No. 18-

IN THE

# Supreme Court of the United States

STEPHENS INSTITUTE, D/B/A THE ACADEMY OF ART UNIVERSITY,

*Petitioner,*

*v.*

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

*Respondents.*

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI


LELAND B. ALTSCHULER
LAW OFFICES OF
LELAND B. ALTSCHULER
1580 Canada Lane
Woodside, California 94062
(650) 328-7917
lee@altschulerlaw.com

STEVEN M. GOMBOS
*Counsel of Record*
JACOB C. SHORTER
DAVID A. OBUCHOWICZ
GOMBOS LEYTON, P.C.
11350 Random Hills Road,
Suite 400
Fairfax, Virginia 22030
(703) 934-2660
sgombos@glpclaw.com

*Counsel for Petitioner*



285977

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTIONS PRESENTED

In *Universal Health Services v. U.S. ex rel. Escobar*, this Court held that a misrepresentation about compliance with a legal requirement must be material to the government's payment decision to be actionable under the False Claims Act. 136 S.Ct. 1989, 1996 (2016). So then only one question faced the Ninth Circuit below: whether Petitioner Academy of Art University's alleged failure to disclose noncompliance with the incentive compensation ban (ICB) was material to the Department of Education's decision to make federal financial aid available to students attending the Academy of Art University.

The Department of Education answered that question years ago in an enforcement policy for ICB violations. That policy expressed the Department's judgment that students attending ICB noncompliant schools remain eligible for financial aid for use at those same schools. And since enacting that policy judgment, the Department of Education has never limited, suspended, or terminated any university's participation in the federal financial aid programs and never required any university to repay financial aid funds because it violated the ICB. The Department of Education even investigated Respondents' specific fraud allegations against Petitioner and determined that neither administrative penalties nor termination was warranted.

Still, a majority of the Ninth Circuit found the FCA's demanding and rigorous materiality standard satisfied based on evidence showing that the Department "cared" about ICB compliance in some broad sense. That decision conflicts with *Escobar*, the general approach to materiality

several circuits have taken since, and the Seventh Circuit's decision in a case involving misrepresentations about compliance with the same requirement.

The questions presented are:

1. Whether general evidence that the Department of Education cared about ICB compliance, but never denied payment when colleges violated the ICB, establishes materiality.

2. Whether the Department of Education's ICB policy—in which the Department affirmed it would make financial aid available to students attending ICB noncompliant schools—defeats Respondents' FCA claim based on ICB violations.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceeding below. Pursuant to this Court's Rule 29.6, undersigned counsel state that Stephens Institute d/b/a the Academy of Art University (i) has no parent or subsidiaries not wholly owned by the corporation, (ii) no publicly held company owns ten percent of more of the Academy of Art University's stock, and (iii) no affiliate has issued shares of the Academy of Art University's stock to the public.

## TABLE OF CONTENTS

*Table of Contents*

## TABLE OF APPENDICES

## TABLE OF CITED AUTHORITIES

*Page*

**CASES**

*Page*



**STATUTES AND OTHER AUTHORITIES**

*Cited Authorities*

*Page*

## PETITION FOR WRIT OF CERTIORARI

Stephens Institute, doing business as the Academy of Art University ("AAU"), respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## INTRODUCTION[1]

Since this Court's decision in *Universal Health Services v. U.S. ex rel. Escobar*, 136 S.Ct. 1989 (2016), courts have wrestled with how exactly to apply what this Court characterized as the False Claims Act's "rigorous" and "demanding" materiality standard. Although many courts view *Escobar* as having set a heightened standard for establishing materiality, not all courts agree. And how demanding that standard is in practice depends greatly on what circuit the case arises in. This inconsistent application undermines the intended purpose of *Escobar*'s rigorous materiality standard as a check on expansive liability under the FCA.

The Ninth Circuit's decision below highlights the uncertainty among lower courts applying *Escobar*'s materiality standard. The court below divided sharply over *Escobar*'s effect on one of the Ninth Circuit's most frequently cited FCA cases, exemplifying how courts divide over *Escobar*'s materiality standard. In *U.S. ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), the Ninth Circuit found the incentive compensation

1. The petition references AAU's Excerpts of Record and Further Excepts of Record in the Ninth Circuit as "ER __." and "FER __.," respectively. The appendix to this petition is cited as "Pet. App. __."

ban (ICB) material because the Department of Education conditioned the university's participation in financial aid programs on compliance with the ICB in a statute, regulation, and contract provision. *See* Pet. App. 11a.

But *Escobar* says that the government's mere decision to label compliance with a requirement as a condition of payment is not sufficient to satisfy materiality. *Escobar*, 136 S.Ct. at 2003. This Court instead directed lower courts to look to the likely or actual effect of a misrepresentation on the government's payment decision. *Id.* at 2002.

Yet the panel majority in the decision below found *Escobar* and *Hendow* compatible. Pet. App. 11a. Although the panel majority conceded *Hendow* looked exclusively to the language of the ICB itself, it noted that the *Hendow* Court may have ruled differently had it faced "countervailing evidence of immateriality." *See* Pet. App. 11a. But what the *Hendow* Court considered, the dissent explained, is precisely what *Escobar* held cannot establish materiality. Pet. App. 19a-21a. The dissent noted that *Escobar* stressed the materiality standard is "rigorous." And while the majority described *Escobar* as creating a "gloss" on the materiality analysis, the dissent held that *Escobar* explicitly overruled *Hendow*'s materiality standard and imposed a new standard altogether. Pet. App. 20a-21a.

The Ninth Circuit's haggling over *Hendow*'s continued vitality goes to the core of this case. Respondents filed an FCA action against AAU alleging violations of the same requirement the Ninth Circuit considered in *Hendow.* And aside from the ICB's language, Respondents offered no evidence at all about the government's likely or actual response to AAU's alleged ICB violations. *See* Pet. App. 24a.

In contrast, AAU put forward considerable evidence of immateriality. That included the Department of Education's ICB enforcement policy, in which the Department announced that students remained eligible for student financial aid even if they attended ICB noncompliant schools. ER at 104-05. The evidence also included multiple federal reports about the Department's ICB enforcement history. Those reports confirmed that the Department routinely responded to ICB violations by continuing school participation and student funding, consistent with its policy. And finally, the evidence showed that the Department investigated Respondents' fraud allegations and decided not to take action against AAU for ICB noncompliance. ER at 407-08.

The Ninth Circuit split on materiality. The majority held that reasonable jurors could find materiality based on evidence showing simply that the Department cared about ICB compliance. Pet. App. 16a. But the dissent correctly noted that whether the government cared about ICB compliance in some broad sense is insufficient under *Escobar*. Pet. App. 25a. ICB compliance must be material to the Department's payment decision, and Respondents put forward no evidence to that effect. Pet. App. 24a.

This internal dispute mirrors larger divisions among circuit courts since *Escobar*. At least four circuits recognize that *Escobar* requires careful scrutiny of the government's actual payment behavior after learning of fraud allegations. In any of those circuits, AAU would have prevailed on its motion for summary judgment.

Questions about *Escobar*'s materiality standard keep coming to this Court. Already this term, many petitions

have raised issues about the materiality standard. The same issue will continue until this Court provides additional guidance.

The Court should provide that guidance now.

## OPINIONS BELOW

The Ninth Circuit's amended opinion is reported at 909 F.3d 1012. *See* Pet. App. 1a-28a. The relevant opinions of the United States District Court for the Northern District of California are unpublished but reproduced in the appendix at Pet. App. 29a-45a, 46a-56a.

## JURISDICTION

The court of appeals had appellate jurisdiction over the district court's order under 28 U.S.C. § 1292(b). By opinion dated November 26, 2018, the court of appeals denied AAU's timely request for rehearing and rehearing en banc. 909 F.3d 1012. This Court's jurisdiction is requested under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Title 31 U.S.C. § 3729 provides, in pertinent part,

**§ 3729. False claims**

(a) Liability for certain acts.

(1) In general. Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person.

Title 20 U.S.C. § 1094(a) provides, in relevant part,

**§ 1094. Program participation agreements**

(a) Required for programs of assistance; contents. In order to be an eligible institution for the purposes of any program authorized under this subchapter, an institution must be an institution of higher education or an eligible institution (as that term is defined for the purpose of that program) and shall . . . enter into a program participation agreement with the Secretary. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirements:

*******

(20) The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admissions activities or in making decisions regarding the award of student financial assistance . . . .

## STATEMENT OF THE CASE

### 1. Statutory Framework

***a. The False Claims Act.*** The False Claims Act imposes significant penalties on any person who "knowingly presents, or causes to be presented, a false of fraudulent claim for payment." 31 U.S.C. § 3729(a)(1)(A). Any person found liable for making a false claim faces treble damages plus civil penalties of up to $10,000 per false claim. § 3729(a); *see Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 784 (2000) (noting that FCA damages are "essentially punitive in nature"). The FCA's *qui tam* provisions allow private citizen "relators" to file actions and recover substantial portions of any monetary recovery. *See* 31 U.S.C. § 3730(d)(1)-(2) (allowing relators to recover between 15 and 30 percent of any proceeds of the action, plus attorneys' fees and costs).

**b. *The Higher Education Act.*** Every year millions of American students count on some form of federal financial aid to help pay the costs of their college education. Congress makes that financial aid available through several programs under Title IV of the Higher Education Act of 1965 (20 U.S.C. § 1001, *et seq.*). To qualify for financial aid students must meet certain eligibility criteria and attend an institution that participates in the Title IV programs. The Department of Education administers the Title IV programs by making financial aid available to eligible students through their participating college or university, with the institution disbursing the funds to the students to pay for tuition, fees, and other costs of attendance.

To participate in Title IV programs, an institution must execute a Program Participation Agreement (PPA) with the Secretary of the Department of Education. *See* 20 U.S.C. § 1094(a). The PPA conditions every institution's Title IV participation on compliance with *all* Title IV requirements. *See* ER at 293-303 (Petitioner's 2006 PPA)*; see also United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 701 (7th Cir. 2015) (noting the PPA requires compliance with a panoply of statutory, regulatory, and contractual requirements). The Department generally issues colleges new PPAs every 4-6 years, continuing their Title IV participation.

The HEA gives the Education Secretary broad discretion to balance enforcement of the PPA's requirements with the goal of maintaining broad access to financial aid. Although the PPA's terms condition an institution's Title IV participation, an institution does not become ineligible to participate simply because it violates a program requirement. *See* Pet. App. at 12a (noting that noncompliance does not automatically revoke an institution's participation). Instead, the Education Secretary can enforce compliance through several mechanisms including terminating Title IV participation if warranted. *See* 34 C.F.R. § 668.11; *see also* ER at 125 (addressing the types of enforcement action available to the Department).

**c. *The Incentive Compensation Ban.*** This FCA *qui tam* case concerns the incentive compensation ban (ICB)—one of the PPA's many hundreds of requirements. *See* Pet. App. 24a, n.2. The ICB prohibits participating institutions from paying certain employees compensation based on their success securing student enrollments. 20

U.S.C. § 1094(a)(20). Compliance with the ICB, like all PPA requirements, is a condition of participation in Title IV programs. *See* § 1094(a) (stating that the PPA conditions Title IV participation on compliance with its terms); 34 C.F.R. § 668.14(a) (same).

## 2. Factual Background

***a. The Department's approach to ICB enforcement.*** The Department published regulations in 2002 introducing 12 "safe harbors" to the ICB—compensation arrangements colleges could use without violating the ban. The only regulation relevant to this action is Safe Harbor A, which allowed colleges to adjust an employee's annual salary twice within 12 months so long as the adjustment was not based *solely* on the number of students recruited, admitted, or enrolled. *See* 67 Fed. Reg. 51718, 51723 (2002); 34 C.F.R. § 668.14 (b)(22)(ii)(A)(2003) ("Safe Harbor A").

That same year the Department also issued an enforcement policy for ICB violations. On October 30, 2002, the Department's then-Deputy Secretary William Hansen issued a memorandum to the Chief Operating Officer for Federal Student Aid describing how the Department would respond to ICB violations. ER at 104-05 ("Hansen Memo"). The Hansen Memo acknowledged that the Department had measured the harm from ICB violations based on the amount of student aid awarded when the violations occurred. *See id.*

But that approach produced severe consequences. The Department began reconsidering its approach after the Computer Learning Center, a chain of vocational training centers in 11 states, closed its doors and filed for bankruptcy after the Department demanded the return

of $187 million in financial aid awarded while the school allegedly violated the ICB. Almost overnight more than 9,500 students found themselves scrambling to complete their training elsewhere, if at all. And the school's closure put the public on the hook for any loans the Department would later discharge. *See* Consumer Affairs, Computer Learning Center files for bankruptcy, cancels classes (Jan. 27, 2001), available at https://goo.gl/aCCWch.

The Hansen Memo explained how the Department had come to rethink that approach to ICB violations. It explained that the Department did not suffer "monetary loss" when schools violated the ICB. ER at 104. This is so because the Department considered students eligible for financial aid *even if* they attended ICB noncompliant schools. *See id.* In other words, an institution's failure to comply with the ICB did not affect the Department's decision to make financial aid available to students attending that institution. So the Hansen Memo explained that the Department would no longer require schools to repay financial aid as a penalty. *Id.* Instead, the Department would consider ICB violations as compliance matters generally resolved through administrative fines, not as fraud upon the government.[2] *See id.*

***b. The Department followed the Hansen Memo through 2015.*** In 2008, Congress mandated that the Government Accountability Office study the Department's ICB enforcement under the Safe Harbors. *See* ER at 166.

2. *See* Malcolm J. Harkins, III, *The Ubiquitous False Claims Act: The Incongruous Relationship Between a Civil War Era Fraud Statute and the Modern Administrative State*, 1 St. Louis U.J. Health L. & Pol'y 131, 157 (2007) (discussing the Department's decision not to treat ICB violations as fraud).

The GAO later produced two reports outlining its findings after studying the Department's ICB enforcement between 1998 and 2009. *See id.*; *see also* ER at 107. Among other things, the GAO confirmed that the Hansen Memo dictated the Department's ICB enforcement. ER at 142.

The Department's Office of Inspector General later completed its own study of the Department's ICB enforcement between 2010 and 2014. ER at 71. It confirmed that the Department still required the Federal Student Aid office "to follow the Hansen Memo." *Ibid.* And the Hansen Memo continued to control until the Department officially rescinded it on June 2, 2015. In short, the Department's own policy between 2002 and 2015 said that ICB violations did not cause the Department "monetary loss," because students remained eligible for financial aid even if they attended ICB noncompliant schools. ER at 104-05*; see also U.S. ex rel. Brooks v. Stevens-Henager College, Inc.*, 2019 U.S. Dist. LEXIS 6783, *33, n.4 (D. Utah Jan. 14, 2019).

This policy judgment meant that the Department did not deny financial aid to ICB noncompliant schools. The Department instead routinely responded to ICB violations by requiring schools to take simple corrective actions to come back into compliance while continuing to make financial aid available to their students. Indeed, the GAO's second report confirmed that the Department required corrective action while continuing payment in 25 of 32 cases when it identified ICB violations. ER at 139. In the seven remaining cases, the Department required repayment only once,[3] issued minor fines in two cases

3. This was the action against Computer Learning Center that preceded the Hansen Memo, as discussed above. *See* ER at 139.

totaling just $64,000, and took no action in the remaining cases. *See* ER at 139. Put simply, administrative fines comprised the only enforcement action the Department took under the Hansen Memo and then only rarely. *See* ER at 65, 139. And by setting down the Department's response to every confirmed ICB violation between 2002 and 2009, the GAO report made clear that the Department did not respond to *any* ICB violation by (1) withholding financial aid; (2) demanding repayment of financial aid; or (3) limiting, suspending, or terminating any institution's participation in Title IV programs. *See* ER at 141.

Along with those 32 instances when the Department found ICB violations, the GAO report addressed another 22 instances when the Department entered settlement agreements with schools. As the GAO report makes plain, those 22 cases did not include findings of ICB violations;[4] indeed, the GAO report included settlements in private *qui tam* lawsuits merely alleging ICB violations. *See* ER at 127 (stating that those lawsuits use the legal process "to determine if a potential [ICB] compliance problem has occurred"). All in all, the median settlement totaled just $30,000. ER at 144. And nearly all the settlement proceeds the GAO report mentions are attributable to the settlement of a single FCA lawsuit in which the government declined intervention. ER at 140 (referencing the settlement agreement in the *U.S. ex rel. Hendow v. University of Phoenix qui tam* case).

4. ER at 119 (counting instances when the Department made findings of ICB noncompliance in the 32 substantiated violations); 170-71 (explaining that the 22 settlement agreements did not include admissions or findings of ICB noncompliance).

***c. Relators allege AAU violated the ICB.*** Petitioner AAU is a private art school founded in San Francisco, California in 1929. ER at 439. AAU offers undergraduate and graduate degrees in several areas, including animation and visual effects, graphic design, architecture, industrial design, and art history. The university has participated in the Title IV programs without interruption for more than 30 years.

Respondents are four former AAU admissions representatives who allege that AAU paid them in violation of the ICB based solely on enrollment success. *See* Brief of Appellees, *U.S. ex rel. Rose v. Stephens Institute*, No. 17-15111 (9th Cir.) (Dkt. #24 at 8-9). Respondents filed suit against AAU under the FCA. They alleged that AAU made implied false certifications to the Department by requesting financial aid for students without disclosing its ICB violations. *Id.* According to Respondents, the Department would not have made financial aid available to AAU's students had it known of the university's alleged ICB violations. They claim that AAU defrauded the Department of every dollar in financial aid its students received between 2006 and 2010.

During that period, AAU used two written compensation plans to compensate admissions representatives. Both plans relied on Safe Harbor A's guidance permitting salary adjustments no more than twice annually, so long as the adjustment was not based solely on enrollments. See 34 C.F.R. § 668.14(b)(22)(ii)(A)(2010). Under both plans AAU adjusted admissions representatives' salaries based on their individual performance on numerous criteria that included qualitative performance factors along with quantitative enrollment numbers.

Respondents argue that both plans violated the ICB despite Safe Harbor A's plain language. They contend that the compensation plan AAU used during 2006-2009 complied with Safe Harbor A as written, though not as AAU applied it. *See* Relators' Opp. to AAU's Motion for Summary Judgment, *U.S. ex rel. Rose v. Stephens Inst.*, No. 4:09-cv-05966 (N.D. Cal.) (Dkt. #159 at 1). Although the initial plan included many factors, Respondents assert AAU only considered enrollment numbers in practice. Respondents argue that AAU's second compensation plan, used in 2010, also violated the ICB. According to them, the scorecard AAU used to determine salary adjustments under the second compensation plan facially violated the ICB. *Id.*

***d. The government examined AAU's compensation practices.*** After Respondents filed their complaint on December 21, 2009, the government examined AAU's compensation plans and practices. The Department of Justice first examined AAU's compensation practices while Respondents' complaint remained under seal. During its review, the Department of Justice requested and received AAU's initial compensation plan and supporting documentation, including employee performance reviews, related email, and pay records. The Department of Justice also interviewed several AAU admissions representatives and managers. *See* FER at 68-133. Following its review, the Department of Justice declined to intervene.

The Department of Education also reviewed Respondents' allegations. After the Department of Justice declined to intervene, the Department of Education opened a program review in 2011 that focused on AAU's compensation practices in 2009-2011 using the

scorecard to determine adjustments. During its review, the Department of Education requested, received, and reviewed several copies of the scorecard that Respondents contend is facially noncompliant with the ICB. ER at 309-12, 315-20, 342, 350. Yet the Department completed its review in March 2012 without making any adverse finding about AAU's compensation practices. ER at 407-08. And just one month after closing its review, the Department issued AAU a new PPA recertifying the university's Title IV participation for another five years. ER at 440.

### 3. Procedural Posture

***a. The initial summary judgment decision.*** AAU filed a motion for summary judgment in 2015. At that time, the controlling law in the Ninth Circuit held that the ICB's language itself established materiality. *See U.S. ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006). So AAU focused its motion mainly on challenging the lack of evidence establishing the FCA's falsity and scienter elements. AAU asserted that the government's inaction after investigating Relators' specific fraud allegations undermined the notion that either plan violated the ICB, particularly as to the scorecard that Respondents alleged facially violated the ICB. The district court ultimately denied AAU's motion as to Relators' implied certification claim. *See* ER at 23-24 (granting AAU summary judgment on Respondents' promissory fraud and express false certification claims but denying summary judgment on implied certification theory).

Shortly thereafter this Court decided *Universal Health Services v. U.S. ex rel. Escobar*, 136 S.Ct. 1989

(2016). In *Escobar*, this Court clarified when the FCA imposes liability for implied false certification claims. *Id.* at 1995. The Court held that an actionable implied certification claim must satisfy two conditions—first, the claim must make specific representations about the goods or services provided; and second, the failure to disclose noncompliance with a material requirement must render those representations misleading. *Id.* at 2001.

This Court also clarified the FCA's materiality element, which it described as rigorous and demanding. *Id.* at 2002, 2003. *Escobar* explained that it is not enough to satisfy materiality that the government designates compliance with a statute, regulation, or contract provision as a condition of payment. *Id.* at 2003. Rather, the touchstone for materiality is the likely or actual effect of the misrepresentation on the government's payment decision. *Id.* at 2002. And the strongest evidence of this, *Escobar* explained, is the government's response in the same or similar circumstances. *Id.* at 2004.

***b. The district court reaffirms based on Hendow.*** AAU sought reconsideration of summary judgment under *Escobar*. This Court's falsity and materiality standards warranted entry of summary judgment for AAU on the evidence before the court. First, the only representations AAU made when it requested loans for students spoke to the individual student-borrower's eligibility. Nothing more. *See* ER at 183. And the failure to comply with the ICB would not render those representations misleading because the Department itself considered students eligible for financial aid even if they attended ICB noncompliant schools. ER at 104-05. Second, Respondents had not offered evidence that the Department would likely have

denied financial aid to AAU students had it known of AAU's alleged ICB violations. They rested instead on the Ninth Circuit's prior *Hendow* decision. But the undisputed record evidence—specifically the GAO and OIG reports—confirmed that the Department never denied payment to any school that violated the ICB and instead worked with schools to come back into ICB compliance while continuing to make financial aid available. ER at 139. This followed from the Department's policy judgment about ICB enforcement embodied in the Hansen Memo.

Still, the district court reaffirmed its prior decision. It expressed the view that the Ninth Circuit's *Hendow* decision controlled. Pet. App. 53a. But the district court acknowledged that it was "a close question whether ICB compliance is material under *Escobar*'s materiality analysis, with its focus on the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." Pet. App. 53a. And noting that the Seventh Circuit had recently found ICB noncompliance immaterial under *Escobar,* Pet. App. 53a, the district court certified its order for interlocutory appeal, Pet. App. 55a.

***c. The Ninth Circuit granted interlocutory appeal and affirmed.*** The Ninth Circuit affirmed the district court's order denying summary judgment in a split decision. Pet. App. 1a-28a. Like the district court, the court below acknowledged that *Escobar* had unsettled the Ninth Circuit's law on the FCA's falsity and materiality elements. Pet. App. 6a.

As to falsity, the Ninth Circuit held that reasonable jurors could conclude that AAU made misleading half-truths when it requested financial aid for "eligible students" enrolled at an "eligible program." Pet. App. 9a.

Although the decision fails to explain the court's reasoning, the Ninth Circuit seemingly accepted Respondents' unsupported legal claim that AAU lost its eligibility to participate in Title IV programs automatically upon violating the ICB. *But see Brooks*, 2019 U.S. Dist. LEXIS 6783, *29-35 (D. Utah Jan. 14, 2019) (explaining with reference to the Department's regulations that school participation continues despite noncompliance unless the Secretary initiates action to terminate participation). And the Ninth Circuit simply ignored the Department's own judgment, expressed in the Hansen Memo, that students attending ICB noncompliant schools remain eligible for financial aid for use at those schools. ER at 104.

The Ninth Circuit also held that reasonable jurors could find materiality for three reasons: (1) the Department conditioned payment on compliance; (2) the Department's past actions showed it cared about ICB compliance; and (3) Respondents' specific allegations about AAU's noncompliance. Pet. App. 12a.

But the court's materiality analysis embodied extreme indifference to the Department's actual views.[5] Nowhere in its opinion does the Ninth Circuit even acknowledge the Hansen Memo in which the Department dispelled the notion that ICB compliance is material to its decision to make financial aid available to students. *See* ER at 104-05. Worse still, the Ninth Circuit favorably relied on the enforcement approach the Hansen Memo rejected. *See* Pet. App. 16a (citing the $187 million liability that bankrupted the Computer Learning Center and

5. *See* Malcolm J. Harkins, supra n. 2, at 156-58 (discussing the *Hendow* Court's disregard of the Hansen Memo).

precipitated the Hansen Memo). The court below recast the ICB as an express condition of payment despite its plain language; in effect, putting its thumb on the scales in favor of materiality. *See* Pet. App. 13, n.6.[6] And the Ninth Circuit casually dismissed the Department's decision to take "no action against [AAU] for noncompliance" after investigating Respondents' fraud allegations as just "some contrary evidence" on materiality. Pet. App. at 14a-15a, n.7.

Judge Smith dissented from the court's materiality analysis. He wrote to explain his view that the majority (1) failed to articulate *Escobar*'s rigorous and demanding standard; (2) applied a different materiality standard altogether; and (3) reached an erroneous legal conclusion. Pet. App. 19a. As Judge Smith explained, the majority held that evidence showing the Department cared about ICB compliance in a broad sense satisfied the FCA's materiality standard. Pet. App. 25a. But caring is not enough to make compliance material to the government's payment decision under *Escobar*'s demanding materiality standard. *Ibid.*

---

6. This Court in *Escobar* explained that whether the *government* expressly identifies compliance as a condition of payment is relevant evidence of materiality. *Escobar*, 136 S.Ct. at 2002. The ICB's plain language, however, makes clear that compliance is a condition of participation, not payment. *See* 20 U.S.C. § 1094(a) (conditioning participation on compliance with the PPA's terms, including the ICB); 34 C.F.R. § 668.14(a) (same)*; see also United States v. ITT Educ., Servs.*, 284 F. Supp. 2d 487, 501 (S.D. Tex. 2003) *aff'd*, 111 F. App'x 296 (5th Cir. 2004); *Sanford-Brown*, 788 F.3d at 709-10.

## REASONS FOR GRANTING THE PETITION

### 1. The Ninth Circuit's approach to materiality conflicts with how other circuits apply this Court's decision in *Escobar*.

"A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision to be actionable under the False Claims Act." *Escobar*, 136 S.Ct. at 2002. The touchstone for whether a misrepresentation is material, this Court explained, turns on its "effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Id.* The Court further explained that the standard for materiality is "rigorous" and "demanding." *See id.* at 2002-03. It debunked the notion that simply designating a requirement as a condition of payment establishes materiality. *See id.* at 2003. And *Escobar* clarified instead that courts should closely scrutinize how the government actually responds when violations occur. *Id.* at 2004.

Circuit courts recognize that *Escobar*'s demanding materiality standard requires plaintiffs to put forward evidence at summary judgment showing that "the government's decision to pay [] would likely or actually have been different had it known of [the] alleged noncompliance." *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445, 447 (7th Cir. 2016). So those courts consider it very strong evidence of immateriality when the record shows the government used its vast investigatory powers to examine what plaintiffs had to say about alleged fraud and decided no action was necessary (*see id.*)—at least in most circuits.

The Ninth Circuit's decision below is an outlier. It split from all these cases when it dismissed the government's decision not to take *any* enforcement action after investigating the plaintiff's specific fraud allegations as simply "some contrary evidence" raising an issue of fact on materiality. Pet. App. at 14a, n.7.

At this Court's invitation, the Solicitor General recently filed an amicus brief in *Gilead Sciences, Inc. v. U.S. ex rel. Campie*, No. 17-936, another Ninth Circuit decision. *See* Brief for the United States as Amicus Curiae, *Gilead Sciences, Inc. v. U.S. ex rel. Campie*, No. 17-936, *cert. denied*, (Jan. 7, 2019) ("SG Brief"). The Solicitor General denied there is a circuit split about how to apply *Escobar*'s materiality analysis at the motion to dismiss stage. But there is "a circuit split at the summary judgment and post-trial stage concerning the burden and the evidence required for materiality," as another litigant pointed out in response to the SG Brief. *See* Supplemental Brief of Petitioner, *U.S. ex rel. Harman v. Trinity Indus., Inc.*, No. 17-1149, *cert. denied*, (Jan. 7, 2019) (noting that the Ninth Circuit's decision here created the circuit split). Indeed, the Solicitor General distinguished many decisions on which the *Gilead* petitioner relied because they "arose at summary judgment or after trial, rather than at the pleading stage." SG Brief at 17. This petition presents a matured circuit split about the proper application of *Escobar*'s materiality standard at summary judgment. This Court should resolve the split and provide definitive guidance to the lower courts and litigants.

### a. Four circuits recognize that unrebutted government inaction defeats materiality at summary judgment.

Before the decision below, circuit courts applying *Escobar* at the summary judgment stage—including the Third, Fifth, Seventh, and D.C. Circuits—have said it is very strong evidence of immateriality when the government: (1) has heard what the plaintiff had to say about the alleged fraud; (2) has examined the specific fraud alleged; and (3) has taken no enforcement action against the defendant. Those courts properly read *Escobar* to require in those circumstances that plaintiffs produce evidence rebutting the government's inaction; otherwise, the inference of immateriality becomes conclusive. *See U.S. ex rel. Harman v. Trinity Indus.*, 872 F.3d 645, 663 (5th Cir. 2017), *cert. denied*, (Jan. 7, 2019) (No. 17-1149).

In *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445 (7th Cir. 2016), for example, the plaintiff alleged that Sanford-Brown College made implied false claims when it requested Title IV funds for students but failed to disclose its failure to comply with the ICB. As here, the plaintiff "offered no evidence that the government's decision to pay [the college] would likely or actually have been different had it known of [Sanford-Brown's] alleged noncompliance." *Id.* at 447. The plaintiff instead argued, as Relators have here, that the government conditioned payment on compliance with the ICB. *See Sanford-Brown, Ltd.*, 788 F.3d 696, 710 (7th Cir. 2015) (noting the plaintiff's reliance on the Ninth Circuit's decision in *Hendow*).

The Seventh Circuit held that the plaintiff had failed to establish materiality. As the court explained, "it is

not enough to show that 'the government would have the option to decline to pay if it knew of the defendant's noncompliance.'" *Sanford-Brown, Ltd.*, 840 F.3d at 447 (quoting *Escobar*, 136 S.Ct. at 2003). The FCA's materiality standard instead "'looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'" *Id.* And just as it does here, the evidence confirmed the Department of Education had examined Sanford-Brown College and "concluded that neither administrative penalties nor termination was warranted." *Id.* at 447. This entitled the college to summary judgment. *Id.*

The Fifth Circuit has also held that the government's inaction after investigating the plaintiff's fraud allegations defeats materiality at summary judgment. In *Abbot v. BP Exploration & Prod.*, 851 F.3d 384 (5th Cir. 2017), the plaintiff alleged that the defendant had not received required engineer approvals for construction performed on a floating oil production facility. *Id.* at 388. As happened here, the plaintiff's allegations prompted the paying agency to investigate. *Id.* And at the completion of its substantial investigation, the paying agency (like the Department of Education here) found no reason to take disciplinary action or to terminate the contract. *Id.* This unrebutted strong evidence of immateriality, in the Fifth Circuit's view, entitled the defendant to summary judgment. *Id.* at 388. *See also U.S. ex rel. Harman v. Trinity Indus.*, 872 F.3d 645 (5th Cir. 2017) (overturning a jury verdict of $663 million because the paying agency's policy decision that the road-safety equipment at issue was eligible for federal funding rendered the alleged non-disclosure immaterial).

The D.C. Circuit agrees. Like the Fifth and Seventh Circuits, the D.C. Circuit entered summary judgment for the defendant based on the government's deliberate inaction after investigating the plaintiff's fraud allegations. *U.S. ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1034 (D.C. Cir. 2017). The plaintiff had alleged that the defendant increased its take under a cost-plus contract by falsely inflating headcount data. In support of that claim, the plaintiff submitted the declaration of an administrative contracting officer, who said that he might have investigated more had he known of the inflated data, and that his investigation might have led to disallowed charges. *Id.* at 1033. But those claims were speculative and could apply to any kind of false data, the court found. The court also explained that "'materiality looks to the effect on the likely or *actual* behavior of the recipient of the misrepresentation.'" *Id.* at 1032 (quoting *Escobar*, 136 S.Ct. at 2002) (emphasis added). So "courts need not opine in the abstract when the record offers insight into the Government's actual payment decisions." *Id.* at 1032. The D.C. Circuit thus would not ignore what actually occurred: the paying agency "investigated [the plaintiff's] allegations and did not disallow any charged costs." *Id.* at 1034.

The Third Circuit reached a similar conclusion in a case involving allegations that a pharmacy benefits manager used "dummy" Prescriber IDs in claims submitted to the Centers for Medicare and Medicaid Services (CMS). *U.S. ex rel. Spay v. CVS Caremark Corp.*, 875 F.3d 746 (3d. Cir. 2017). The plaintiff alleged Caremark Rx LLC falsely certified the accuracy of the claims that included dummy Prescriber IDs. *Id.* at 751. But the record evidence the Third Circuit confronted—like the evidence here—

revealed that the government did not deny payment when pharmacy benefits managers used dummy Prescriber IDs. Indeed, the court noted that CMS (1) knew that the industry widely used dummy Prescriber IDs; (2) took no action to deny payment on such claims during the period at issue; and (3) only changed its position on the use of dummy Prescriber IDs much later. *Id.* at 764. The Third Circuit recognized that this constituted strong evidence the false claims alleged were not material and affirmed summary judgment. *Id.*

Those circuits all recognize that when the relevant government agency declines to act after examining fraud allegations and the plaintiffs fail to offer evidence rebutting the inference of immateriality, their FCA claims fail.

**b. The Ninth Circuit's approach to materiality is much more expansive than its sister courts' approach.**

The Ninth Circuit's decision conflicts with the decisions of the Third, Fifth, Seventh, and D.C. Circuits. In the Ninth Circuit's view of materiality, when the government investigates the specific fraud alleged and determines it does not warrant action, that is just "some contrary evidence" raising an issue of fact on materiality. Pet. App. at 14a, n.7. That approach means plaintiffs can carry their burden at summary judgment even if they concede the government took no action after examining the fraud allegations and offer no evidence rebutting the resulting inference of immateriality. But that approach fails to credit the government's inaction as very strong evidence of immateriality, which the plaintiff must

overcome with hard evidence if they intend to prove that the government's payment decision would likely or actually have been different. *See D'Amico v. City of New York*, 132 F.3d 145 (2d Cir. 1998) ("The non-moving party . . . must offer some hard evidence showing that its version of the events is not wholly fanciful."). More significantly, the decision below ignores the Department's policy decision not to seek recovery of Title IV funds when colleges violated the ICB.

In any of the four circuits described above, AAU would have prevailed on its motion for summary judgment. The Department of Education's decision not to seek repayment or take any enforcement action after investigating Relators' allegations would constitute "very strong evidence of immateriality." *Sanford-Brown*, 840 F.3d at 447 (affirming summary judgment for college facing FCA liability based on alleged ICB violations). Indeed, those circuits all recognize that government inaction "substantially increases the burden on the relator" to establish the FCA's already demanding materiality standard. *See U.S. ex rel. Harman v. Trinity Indus.*, 872 F.3d 645, 663 (5th Cir. 2017), *cert. denied*, (Jan. 7, 2019) (No. 17-1149). But deliberate government inaction counts for nothing in the Ninth Circuit, at least not when the government investigates fraud related to past (not current) payments and takes no action. The Ninth Circuit read *Escobar* so rigidly, in this one detail, that it refused even to "analyze the Department's behavior here to determine whether [ICB] compliance [] was material." Pet. App. 14a. But the Department had the authority to recoup Title IV funds it paid out to AAU in prior years and it declined to do so after investigating Respondents'

allegations.[7] That decision is very strong evidence of immateriality, as the other circuits say.

The evidence is even stronger here because the decision follows the Department's general ICB enforcement policy. In the Hansen Memo, the Department explained its decision to make financial aid available to students attending ICB noncompliant schools for use at those schools. ER 104-05. And the record evidence confirms the Department followed the Hansen Memo by allowing ICB noncompliant schools to retain Title IV funds disbursed to students when the ICB violations occurred and to continue participating in Title IV programs while coming back into compliance. ER at 139. In the other circuits, the Department's policy decision not to take "action to deny [Title IV funds]" to ICB noncompliant schools would have led to summary judgment for AAU absent credible evidence the Department deviated from its policy in practice. *Spay*, 875 F.3d at 764 (crediting CMS's policy allowing use of dummy Prescriber IDs as strong evidence of immateriality); *Harman*, 872 F.3d at 667-68 (overturning $663 million jury verdict based on government policy decision approving defendant's eligibility for funding). But here, the Ninth Circuit failed to acknowledge—let alone consider—the Hansen Memo.

---

7. The Ninth Circuit's express reliance on the Department's pre-Hansen Memo policy of recouping payments to support materiality exemplifies the court's one-sided analysis. Since the Ninth Circuit relied on the Department's decision to recoup prior payments to Computer Learning Center as evidence of materiality (*see* Pet. App. 16a), it should have credited the Department's decision not to recoup payments after investigating AAU's alleged fraud as evidence of immateriality.

Those circuits better understand how to apply *Escobar*'s materiality standard. Whether a misrepresentation is misleading asks about something practical. As this Court explained, the concept of materiality looks to whether the government's payment decision would likely have been different if it had known of the misrepresentation. *See Escobar*, 136 S.Ct. at 2002. The government's behavior after learning of alleged fraud is thus the only real guide; the rest is guesswork. So when the Department investigated the specific fraud allegations and took no action to recoup payments consistent with the Hansen Memo's general ICB enforcement policy, it answered *Escobar*'s materiality inquiry. *McBride*, 848 F.3d at 1034 (explaining that courts "should not ignore what actually occurred" when they have "the benefit of hindsight").

The decision below, however, would allow a jury to award treble damages under the FCA despite the Department's explicit policy decision; its consistent, decade-long practice under the Hansen Memo; and its specific behavior here. Down that road lies uncertainty for the government, which may find its policy decisions wiped out by juries second-guessing those judgments, and for program participants who rely on the government's policy decisions to "anticipate and prioritize their compliance obligations." *Escobar*, 136 S.Ct. at 2002. *Escobar* clarified the FCA's demanding materiality standard to avoid these harms at the summary judgment stage.

**2. The Ninth Circuit's decision disregards *Escobar* and charts a dangerous roadmap for future cases.**

**a.** The materiality standard set out by the Ninth Circuit sidesteps *Escobar*. This Court made clear in

its *Escobar* decision that a misrepresentation about compliance must be material to the government's payment decision itself. *Escobar*, 136 S.Ct. at 2002-04. But in the Ninth Circuit's view, a plaintiff establishes materiality if the evidence shows the government simply *cares* about compliance with the requirement before the court. Pet. App. 16a. Though as Judge Smith's dissent correctly noted: whether the government cares about compliance is not enough to make it material under *Escobar*. Pet. App. 25a.

The facts here prove the point. No reasonable juror could find AAU's alleged misrepresentation of ICB compliance material to the Department's payment decision—that is, the Department's decision to make financial aid available to AAU students. The Hansen Memo definitively answers that question. It makes plain the Department's policy decision to make financial aid available to students without regard to whether the school they attend is complying with the ICB. ER at 104. And the Department adopted the Hansen Memo in view of the severe consequences that followed from its prior approach tying financial aid to ICB compliance. *See* ER 104 (explaining the Department's reconsideration of its prior approach).

The undisputed evidence also confirms that after announcing the Hansen Memo, the Department did not respond to any ICB violation by (1) denying payment; (2) requiring repayment; or (3) limiting, suspending, or terminating any school's access to Title IV funds. ER at 141. Simply put, the Department's express policy and confirmed practice answer *Escobar*'s materiality inquiry. *See Escobar*, 136 S.Ct. at 2002 (explaining that materiality looks to the "effect on the likely or actual behavior of the recipient of the misrepresentation").

That the Ninth Circuit found otherwise only confirms the dissent's view that the court applied an erroneous standard. Pet. App. 19a-20a. Indeed, the court below asserted *Escobar* merely "creat[ed] a gloss on the analysis of materiality" applied in *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), in which the court found the ICB's language dispositive of materiality. Pet. App. 11a (acknowledging the *Hendow* Court considered only the ICB's language). That "may not be sufficient, without more, to prove materiality" under *Escobar*, the Ninth Circuit conceded. Pet. App. 13a. But coupled with evidence showing the Department "did care" about ICB compliance it allowed reasonable jurors to find AAU's alleged misrepresentations material. Pet. App. 16a. Only under this diminished standard could the Ninth Circuit find materiality when the evidence confirmed the Department responded in the mine run of ICB noncompliance cases by taking corrective measures *other* than denying payment. *See* Pet. App. 15a (citing corrective actions as evidence supporting materiality). *But see Sanford-Brown, Ltd*, 840 F.3d at 447 (stating that the plaintiff must put forward evidence "that the government's decision to pay [the defendant] would likely or actually have been different had it known of [the defendant's] alleged noncompliance with Title IV regulations").

That analysis defies this Court's decision in *Escobar*. When the Department's typical response to ICB noncompliance is to take corrective action while continuing payment, it undermines materiality. *See Escobar*, 136 S.Ct. at 2002 ("materiality looks to the effect on the likely or actual behavior of the recipient"); *McBride*, 848 F.3d at 1034 (when determining materiality courts must "not ignore what actually occurred"). That goes for the few instances when the Department responded to ICB

violations by issuing administrative fines, too. *See* ER at 139 (reporting that the Department resolved 2 of 32 cases by issuing fines to the schools). The Hansen Memo explains the Department's decision to enforce ICB compliance through fines as an explicit rejection of its prior approach linking financial aid to ICB compliance. ER at 104.

The Ninth Circuit erred by conflating immaterial with unimportant. Administering complex federal programs requires balancing competing objectives. The challenging task facing the Department is not whether to care about ICB compliance in some broad sense. It is how to determine the proper balance between enforcing the requirements of Title IV participation and maintaining broad access to education by making financial aid available despite noncompliance.

The Ninth Circuit's analysis upends that balance. It effectively wrests control over the Title IV programs from the Department. Without question, the Department cares about all of its regulations. And by treating all government activity as evidence of materiality (even simply receiving the benefit of a private *qui tam* settlement),[8] the Ninth

8. The decision below relied on the settlement agreement dismissing the University of Phoenix *qui tam* action as evidence of materiality. *See* Pet. App. 16a. But the decision by private litigants to settle an FCA claim (which the government must approve under the FCA, *see* 31 U.S.C. § 3130(b)(1)) tells us nothing about whether ICB compliance is material to the Department's payment decision. Nor does it provide evidence about what the Department would have done in this case. At most, the University of Phoenix *qui tam* settlement is a cautionary example about what happens when the FCA's rigorous materiality standard is not strictly enforced. The pressure on FCA defendants facing open-ended liability compels settlement.

Circuit substitutes its judgment for the Department's over what constitutes fraud and what is a garden-variety regulatory violation. That turns the FCA into a private right of action for litigants to pursue any regulatory violation against all universities that participate in Title IV programs. *But see Escobar*, 136 S.Ct. at 2003 ("The [FCA] is not an all-purpose antifraud statute, or a vehicle for punishing garden-variety breaches of contract or regulatory violations.").

This is not what the FCA was enacted to achieve. *See Harman*, 872 F.3d at 668-69 ("Congress enacted the FCA to vindicate fraud on the federal government, not second guess decisions made by those empowered through the democratic process to shape public policy); *D'Agostino v. ev3, Inc.*, 845 F.3d 1, 8 (1st Cir. 2017) ("The FCA exists to protect the government from paying fraudulent claims, not to second-guess agencies' judgments[.]").

**b.** The court below also misapplied *Escobar*'s falsity requirements. The Ninth Circuit's falsity analysis collapsed *Escobar*'s "two conditions" requirement back into the broad implied certification theory this Court considered and declined to adopt. In *Escobar*, this Court affirmed implied certification when two conditions are satisfied: first, the defendant's claim for payment "makes specific representations about the goods or services provided," and second, "the defendant's failure to disclose noncompliance with a material statutory, regulatory, or contractual requirement makes those representations misleading half-truths." *Escobar*, 136 S.Ct. at 2001.

The Ninth Circuit here begrudgingly accepted *Escobar*'s falsity requirements as the test for implied

certification claims. Pet. App. 8a-9a. But the Ninth Circuit failed to apply this Court's standard for implied false certifications. The court below simply accepted Respondents' allegation that AAU made misleading half-truths by submitting requests for financial aid that represented students were "eligible borrowers" enrolled in an "eligible program" without disclosing its alleged ICB violations. Pet. App. 9a. But ICB compliance does not affect either borrower or program eligibility under the Department's regulations. *See Brooks*, 2019 U.S. Dist. LEXIS 6783, *33, n.4 (D. Utah Jan. 14, 2019). And the Ninth Circuit simply ignored the Hansen Memo's explicit statement that students remain eligible for financial aid even if they attend ICB noncompliant schools. ER at 104. Simply put, AAU's representations were "literally true." Brief for the United States as Amicus Curiae Supporting Appellee, *U.S. ex rel. Rose v. Stephens Institute*, 909 F.3d 1012 (9th Cir. 2018) (ECF 30 at 20).

Because the Department itself considered students who attended ICB noncompliant schools eligible for financial aid (ER at 104), AAU's alleged failure to disclose its ICB noncompliance would not have misled anyone associated with the Department about the eligibility of AAU's students. The Ninth Circuit found otherwise because it applied the broad theory of implied certification this Court considered but declined to adopt in *Escobar*. *See Escobar*, 136 S.Ct. at 1998 (discussing the First Circuit's view that every claim for payment implies compliance with all applicable program requirements). On that basis alone, this Court should summarily reverse the Ninth Circuit's decision below and enter judgment for Petitioner.

**c.** The decision below is a roadmap back to the expansive view of liability this Court rejected in *Escobar*. When all that is needed to establish materiality under the FCA is that the government conditioned program participation on compliance with a requirement and a court's conclusion that the government cared about compliance in some broad sense, there is no discernable limiting principle cabining open-ended liability. *Escobar*, 136 S.Ct. at 2002; *see* Petition for Writ of Certiorari at 33-34, *Brookdale Senior Living Communities, Inc. v. U.S. ex rel. Prather*, No. 18-699 (Nov. 20, 2018) (raising similar concerns at the motion to dismiss stage).

Under the Ninth Circuit's analysis, every requirement in the PPA becomes a potential trap set "to impose strict liability" on colleges under the FCA—regardless whether the Department routinely pays claims despite knowledge of noncompliance. *See Sanford-Brown, Ltd.*, 788 F.3d at 711.

Consider just one of many possible examples: Every college that participates in Title IV programs must promise in its PPA to comply with the Jeanne Clery Act, which requires schools to annually disclose criminal offenses that occur on their campuses. *See* 20 U.S.C. § 1092(f); 34 C.F.R. § 668.14(c)(2)(ii); ER at 294. Congress itself described the Clery Act as "a very, very important statute" and the disclosures critical tools without which parents and prospective students "cannot make an evaluation as to where they want to [attend]." Campus Crime: Compliance and Enforcement Under the Clery Act: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 590 (2006).

But colleges do fail to report criminal offenses committed on their campuses (either intentionally or recklessly), particularly sex-related crimes. So it is no surprise that the Department has confirmed violations at many colleges,[9] including some of the most prestigious, like Yale University, which once failed to report four separate forcible sexual offenses. And for those violations, the Department fined Yale $165,000—more than the total combined fines it issued for ICB violations between 2002 and 2010. *See* Fine Letter from U.S. Dep't. of Educ., to Yale President Richard Levin (Apr. 19, 2013) available at https://goo.gl/wJHxKz.

Under the Ninth Circuit's analysis, a jury could find FCA liability at Yale for financial aid requests it made without disclosing its Clery Act violations. Compliance with the Clery Act is a condition of participation and the Department does care about Clery Act violations as its administrative fines show. And the Ninth Circuit would accept FCA liability for Clery Act violations under the analysis below even if the Department (1) does not treat Clery Act violations as fraud; (2) does not seek repayment of Title IV funds; and (3) does not limit, suspend, or terminate participation in Title IV programs for Clery Act noncompliance. All because the Department cares about Clery Act compliance in some broad sense. Pet. App. at 25a.

---

9. *See* Dep't. of Educ., Office of Federal Student Aid, Clery Act Reports, https://goo.gl/2ZzfgZ (last visited Feb. 2, 2019) (identifying fines for Clery Act violations at several schools, including La Salle University, Miami University of Ohio, Occidental College, Pennsylvania State University, and the University of Montana).

But whether the government simply cares about compliance is not enough to show materiality under *Escobar*. Pet. App. 25a. There is no risk that a court will substitute its judgment for the government's when it determines that purchased guns "must actually shoot." *Escobar*, 136 S.Ct. at 2001. But Title IV participation is not like contracting to provide firearms. In the Title IV context, imposing FCA liability for regulatory violations can jeopardize broad access to education. And courts are poorly equipped to determine the proper balance between enhancing access to education by allowing schools to receive Title IV funding despite regulatory violations and adequately enforcing the program participation requirements. By ignoring the Department's explicit judgment about ICB violations in the Hansen Memo, the Ninth Circuit substituted its judgment for the Department's and expanded FCA liability to include violations the paying agency did not consider material to its decision to make financial aid available. This Court should reject the Ninth Circuit's expansive view of liability.

### 3. The petition raises important questions that warrant consideration now.

Since this Court's decision in *Escobar*, courts have wrestled with how to apply its rigorous and demanding materiality standard. Several petitions for writ of certiorari have been filed seeking additional guidance about materiality. This case presents an excellent vehicle for the Court to clarify how the FCA's rigorous materiality standard should be applied. The unique record here provides unparalled detail about the Department's routine response when schools violated the ICB. It includes evidence about the Department's specific conduct

after investigating AAU's alleged fraud. And it includes evidence as to the Department's broad policy judgment about how to enforce the ICB. This Court will not likely have such a context-rich opportunity to clarify how courts should apply *Escobar*'s materiality standard for some time.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LELAND B. ALTSCHULER
LAW OFFICES OF
LELAND B. ALTSCHULER
1580 Canada Lane
Woodside, California 94062
(650) 328-7917
lee@altschulerlaw.com

STEVEN M. GOMBOS
*Counsel of Record*
JACOB C. SHORTER
DAVID A. OBUCHOWICZ
GOMBOS LEYTON, P.C.
11350 Random Hills Road,
Suite 400
Fairfax, Virginia 22030
(703) 934-2660
sgombos@glpclaw.com

*Counsel for Petitioner*

# APPENDIX

**APPENDIX A — ORDER AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 26, 2018**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15111

UNITED STATES EX REL. SCOTT ROSE; MARY AQUINO; MITCHELL NELSON; LUCY STEARNS,

*Plaintiffs-Appellees,*

v.

STEPHENS INSTITUTE, DBA ACADEMY OF ART UNIVERSITY,

*Defendant-Appellant.*

Appeal from the United States District Court
for the Northern District of California
D.C. No. 4:09-cv-05966-PJH
Phyllis J. Hamilton, Chief Judge, Presiding

Argued and Submitted December 6, 2017
San Francisco, California

Filed August 24, 2018
Amended November 26, 2018

*Appendix A*

Before: Susan P. Graber and N. Randy Smith, Circuit Judges, and Jennifer G. Zipps,* District Judge.

Opinion by Judge Graber;
Dissent by Judge N.R. Smith

## ORDER AND AMENDED OPINION

GRABER, Circuit Judge:

This qui tam action, brought under the False Claims Act, comes to us on interlocutory appeal from the district court's denial of summary judgment so that we can settle questions of law posed in the wake of *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016). We affirm.

## FACTUAL AND PROCEDURAL HISTORY[1]

Defendant Stephens Institute, doing business as Academy of Art University, is an art school in San Francisco that offers undergraduate and graduate degrees. Defendant receives federal funding—in the form

* The Honorable Jennifer G. Zipps, United States District Judge for the District of Arizona, sitting by designation.

1. "We review *de novo* the district court's denial of summary judgment. When doing so, we 'must determine whether the evidence, viewed in a light most favorable to the non-moving party, presents any genuine issues of material fact and whether the district court correctly applied the law.'" *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1150 (9th Cir. 2016) (quoting *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995)). Here, therefore, we view the evidence in the light most favorable to Relators.

of federal financial aid to its students—through various funding programs available under Title IV of the Higher Education Act. To qualify for that funding, Defendant entered into a program participation agreement with the Department of Education ("Department"), in which it pledged to follow various requirements, including the incentive compensation ban. The incentive compensation ban prohibits schools from rewarding admissions officers for enrolling higher numbers of students. 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22).

In 2006, Defendant's admissions department instituted a new policy to encourage admissions representatives to enroll more students. The policy established an enrollment goal for each admissions representative. If a representative succeeded in enrolling that number of students, he or she would receive a salary increase of up to $30,000. Conversely, a representative could have his or her salary decreased by as much as $30,000 for failing to reach the assigned enrollment goal. Defendant characterized those adjustments as dependent on both quantitative success, meaning a representative's enrollment numbers, and qualitative success, meaning the representative's non-enrollment performance. But, in practice, the employees understood that their salary adjustments rested entirely on their enrollment numbers. Defendant rewarded one team of representatives with an expense-paid trip to Hawaii. The team received that reward solely because of their enrollment numbers.

That enrollment incentive policy remained in place until 2009, when Defendant instituted new enrollment goals and a "scorecard" system for calculating salary

adjustments. The scorecard system involved separate salary adjustment calculations for qualitative and quantitative performance. An admissions representative could receive an adjustment of as much as $23,000 for quantitative performance alone; adjustments related to qualitative performance topped out at $6,000. Managers were told not to share those scorecards with admissions representatives because of concerns about compliance with the participation agreement. The scorecard policy remained in effect until 2010.

Relators Scott Rose, Mary Aquino, Mitchell Nelson, and Lucy Stearns, who are former admissions representatives for Defendant, brought this False Claims Act action in 2010, claiming that Defendant violated the incentive compensation ban from 2006 through 2010. Defendant filed a motion for summary judgment, which the district court denied on May 4, 2016. But on June 16, 2016, the Supreme Court decided *Escobar*, in which the Court clarified the law surrounding falsity and materiality in False Claims Act claims. 136 S. Ct. at 1999, 2001. Defendant filed a motion for reconsideration in light of *Escobar*, which the district court likewise denied. But the district court granted in part Defendant's motion for an interlocutory appeal, certifying to this court several questions relating to *Escobar*'s effect on our precedent.[2]

2. The three questions certified for interlocutory appeal are:

> (1) Must the "two conditions" identified by the Supreme Court in Escobar always be satisfied for implied false certification liability under the [False Claims Act], or does *Ebeid*'s test for implied false certification remain good law?

*Appendix A*

## DISCUSSION

### A. Legal Background

The Department of Education oversees the grant of Title IV funds to colleges and universities. To qualify for such funds, schools must comply with a number of statutory, regulatory, and contractual requirements. One such requirement is the incentive compensation ban, which is mandated by statute, regulation, and contractual program participation agreements. The incentive compensation ban prohibits schools from providing "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities." 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22). If individuals become aware of a school's violation of the incentive compensation ban, they can bring a qui tam action on behalf of the United States under the False Claims Act. When the Department becomes aware of such violations, it also can take direct action against noncompliant schools by, among other things, mandating corrective action; reaching a settlement agreement;

---

> (2) Does an educational institution automatically lose its institutional eligibility if it fails to comply [with] the [incentive compensation ban]?
>
> (3) Does *Hendow*'s holding that the [incentive compensation ban] is material under the [False Claims Act] remain good law after *Escobar*?

Although we structure our discussion differently, we have endeavored to answer those questions.

imposing fines; or limiting, suspending, or terminating a school's participation in federal student aid programs.

The False Claims Act imposes liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). We articulated the four elements of a False Claims Act claim in *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), another case that involved alleged violations of the incentive compensation ban. Under *Hendow*, a successful False Claims Act claim requires: "(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." *Id.* at 1174. But *Escobar* has unsettled the state of this circuit's law with regard to two of those elements: falsity and materiality.

**B. Implied False Certification**

As relevant here, the falsity requirement can be satisfied in one of two ways. The first is by express false certification, which "means that the entity seeking payment [falsely] certifies compliance with a law, rule or regulation as part of the process through which the claim for payment is submitted." *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). The other is by implied false certification, which "occurs when an entity has *previously* undertaken to expressly comply with a law, rule, or regulation [but does not], and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process

of submitting the claim." *Id.* (emphasis added).

In *Ebeid*, we clarified that, to establish a claim under the implied false certification theory, a relator must show that "(1) the defendant explicitly undertook to comply with a law, rule or regulation that is implicated in submitting a claim for payment and that (2) claims were submitted (3) even though the defendant was not in compliance with that law, rule or regulation." *Id.* Thus, under *Ebeid*, a relator bringing an implied certification claim could show falsity by pointing to noncompliance with a law, rule, or regulation that is necessarily implicated in a defendant's claim for payment.

The Supreme Court subsequently addressed implied false certification in *Escobar*. There, the Supreme Court held that

> [t]he implied certification theory can be a basis for liability, *at least* where two conditions are satisfied: first, the claim does not merely request payment, but also makes *specific representations* about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

*Escobar*, 136 S. Ct. at 2001 (emphases added).

We have addressed *Escobar* in two cases that create uncertainty about the ongoing validity of *Ebeid*'s test

for falsity in implied false certification cases. First, in *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 332 (9th Cir. 2017), we considered only *Escobar*'s two-part test in determining that the plaintiff's implied false certification claim failed; we did not consider whether the claim met the lower standard for falsity enunciated in *Ebeid*. Then, in *United States ex rel. Campie v. Gilead Sciences, Inc.*, we noted that *Escobar* "'clarif[ied] *some* of the circumstances in which the False Claims Act imposes liability' under [an implied false certification] theory." 862 F.3d 890, 901 (9th Cir. 2017) (emphasis added) (quoting *Escobar*, 136 S. Ct. at 1995), *petition for cert. filed*, 86 U.S.L.W. 3519 (U.S. Dec. 26, 2017) (No. 17-936). But we then stated that the "Supreme Court held that although the implied certification theory can be a basis for liability, two conditions *must* be satisfied." *Id.* (emphasis added) (citing *Escobar*, 136 S. Ct. at 2000).

Were we analyzing *Escobar* anew, we doubt that the Supreme Court's decision would require us to overrule *Ebeid*. The Court did not state that its two conditions were the *only* way to establish liability under an implied false certification theory. But our post-*Escobar* cases—without discussing whether *Ebeid* has been fatally undermined—appear to *require Escobar*'s two conditions nonetheless. We are bound by three-judge panel opinions of this court. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). We conclude, therefore, that Relators must satisfy *Escobar*'s two conditions to prove falsity, unless and until our court, en banc, interprets *Escobar* differently.

On this record, a reasonable trier of fact could conclude that Defendant's actions meet the *Escobar* requirements for falsity. In the Federal Stafford Loan School Certification form, Defendant specifically represented that the student applying for federal financial aid is an "eligible borrower" and is "accepted for enrollment in an eligible program." Because Defendant failed to disclose its noncompliance with the incentive compensation ban, those representations could be considered "misleading half-truths." That is sufficient evidence to create a genuine issue of material fact and, therefore, to defeat summary judgment.

**C. Materiality**

Under the False Claims Act, "the term 'material' means having 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). In *Hendow*, we held that the relators had alleged adequately that the University of Phoenix "engaged in statements or courses of conduct that were *material* to the government's decision with regard to funding." 461 F.3d at 1177. In concluding that the alleged violations of the incentive compensation ban were material, we relied on the fact that the statute, regulation, and program participation agreement all explicitly conditioned payment on compliance with the incentive compensation ban. *Id.* We did not explicitly consider any other factors in determining that the relators properly pleaded the materiality of the university's violations. *Id.* We noted, with regard to materiality, that "the question is merely whether the false certification . . . was relevant to the government's decision to confer a benefit." *Id.* at 1173.

In *Escobar*, the Supreme Court elaborated on what can and cannot establish materiality in the context of the False Claims Act. The Court clarified that "[w]hether a provision is labeled a condition of payment is *relevant* to but not *dispositive* of the materiality inquiry." *Escobar*, 136 S. Ct. at 2001 (emphases added). Therefore, "even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability." *Id.* at 1996. Instead, the Court explained, "materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation," meaning the government. *Id.* at 2002 (internal quotation marks and brackets omitted).[3]

The Supreme Court then laid out three scenarios that may help courts determine the likely or actual behavior of the government with regard to a given requirement. First, "proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." *Id.* at 2003. Second, the Court explained

3. The dissent maintains that we have ignored the Supreme Court's assertion that the materiality standard is "rigorous" or "demanding." Dissent at 25. Those adjectives, while they give flavor to the Court's noncompliance is material in *all* cases. For instance, *Hendow* discussion, do not establish the *test* that the Court requires us to use. The actual test to be applied is the one that we quote and apply in text: what is the effect of a misrepresentation on the likely or actual behavior of the government. We have, in our view, applied that test rigorously.

that, "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." *Id.* (emphasis added). Third, "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." *Id.* at 2003-04 (emphasis added). The Court further noted that materiality "cannot be found where noncompliance is minor or insubstantial." *Id.* at 2003.

In our view, *Hendow* is not "clearly irreconcilable with the reasoning or theory of" *Escobar* and, therefore, has not been overruled. *Miller*, 335 F.3d at 893. It is true that *Hendow* explicitly considered only the facts that the defendant had violated a statute, regulation, and contract—by not complying with the incentive compensation ban—and that payment was conditioned on compliance with the ban. 461 F.3d at 1175. But *Hendow* did not state that itself may have been decided differently had there been countervailing evidence of immateriality.[4]

4. The dissent claims that *Hendow* explicitly rejected "the 'countervailing evidence' [of immateriality] before it" when determining that the incentive compensation ban is material. Dissent at 23. *Hendow* did not do so. The opinion contains no suggestion whatsoever that any countervailing *evidence* existed. Rather, the dissent quotes from a passage in which the opinion considers the parties' *legal* arguments concerning the extent of the enforcement powers of the Department of Education; did "its authority to take 'emergency action' . . . mean[] that the statutory requirements are causally related to its decision to pay out moneys

After *Escobar*, it is clear that noncompliance with the incentive compensation ban is not material per se. Nor does noncompliance automatically revoke institutional eligibility. Rather, we must examine the particular facts of each case. In other words, we view *Escobar* as creating a "gloss" on the analysis of materiality. But the four basic elements of a False Claims Act claim, set out in *Hendow*, remain valid. *See supra* p. 11.

Applying the *Escobar* standard of materiality to the facts here, we conclude that Defendant has not established as a matter of law that its violations of the incentive compensation ban were immaterial. A reasonable trier of fact could find materiality here because the Department's payment was conditioned on compliance with the incentive compensation ban, because of the Department's past enforcement activities, and because of the substantial size of the forbidden incentive payments.[5]

---

due"? *Hendow*, 461 F.3d at 1175. *Hendow* simply does not discuss the relevance of evidence that, for example, the Department refused to impose sanctions on schools that violated the incentive compensation ban. *Hendow* and *Escobar*, therefore, are not clearly irreconcilable. *Miller*, 335 F.3d at 893.

5. In concluding that the existing record is insufficient to create an issue of fact as to materiality, the dissent demands more certainty than *Escobar* and general principles governing summary judgment require. For example, the dissent argues that the government's responses to other schools' similar misrepresentations is insufficient to demonstrate that the government "*would* find" the misrepresentations material in this case. Dissent at 27-28 (emphasis added). But *Escobar* speaks in terms of "likely," as well as "actual," behavior. 136 S. Ct. at

*Appendix A*

### 1. Funds Conditioned on Compliance

We consider first the same factor that *Hendow* did: the government conditioned the payment of Title IV funds on compliance with the incentive compensation ban through statute, regulation, and contract. Had Defendant not certified in its program participation agreement that it complied with the incentive compensation ban, it could not have been paid, because Congress required as much.[6] After *Escobar*, that triple-conditioning of Title IV funds on compliance with the incentive compensation ban may not be sufficient, without more, to prove materiality, but it is certainly probative evidence of materiality.

### 2. Past Department Actions

We next consider how the Department has treated similar violations. We look to the three scenarios bearing

---

2002. As another example, the dissent states that "[s]ignificant materiality questions remain," the answers to which "are required before liability" can attach. Dissent at 28. But the only question that we are called on to answer in this summary judgment appeal is whether there is a genuine issue of material fact; we need not and do not decide whether Relators do or should prevail.

6. Defendant argues that the incentive compensation ban is expressly identified as a condition of *participation* in the government's Title IV programs, not as a condition of *payment*. We addressed that argument in *Hendow* and concluded that it is "a distinction without a difference." 461 F.3d at 1176. Because no subsequent Supreme Court or Ninth Circuit en banc case has undermined our holding, we cannot, and do not, revisit that determination now.

on materiality that the Supreme Court enunciated in *Escobar*, though none of them is necessarily required or dispositive. *See Escobar*, 136 S. Ct. at 2003-04 (laying out scenarios that can constitute proof of materiality or immateriality, but noting that such proof "is not necessarily limited to" those scenarios).

First, we ask whether there is "evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance" with the incentive compensation ban, because such a showing can help establish that the requirement was material. *Escobar*, 136 S. Ct. at 2003. There is no such evidence in this case and, therefore, that inquiry does not factor into our analysis.

Second, we ask whether the Department has paid "a particular claim in full despite its *actual knowledge* that" the incentive compensation ban was violated, because "that is very strong evidence that [the incentive compensation ban is] not material." *Id.* (emphasis added). The record does not establish that, during the relevant time period, the Department had actual knowledge that Defendant was violating the incentive compensation ban. We cannot, therefore, analyze the Department's behavior here to determine whether compliance with the incentive compensation ban was material.[7]

7. Defendant points to the Department's 2011 program review of Defendant, which took place after Relators filed this action. Defendant argues that the program review, which made no findings regarding the incentive compensation ban and resulted in no action against Defendant for noncompliance, is proof that the

Third, we examine whether the Department "regularly pays a particular type of claim in full despite *actual knowledge* that certain requirements were violated, and has signaled no change in position, [because] that is strong evidence that the requirements are not material." *Id.* at 2003-04 (emphasis added). To show that the Department does regularly pay claims in full despite knowing about violations of the incentive compensation ban, Defendant points to two 2010 Government Accountability Office ("GAO") reports. The first report identifies 32 instances in which schools violated the incentive compensation ban between 1998 and 2009, and the second documents the Department's responses to those 32 violations. Because the Department "did not limit, suspend, or terminate any [of those] school[s'] access to federal student aid," Defendant argues, the Department regularly paid claims in full despite actual knowledge of violations of the incentive compensation ban.

Defendant's argument does not tell the whole story. Of the 32 schools with substantiated violations, the Department ordered 25 of them to take corrective action, which included terminating bonus payments to recruiters

---

incentive compensation ban was not material to the Department. But the letter closing the review cautioned that the review's determination "does not relieve [Defendant] of its obligation to comply with *all* of the statutory or regulatory provisions governing the Title IV, [Higher Education Act] programs," and specifically noted that "compensation *must not* be based in any way on the number of students enrolled." (Emphases added.) Further, at the summary judgment stage, the presence of some contrary evidence does not negate the existence of an issue of fact on materiality.

and ending referral fees to students. And 2 of those 25 schools were required to pay fines as a penalty, which together totaled $64,000. The Department also identified a liability of more than $187 million in misspent student aid funds at 1 of the 32 schools, meaning that the Department required the school to repay improperly awarded federal funds. The Department recouped more than $16 million of the total liability. The GAO reports also show that the Department took no further enforcement action at six schools with violations. But, of those six schools, three of them closed, two were terminated for other reasons, and one school's violations fell within a "safe harbor provision." The GAO reports further reveal that the Department reached settlement agreements with 22 additional schools, which allowed it to recoup funds totaling more than $59 million in payments.

There is evidence, then, that the Department *did* care about violations of the incentive compensation ban and did not allow schools simply to continue violating the ban while receiving Title IV funds. And in many cases, through one means or another, the Department recouped many millions of dollars from the violating schools, showing that it was not prepared to pay claims "in full" despite knowing of violations of the incentive compensation ban. The Department can demonstrate that requirements, such as the incentive compensation ban, are material without directly limiting, suspending, or terminating schools' access to federal student aid. A full examination of the Department's past enforcement habits in similar cases, therefore, reveals that a reasonable trier of fact could find that Defendant's violations of the incentive compensation ban were material.

**3. Magnitude of Violation**

As mentioned, the Supreme Court also noted in *Escobar* that materiality does not exist "where noncompliance is minor or insubstantial." 136 S. Ct. at 2003. For instance, were a school to offer admissions representatives cups of coffee or $10 gift cards for recruiting higher numbers of students, there would be no viable claim under the False Claims Act. That is not the case here. Under Defendant's 2006-2008 compensation scheme, admissions representatives stood to gain as much as $30,000 and a trip to Hawaii simply by hitting their enrollment goals. And under Defendant's 2009-2010 scorecard compensation scheme, representatives' salaries could be adjusted by as much as $23,000 for meeting their enrollment goals.

Those large monetary awards are quite unlike a small, occasional perk. Rather, those awards are precisely the kind of substantial incentive that Congress sought to prevent in enacting the ban on incentive compensation. Therefore, the tremendous bonuses that Defendant's admissions representatives could receive by achieving their enrollment goals (and the similar decreases that could result from falling short of the targets set by Defendant) also counsel against a finding that Defendant's noncompliance was immaterial.

Overall, then, when we construe the evidence in the light most favorable to Relators, we conclude that a reasonable trier of fact could find that Defendant's noncompliance with the incentive compensation ban was material.

**D. Safe Harbor**

Finally, Defendant argues that, even if there is a question of fact as to one or more of *Hendow*'s four requirements for claims under the False Claims Act, it should win on summary judgment because any violations of the incentive compensation ban fell within the Department's safe harbor provision. The now-repealed safe harbor provision was in effect from 2003 through 2010. *Compare* Federal Student Aid Programs, 67 Fed. Reg. 67,048-01, 67,072 (Nov. 1, 2002), *with* 34 C.F.R. § 668.14(b)(22)(i)(B). That provision required, among other things, that "any adjustment [in compensation] is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid." Federal Student Aid Programs, 67 Fed. Reg. at 67,072.

Defendant's argument fails, at least on summary judgment. Viewed in the light most favorable to Relators, the record contains evidence that Defendant *did* make compensation adjustments based solely on admissions representatives' enrollment numbers.

**AFFIRMED**.

*Appendix A*

N.R. SMITH, Circuit Judge, dissenting in part:

I agree with the Majority's opinion through Section B of the Discussion Section, however we part ways regarding: (1) the validity of *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), in light of the Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016); and (2) whether, under *Escobar*'s "demanding" and "rigorous" materiality standard, there was sufficient evidence of a "material" violation of the Incentive Compensation Ban (ICB) to defeat summary judgment, *id* at 1996, 2003. Instead, I would reverse the district court's materiality finding, vacate the judgment, and remand for additional discovery and further briefing. Why?

The Majority makes three errors in its analysis. First, it fails to recognize that *Hendow*'s materiality holding is no longer good law after *Escobar*. Second, it fails to fully articulate the Supreme Court's materiality standard as outlined in *Escobar*. Finally, the Majority applies its erroneous legal standard to the facts at hand, reaching an erroneous conclusion. Let me explain.

## I. *Escobar* overruled the logic of *Hendow*'s materiality holding.

The Majority erroneously concludes that it can still rely—at least in some regard—on *Hendow*'s materiality holding, because it "may have been decided differently had there been countervailing evidence of immateriality."

Maj. Op. at 15-16. *Escobar*, the Majority concludes, merely "creat[ed] a 'gloss' on the analysis of materiality." Maj. Op. at 16. I disagree. Instead, *Escobar* explicitly overruled *Hendow*'s materiality standard and imposed a new materiality analysis that we must follow and apply.

The Majority's theory that *Hendow* could have reached a different conclusion in light of "countervailing evidence" does not acknowledge *Hendow*'s own reasoning. *Hendow* explicitly rejected the "countervailing evidence" before it: "questions of enforcement power are *largely academic*, because the eligibility of the University under Title IV and the Higher Education Act of 1965 . . . is *explicitly* conditioned, in three different ways, on compliance with the [ICB]." *Hendow*, 461 F.3d at 1175 (last emphasis original). Put another way: the government's enforcement *power*—much less what it actually did with that power—did not matter. Rather, *Hendow* clearly held that "expressly condition[ing] [payment] in three different ways" on compliance with the ICB was sufficient to make compliance with the ICB material. *Id.* at 1177.

However, *Escobar* rejected this *Hendow* materiality standard. In *Escobar*, the First Circuit followed *Hendow* and concluded that the "express and absolute language of the regulation in question, in conjunction with the repeated references to supervision throughout the regulatory scheme, constitute[d] dispositive evidence of materiality." *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 780 F.3d 504, 514 (1st Cir. 2015) (citations and quotation marks omitted), *vacated and remanded by Escobar*, 136 S. Ct. at 1996. Rejecting that

reasoning, the Supreme Court instead held that "the label the Government attaches to a requirement" is not dispositive. *Escobar*, 136 S. Ct. at 1996. Accordingly, the Supreme Court outlined that the proper inquiry is "whether the defendant knowingly violated a requirement that the defendant knows is *material* to the Government's payment decision." *Id.* at 1996 (emphasis added); *see also id.* at 2001 ("[S]tatutory, regulatory, and contractual requirements are not automatically material, even if they are labeled conditions of payment."); *id.* at 2003 ("In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive.").

Thus, under *Escobar*, the analysis focuses not on *whether* payment is conditioned on compliance, but *whether* the Government would truly find such noncompliance material to a payment decision. Because *Hendow* does not follow that analysis, the Majority opinion should conclude that *Hendow*'s materiality holding is "clearly irreconcilable with the reasoning and theory of" *Escobar* and explicitly overrule *Hendow* to that extent. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003).

## II. The Majority fails to articulate the "demanding" and "rigorous" nature of the materiality standard imposed by *Escobar*.

There is no question that the Majority outlines part of the *Escobar* materiality standard. However, it leaves out two very significant aspects, both of which are required

to determine whether a misrepresentation is actually material.

First, the Supreme Court stated four times that the materiality test was "rigorous" or "demanding." *Escobar*, 136 S. Ct. at 1996 ("We clarify below how that *rigorous materiality requirement* should be enforced." (emphasis added)); *id.* at 2002 ("[The materiality and scienter] requirements are *rigorous*." (emphasis added)); *id.* at 2003 ("The materiality standard is *demanding*." (emphasis added)); *id.* at 2004 n.6 ("The standard for materiality that we have outlined is a familiar *and rigorous one*." (emphasis added)). The Majority states that these descriptors of the analysis merely "give flavor to the Court's discussion," but otherwise ascribes no use to them. Maj. Op. at 14, n.3. Descriptions of *how* the test is to be applied are not just "flavor[ing]," they are the key in conducting the analysis the Supreme Court has instructed us to do. Anything less is insufficient and the Majority's application of *Escobar* reveals its lack of rigor.

Second, the Supreme Court provided a very clear standard for evaluating whether the misrepresentation was "material to the Government's payment decision." *Id.* at 1996; *see also id.* at 2002-03. The Supreme Court stated that the primary inquiry "looks to the effect on the *likely or actual behavior* of the recipient of the alleged misrepresentation." *Id.* at 2002 (emphasis added and quotation marks omitted). To illustrate *what* the inquiry looks like, the Supreme Court then explicitly referenced both tort and contract law materiality standards. These standards require an analysis of what, for example,

"a reasonable man would attach importance to . . . in determining his choice of action in the transaction" or whether "the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter in determining his choice of action, even though a reasonable person would not." *Id.* at 2002-03 (quotation marks omitted) (citing Restatement (Second) of Torts § 538 at 80); *see also id.* at 2003 n.5.[1] Again, similar to the "demanding" and "rigorous" nature of the inquiry, the Majority does not even mention the contract or tort guideposts provided by the Supreme Court. *Id.* at 1996, 2003.

In sum, though expressly suggesting that payment can be *relevant, Escobar* requires that the primary inquiry of whether a misrepresentation is material mandates a "rigorous" and "demanding" inquiry into the "likely or actual behavior" of the Government to determine whether it "would attach importance [to the misrepresentation] in determining [its] choice of action in the transaction." *Id.* at 2002-03 (quotation marks omitted). Stated differently,

1. Indeed, the Supreme Court's illustrations of the inquiry outline the required specificity. It held that "proof of materiality can include" evidence that: (1) "the defendant *knows* that the Government consistently refuses to pay claims *in the mine run of cases* based on noncompliance with the *particular* statutory, regulatory, or contractual requirement"; or (2) "the Government pays a particular claim in full despite its *actual knowledge* that certain requirements were violated . . . ." *Escobar*, 136 S. Ct. at 2003-04 (emphasis added). Actual knowledge of regular, repeated nonpayment or actual knowledge of violations are both particular and demanding standards.

the evidence (regarding the government's response to a misrepresentation) must be specific or directly analogous to the current alleged misrepresentation. Anything else would not be sufficiently "demanding" or "rigorous" to determine the Government's "likely or actual behavior." *Id.*

## III. The Majority erroneously concludes that, on this record, there are sufficient questions of material fact to defeat summary judgment.

The Majority, like the district court, fails to properly apply the "demanding" and "rigorous" *Escobar* standard to the evidence in this case. *Id.* at 2002-03.

First, there is simply no evidence before us regarding *how* the Government would respond to the specific ICB violations alleged against Stephens Institute. At most, the Majority relies on aggregate data regarding the Government's *general* enforcement of the ICB.[2] The Majority concludes that this is sufficient: "There

2. Plaintiffs establish no more. A plaintiff bears the burden to present sufficient evidence from which a jury could conclude the misrepresentations were material to the government's payment decision. Here, Plaintiffs alleged Stephens Institute knowingly paid significant compensation to recruiters for meeting certain enrollment goals. Yet, the record also indicates that the ICB is only one of many (if not hundreds) of the regulations with which the Department of Education (DOE) requires schools to comply and that the DOE has generally doled out only minor penalties for ICB violations—particularly for several seemingly significant violations. In this light, I think a jury would be left to speculate *how* important the alleged misrepresentations actually are.

is evidence, then, that the Department *did* care about violations of the incentive compensation ban and did not allow schools simply to continue violating the ban while receiving Title IV funds." Maj. Op. at 20. Certainly, the Majority is correct that this evidence demonstrates that the Government *cares* in a broad sense. But, caring is not enough to make it material under the *Escobar* standard. Whether aggregate data demonstrates that the Government cares is not evidence that, *in this case*, the Government would find these alleged misrepresentations *material*. Significant materiality questions remain, for example: Does a fine for noncompliance represent a "material" aspect? Or, are fines only imposed for minor regulatory violations, which *Escobar* explicitly stated were not material? *Escobar*, 136 S. Ct. at 2003 ("The False Claims Act is not . . . a vehicle for punishing garden-variety breaches of contract or regulatory violations."). If the fines are material, were they imposed for more or less egregious behavior than the alleged Stephens Institute behavior? The aggregate data answers none of these questions and yet their answers are required before liability under the "demanding" and "rigorous" *Escobar* standard may be imposed. *Id.* at 2002-03.[3]

---

3. The Majority faults my dissent for stating that answers to these questions are required before "liability . . . may be imposed." Maj. Op. at 17, n.5. Particularly, it argues that on summary judgment, we must only determine whether there are questions of material fact, not whether "liability . . . may be imposed." The Majority's argument misreads my dissent and confuses the standard. Like we must on summary judgment, I am "view[ing] the evidence in the light *most favorable to the non-moving party*." *Vos. v. City of Newport Beach*, 892 F.3d 1024, 1030 (9th Cir. 2018)

Second, with no specific evidence regarding how the Government would respond to the instant allegations, the only "relevant" evidence that remains is the fact that compliance with the ICB is a condition for payment. Indeed, to reach its conclusion, the Majority appears to invoke the all or nothing *Hendow* analysis, which the Supreme Court squarely rejected. And, the Majority steps beyond such evidence being "relevant" and concludes that the Government's triple-conditioning of ICB compliance is "probative evidence of materiality." Maj. Op. at 17-18.

However, the sole fact that compliance is a condition of payment is not enough. *Escobar*, 136 S. Ct. at 2003 ("In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but *not automatically dispositive*." (emphasis added)). Yes, certification of compliance with the ICB is required for payment, but so is certification of compliance with a *host* of additional statutes, regulations, and contractual requirements. There is no indication that the Government holds the

---

(emphasis added) (quoting *Lal v. California*, 746 F.3d 1112, 1115-16 (9th Cir. 2014)). In this case, there is no real dispute about *what* the evidence is, but whether the evidence proffered is—viewed in the light most favorable to the non-moving party—sufficient to even go to trial, i.e., impute liability in the best case Plaintiffs have. Here, the evidence proffered is simply not enough under *Escobar*—there is *no* evidence about *what* the Government would actually do in this case (or even in a similar case). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ICB out as an exceptionally important requirement and, under *Escobar*, misrepresentations regarding compliance "must be material to the Government's payment decision." *Id.* at 1996. Therefore, absent additional evidence demonstrating that in *this* situation, the Government treated a violation as material, and in *that* situation, it did not, conditioning compliance with the ICB is simply not enough to prove materiality. *Id.* at 2003 & n.5 (holding the misrepresentation must go "to the very essence of the bargain" (quoting *Junius Constr. Co. v. Cohen*, 257 N.Y. 393, 178 N.E. 672, 674 (1931))).

As such, all we have before us is (1) general, aggregate evidence that the Government cares about ICB violations (not that what Stephens Institute is specifically accused of doing is, indeed, material such that it would influence a payment decision by the Government), and (2) the fact that payment is triple-conditioned on compliance with the ICB. This is not enough to meet the "rigorous" and "demanding" inquiry into the "likely or actual behavior" of the Government to determine whether it "would attach importance to [the misrepresentation] in determining [its] choice of action in the transaction." *Id.* at 2002-03 (quotation marks omitted).

**IV. Conclusion.**

It is apparent from both the district court's order and the parties' briefing that there was confusion regarding the materiality question, particularly the role of *Hendow* in light of *Escobar*. And, there is insufficient evidence to establish that the allegations against Stephens Institute

would be considered material. However, the clarification of the interaction between *Hendow* and *Escobar* could change what the parties seek in discovery and the district court's ultimate conclusion. Therefore, in light of the clarified reasoning, I would reverse the district court's denial of Stephens Institute's motion for summary judgment, vacate the judgment, and remand for (1) additional discovery to develop the summary judgment record; (2) additional briefing; and, after that, (3) a re-examination by the district court.

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED SEPTEMBER 20, 2016

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 09-cv-05966-PJH

SCOTT ROSE, *et al.*,

*Plaintiffs,*

v.

STEPHENS INSTITUTE,

*Defendant.*

September 20, 2016, Decided
September 20, 2016, Filed

### ORDER DENYING MOTION FOR RECONSIDERATION

Defendant's motion for reconsideration came on for hearing before this court on August 31, 2016. Plaintiff-relators Scott Rose, Mary Aquino, Mitchell Nelson, and Lucy Stearns ("relators") appeared through their counsel, James Wagstaffe, Stephen Jaffe, Kenneth Nabity, and Brady Dewar. Defendant Stephens Institute, doing business as Academy of Art University ("AAU"), appeared through its counsel, Steven Gombos, Gerald Ritzert, and

Jacob Shorter. The United States appeared through its counsel, Jonathan H. Gold. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby DENIES the motion, for the following reasons.

## BACKGROUND

### A. The Relators' Claims

This is a *qui tam* action brought by relators against AAU for violations of the False Claims Act ("FCA"). Relators allege that AAU fraudulently obtained funds from the U.S. Department of Education (the "DOE") by falsely alleging compliance with Title IV of the Higher Education Act.

Specifically, relators allege that defendant ran afoul of Title IV's prohibition on providing "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admissions activities." 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22). This requirement, which applies to colleges and universities that receive federal funding, is referred to as the incentive compensation ban ("ICB"). The ICB is designed to prevent schools from incentivizing recruiters to enroll poorly-qualified students who will not benefit from federal subsidies, and may be unable or unwilling to repay federal student loans. *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005).

Relators acknowledge the existence of a "safe harbor," which allowed colleges to provide "payment of fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period and any adjustment is not based *solely* on the number of students recruited, admitted, enrolled, or awarded financial aid." 34 C.F.R. § 668.14(b)(22)(ii)(A) (emphasis added) (2010). However, relators allege that AAU's actions fall outside of the safe harbor, because it awarded compensation based only upon enrollment success. (Although it applied at the time of the events of this suit, this safe harbor was subsequently repealed in 2011.)

On December 21, 2009, relators brought two causes of action, both under the False Claims Act: (1) knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval under 31 U.S.C. § 3729(a)(1)(A); and (2) knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim under 31 U.S.C. § 3729(a)(1)(B). On November 8, 2011, after the government declined to intervene, relators filed the operative second amended complaint ("SAC"), asserting the same two causes of action. Dkt. 18.

**B. Procedural History**

AAU's motion for summary judgment came on for hearing on March 9, 2016. Dkt. 150, 169. In a May 4, 2016 order, the court denied the motion, but limited the relators'

claims to a single "implied false certification theory" under § 3729(a)(1)(A). Dkt. 179 at 12-13 (the "May 4 Order"). The court found that an express certification theory was "not viable" because relators conceded that AAU's individual requests for Title IV loans did not contain any explicit certification of compliance with the ICB. *Id.* at 11. Rather, AAU expressly certified compliance only in its 2006 and 2012 program participation agreements ("PPAs"). *Id.* As the allegations of ICB violations were limited to the fall of 2006 through the fall of 2010, relators had no evidence that either promise in the PPAs was "false when made." *Id.* at 11-12. As a result, a promissory fraud theory was also not viable.

The remaining claim is based on implied false certification, which "occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim." *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). The court found triable issues of fact as to whether, from late 2006 through 2010, AAU submitted claims that were impliedly false in light of its 2006 promise to comply with the ICB. In particular, relators submitted evidence tending to show that AAU applied for Title IV student loans even though its recruiters were being paid bonuses based on enrollment success.

An FCA claim has four elements: "(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay

out money or forfeit moneys due." *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006). As to falsity, the court found that there was a material dispute of fact over whether AAU paid out compensation solely based on enrollment, and thus fell outside the scope of the safe harbor. Dkt. 179 at 16. Similarly, there was evidence tending to show AAU acted with knowledge of falsity—or at least a reckless disregard for the truth—with respect to its alleged noncompliance with the ICB. In particular, the court noted evidence suggesting that AAU attempted to hide its compensation practices. *Id.* at 17-18. AAU did not "meaningfully challenge" materiality or causation, the two remaining elements. *Id.* at 18.

### C. The *Escobar* Decision

On June 1, 2016, the court granted a stay of proceedings until the Supreme Court issued its ruling in *Universal Health Services, Inc. v. U.S. ex rel. Escobar*. Dkt. 183. The Supreme Court had granted certiorari in Escobar to decide whether the implied certification theory of legal falsity under the FCA was viable. On June 16, the Supreme Court issued its opinion in *Escobar*. In pertinent part, the Court held that "the implied false certification theory can, at least in some circumstances, provide a basis for liability." *Escobar*, 136 S. Ct. 1989, 1995, 195 L. Ed. 2d 348 (2016). Noting that "[w]e need not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment," *id.* at 2000, the Court found that liability attaches:

> at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

*Id.* at 2001.

However, the Supreme Court required a "rigorous" showing that the defendant's failure to disclose noncompliance was material to the government's payment decision, noting that "statutory, regulatory, and contractual requirements are not automatically material." *Id.* at 2001-02. Instead, materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Id.* at 2002 (citing 26 Williston on Contracts § 69:12, p. 549 (4th ed. 2003)). The Court noted some factors that may be considered:

> In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or

> contractual requirement. Conversely, 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.

*Id.* at 2003-04.

On June 23, pursuant to Local Rule 7-9(b)(2), this court granted AAU leave to file a motion for reconsideration regarding the impact of *Escobar* on the May 4 Order. Dkt. 191. The basis for leave was a potential "change in law occurring after the time" of the summary judgment order. L.R. 7-9(b)(2). Materiality was not "meaningfully challenged" in defendant's motion for summary judgment, and therefore not addressed in the May 4 Order, because this issue was settled by Ninth Circuit law. *See Hendow*, 461 F.3d at 1175-76. The court noted that "*Escobar* articulated a materiality standard under the [FCA] that, at least potentially, undermines the existing Ninth Circuit law on the issue." Dkt. 191 at 1-2.

AAU followed with the instant motion, which argues that the court should reconsider its denial of summary judgment because there is no material dispute of fact that: (1) the allegations in this case fail the "two-part test" for

falsity established by *Escobar*; and (2) materiality is not satisfied under the *Escobar*'s "demanding" standard. *See* Dkt. 192 ("Mot.").

## DISCUSSION

### A. Legal Standard

A party may move for summary judgment on a "claim or defense" or "part of . . . a claim or defense." Fed. R. Civ. P. 56(a). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, a court must view the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor. *Id.* at 255; *Hunt v. City of Los Angeles*, 638 F.3d 703, 709 (9th Cir. 2011).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Material facts are those that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue where the nonmoving party will bear the burden of proof at trial, the moving party may carry its initial burden of production by submitting admissible "evidence negating an essential element of the nonmoving party's case," or by showing, "after suitable discovery," that the "nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1105-06 (9th Cir. 2000); *see also Celotex*, 477 U.S. at 324-25 (moving party can prevail merely by pointing to an absence of evidence to support the nonmoving party's case).

When the moving party has carried its burden, the nonmoving party must respond with specific facts, supported by admissible evidence, showing a genuine issue for trial. Fed. R. Civ. P. 56(c), (e). But allegedly disputed facts must be material — existence of "some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48.

**B. AAU's Motion for Leave to Take Judicial Notice**

In conjunction with its motion, AAU asks the court to take judicial notice of seven documents based upon their status as official government reports and agency records.

Dkt. 194. AAU submits these documents as evidence regarding the DOE's past enforcement of the ICB.

The court GRANTS the request for judicial notice. The motion is unopposed, and judicial notice is appropriate because AAU has established that the documents are official government reports available on official websites. *See, e.g.*, *Jarvis v. JP Morgan Chase Bank, N.A.*, No. CV 10-4184-GHK, 2010 U.S. Dist. LEXIS 84958, 2010 WL 2927276 (C.D. Cal. July 23, 2010) ("Judicial notice may be taken of documents available on government websites.").

However, the court will consider the evidence only as they relate to the DOE's historical practice in enforcing the ICB—which is relevant to the materiality issues—and not for the truth of any legal conclusions asserted therein. In particular, the court will consider the so-called "Hansen Memo" *only* as evidence regarding the DOE's past enforcement of the ICB, and ignore its legal assertion that ICB noncompliance "does not render a recruited student ineligible." *See* Dkt. 194-1 Ex. B, Memorandum from William D. Hansen, Deputy Secretary of the Department of Education to Terri Shaw, Chief Operating Officer of Federal Student Aid (October 30, 2002). The Hansen Memo lacks binding legal force; it is an informal internal memo, not an authoritative agency regulation. *See Main*, 426 F.3d at 917 (Hansen Memo has "no legal effect").

**C. Analysis**

Turning to the merits, in order for the court to reconsider its May 4 denial of summary judgment, ASU

must show that, in light of *Escobar*, there is no longer any material dispute of fact as to liability under the FCA. The required elements for FCA liability are: (1) a false statement; (2) made with scienter; (3) materiality; and (4) causation. *Hendow*, 461 F.3d at 1174. AAU's motion for reconsideration only challenges the falsity and materiality elements.

In particular, AAU alleges two bases for reconsideration under *Escobar*. First, it argues that the claims here fail Escobar's new "two-part test" for falsity in implied certification claims. Second, AAU argues that non-compliance with the ICB was not material to the payment decision under *Escobar* based on (i) the DOE's history of rarely revoking Title IV funds for ICB violations; and (ii) because the DOE has continued to pay AAU despite having knowledge of the allegations in this case. Mot. at 2-3.[1]

1. AAU also asserts, in a conclusory fashion, that there is no evidence that anyone at AAU *knew* that the ICB was material. Mot. at 20. This argument is a non-starter, because this court has already held that the relators' evidence established a triable issue on whether AAU acted with scienter under the FCA. May 4 Order at 16-18. In particular, relators presented evidence suggesting that AAU was keenly aware of the significance of ICB and the safe harbor, such that AAU employees took active steps "to hide their compensation practices." *Id.* at 17. This evidence suffices to create a genuine dispute of fact that "AAU knew that it was actively circumventing the law," and that AAU knew the ICB was material to the government. *Id.* at 18. Nothing in *Escobar* alters this prior finding.

*Appendix B*

**1. *Escobar*'s Alleged "Two-Part Test" for Implied False Certification**

AAU is incorrect as a matter of law that *Escobar* establishes a rigid "two-part test" for falsity that applies to every single implied false certification claim. The Supreme Court's statement that FCA liability attached "at least where two conditions are satisfied," *Escobar*,136 S. Ct. at 2001, must be read in context. The Court explicitly prefaced its holding by making clear that "[w]e need not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment." *Id.* at 2000. The Supreme Court's use of "at least" indicated that it need not decide whether the implied false certification theory was viable in all cases, because the *particular* claim before it contained "specific representations" that were "misleading half-truths." *Id.* at 2001. The language in *Escobar* that AAU relies upon does not purport to set out, as an absolute requirement, that implied false certification liability can attach *only* when these two conditions are met.

Even assuming that this "two-part test" applied, relators have raised a triable issue that the claims here were impliedly false per the two conditions of *Escobar*. As the loan form submitted by AAU shows, *see* Dkt. 194-1 Ex. E, AAU's request for payment represents that the student-borrower is "eligible" and is enrolled "in an eligible program." If AAU was not in compliance with the ICB, failure to disclosure this fact would render the loan forms misleading because AAU would not have been an "eligible" institution. While AAU attempts to distinguish between

an "eligible program" and an "eligible institution," an eligible program can only exist if the institution is eligible, and a student can only be eligible if she is enrolled an eligible institution. *See* 34 C.F.R. § 668.32(a)—(a)(1)(i) ("A student is eligible [for Title IV funds] if the student . . . [is] enrolled . . . at an eligible institution."). AAU's distinction between student eligibility and institutional eligibility has been implicitly rejected by the Ninth Circuit. *See Hendow*, 461 F.3d at 1176 ("[C]ompliance with the incentive compensation ban is a necessary condition of continued eligibility and participation: compliance is a 'prerequisite' to funding; funding shall occur 'only if' the University complies . . . .").

In sum, *Escobar* did not establish a rigid two-part test for falsity that must be met in in every single implied certification case. In any event, AAU did make "specific representations" in the submitted student loan forms that would be "misleading half-truths" should the relators prove at trial that AAU was not in compliance with the ICB. As the court has already found, the relators have presented evidence creating a triable issue as to whether the AAU's implied certifications of compliance with the ICB were, in fact, false. May 4 Order at 13-16.

**2. Whether the Alleged ICB Violations Were Material**

AAU's primary argument is that any noncompliance with the ICB was not material under the "rigorous" standard set forth in *Escobar*. As preliminary matter, the Ninth Circuit has previously held that the ICB is material

under the FCA. *See Hendow*, 461 F.3d at 1176-77 (9th Cir. 2006). As a result, to even assert its materiality argument, AAU must show that *Escobar* "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003).

*Hendow*'s materiality holding does rely heavily on the fact that Title IV funds are "explicitly conditioned, in three different ways, on compliance with the incentive compensation ban." 461 F.3d at 1175. This is only one non-dispositive factor after *Escobar*, which held that "statutory, regulatory, and contractual requirements are not automatically material." 136 S. Ct. at 2001-02. The focus under *Escobar* is not how the condition is designated but instead "the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Id.* at 2002. However, *Hendow* further found that "if the University had not agreed to comply with [the ICB], it would not have gotten paid." 461 F.3d at 1176. As a result, this court finds that *Hendow* and *Escobar* are not "clearly irreconcilable," and thus *Hendow* remains binding precedent.

Nonetheless, the court has evaluated the ICB and concludes that it is a material condition under the standard articulated in *Escobar*. The FCA defines "material" to mean "having 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). Under *Escobar*, the court is to examine the ICB's tendency to influence the behavior of the government, looking to such factors as whether the provision was a condition of payment, whether the government consistently refuses to pay claims in the

mine run of cases based on noncompliance, or whether, instead, the government routinely pays a particular claim in full despite its actual knowledge of noncompliance. 136 S. Ct. at 2003-04.

In support of its materiality argument, AAU relies on (i) the DOE's decision not take action against AAU despite its awareness of the allegations in this case; and (ii) the fact that, historically, the DOE has only rarely revoked a school's Title IV funds based on an ICB violation. Mot. at 14-20.

The court finds that the DOE's decision to not take action against AAU despite its awareness of the allegations in this case is not terribly relevant to materiality. The DOE did not cite any reason for this decision, which could well have been based on difficulties of proof or resource constraints, or the fact that the truth of the allegations has yet to be proven. In such circumstances, the DOE's inaction does not provide any basis for the court to infer that the DOE had "actual knowledge" of AAU's violations or chose not to act because it considered the ICB unimportant.

AAU also relies on the DOE's history of uneven enforcement of the ICB. The record shows that, between 1998 and 2009, the DOE handled 54 incentive compensation ban cases. *See* Dkt. 194-1, Ex. C at 30. Of these, 22 ended in settlement agreements yielding over $59 million for the DOE. *Id.* at 32. Of the 32 substantiated violations, the DOE required corrective action (i.e., forward-looking reforms) in 25 cases, imposed fines in two cases, and imposed liability (i.e., revoking Title IV funds) in one case. *Id.* at 31.

AAU is thus correct that, with one exception, the DOE "has not limited, suspended or terminated any schools' participation in Title IV" based on ICB violations. Dkt. 194-1 Ex. A at 9. However, this fact does not prove that the DOE considered ICB violations immaterial or unimportant to the Title IV bargain. To the contrary, the DOE took corrective actions against schools, issued fines, and entered into settlement agreements (which function like a fine or partial revocation of funds) totaling tens of millions of dollars. The government's actions show that the DOE cared about the ICB, and that it did not always pay the claims "in full" despite knowledge of the ICB violations. *Escobar*, 136 S. Ct. at 2003; *cf. Hendow*, 461 F.3d at 1176 ("[T]he DOE . . . quite plainly care about an institution's ongoing conduct, not only its past compliance [with the ICB.]").

Finally, the court notes that the DOE's enforcement of the ICB has changed over time, signaling a "change in position" that is relevant under *Escobar*. 136 S. Ct. at 2004. In 2002, in informal guidance, the DOE took the position that fines, and not suspension of participation in Title IV, were the most appropriate penalty for ICB violations. *See* Hansen Memo, Dkt. 194-1 Ex. B at 1. It also created the safe harbors in that year. Dkt. 194-1 Ex. D at 2. However, by 2008 this position had attracted criticism and Congress commissioned a study of DOE's ICB enforcement. *See* Dkt. 194-1 Ex. C at 2. The DOE subsequently took steps to eliminate the safe harbors. Dkt. 194-1 Ex. A at 1. In 2015, after the Office of the Inspector General released a critical report, *see id.*, the DOE officially rescinded the Hansen Memo. Considering these recent changes, it would be a mistake to give too much weight to the DOE's record of past enforcement.

In sum, ICB compliance is a matter "to which a reasonable person would attach importance in determining his or her choice of action with respect to the transaction involved." *Escobar*, 136 S. Ct. at 2003 n.5 (citing Williston on Contracts § 69:12, pp. 549-50). Nothing in *Escobar* suggests that actions short of a complete revocation of funds are irrelevant to the court's materiality analysis. Here, the government's corrective reforms, fines, and settlement agreements show that it considered the ICB to be an important part of the Title IV bargain, and that it took action against schools based on ICB noncompliance. These actions show that ICB noncompliance was "capable of influencing" the government's payment decisions. 31 U.S.C. § 3729(b)(4). At the least, relators have shown that there is a triable issue as to whether the ICB is material under the *Escobar* standard. Summary judgment in favor of AAU would therefore be inappropriate.

**CONCLUSION**

For the foregoing reasons, the motion for reconsideration is DENIED. The court shall hold a joint case management conference on **October 6 at 2:00 p.m**. to set a pretrial schedule.

**IT IS SO ORDERED**.

Dated: September 20, 2016

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED OCTOBER 28, 2016

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 09-cv-05966-PJH

SCOTT ROSE, *et al.*,

*Plaintiffs,*

v.

STEPHENS INSTITUTE,

*Defendant.*

October 28, 2016, Decided
October 28, 2016, Filed

### ORDER GRANTING IN PART MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

Before the court is defendant Stephens Institute's motion certify this court's September 20, 2016 order for interlocutory appeal, and to stay the case pending appeal. The matter is fully briefed and suitable for decision without oral argument. Accordingly, the hearing set for November 9, 2016 is VACATED. Having read the parties' papers and carefully considered their arguments and the

relevant legal authority, and good cause appearing, the court hereby GRANTS the motion in part.

**BACKGROUND**

The facts of the case are described in the court's prior orders denying defendant's motions for summary judgment and reconsideration. *See* Dkt. 179, 208. In brief, plaintiff-relators Scott Rose, Mary Aquino, Mitchell Nelson, and Lucy Stearns ("relators") allege that defendant Stephens Institute, doing business as Academy of Art University ("AAU") fraudulently obtained government funds from the U.S. Department of Education (the "DOE") by falsely certifying compliance with Title IV of the Higher Education Act. In particular, relators allege that AAU received Title IV funds while not in compliance with the incentive compensation ban ("ICB"), which prohibits colleges and universities from paying recruiters bonuses or other incentive payments based on enrollment success. 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22).

On May 4, 2016, the court denied AAU's motion for summary judgment, but limited the relators' case to a single claim for implied false certification under 31 U.S.C. § 3729(a)(1)(A). Dkt. 179 at 11-13. Implied false certification "occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim." *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010).

*Appendix C*

A False Claims Act ("FCA") claim has four elements: "(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006). Under *Ebeid*, falsity under an implied certification theory requires that "(1) the defendant explicitly undertook to comply with a law, rule or regulation that is implicated in submitting a claim for payment and that (2) claims were submitted (3) even though the defendant was not in compliance with that law, rule or regulation." 616 F.3d at 998.

On June 1, 2016, the court granted a stay of proceedings until the Supreme Court issued its ruling in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016), in which the Court was to address whether the implied certification theory of legal falsity under the FCA was viable. Dkt. 183. On September 20, 2016, this court denied AAU's motion for reconsideration of the court's summary judgment order based on the decision in *Escobar*. *See* Dkt. 208 (the "September 20 Order").

In pertinent part, the September 20 Order first held that that *Escobar* did not create a "two-part test" for falsity that applies to every implied false certification claim. *Id.* at 8-9. Rather, the Court in *Escobar* expressly declined to decide "whether all claims for payment implicitly represent that the billing party is legally entitled to payment." 136 S. Ct. at 2000. This court found that "two conditions" described in *Escobar*, while sufficient to

support FCA liability "at least" as to the particular claim before the Court, were not absolute requirements that must be met in all implied false certification cases. Sept. 20 Order at 8. In particular, *Escobar* left intact the Ninth Circuit's *Ebeid* standard for implied false certification.[1]

Second, the September 20 Order held that although *Escobar* made clear that the materiality standard for liability under the FCA is "rigorous" and "demanding," the Ninth Circuit's holding in *Hendow* that ICB noncompliance is material remained good law. *Id.* at 9-10. Nonetheless, the court went on to independently analyze the ICB under *Escobar*'s standard for materiality. *Id.* at 10-12. The court found that relators had submitted evidence tending to show that the ICB was "capable of influencing" the DOE's payment decisions. *Id.* at 12 (quoting 31 U.S.C. § 3729(b)(4)). As a result, the court concluded that there was a triable issue of fact as to whether the ICB was material, precluding summary judgment. Sept. 20 Order at 12.

AAU now moves this court to certify the September 20 Order for an interlocutory appeal under 28 U.S.C. § 1292(b). Dkt. 212. AAU's motion identifies four "controlling questions of law" that it contends are suitable for certification.

---

1. As an alternative basis for the denial of summary judgment, the court found that triable issues existed as to whether the loan certification forms used by AAU contained "specific representations" that were "misleading half-truths" under the "two conditions" of *Escobar*. Sept. 20 Order at 8-9.

*Appendix C*

## DISCUSSION

### A. Legal Standards

The rule allowing a party to seek certification to appeal an interlocutory order, 28 U.S.C. § 1292(b), is a departure from the normal rule that only final judgments are appealable, and therefore it must be construed narrowly. *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067-68 n.6 (9th Cir. 2002). To obtain certification for interlocutory review, the court must find "(1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981) (citing 28 U.S.C. § 1292(b)).

If an order is certified for interlocutory appeal, the case is not stayed "unless the district court or the Court of Appeals or a judge thereof shall so order." 28 U.S.C. § 1292(b). However, this court has "broad discretion to decide whether a stay is appropriate to 'promote economy of time and effort for itself, for counsel, and for litigants.'" *See Ritz Camera & Image, LLC v. Sandisk Corp.*, No. 5:10-CV-02787-JF/HRL, 2011 U.S. Dist. LEXIS 100335, 2011 WL 3957257, at *3 (N.D. Cal. Sept. 7, 2011) (quoting *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972)).

### B. Analysis

AAU's motion seeks certification of four questions: (1) whether claims for payment can support liability

under an implied false certification theory without meeting the "two conditions" described in *Escobar*; (2) whether a failure to comply with the ICB automatically causes a loss of institutional eligibility under Title IV; (3) whether the Ninth Circuit's pre-*Escobar* materiality analysis in *Hendow* remains good law; and (4) whether the materiality standard of *Escobar* is met in this case, in light of the DOE's past practice of only rarely terminating an institution's participation in Title IV based on ICB noncompliance. Dkt. 212 at 4-5.

The court finds that the first question—whether *Escobar*'s "two conditions" are necessary conditions for liability—is appropriate for certification. Although this court did not understand *Escobar* to create a rigid "two-part test" for implied certification liability, other courts appear to treat the two conditions of *Escobar* as absolute requirements. *See, e.g.*, *United States ex rel. Handal v. Ctr. for Emp't Training*, No. 2:13-cv-01697-KJM-KJN, 2016 U.S. Dist. LEXIS 105158, at *12 (E.D. Cal. Aug. 8, 2016) ("To establish implied false certification, a plaintiff must show [*Escobar*'s two conditions]."); *United States ex rel. Doe v. Health First, Inc.*, No. 6:14-cv-501-Orl-37DAB, 2016 U.S. Dist. LEXIS 95987, at *8 (M.D. Fla. July 22, 2016) ("[*Escobar*'s] two conditions must exist to impose liability . . . ."); *United States ex rel. Creighton v. Beauty Basics Inc.*, No. 2:13-CV-1989-VEH, 2016 U.S. Dist. LEXIS 83573, at *9 (N.D. Ala. June 28, 2016) ("[T]he plaintiff must allege [*Escobar*'s two conditions]."). Because of the uncertainty about this issue in the district courts, the court finds that clarity on the appropriate standard for falsity in implied certification claims post-

*Escobar* would materially advance the resolution of this litigation. In particular, guidance from the Ninth Circuit would be helpful in crafting jury instructions should the case proceed to trial.

AAU's second question for certification presumes that the first question is decided in its favor. If *Escobar*'s "two-part test" applies here, the relators must show that AAU's claim for payment (the Federal Stafford Loan School Certification form, *see* Dkt. 194-5) contains "specific representations about the goods or services provided" which are "misleading half-truths" in light of AAU's alleged failure to comply with the ICB. 136 S. Ct. at 2001. In the September 20 Order, this court found that because AAU's loan certification represented that the student-borrower is "eligible" and is enrolled "in an eligible program," a failure to disclosure noncompliance with the ICB would render the loan forms "misleading." However, AAU argues that, even assuming that it was not in compliance with the ICB, nothing in the loan certification forms would be misleading because its institutional eligibility is not lost upon ICB noncompliance. The court finds that this question, as well, is a controlling issue of law as to which reasonable jurists might disagree that is appropriate for certification.

AAU's third question for certification goes to the materiality element of an FCA claim. Prior to *Escobar*, the Ninth Circuit held that the ICB is material as that term is used in the FCA. *See Hendow*, 461 F.3d at 1175-77 (holding that the ICB is a material condition of Title IV funding). As the court noted in its September 20 Order,

however, the reasoning of *Hendow* relied heavily on the fact that Title IV funds are "explicitly conditioned, in three different ways, on compliance with the incentive compensation ban." Sept. 20 Order at 10 (quoting *Hendow*, 461 F.3d at 1175). After *Escobar*, this is only one non-dispositive factor to consider in the materiality analysis as "statutory, regulatory, and contractual requirements are not automatically material." 136 S. Ct. at 2001-02.

Although this court concluded that it was bound by the holding of *Hendow*, it is a close question whether the ICB is material under *Escobar*, with its focus on "the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." 136 S. Ct. at 2002. The court finds that this issue is a controlling matter of law on which reasonable jurists could disagree. *Compare United States v. Sanford—Brown, Ltd.*, No. 14-2506, 840 F.3d 445, 2016 U.S. App. LEXIS 19195, 2016 WL 6205746, at *1 (7th Cir. Oct. 24, 2016) (affirming finding that "noncompliance with Title IV regulations" was immaterial following *Escobar*) *with United States ex rel. Miller v. Weston Educ., Inc.*, No. 14-1760, 840 F.3d 494, 2016 U.S. App. LEXIS 18758, 2016 WL 6091099, at *6 (8th Cir. Oct. 19, 2016) (finding triable issues of fact as to whether Title IV recordkeeping requirements are material under *Escobar*). Moreover, this case is a strong vehicle for the Ninth Circuit to consider its materiality law in light of *Escobar*, as the facts are substantially similar to those in *Hendow*. Because the materiality issue, if decided in AAU's favor, could resolve the case, the court further finds that its resolution would advance the ultimate termination of the litigation, and therefore certifies the matter for interlocutory appeal.

AAU's final question also relates to materiality. Presuming that *Hendow*'s holding on ICB materiality is no longer binding, AAU seeks to certify the issue of whether the ICB is material in light of the fact that the DOE has only rarely suspended schools' participation in Title IV based on ICB noncompliance. In the September 20 Order, this court reviewed the evidence regarding the DOE's past enforcement of the ICB and concluded that a triable issue of fact existed because "the [DOE's] corrective reforms, fines, and settlement agreements show that it considered the ICB to be an important part of the Title IV bargain, and that it took action against schools based on ICB noncompliance." Sept. 20 Order at 12.

Although the court finds that reasonable jurists could disagree on the matter, AAU's fourth question is inappropriate for certification as it is not a "question of law." *See* 28 U.S.C. § 1292(b). If the Ninth Circuit chooses to alter *Hendow*'s holding or analysis on materiality, the court can apply that new standard to the evidence submitted by relators and AAU on remand.

Having found that three of AAU's questions are suitable matters for an interlocutory appeal, the court also finds that a stay of the case is appropriate pending appeal. A stay will promote judicial economy by delaying trial—the next step in this case—until these novel legal questions raised in the wake of *Escobar* are resolved. If the case proceeded to trial concurrently with the interlocutory appeal, and the Ninth Circuit ultimately disagreed as to legal standard for falsity or materiality, the court and parties would be forced to redo a lengthy and costly trial.

Although relators object to further delay while this case is stayed, the delay will only be significant if the Ninth Circuit agrees that these questions of law are appropriate for prompt resolution, and accepts the appeal.

**CONCLUSION**

For the foregoing reasons, the court CERTIFIES its September 20, 2016 Order and the following three questions for interlocutory appeal pursuant to 28 U.S.C. § 1292(b):

1. Must the "two conditions" identified by the Supreme Court in *Escobar* always be satisfied for implied false certification liability under the FCA, or does *Ebeid*'s test for implied false certification remain good law?

2. Does an educational institution automatically lose its institutional eligibility if it fails to comply the ICB?

3. Does *Hendow*'s holding that the ICB is material under the FCA remain good law after *Escobar*?

The court hereby STAYS the case pending resolution of AAU's appeal. In light of the stay, the case management conference scheduled for December 1, 2016 is VACATED. The parties shall notify the court upon the resolution of AAU's petition for permission to appeal, and upon the resolution of any appeal that is accepted by the Ninth Circuit.

*Appendix C*

**IT IS SO ORDERED**.

Dated: October 28, 2016

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge