit corporations, institutes, banks, funds, foundations, and other organizations" that "are privately owned but are controlled by the federal government to a greater extent than other" similar entities, like Amtrak and the Federal Reserve Banks. *See* U.S. Gov't Accountability Off., GAO-10-97, Federally Created Entities: An Overview of Key Attributes 17-22 (2009).

If this Court permits cases like this one to proceed to trial, a statute enacted to address flagrant acts of fraud harming the federal treasury could instead be used to pursue punitive treble damages for private arrangements between private entities

involving private funds that were never the Government's property to lose—much less to recoup.

The panel's decision is an outlier. Most courts have rightly concluded as a matter of law that claims submitted to these sorts of federally created private entities, involving arrangements that do not implicate the public fisc, fall outside the FCA's reach. For example, in *United States ex rel. Totten v. Bombardier Corp.*, the D.C. Circuit held (in an opinion written by then-Judge Roberts) that the FCA did not apply to invoices submitted to Amtrak, rejecting the relator's argument that any claim submitted to Amtrak was subject to the FCA simply "because Amtrak was a mixed-ownership government corporation" and "the Government has continued to hold all of Amtrak's preferred stock, and has provided sizable subsidies to Amtrak." 380 F.3d 488, 491 (D.C. Cir. 2004).

If the panel's reasoning were correct, *Totten* very likely would have come out the other way. As would a number of previously decided cases in other circuits and districts. *See, e.g.*, *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 183 (3d Cir. 2001) (FCA does not cover claims to bankruptcy court, although federal bankruptcy judge oversaw distribution in furtherance of federal program of administering bankruptcy estates); *U.S. ex rel. Costner v. URS Consultants, Inc.*, 153 F.3d 667, 671, 677 (8th Cir. 1998) (FCA does not cover fraud against trust fund established to "meet [private party's] environmental clean up responsibilities under

[its] Consent Decree" with the Environmental Protection Agency (internal quotation marks omitted)); *Garg*, 478 F. App'x at 741 (FCA did not reach tax-exempt bonds issued by a state utilities authority simply because the federal government granted tax-exempt status); *U.S. ex rel. Adams v. Wells Fargo Bank N.A.*, No. 2:11-cv-535, 2013 WL 6506732, at *1 (D. Nev. Dec. 11, 2013) (Government conceded, and court held, that pre-2009 FCA did not apply to congressionally created Fannie Mae and Freddie Mac); *U.S. ex rel. Fellhoelter v. Valley Milk Prods., L.L.C.*, 617 F. Supp. 2d 723, 729-30 (E.D. Tenn. 2008) (FCA does not cover privately held funds that milk producers paid to other private parties under federal agricultural marketing orders).

The Second Circuit is the only other circuit to have endorsed a sweeping definition of "provides" akin to the one the Government advocates here, holding in *U.S. ex rel. Kraus v. Wells Fargo & Co.* that the word "is properly read to reach some circumstances in which the government makes money available through an exercise of its legal authority outside the appropriations process." 943 F.3d 588, 602 (2d Cir. 2019) (citation omitted). In adopting this expansive reading, the Second Circuit relied on the district court's decision *in this case*, underscoring the real and negative effect that this Court's affirmance would have for a host of private commercial transactions involving purely private funds. The court in *Kraus* concluded that the FCA applies to Federal Reserve Banks' discount-window loans

because even though the Federal Reserve Banks are owned and funded by private member banks, Congress created the mechanism through which the banks issued the loans. *Id.* at 603-04. The court reasoned that the federal government "provided" the funds for the loans at issue by creating "the source of the purchasing power conferred on the banks." *Id.* at 603. But even there, the banks were "required to remit all their excess earnings to the United States Treasury," so the court concluded that the alleged fraud there "injure[d] the public fisc." *Id.* at 604-05; *see id.* at 592 (same).

If Congress had intended to apply the FCA's "punitive" liability scheme to private funds held by private entities simply because the funding mechanism was made possible by federal law, regardless of whether there was any loss to the public fisc, it would have said so. *See Vt. Agency*, 529 U.S. at 784. Given the significant ramifications of a holding that allows *a jury* to read this construction into the FCA, this issue warrants the full court's consideration.

CONCLUSION

The Court should grant defendant-appellee's petition for rehearing en banc.

Dated: September 6, 2023

Respectfully submitted,

/s/ Christian D. Sheehan

Andrew R. Varcoe
Maria C. Monaghan
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Christian D. Sheehan
John P. Elwood
Jayce L. Born
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
T: (202) 942-5000
F: (202) 942-5999
christian.sheehan@arnoldporter.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. The foregoing Brief of Amici Curiae complies with the type-volume limitations of Seventh Circuit Rule 29 because the brief contains 2,511 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: September 6, 2023

/s/ Christian D. Sheehan
Christian D. Sheehan

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2023, I electronically filed the foregoing document with the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 6, 2023

/s/ Christian D. Sheehan
Christian D. Sheehan