No. 17-15111

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *EX REL.* SCOTT ROSE, MARY AQUINO, MITCHELL NELSON, AND LUCY STEARNS,

Plaintiffs-Appellees,

v.

STEPHENS INSTITUTE, A CALIFORNIA CORPORATION DOING BUSINESS AS ACADEMY OF ART UNIVERSITY,

Defendant-Appellant.

On appeal from the United States District Court for the Northern District of California, The Honorable Phyllis J. Hamilton, Case No. 4:09-cv-05966-PJH

BRIEF FOR *AMICUS CURIAE* TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLEES AND AFFIRMANCE

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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 this 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.

TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Pursuant to Fed. R. App. P. 29, Taxpayers Against Fraud Education Fund ("TAFEF") respectfully submits this brief as *Amicus Curiae* in support of Appellees Scott Rose, Mary Aquino, Mitchell Nelson, and Lucy Stearns. A Motion for Leave to File has been filed contemporaneously herewith, and this brief is subject to that Motion. TAFEF supports Appellees and affirmance of the district court's decision for the reasons set forth below.

I. INTEREST OF *AMICUS CURIAE*[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 False Claims Act ("FCA"), regularly participates in litigation as *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

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

interest in ensuring proper interpretation and application of the FCA.

TAFEF previously filed *amicus* briefs in *United States ex rel. Escobar v. Universal Health Services* in the First Circuit, the Supreme Court, and on remand to the First Circuit. TAFEF files this brief on the reach of the Supreme Court's decision in *Escobar*. TAFEF leaves any other disputed issues to the parties.

II. ARGUMENT

In 2016, the Supreme Court recognized the implied certification theory of liability under the FCA, which imposes liability for knowing misrepresentations of compliance with statutory, regulatory or contractual terms material to the payment of funds by the United States. *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016) ("*Escobar*"). After this decision, Defendant-Appellant The Stephens Institute, dba the Academy of Art University ("AAU"), sought reconsideration of the district court's pre-*Escobar* order denying summary judgment for AAU and finding that AAU's violations of the Incentive Compensation Ban ("ICB") of the Higher Education Act constituted material violations of the terms of its receipt of federal funds and thus rendered the resulting claims false or fraudulent under the FCA. (ER at 13-30). The district court denied AAU's post-*Escobar* motion for reconsideration of that denial of summary judgment, finding that its prior order was fully in line with the Supreme Court's holding in *Escobar*. (ER at 1).

TAFEF supports affirmance of the district court's order. *Escobar* rejected the categorical bright lines urged by AAU and its supporting amici and the district court's decision is fully consistent with the Supreme Court's guidance.

A. ***Escobar*** **Rejects Categorical Bright Lines.**

Prior to *Escobar*, the majority of Courts of Appeal, including this one, had recognized the theory of implied certification under the False Claims Act. *E.g.*, *United States ex rel. Ebeid v. Lungwitz, et al.*, 616 F.3d 993, 996 (9th Cir. 2010) ("[W]e now join our sister circuits in recognizing a theory of implied certification."). That theory generally recognized that knowing violations of conditions material to the Government's payment decisions are actionable under the FCA, even in the absence of an express statement of compliance with those conditions. Some courts disagreed, however, on whether material conditions were limited to those expressly designated as "conditions of payment" in the underlying statute, regulation or contract. *Compare Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2011) (limiting liability to express conditions of payment), with *United States v. Science Applications International Corporation*, 626 F.3d 1257 (D.C. Cir. 2010) (finding liability where contractor violates contractual requirements material to the government's decision to pay regardless of whether the contract expressly designates them as "conditions of payment").

Leading up to the Supreme Court's decision, the D.C. and First Circuit

Courts of Appeal issued opinions analyzing the differences in jurisprudence on the application of implied certification theories of liability under the FCA, finding that rigid judge-made categories regarding what is "false or fraudulent" under the statute can "create artificial barriers that obscure and distort" the statute's language. *United States ex rel. Hutcheson v. Blackstone Medical*, 647 F.3d 377, 385-86 (1st Cir. 2011), *cert. denied*, 565 U.S. 1079 (2011); *SAIC*, 626 F.3d at 1269. Rejecting artificial and categorical limitations on falsity, those courts of appeal determined that "strict enforcement of the Act's materiality and scienter requirements" adequately cabined liability for false and fraudulent claims. *Hutcheson*, 647 F.3d at 388, *quoting SAIC*, 626 F.3d at 1270.

The Supreme Court agreed. *Escobar,* 136 S. Ct. at 2002. Rather than adopting "a circumscribed view of what it means for the claim to be false or fraudulent," *id.*, the Supreme Court returned to the text of the statute, and held that the FCA reaches certain misleading omissions regarding violations of statutory, regulatory or contractual requirements. *Id*. at 1999. Instead of the bright lines espoused by AAU and some courts of appeal, the Supreme Court determined, as this Court has, that the FCA's materiality and scienter requirements adequately bounded the statute's reach. *Id.* at 2002, *quoting SAIC*, 626 F.3d at 1270; *Hutcheson*, 647 F.3d at 388.

Returning to the FCA text and its "common law antecedents," the Supreme

Court provided guidance on how the materiality requirement should be enforced. *Id.* at 2001. *Escobar* clarified that labels like "conditions of payment" and "conditions of participation" are not useful when evaluating materially misleading claims under the FCA because materiality necessarily involves a fact- and context-specific inquiry. *Id.* (rejecting the use of "a single fact or occurrence as always determinative") (*quoting Matrixx Initiatives, Inc. v. Siracusano,* 563 U.S. 27, 39 (2011)).

B. Under *Escobar*, Express False Statements on Claim Forms Are Not Required to Establish Falsity.

The Supreme Court reaffirmed the long-established view that claims for payment need not include an affirmative false statement of fact in order to qualify as "false" under the FCA. "Because common-law fraud has long encompassed certain misrepresentations by omission, 'false or fraudulent claims' include more than just claims containing express falsehoods." *Escobar*, 136 S. Ct. at 1999.

The Supreme Court held that the implied certification theory of legal falsity can be a basis for liability "***at least***" in the circumstance where "the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a [material] statutory, regulatory, or contractual requirement." *Id.* at 1995 (emphasis supplied).

1. The Supreme Court Did Not Establish an Exclusive Test.

The Supreme Court's explicit language in *Escobar* makes clear that it did not establish an exclusive test for implied certification liability. The Court not only chose the phrase "at least" instead of "only," but also expressly stated that it was not reaching the question of "whether all claims for payment implicitly represent that the billing party is legally entitled to payment." *Escobar*, 136 S. Ct. at 2000. Thus, the Court did not purport to reject Circuit precedent holding that claims which contain no representations regarding the underlying conduct can be impliedly false.[2]

The Supreme Court observed that its description of a type of implied certification aligns squarely within the rule embraced throughout the common law that "half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations." *Id.* This common law precept has long been fundamental to the implied certification theory. *See e.g., Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994) (withholding "information critical to the decision to pay" is "the essence of a false claim").

[2] *E.g.*, *Ebeid*, 616 F.3d. at 996; *Hutcheson*, 647 F.3d at 386-88; *SAIC*, 626 F.3d at 1266; *United States v. Rogan*, 459 F. Supp. 2d 692, 717-18 (N.D. Ill. 2006), *aff'd* 517 F.3d 449 (7th Cir. 2008); *United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628 (4th Cir. 2015), *vacated by* 136 S. Ct. 2504 (2016), *remanded to* 2017 U.S. App. LEXIS 8588 (4th Cir. May 16, 2017).

While *Escobar* fundamentally altered the jurisprudence in some circuits when it held that designating a requirement as a condition of payment is neither required nor sufficient, but rather is one factor in the materiality analysis, *Escobar* did not purport to affect existing precedent holding that "the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment." *Ebeid*, 616 F.3d at 996 (citations omitted).[3] As Relators discuss in more detail in their brief, the majority of district courts to address this issue have rejected the proposition that *Escobar* established an exclusive test for implied certification liability. *See* Doc. 24 at 30-34.[4]

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[3] This Court has yet to address this issue. AAU argues that later decisions of panels of this Circuit overruled *Ebeid* by recognizing the Supreme Court's language on specific representations. *E.g.*, *United States ex rel. Campie v. Gilead*, 2017 U.S. App. LEXIS 12163, *20 (9th Cir. July 7, 2017) ("The Supreme Court held that although the implied certification theory can be a basis for liability, two conditions must be satisfied… First, the claim must not merely request payment, but also must make specific representations about the goods and services provided…"); *see also United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325 (9th Cir. Jan. 12, 2017) (finding no evidence of specific representations). But neither decision discussed the Supreme Court's statement that it was not resolving whether a request for payment could imply compliance without a specific representation. *See Campie*, 2017 U.S. App. LEXIS at *19 (noting that *Escobar* "'clarif[ied] *some* of the circumstances in which the False Claims Act imposes liability'" under the implied certification theory)(quoting *Escobar*) (emphasis added). Nor did either decision discuss the Circuit's prior decisions, and whether *Ebeid* was overruled.

[4] *Citing, among others, United States ex rel. Wood v. Allergan, Inc.*, 10-CV-5645 (JMF), __ F. Supp. 3d __, 2017 U.S. Dist. LEXIS 50103 (S.D.N.Y. Mar. 31, 2017); *United States v. DynCorp International, LLC*, 16-1473 (ESH), __ F. Supp. 3d__, 2017 U.S. Dist. LEXIS 76397, *19 (D.D.C. May 9, 2017); *United States v. Celgene Corp.*, 226 F. Supp. 3d 1032 (C.D. Cal. Dec. 28, 2016).

2. AAU Misconstrues the Nature of the "Specific Representations" Identified by the Supreme Court.

Even if this Court were to require that a claim for payment include specific representations, the Supreme Court's decision makes clear that the nature of the representation must be understood in context, and is not an express certification requirement. Thus, in *Escobar*, a billing code on a healthcare claim was sufficiently specific to represent the nature of the services that were being provided and for which payment was sought. Because the services provided did not in fact conform to material aspects of the services represented, the billing codes were misleading half-truths. As the Supreme Court made clear, the billing codes were "clearly misleading" because "anyone" would conclude that the services described by those codes complied with material requirements for mental health facilities. *Escobar*, 136 S. Ct. at 2000.

Here, the certifications of compliance identified by Relators represent to the United States that AAU was eligible to receive federal funds for particular "eligible" borrowers in an "eligible" program. As this Circuit and others have already recognized, the purpose of the ICB is "to curb the risk that recruiters will 'sign up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans.'" *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1168-69 (9th Cir. 2006), *citing United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916

(7th Cir. 2005), *cert. denied*, 547 U.S. 1071 (2006). Thus, certifications about eligible borrowers would lead someone to believe that AAU complied with material requirements for eligibility – namely those that go to the essence of the bargain with the United States, compliance with the ICB. The district court correctly concluded that violations of the ICB affect whether AAU is eligible for payment, and thus makes the representation of eligible students and eligible programs misleading. (ER at 9).

AAU's argument that there is a technical distinction between institutional eligibility and the language on the certification reads too much into the Supreme Court's reference to "specific representations," and brings implied certification full circle back to the pre-*Escobar* arguments about "magic words" that a claim form must contain. A rigid express representation requirement on claim forms essentially reverts implied certification back to an express certification theory of liability. In addition, there is simply no way a rigid requirement can encompass the range of types of fraud perpetrated on the United States, particularly using forms drafted by agencies long before *Escobar* was decided.

The Fourth Circuit, the only court of appeals to address the issue, squarely rejected a similar argument that *Escobar* articulated a circumscribed view of falsity. *United States v. Triple Canopy*, 857 F.3d 174, 178 (4th Cir. 2017). Rejecting an argument that the government had not established falsity because the

description of the services provided was not false on the face of the invoice, the Fourth Circuit observed that *Escobar* is simply "not as crabbed as [defendant] posits." *Id.* The Fourth Circuit concluded that invoices listing the number of guards and hours worked are misleading half-truths because "anyone reviewing Triple Canopy's invoices 'would probably—but wrongly—conclude that [Triple Canopy] had complied with core [contract] requirements.'" *Triple Canopy*, 857 F.3d at 179, *citing Escobar*, 136 S. Ct. at 2000.

As the Supreme Court recognized, an invoice identifying goods or services (by code or by narrative) can mislead the United States as to whether the claimant has complied with material conditions attendant to the delivery of those goods or services, even if those conditions are not identified on the claim for payment. A "magic word" requirement for language regarding the specific condition violated wholly ignores the Supreme Court's rejection of labels in favor of "whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." *Escobar*, 136 S. Ct. at 1996. Indeed, the essence of the type of fraud at issue in implied certification cases is that the fraud involves a material *omission*.

C. Materiality Is a Holistic Inquiry and No Single Factor is Determinative.

Escobar affirmed that the "term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or

property." 136 S. Ct. at 2002 (citations omitted). As the Supreme Court explained, and this Circuit has already recognized, "materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'" *Id*.[5]

The Supreme Court made clear that materiality can be established either from the perspective of a "reasonable person" or the particular defendant. Specifically, a matter is material

> (1) "if a reasonable [person] would attach importance to it in determining a choice of action in the transaction"; or
>
> (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter "in determining [a] choice of action," even though a reasonable person would not.

Id. at 2002-03, *quoting in part* Restatement (Second) of Torts § 538, at 80.

The Supreme Court explained that in applying this standard, the label attached to a particular rule, regulation or contract term may be relevant, but is not necessarily dispositive. Thus, the Court rejected the false dichotomy already rejected by this Circuit in *Hendow* between a so-called condition of participation and a condition of payment:

> [F]orcing the Government to expressly designate a provision as a condition of *payment* would create further arbitrariness. Under Universal Health's view, misrepresenting compliance with a requirement that the Government expressly identified as a condition of payment could expose a defendant to

[5] The Supreme Court explained that it need not resolve whether this definition is taken from the Act itself in § 3729(b)(4) or from the common law because materiality is applied similarly "[u]nder any understanding of the concept." 136 S. Ct. at 2002.

> liability. Yet, under this theory, misrepresenting compliance with a condition of eligibility to even participate in a federal program when submitting a claim would not.

Id. at 2002; *Hendow*, 461 F.3d at 1176.

Escobar identified a variety of factors which may bear on the materiality inquiry, including whether the violation is "garden-variety" or "minor or insubstantial," 136 S. Ct. at 2003; whether the violation is significant, *id.* at 2004; whether it involves "core" or "basic" requirements, or "critical facts," *id.* at 2000-01; whether the violation goes to the "essence of the bargain," *id*. at 2003 n.5 (citation omitted); or whether and how the Government took action where it had actual knowledge of the same or similar violations, *id.* at 2003-04. The Government's decision to expressly identify a provision as a condition of payment is relevant, but not "automatically dispositive." *Id.* at 2003. In this way, no "single fact or occurrence…[is] always determinative." *Id.* at 2001, *quoting Matrixx*, 563 U.S. at 39. Thus, materiality is a fact- and context-specific standard that rests within the sound discretion of the court and can be met in a variety of circumstances. *Id.* at 2001-04.

At bottom, these factors are focused on whether the underlying misrepresentation is "material to the other party's course of action." *Id.* at 2001. As the First Circuit has described, the relevant materiality inquiry affirmed by *Escobar* focuses on "whether a piece of information is sufficiently important to

influence the behavior of the recipient." *United States ex rel. Winkelman et al. v. CVS Caremark Corp.*, 827 F.3d 201, 211 (1st Cir. 2016), *quoted in United States ex rel. Escobar v. Universal Health Servs.*, 842 F.3d 103, 110 (1st Cir. 2016) (on remand).

AAU takes issue with the district court's analysis based on the court's citation to *Hendow*, arguing that *Escobar* rejected *Hendow*'s materiality analysis. But AAU misreads *Hendow*. While *Escobar* rejected reliance on express conditions of payment as dispositive, the *Hendow* panel did not rely exclusively on that factor. It also evaluated several other elements of materiality. *Hendow* looked not only at how the eligibility for payment is expressly structured under the Higher Education Act, but also looked to the purpose of the ICB. This Court determined that the ICB conditions were "'the *sine qua non*' of federal funding" because "if the University had not agreed to comply with them, it would not have gotten paid." *Hendow*, 461 F.3d. at 1176. In addition, this Court concluded that the Department of Education and Congress plainly care about an institution's ongoing conduct, not only its past compliance [with the ICB]." *Id.*

This holistic analysis, which the district court below also undertook aligns with *Escobar*'s guidance on materiality. This Court, and the district court below, have looked not only to the express language of the statute — which remains an important, even if not dispositive, factor in assessing materiality — but also looked

to whether the violations go to the essence of the bargain with the United States. AAU ignores what the Supreme Court highlights: materiality is concerned with requirements the Government specifically "cared about" and to which "a reasonable person would attach importance in determining his or her choice of action with respect to the transaction involved." The district court correctly concluded that those criteria were met after conducting a multi-factored evaluation of the obligations at issue.

D. The Government's Payment of Claims Does Not Negate Materiality.

In the list of non-dispositive factors relevant to the materiality inquiry, the Supreme Court in *Escobar* explained that Government action regarding the case or similar cases may be relevant. The Supreme Court explained,

> if the Government pays a particular claim in full despite its *actual knowledge* that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite *actual knowledge* that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Escobar, 136 S. Ct. at 2003-04 (emphasis supplied).

Many defendants, including AAU, have attempted to present the Court's statement as if it read that payment of a claim is dispositive evidence that a requirement is not material, or that such continued payments are weighted more than any other evidence of materiality. But that is not what the Court stated, and

any such rule would both contravene the statute and the reality of the Government's payment systems.

The Government's failure to deny payment by itself does not signify lack of materiality, even if the Government is fully aware of the defendant's conduct. 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. *United States ex rel. Am. Sys. Consulting 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).[6] Indeed, "[t]he more essential the continued execution of a contract is to an important government interest, the less

[6] *See also 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).

the government's continued payment weighs in favor of the government knowledge defense. To find otherwise could lead to perverse outcomes; the more dependent the government became on a fraudulent contractor, the less likely it would be to terminate the contract (and the less likely the contractor would be held liable)." *United States ex rel. Al-Sultan v. Public Warehousing Co.*, 2017 U.S. Dist. LEXIS 37643 at *18-19 (N.D. Ga. March 16, 2017) (internal quotations and citations omitted).

In addition, *Escobar* does not fundamentally change existing law regarding the relevance of government knowledge of fraud to a defendant's liability. All courts of appeal to have considered the issue hold that government knowledge is not a defense to an FCA action, recognizing that the 1986 Amendments to the FCA specifically repealed such a defense.[7] Rather, evidence that the appropriate paying official, with full knowledge of the underlying conduct, approved the particulars of the resulting claim may negate a defendant's scienter as to the falsity of that claim. *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 952 (10th Cir. 2008). To obtain the benefit of that inference, there must be evidence that a Government agent: (1) with the requisite level of authority;[8] (2) "*knows and approves* of the

[7] *E.g., Varljen v. Cleveland Gear Co.*, 250 F.3d 426, 430 (6th Cir. 2001); *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000); *United States ex rel. Cantekin v. Univ. of Pittsburgh*, 192 F.3d 402, 408 (3d Cir. 1999).

[8] *See Bornstein v. United States*, 345 F.2d 558 (Ct. Cl. 1965) ("It is a settled

facts underlying an allegedly false claim;"[9] (3) "*prior* to presentment;"[10] and (4) nonetheless "authorizes the contractor to make that claim."[11]

Similarly, in order to affirmatively signal that the conduct is immaterial to the Government, the appropriate official of the paying agency must have both actual knowledge of the conduct and approve the claim prior to payment. To hold otherwise would "shift the burden" to catch the fraud on the Government, "which is directly at odds with the stated goal of the FCA." *United States ex rel. Schell* v. *Battle Creek Health Sys.*, 419 F.3d 535, 541 (6th Cir. 2005). The FCA's purpose is to "protect the Treasury against the…unscrupulous host." S. Rep. No. 99-345, at *11, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276. As the Seventh Circuit rightly described in *Rogan*, "[t]he question is not remotely whether [defendant] was sure to be caught—though it would have been, had it disclosed the truth on all 1,812

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principle of law that the United States is not bound by the unauthorized acts of its agents, that it is not estopped to assert lack of authority as a defense, and that persons dealing with an agent of the government must take notice of the limitations of his authority.") (citation omitted).

[9] *Burlbaw*, 548 F.3d at 952.

[10] *Id.*

[11] *Id. See also, e.g., United States ex rel. Werner v. Fuentez Sys. Concepts, Inc.*, 319 F. Supp. 2d 682 (N.D.W.Va. 2004) (Coast Guard officials responsible for contracts directed defendants to bill for time not worked), *aff'd* 115. Fed. Appx. 127 (4th Cir. 2004). *Compare United States v. Chen*, 402 Fed. Appx 185 (9th Cir. 2010) (government did not instruct the defendant to bill as he did).

reimbursement requests—but whether the omission could have influenced the agency's decision…[The] laws against fraud protect the gullible and careless…." 517 F.3d at 452.

AAU's rigid reading of the materiality requirement ties the hands of the United States, such that its only remedy in the face of material violations would be to deny payment in every instance, and potentially grind its operations to a halt – including programs benefitting for health care beneficiaries, students, and military personnel. In addition, such a requirement would essentially require the Government to recoup payments already made before an FCA action could move forward. Such a result would be counter to the plain language of the statute, which includes no such requirement, as well as the legislative history of the statute. "Congress intended to allow the government to choose from a variety of remedies, both statutory and administrative, to combat fraud." *United States ex rel. Onnen v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 688 F.3d 410, 415 (8th Cir. 2012).

Moreover, AAU elevates the significance of the Government's payment decisions over other indices of materiality, including the statute, and the Government's statements regarding its expectations under that statute. This flatly ignores *Escobar*'s directive that no "single fact or occurrence…[is] always determinative," (*id.* at 2001), and it disregards the relevance of any other factor.

Here, the district court looked at the Government's actions over time

(including fines assessed against and settlement agreements with, other educational institutions), as well as its informal guidance, the language of the statute and required certifications, and the context of the alleged conduct. This is precisely the type of fact- and context-specific inquiry the Supreme Court left in the hands of the district courts.

E. The Chamber of Commerce's *Amicus* Brief Retreads Arguments Already Rejected by the Supreme Court.

The Chamber of Commerce's *Amicus* Brief makes arguments similar to those the Chamber made in *Escobar* and that the Supreme Court rejected.[12] The Court considered the "fair notice" and other policy arguments put forward by Universal Health and its supporting *amici* as a reason to reject implied certification, and determined that "policy arguments cannot supersede clear statutory text." *Escobar*, 136 S. Ct. at 2002 (citation omitted). Instead of circumscribing FCA liability to cases with express certification or expressly designated "conditions of payment," the Court held that "concerns about fair notice and open-ended liability 'can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements.'" *Id.*, *quoting SAIC* at 1270.

Though its policy arguments were a non-starter in *Escobar*, the Chamber's suggestion here that implied certification cases must be reined in because they are

[12] Amicus Brief in Support of Petitioner, *Universal Health Services v. United States ex rel. Escobar*, 579 U.S. ---, 136 S. Ct. 1989 (2016) (No. 15-7).

a byproduct of greedy relators and their attorneys in meritless, declined cases bears some attention. This assertion is not only wildly inaccurate, but also flies in the face of the statutory text, Congress' intent in adopting the FCA, and the long track record of the importance of relators and their counsel to the Government's fight against fraud.

The legislative history leading up to the adoption of the 1986 amendments reflects the central role that relators and their counsel were to have in the public/private partnership of pursuing fraud against the Government. The FCA clearly expresses the value Congress places on relator-driven cases and Congress has repeatedly reinforced the importance of the public/private partnership of the FCA. *E.g.*, 132 Cong. Rec. S15036 (daily ed. Oct. 3, 1986) (statement of Sen. Grassley)("Primary in the original 'Lincoln Law' as well as this legislation is the concept of private citizen assistance in guarding taxpayer dollars."); 145 Cong. Rec. E1546 (daily ed. July 14, 1999) (statement of Rep. Berman) (with the 1986 amendments, "Congress wanted to encourage those with knowledge of fraud to come forward…[and] we wanted relators and their counsel to contribute additional resources to the government's battle against fraud"). As Congress recognized, relators and their counsel do not enter into FCA litigation lightly. *E.g.*, S. Rep. No. 99-345, at *28 (acknowledging the "risks and sacrifices of the private relator"). The decision to file a *qui tam* case very often involves great personal risks to

career, income, savings, family, friendship, and in some cases, even personal safety.[13]

Far from the "small" or "nonexistent" recoveries the Chamber insists come from relator-initiated suits (Doc. 19 at 7), the growth in *qui tam* suits has led to increased recoveries for the public fisc since the *qui tam* provisions of the FCA were strengthened in 1986.[14] From 2009-2016, the Government recovered $23.97 billion via *qui tam* suits, just over 76% of the total $31.37 billion recovered. Notably, in the fraud statistics published by the Department of Justice, declined cases have resulted in the recovery of over two and a quarter billion dollars for the United States.[15]

Contrary to the Chamber's assertions, cases where the Government declines to intervene have been significant. For example, just weeks ago, the Department of Justice issued a press release for a recent $280 million settlement in *United*

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[13] *The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Com. on the Judiciary*, 110th Cong. 167-85 (2008) (statement of Tina M. Gonter, Relator), *available at* https://www.judiciary.senate.gov/download/testimony-of-tina-m-gonter-pdf.

[14] U.S. Dep't of Justice, *Fraud Statistics Overview: October 1, 1987 –September 30, 2016* (Dec. 13, 2016), *available at* https://www.justice.gov/opa/press-release/file/918361/download.

[15] *Id*.

States ex rel. Brown v. Celgene Corp., a declined *qui tam* suit involving unapproved uses of cancer drugs. https://www.justice.gov/usao-cdca/pr/celgene-agrees-pay-280-million-resolve-fraud-allegations-related-promotion-cancer-drugs. As the Special Agent in Charge for the Office of Inspector General of the U.S. Department of Health and Human Services stated: "Today's recovery again spotlights the importance of the False Claims Act in preserving precious government health plan resources, …This invaluable law enlists all in the battle against fraudulent health care schemes." *Id.* This recovery is far from an aberration. *See, e.g.,* declined settlements in *United States ex rel. Bibby, et al. v Wells Fargo Bank NA, et al.*, No. 06-00547 (N.D. Ga.) ($108M, August 4, 2017); *United States ex rel. Galmines v. Novartis,* No. 06-3213 (E.D. Pa.) ($35M, Oct. 11, 2016); *United States ex rel. Caron, et al. v. B&H Education, Inc., et al.*, 13-5256 (C.D. Ca.) ($11M, August 24, 2016); *United States ex rel. Vainer and Barbir v. DaVita, Inc. et al.*, No. 1:07-cv-2509 (N.D. Ga.) ($450M, June 24, 2015).[16]

More importantly, the statute makes no distinction between intervened and non-intervened cases for purposes of liability. 31 U.S.C. § 3729(a)(1) (identifying

[16] https://in.reuters.com/article/wells-fargo-settlement-idINL1N1KQ0Y1 (Aug. 4, 2017); https://www.lexislegalnews.com/articles/11802/novartis-pays-35m-to-settle-elidel-marketing-false-claims-lawsuit (Oct. 11, 2016); https://www.justice.gov/usao-cdca/pr/defunct-cosmetology-school-s-insurer-pays-86-million-resolve-claims-school-improperly (Aug. 24, 2016); https://www.justice.gov/opa/pr/davita-pay-450-million-resolve-allegations-it-sought-reimbursement-unnecessary-drug-wastage (June 24, 2015).

substantive violations applicable regardless of whether the government or the relator has primary responsibility for the case). Rather, in a declined case, the relator pursues the Government's claim. 31 U.S.C. § 3730(b); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) ("The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim."). The statute not only contemplates that declined cases go forward, it offers a larger reward for such cases that are successful. 31 U.S.C. § 3730(d)(2) (providing that if the government does not intervene a successful relator is entitled to between 25 and 30% of the proceeds).

In addition, contrary to the Chamber's arguments, a decision by the Justice Department not to assume control of the suit is not a commentary on its merits. "The Justice Department may have myriad reasons for permitting the private suit to go forward including limited prosecutorial resources and confidence in the relator's attorney." *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 974 n.5 (7th Cir. 2002), *aff'd*, 538 U.S. 119 (2003); *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006) (non-intervention does not mean that the relator's claims lack merit); *United States ex rel. Williams v. Bell Helicopter, Textron Inc.*, 417 F.3d 450, 455 (5th Cir. 2005) (observing that the decision of the government not to intervene may be the result of a "cost-benefit analysis").

Recognizing that lack of resources may be the reason for many declinations, the Chamber argues that these resource decisions should dictate court's materiality conclusions. This argument contravenes the statute's clear mandate, as well as the legislative history of the statute. Congress specifically intended that relators and their counsel would supplement the resources of the outmanned United States. S. Rep. 99-345 at *7-8 (noting that corporations were able "to devote many times the manpower and resources available to the Government," and that mismatch of legal resources was one of the reasons Congress sought to enlist the aid of private citizens and their counsel). The Supreme Court in *Escobar* rejected efforts to graft onto the statute requirements that Congress did not include. *Escobar*, 136 S. Ct. at 2002 ("policy arguments cannot supersede clear statutory text") (citation omitted).

Far from supporting extra-statutory limitations on the application of the False Claims Act, the existence of more cases, and even more declined cases, reflects a high level of fraud and a robust private public partnership to pursue it. The recoveries to date suggest a mammoth growth in identified fraud across all government programs. In 1986, only $54 million was recovered under the FCA. In 2016, that figure increased to $4.7 billion.[17] Many of the frauds are complex and

[17] 155 Cong. Rec. E1295, 1298 (statement of Rep. Berman); U.S. Dep't of Justice, Press Release, *Justice Department Recovers over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016* (Dec. 14, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016.

the assistance of knowledgeable relators and their counsel in pursuing them is essential. In January 2016, the Government Accountability Office reported that a review of healthcare fraud cases from 2010 reflected about "68 percent of the cases included more than one scheme with 61 percent including two to four schemes and 7 percent including five or more schemes."[18] The "sophisticated and widespread" fraud that Congress sought to redress in 1986 (S. Rep. No. 99-345 at *2) remains a critical concern.

The FCA expressly contemplates that the Government will not pursue all cases and the fact that cases are proceeding without the Government is part of the statutory design, not a flaw. The FCA was designed to protect the public fisc, and in line with that goal, the role of relators was expanded in 1986 to "encourage more private enforcement suits." S. Rep. No. 345 at 23-24 (1986).

Here, the district court has twice found that the alleged violations at issue went to the essence of the Government's bargain, and counsel for the United States has itself argued that violations of the ICB are material to the United States. AAU is a government contractor receiving significant amounts of federal funding, and the relators in this declined litigation properly argue that AAU should be held to

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[18] Report to Congressional Requesters, *Health Care Fraud: Information on the Most Common Schemes and the Likely Effect of Smart Cards* (Jan. 2016), *available at* http://www.gao.gov/assets/680/674771.pdf.

the material terms of its agreement with the United States. Arguments that declined cases are inappropriately stretching the statute are squarely incorrect: actions like this one are doing precisely what the statute contemplated.

III. CONCLUSION

TAFEF respectfully urges that the district court be affirmed.

August 7, 2017

Respectfully submitted,

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