No. 22-1035

IN THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

UNITED STATES OF AMERICA ex rel. VICTORIA DRUDING, *et al*.,

Plaintiffs-Appellants,

v.

CARE ALTERNATIVES, INC.

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

BRIEF OF AMICUS CURIAE TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLANTS

Jacklyn DeMar
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W., Suite 501
Washington, DC 20036
Telephone: (202) 296-4826
Email: jdemar@taf.org

Nathaniel F. Smith
HALUNEN LAW
80 South 8th Street, Suite 1650
Minneapolis, MN 55402
Telephone: (612) 605-4098
Email: smith@halunenlaw.com

Counsel for Amicus Curiae Taxpayers Against Fraud Education Fund

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in the matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

Respectfully Submitted,

Dated: May 6, 2022

TAXPAYERS AGAINST FRAUD EDUCATION FUND

By: s/Jacklyn N. DeMar
Jacklyn N. DeMar

Attorney for *Amicus Curiae*
Taxpayers Against Fraud Education Fund

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To the Honorable United States Court of Appeals:

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, TAFEF respectfully submits this brief as AMICUS CURIAE in support of Appellants. A Motion for Leave to File has been filed contemporaneously with this brief, which is subject to that Motion.

STATEMENT OF INTEREST[1]

TAFEF is a nonprofit, public interest organization dedicated to combating fraud against the Government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the federal False Claims Act ("FCA"), has participated in litigation as a *qui tam* relator and as an *amicus curiae*, and has provided testimony to Congress about ways to improve the FCA. TAFEF is supported by whistleblowers and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986. TAFEF has a strong interest in ensuring proper interpretation and application of the FCA.

TAFEF's interest in this case is ensuring that the Supreme Court's broad dicta in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989

[1] No party's counsel authored this brief, in whole or in part, and no person other than Amicus Curiae TAFEF, its members, or its counsel made a monetary contribution that was intended to fund preparing or submitting this draft.

(2016) (*Escobar I*) on materiality is not misinterpreted to impose a standard the Court did not adopt and Congress did not intend. The district court granted summary judgment on the element of materiality because it found that relators introduced no evidence that the Government's continued payment of defendants' claims "was not the result of its having concluded those inadequacies were immaterial to its decision to make those payments." *Druding v. Care Alternatives, Inc.*, No. CV 08-2126, 2021 WL 5923883, at *6 (D.N.J. Dec. 15, 2021). That holding is inconsistent with *Escobar I* and contradicts this court's post-*Escobar I* materiality analysis. Moreover, it fails to appreciate how Government payment systems function and, if adopted, could dramatically undermine the FCA.

ARGUMENT

The Supreme Court's decision in *Escobar I* endorsed well-understood standards of materiality grounded in the common law. *Id.* at 2003. Under this construct, the inquiry is whether false or fraudulent claims are capable of influencing a particular decision or action—not whether they actually did so.

Escobar I did not change the "natural tendency" standard Congress codified in defining materiality under the FCA, which provides that a violation is material if it has "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4)). Indeed, the Court specifically observed that the FCA's materiality requirement is no different whether

using the language of the statute or the common law, because "[u]nder any understanding of the concept, materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'" *Id.* (quoting 26 R. Lord, Williston on Contracts § 69:12, p. 549 (4th ed. 2003).

The Supreme Court took note that under the common law, materiality can be established from the perspective of a "reasonable person" or the particular defendant. Specifically, a matter is material if: (1) a reasonable person would attach importance to it in determining his choice of action; or (2) if the defendant knew or had reason to know that the recipient of the representation would attach importance to it in determining his choice of action even if a reasonable person would not. *Id*. at 2003 (citing Restatement (Second) of Torts § 538, at 80).

The Supreme Court, in dicta, also identified several factors that may or may not be relevant to the materiality determination. *Id.* at 2003-04. These factors included consideration of the underlying statutory, regulatory, or contractual system and whether the compliance was "central" or imperative" to the items or services provided or "minor or insubstantial." *Id.* at 2001-04.

While the factors that the Supreme Court listed in dicta may be the types of factors to consider when assessing materiality, as the Court itself explained, and this Court has recognized, the list was not exhaustive and the materiality determination requires an analysis based on the facts of each case. *Escobar I,* 136 S. Ct. at 2001

(no "single fact or occurrence [is] always determinative") (quoting *Matrixx Initiatives, Inc. v. Siracusaro,* 563 U.S. 27, 39 (2011)); *United States ex rel. Int'l Bhd. of Elec. Workers Loc. Union No. 98 v. Farfield Co.*, 5 F.4th 315, 342 (3d Cir. 2021).

Nevertheless, some courts, like the district court below, have misconstrued and wrongly emphasized the Supreme Court's observation that continued Government payment with actual knowledge of noncompliance is "strong evidence that the requirements are not material." *Id.* at 2003-04. In this case, the district court held that in order for the Relators to meet their burden on summary judgment, they had to present evidence that the Government's continued payment of claims after awareness of allegations of defendant's inadequate billing practices did not indicate lack of materiality. But that requirement neither follows from *Escobar* nor faithfully applies the standard Congress adopted when it amended the FCA in 2009 to include a definition of materiality. *See* Fraud Enforcement and Recovery Act of 2009, S. Rep. No. 111-10, at 12, n.6 (2009) (citing *Neder v. United States*, 527 U.S. 1, 16 (1999)). At most, *Escobar I* observed, as one potential factor, that continued Government payment after *actual knowledge* of an *actual violation* may be evidence relevant to, but not dispositive of, materiality.

More fundamentally, the question presented to the Court in *Escobar* did not involve a challenge to the materiality standard, let alone what evidence may be

probative of materiality, but rather addressed falsity—whether "the 'implied certification' theory of legal falsity under the FCA…. is viable" and, if it is, whether a claim can be false if the violated requirement does not expressly state that it is a condition of payment. *See* Petition for Writ of Certiorari, *Universal Health Services, Inc. v. United States et al*., No. 15-7, at ii (June 30, 2015). Moreover, *Escobar I* was a case at the pleading stage, when no evidence had yet been presented. Thus, the Court's observation about what weight to give hypothetical evidence, devoid of any context, much less a developed factual record on the issue of whether and why the Government historically stops (or does not stop) payment, cannot provide a reliable guide for courts in assessing the weight of evidence before them.

As TAFEF demonstrates below, absent evidence that the Government had actual knowledge that an actual violation rendered a claim was false at the time presented, materiality can be established without evidence addressing the reasons for the Government's continued payment of claims.

I. Materiality Is a Holistic, Totality-of-the-Circumstances Inquiry

This Court has correctly interpreted *Escobar I* to endorse an "objective materiality analysis," which "is a holistic, totality-of-the-circumstances examination of whether the false statement has a 'natural tendency to influence or be capable of influencing the payment or receipt of money or property.'" *Farfield*, 5 F.4th at 342, 347 (citing *Escobar I*, at 2003-04).

As the Supreme explained in *Escobar I,* the list of factors that may be relevant to materiality is not exhaustive, and no "single fact or occurrence [is] always determinative." *Escobar I*, 136 S. Ct. at 2001 (quoting *Matrixx*, 563 U.S. at 39); *see also United States ex rel. Bibby v. Mortgage Investors Corp*., 987 F.3d 1340, 1347 (11th Cir. 2021); *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822, 831 (6th Cir. 2018) (describing inquiry as "holistic"). Thus, whether at the motion to dismiss stage, summary judgment, or trial, there is no requirement that particular factors be established. Rather, a court, or a jury, must evaluate the totality of the circumstances relevant to the ultimate question of whether a violation would have a natural tendency to influence or be capable of influencing the government's payment decision.

II. A Plaintiff Is Not Required to Present Evidence Explaining the Government's Continued Payment of Claims to Establish Materiality

The district court thus erred in concluding that, at the summary judgment stage, a plaintiff must come forward with "**some** evidence" that the Government's continued payment of claims "was not the result of its having concluded those inadequacies [of Defendants' billing documentation] were immaterial to its decision to make those payments." *Druding*, 2021 WL 5923883, at *6 (observing that the Government never "refused any of [Defendant's] claims," nor "stopped reimbursing [Defendant] after it was made aware of the false, inadequately supported physician

certifications"). The question at summary judgment is whether there is evidence from which a factfinder reasonably could conclude that a requirement is capable of influencing a payment decision. That evidence need not include an explanation for the Government's continued payment, as such evidence would not even be required at trial. Rather, the court must assess whether sufficient evidence was presented from which a reasonable factfinder could conclude that a representation was material. *Bibby*, 987 F.3d at 1352 (reversing grant of summary judgment where evidence to support materiality was presented and factfinder would have to weigh the factors favoring materiality against those favoring immateriality).

Thus, for example, this court's decision in *Farfield* affirmed a judgment reached after trial before a special master that a defendant had submitted false claims for payment on a government project where it failed to pay its workers the wages required by the Davis-Bacon Act. At trial, neither party presented evidence on the Government's payment practices. *Farfield*, 5 F.4th at 346 ("The parties have pointed us to no record evidence showing that the Government 'consistently refuses to pay claims in the mine run of cases based on noncompliance with' Davis-Bacon requirements or pays claims like those at issue here 'despite its actual knowledge that certain requirements were violated.'"). Rather than conclude that materiality was therefore not established, this Court held that there was no evidence to suggest the Government would have paid claims it knew were false, and what remained was

the prima facie showing based on the contractual and regulatory requirements and the defendant's knowledge of them. *Id.* at 346. Those other factors were sufficient to support materiality at trial. *See also United States ex rel. Ruckh v. Salus Rehabilitation LLC*, 963 F.3d 1089, 1105 (11th Cir. 2020) (reversing district court's grant of judgment notwithstanding the verdict where a reasonable jury could conclude that upcoding was material to the government's payment decision because it directly affected how much defendants were paid and went to the heart of their ability to obtain reimbursement); *United States v. Coloplast*, 327 F. Supp. 3d 300, 308 (D. Mass. 2018) (denying summary judgment where jury could conclude that government's continued payment had no bearing on whether defendant's practice was material because it could conclude the Government lacked actual knowledge of the violation and other evidence supported materiality).

That the reasons for the Government's continued payment of claims are not essential to a finding of materiality also follows from the fact that the "natural tendency" standard "focuses on the potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered." *Harrison II*, 352 F.3d at 916-17 (noting further that FCA liability may exist even where "a government entity might choose to continue funding the contract despite earlier wrongdoing by the contractor"); *United States. v. Lindsey*, 850 F.3d 1009, 1017 (9th

Cir. 2017) ("materiality is an objective element, and an absence of reliance does not affect its presence").

While some defendants "seem[] to demand that Plaintiffs show that the false statements actually did influence the payment of federal funds," the FCA "commands only that the false statements be 'capable' of influencing government action." *United States ex rel. Hedley v. Abhe & Svoboda, Inc.*, 199 F. Supp. 3d 945, 956 (D. Md. 2016) (*citing Harrison II*, at 916-17). Were it otherwise, "'violations of identical provisions in separate cases could have different materiality results based on the predilections of particular program or accounting staff.'" *United States ex rel. Oliver v. The Parsons Corp.*, 498 F. Supp. 2d 1260, 1289-90 (C.D. Cal. 2006) (citing *United States v. President & Fellows of Harvard Coll.*, 323 F. Supp. 2d 151, 182 (D. Mass. 2004)). Moreover, causation and materiality are not the same thing. *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 491 (3d Cir. 2017) (rejecting the conflation of materiality and causation in the FCA); *see also United States ex rel. Cimino v. Int'l Bus. Machines Corp.*, 3 F.4th 412, 419 (D.C. Cir. 2021) ("[A] statement could be material—that is, capable of influencing the government's decision to enter a contract—without causing the government to do so.").

The district court's holding that a plaintiff must present evidence that the Government's continued payment was for some reason *other than* immateriality has the effect of making government continued payment dispositive, contrary to the

statutory definition[2] and the Supreme Court's decision in *Escobar I*, as well as its prior precedent on materiality. *See Basic Inc. v. Levinson*, 485 U.S. 224, 236 (1988) ("Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive").

The district court should have considered whether the evidence that *was* presented provided a basis from which a reasonable factfinder could conclude that the representations were capable of influencing a payment decision by a reasonable person or that the defendant recognized the representations were material to payment even if a reasonable person would not. As this Court has already noted, the requirements that the medical record support a physician's certification of eligibility for hospice is a condition of payment. *United States ex rel. Druding v. Care Alternatives*, 952 F.3d 89, 93 (3rd Cir 2020) (citing regulations). The requirement of eligibility for hospice is not minor and insubstantial or a mere technical requirement, but rather goes to the heart of the bargain with hospice care providers. The hospice benefit is premised on terminally ill patients, defined as those with a life expectancy of six months or less, focusing on palliative care and waiving the right to Medicare

[2] *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020) (courts must interpret statutory language "in accord with the ordinary public meaning of its terms" because "only the words on the page constitute the law").

payment of care designed to improve the patient's condition. In addition, there was evidence that the defendant was aware of the significance of the requirement, including that it audited its compliance with the requirement, acknowledged shortcomings, did not inform the government of those results, and altered records to cover up noncompliance. *Druding*, 2021 WL 5923883 at *4. Such evidence establishes materiality. *See Farfield*, 5 F.4th at 345 (defendant's appreciation that violations would likely affect the government "is enough to tilt the condition of payment factor in favor of materiality"); *see also United States v. Triple Canopy, Inc.*, 857 F.3d 174, 178-79 (4th Cir. 2017) (noting prior observation that defendant's own actions in covering up the noncompliance supported materiality and that that conclusion aligned with *Escobar I*). Under well-understood concepts of materiality, a factfinder could conclude that those factors supported a finding that the requirements were material.

A. The Government's Continued Payment of Claims is Only Relevant When the Government Has Actual Knowledge that a Requirement Was Violated

Escobar I observed that continued Government payment after "*actual knowledge* that certain requirements were violated" is strong evidence of lack of materiality. *Escobar I*, 136 S. Ct. at 2003-04 (emphasis added). There is a critical distinction between knowledge that fraud has been *alleged* and knowledge that fraud has been *committed*. As the First Circuit explained on remand in *Escobar II*, "mere

awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance." *United States ex rel. Escobar v. Universal Health Svcs.*, 842 F.3d at 105, 112 (1st Cir. 2016) (*Escobar II*); *see also United States ex rel. Brown v. Pfizer, Inc.* No. 05-6795, 2017 WL 1344365, at *11-12 (E.D. Pa. Apr. 12, 2017) ("mere knowledge of allegations regarding non-compliance is insufficient to prove actual knowledge of noncompliance"); *FHFA v. HSBC N. Am Holdings Inc.*, 33 F. Supp. 3d 455, 481 (S.D.N.Y 2014) ("knowledge of conditions creating a risk of falsity, however, is not actual knowledge of falsity").

The Government's payment of claims or failure to take other enforcement actions following mere awareness of *allegations* of fraud simply "has no bearing on the materiality analysis." *Prather*, 892 F.3d at 834; *see also United States ex rel. Campie* v. *Gilead Scis., Inc.*, 862 F.3d 890, 907-08 (9th Cir. 2017) (holding that Government's continued payment of claims despite knowledge of allegations that defendant violated certain requirements relevant to FDA approval of drug did not defeat materiality); *United States ex rel. Rahimi v. Rite-Aid Corp.*, 2019 WL 1426333, at *8 (E.D. Mich. Mar. 30, 2019) ("Rite-Aid's argument conflates 'actual knowledge that certain requirements were violated' with actual knowledge of allegations that certain requirements were violated").[3] Absent "actual knowledge"

[3] In contrast, in *United States ex rel. Spay v. CVS Caremark Corp.*, 875 F.3d 746, 764 (3rd Cir. 2017), there was evidence that the Government was aware at the time

of fraud, continued payment to a provider is not "strong evidence" that the alleged violation is immaterial. *See also Escobar II*, 842 F.3d at 112; *Pfizer*, 2017 WL 1344365, at *11-12.

The government's investigation of the allegations and subsequent decision not to intervene also does not indicate lack of materiality. *Farfield*, 5 F.4th at 346 (noting that the Supreme Court's decision in *Escobar I* involved a non-intervened case and the court did not mention that as a relevant factor). The plain language and structure of the FCA not only authorizes but encourages relators to proceed when the Government declines. *See* 31 U.S.C. § 3729(c)(3) (providing that if the Government declines to proceed, the relator has the right to conduct the action, subject to certain limitations); *Id.* § 3729(d)(2) (awarding greater relator share in declined cases).

The district court appeared to conclude that the Government had knowledge of the falsity of the claims because "it could see what was or was not submitted to it by [Defendants] along with its claims seeking payment." *Druding*, at *6. But awareness of submission is not the same thing as awareness of actual violations. At times the government will have in its possession the information submitted to it, but that does not equate to actual knowledge of a violation. And, as noted above, even if it did, *Escobar I* only describes actual knowledge as "strong" evidence of

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that defendants were submitting claims that flouted the regulatory requirement at issue.

immateriality. Here, other evidence supported materiality, and the court should not have weighed the evidence, which is the role of the factfinder. *Yates v. Pinellas Hematology & Oncology*, 21 F.4th 1288, 1300-01 (11th Cir. 2021) (government payment of claims is relevant only to the extent it helps answer the ultimate question, and other evidence, including the defendant's beliefs at the time, was more than sufficient to uphold the jury's verdict); *Bibby*, 987 F.3d at 1347-48.

B. Even When the Government Has Actual Knowledge of a Violation, the Government Has Many Reasons to Pay Claims That Do Not Indicate That a Requirement is Immaterial.

Even when the Government has actual knowledge of a violation, the Government's continued payment of claims may signal nothing about the significance of the noncompliance to the Government's payment decision or the defendant's understanding of the significance of the nonconformance to the Government's payment decision. The Government's failure to deny payment in the face of noncompliance will often be a poor indicator of materiality. The Government may have many reasons to continue paying even upon learning of possible wrongdoing, including that stopping the payment of claims could potentially jeopardize the public health, safety and welfare, or interfere with contractual rights. *See United States ex rel. Am. Sys. Consulting, Inc., v. ManTech Advanced Sys. Int'l*, 600 Fed. Appx. 969, 977 (6th Cir. 2015) (termination could cause incremental losses that exceed the benefits, making a decision not to terminate a poor indicator of

materiality at the outset); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 917 (4th Cir. 2003) ("we can foresee instances in which a government entity might choose to continue funding the contract despite earlier wrongdoing by the contractor. For example, … to avoid further costs the government might want the subcontractor to continue the project rather than terminate the contract and start over."); *United States v. President & Fellows of Harvard College*, 323 F. Supp. 2d 151, 182 (D. Mass. 2004) (government agency's attempts to continue a project to aid in reform of the Russian market system after discovering the fraud of federal grantee "might simply mean that USAID decided that its first priority would be to salvage some of the work to reform the Russian economy, and then deal with its miscreant grantee later"); *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 442 (E.D.N.Y. 1995) (government continued to pay claims after learning of falsity because it was contractually bound to make the payments). Indeed, "the more dependent the government became on a fraudulent contractor, the less likely it would be to terminate the contract." *United States ex rel. Al-Sultan v. Public Warehousing Co.*, No. 1:05-cv-2968-TWT, 2017 WL 1021745, at *6 (N.D. Ga. Mar. 16, 2017) (internal quotations and citations omitted).

The Government must often ensure that goods and services continue to be provided, and a rule that the Government must stop payment to demonstrate the importance of a regulatory or contractual requirement would harm the public

interest. It is also not in the interest of healthcare providers or other Government contractors to require the Government to stop payment every time there was an allegation of fraud, or even where the Government has actual knowledge of fraud. Collecting the wrongfully obtained payments later as damages is often the most prudent, and sometimes the only, way to proceed. Plainly put, a "defendant's false statement or omission that is capable of influencing the agency's action can give rise to FCA liability—regardless of whether the government pays for the claims or pursues some other course of action." United States Statement of Interest, *Petratos et al v. Genentech, Inc. et al*, 2:11-cv-03691, ECF No. 35-1 (D.N.J. Oct. 07, 2013), at 6-7.[4]

[4] The United States has filed numerous statements of interest explaining that "even where the government has actual knowledge of the defendant's wrongful conduct and continues to pay claims, such action does not necessarily undermine a materiality finding because there are many good reasons, including important public health and safety considerations, why the government might continue to pay claims in such circumstances." *Escobar I*, Case No. 14-1423, Brief of the United States as Amicus Curiae at 24 (1st Cir. Aug. 22, 2016) (citing *Harrison II*). *See, e.g.*, *U.S. ex rel. Miller and Sillman v. Weston Educational*, Case No. 14-1760, Brief of the United States as Amicus Curiae at 24 (8th Cir. Sept. 14, 2016) (same); *U.S. ex rel. Bibby and Donnelly v. Mortgage Investors Corp.*, Case No. 19-12736, Brief of the United States as Amicus Curiae at 22 (11th Cir. Sept. 24, 2019); (same); *U.S. ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, Case No. 17-5826, Brief of the United States as Amicus Curiae at 3 (6th Cir. Oct. 18, 2017) (same); *U.S. ex rel. A1 Procurement, LLC v. Thermcor, Inc.*, Case No. 15-cv-0015 RBS-DEM, ECF No. 188, Statement of Interest at 11 (E.D. Va. Apr. 26, 2017) (same); *U.S. ex rel. Beauchamp v. Academi Training Center, LLC*, Case No. 11-cv-00371 TSE-MSN, ECF No. 204, Statement of Interest at 6 (E.D. Va. Oct. 28, 2016) (same); *U.S. ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, Case No. 12-cv-00764, ECF No. 107, Statement of Interest at 7 (M.D. Tenn. May 3, 2017) (same).

This reality is most evident in the healthcare context where the system is designed to facilitate, not stop, payment. The Government has long followed a "pay and chase" model in the delivery of health care services, which ensures that delays do not hamper treatment of patients or payment to providers.[5]

The Government processes billions of healthcare claims every year. If the Government had to investigate and prevent the payment of all invalid claims to establish the importance of payment rules, the result would be incalculable delay and disruption in federal contracting and payment systems. *See, e.g., United States v. Mesquias*, 29 F.4th 276, 279 (5th Cir. 2022) ("Given the millions of claims that it handles, Medicare cannot scrutinize every claim that comes through the door. So the front end of its reimbursement system is based on trust…. On the back end, after Medicare reimburses the providers, auditors review suspicious claims."). And when the Government finds such claims were not only suspicious but false, materiality (and, as a consequence, the Government's recovery) under the FCA should not be negated by a failure to do the impossible—review and stop payment on those claims on the front end. *United States ex rel. Longo v. Wheeling Hospital*, No. 5:19-CV-192, 2019 WL 4478843, at *7 (N.D. W.Va. Sept. 18, 2019) ("The government does

[5] *See* Preventing Health Care Fraud: New Tools and Approaches to Combat Old Challenges, Hearing Bef. The Sen. Comm. On Finance, 112th Cong., (2011) (statement of Dr. Peter Budetti, Deputy Admin. And Dir. Of CMS Center for Program Integrity), https://www.finance.senate.gov/imo/media/doc/71524.pdf.

not enjoy the luxury of refusing to reimburse healthcare claims the moment it suspects there may be wrongdoing."); *Aldridge on Behalf of the United States v. Corporate Management*, No. 1:16-CV-369 HTW-LGI, 2021 WL 2518221, at *10 (S.D. Miss. June 18, 2021) (government policy "in the face of possible improper claims by a Critical Access Hospital, is to 'pay and chase,' to pay the claims then seek repayment, in order to keep a hospital open where the community would otherwise not have accessible hospital care"). In other contexts, such as procurement of military supplies or disaster recovery services, the Government must often continue to provide the goods or put military personnel or disaster victims at risk. Whether or how quickly agency officials respond to misconduct may also reflect more on the agency's resources and resourcefulness than on the significance of the misconduct. *See United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008) ("The United States is entitled to guard the public fisc against schemes designed to take advantage of overworked, harried, or inattentive disbursing officers; the False Claims Act does this by insisting that persons who send bills to the Treasury tell the truth."). Finally, terminating payment typically is just one of several available remedies, and the United States has broad discretion "to choose a variety of remedies, both statutory and administrative, to combat fraud." *United States v. Sioux Falls Indep. Sch. Dist.*, 688 F.3d 410, 414-15 (8th Cir. 2012).

Many FCA cases feature misrepresentations that clearly satisfy *Escobar's*

materiality standard—in that they involve misrepresentations that a reasonable government actor would find important to the government's payment decision or that the defendant knows the government actor would find important to the government's payment decision—but also feature payment by the Government even after the alleged misrepresentations have been revealed. The Supreme Court's observation that continued payment is relevant is not, and could not be, a directive to the Government regarding how the Government *should* act if it cares about a violation. Rather, the Supreme Court's observation assumes that the Government *does* stop paying if it is concerned. That assumption is factually incorrect.

By way of illustration, the following cases that were litigated or settled featured overwhelming evidence or credible allegations of misrepresentations that would have disqualified a contractor from receiving full payment from the Government. Each of these cases ultimately led to FCA judgments, criminal fines, and/or enormous settlements. Yet in each of these cases, even after receiving the compelling evidence of the misrepresentation, the Government continued to pay the contractor on transactions tainted by the egregious conduct at issue; that is, continued payment did not demonstrate that the violation was not material under the well-understood meaning of that standard. These are just a few of many real-world examples that reflect that even in the face of egregious conduct, the Government may continue to pay claims for any number of legitimate reasons, including to aid

beneficiaries, to provide needed goods for critical government services, or because government systems make it impossible to immediately cut off payment. *See, e.g.*, *United States ex rel. Kennedy v. Novo Nordisk et al.*, No 13-cv-01529 (D.D.C.) (allegations of FCA violations resolved for $58 million, despite Government continuing to pay for defendant's drug); *United States. ex rel. Delaney v. eClinical Works* No. 2:15-cv-00095 (D. Vt.) (the Government resolved allegations of the Anti-Kickback Statute against defendant for $155 million, but at no time stopped payments to defendants or removed their products from the market); *United States ex rel. Brown v. Amedisys Home Health, Inc*. No 10-cv-2323 (E.D. Pa.) (allegations of medical upcoding were resolved for $150 million, despite the government's continuing to make payments to defendants during the pendency of the case); *United States ex rel. Hutcheson v. Blackstone Medical, Inc*. et al. No. 06-1171 (D. Mass.) (the Government continued to make payments to defendant and implicated providers over the entire span of the litigation, ultimately resolving the matter for $30 million under the FCA). That the Government continued paying does not mean the noncompliance was immaterial when the noncompliance was capable of influencing decision-making at the time the claims were submitted.

CONCLUSION

The FCA's "natural tendency" standard renders a matter material if it is capable of influencing a payment decision. Although the district court appeared to

acknowledge that materiality requires a multi-factor, holistic analysis, the district court granted summary judgment for the defendant based on Relators' failure to present evidence explaining the Government's continued payment. That ruling is at odds with the plain language of the statutory definition of materiality, *Escobar I*, and this Court's materiality analysis. For the reasons discussed above, the district court's decision should be reversed.

Respectfully Submitted,

Dated: May 6, 2022

TAXPAYERS AGAINST FRAUD EDUCATION FUND

By: *s/Jacklyn N. DeMar*

Jacklyn N. DeMar, DC Bar No. 998370
TAXPAYERS AGAINST FRAUD EDUCATION FUND
1220 19th Street, N.W., Suite 501
Washington, DC 20036
Telephone: (202) 296-4826

Nathaniel F. Smith
HALUNEN LAW
80 South 8th Street,
IDS Center, Suite 1650
Minneapolis, MN 55402
Telephone: (651) 605-4098

Attorneys for *Amicus Curiae* Taxpayers Against Fraud Education Fund

CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 32(a); Local Appellate Rule 113.3)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,157 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 word processing program, a 14-point font size, and the Times New Roman type style.

The text of this electronic version of the brief is the same as the text of the paper copies of the brief. A virus check using the software Symantec Endpoint Protection Small Business Edition has been run on the electronic version and no virus was detected.

The undersigned is a member of the bar of this Court.

Respectfully submitted,

Dated: May 6, 2022

By: *s/ Jacklyn N. DeMar*
Jacklyn N. DeMar, DC Bar No. 998370
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W., Suite 501
Washington, DC 20036

Telephone: (202) 296-4826

Attorney for *Amicus Curiae* Taxpayers
Against Fraud Education Fund

CERTIFICATE OF SERVICE

I, Jacklyn N. DeMar, certify that on May 6, 2022, I caused a true and correct copy of the Brief of *Amicus Curiae* Taxpayers Against Fraud Education Fund to be served via the Court's ECF Filing System Notification and that service will be accomplished by the CM/ECF system. I further certify that upon filing, I will send ten (ten) paper copies of the foregoing to the Clerk of the Court

Dated: May 6, 2022

By: *s/ Jacklyn N. DeMar*