No.

In the Supreme Court of the United States

MORTGAGE INVESTORS CORPORATION &
WILLIAM L. "BILL" EDWARDS,

Petitioners,

v.

UNITED STATES OF AMERICA *ex rel.*
VICTOR E. BIBBY & BRIAN J. DONNELLY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. KING
Greenberg Traurig LLP
3333 Piedmont Rd. NE
Suite 2500
Atlanta, GA 30305
(678) 553-2100

Counsel for William L. "Bill" Edwards

PAUL W. HUGHES
Counsel of Record
LESLI C. ESPOSITO
BRIAN J. BOYLE
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Mortgage Investors Corporation

QUESTION PRESENTED

The Court recently explained that "a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act." *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016). And, "if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, * * * that is strong evidence that the requirements are not material." *Id.* at 2003-2004.

Here, Mortgage Investors Corporation (MIC) originated mortgage loans guaranteed by the U.S. Department of Veterans Affairs (VA). Relators assert that MIC charged certain fees disallowed by governing regulations, resulting in False Claims Act violations. But the lower courts found as a factual matter that the VA knew that MIC charged allegedly noncompliant fees, yet continued to issue guaranties for MIC's loans—that is, it continued to pay MIC's claims. The district court granted summary judgment for MIC, concluding that the VA's knowing conduct prevented relators from establishing that the alleged regulatory noncompliance was material to the government's decision to pay. The court of appeals reversed, reasoning that *other* regulatory actions—including form letters instructing MIC to comply with the regulatory requirements—create a dispute of fact regarding materiality.

The question presented is:

When a government agency pays claims despite actual awareness of widespread noncompliance with certain regulatory requirements, whether evidence of agency actions *apart from* that payment decision may create a dispute of fact regarding materiality.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the Eleventh Circuit are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner Mortgage Investors Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

United States ex rel. Bibby v. *Mortgage Investors Corp.*, No. 19-12736 (11th Cir. Feb. 17, 2021)

United States ex rel. Bibby v. *Mortgage Investors Corp.*, No. 12-cv-4020 (N.D. Ga. July 1, 2019)

United States ex rel. Bibby v. *Wells Fargo Bank, N.A.*, No. 06-cv-547 (N.D. Ga. Aug. 15, 2017)

United States ex rel. Bibby v. *Wells Fargo Bank, N.A.*, No 15-10279 (11th Cir. Apr. 21, 2015)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Mortgage Investors Corporation and William L. Edwards respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals on panel rehearing (App., *infra*, 1a-32a) is reported at 987 F.3d 1340. That opinion vacated and replaced an earlier panel opinion, which is reported at 985 F.3d 825 and is identical with respect to the issues raised in this petition. The district court's opinion granting summary judgment to petitioners (App., *infra*, 33a-115a) is unreported, but is available at 2019 WL 11637354.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The False Claims Act provides, in relevant part:

> [A]ny person who—
>
> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; [or]
>
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
>
> * * *
>
> 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.

31 U.S.C. § 3729(a)(1).

STATEMENT

In *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), the Court underscored the "demanding" and "rigorous" nature of a False Claims Act (FCA) relator's burden to plead and prove materiality. *Id*. at 1996, 2002, 2003, 2004 n.6. In that decision, the Court emphasized that the ultimate touchstone of materiality is whether the alleged fraud had bearing on "the Government's payment decision." *Id*. at 1996.

This case concerns an increasingly pressing issue in light of the ever-expanding regulatory state: the intersection of the FCA with putative regulatory requirements. Here, petitioner Mortgage Investors Corporation (MIC) originated loans that were then guaranteed through a program administrated by the U.S. Department of Veterans Affairs (VA). Relators assert that MIC violated the FCA by charging fees that were not permitted by the program's governing regulations.

Escobar provided guidance on how to assess materiality in this context, where a relator asserts that a defendant submitted claims while violating certain regulations. It held that, "if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated * * * that is strong evidence that the requirements are not material." 136 S. Ct. at 2003-2004. Put simply, materiality in this context asks whether a government agency would continue to pay a particular claim if it in fact knew of the regulatory noncompliance.

Here, the courts below recognized that the VA was actually aware that MIC was charging the particular fees at issue. Yet, despite this knowledge, the VA continued to issue guaranties for MIC loans, which—per the court of appeals—was the relevant payment decision.

The district court concluded that the government's conduct precluded respondents from proving materiality. It granted summary judgment to MIC because the question relevant to the materiality inquiry is *answered* by the government's own behavior. It is not a mystery in this case what the government would have done had it known of MIC's alleged noncompliance, because the VA *did* know and yet continued to pay. That, the district court properly concluded, warrants a grant of summary judgment in favor of petitioners.

The court of appeals, however, reversed. It recognized that the VA continued to make affirmative payment decisions notwithstanding its actual knowledge of MIC's alleged regulatory violations. But the court concluded that *other* regulatory conduct apart from the payment decisions—such as the VA's issuance of form letters urging compliance—created a disputed question of fact.

In so holding, the court of appeals broke from three other circuits, which have held that the government's affirmative payment decisions—when made with actual knowledge of alleged regulatory violations—foreclose a relator from proving materiality. If the court of appeals had followed suit, it would have affirmed the district court's grant of summary judgment.

This case thus cleanly presents the question whether an agency's actions *apart from* the payment decision can create a dispute of fact regarding materiality when it is established that, even after learning of widespread noncompliance with the relevant regulatory requirements, the government continues to pay claims.

A. Legal background.

The False Claims Act permits private individuals, termed relators, to bring fraud claims on the government's behalf. If successful, relators receive a bounty. That is, the FCA imposes liability on "any person who," among other things, "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A), (B).[1]

Because "the common law could not have conceived of 'fraud' without proof of materiality" (*Escobar*, 136 S. Ct. at 2002 (quoting *Neder* v. *United States*, 527 U.S. 1, 22 (1999)), the FCA's reference to "false or fraudulent claim[s]" (31 U.S.C. § 3729(a)(1)(A), (B)) incorporates a common-law materiality requirement. Five years ago in *Escobar*, the Court addressed certain aspects of this essential element of FCA liability.

To start with, the Court confirmed that an FCA claim may lie against a defendant who submits a claim for payment while falsely certifying, either expressly or impliedly, compliance with applicable regulatory or contractual requirements. See *Escobar*, 136 S. Ct. at 1999. The Court then set out to "clarify" the materiali-

[1] This long-running case is governed by the pre-2009 version of the FCA, which had slightly different operative language. App., *infra*, 57a n.13; see 31 U.S.C. § 3729 (2006). Those textual differences do not affect this petition, however, as the pre-2009 statute included the same inherent materiality requirement as the current FCA. App., *infra*, 58a n.14 (collecting authorities); see also, *e.g.*, *United States ex rel. Spay* v. *CVS Caremark Corp.*, 875 F.3d 746, 760-763 (3d Cir. 2017) (*Escobar* materiality analysis applies to pre-2009 FCA).

ty requirement applicable to all false certifications, express or implied. *Id.* at 2002 ("[A] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act.").

The Court first explained that the focus of the materiality inquiry is the effect the misrepresentation has on the government's behavior: "Under any understanding of the concept, materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'" *Escobar*, 136 S. Ct. at 2002 (quoting 26 Richard A. Lord, *Williston on Contracts* § 69:12, p. 549 (4th ed. 2003)).

Second, the Court was explicit regarding which government "behavior" is the ultimate endpoint of the inquiry: "the Government's payment decision." *Escobar*, 136 S. Ct. at 1996 ("What matters is * * * whether the defendant knowingly violated a requirement that the defendant knows is material *to the Government's payment decision*.") (emphasis added); see also *ibid.* ("A misrepresentation about compliance * * * must be material *to the Government's payment decision* in order to be actionable.") (emphasis added); *id.* at 2002 (same); cf. *id* at 2003 n.5 ("[A] misrepresentation is material if, had it not been made, the party complaining of fraud would not have taken the action alleged to have been induced by the misrepresentation.") (quoting *Williston*, *supra*, § 69:12, p. 550).

Third, the Court rejected the notion that regulatory noncompliance could be material "merely because the Government designates compliance with a particular * * * requirement as a condition of payment," or because "the government would have the *option* to decline to pay if it knew of the defendant's noncompliance." *Escobar*, 136 S. Ct. at 2003 (emphasis added);

see also *id.* at 2004 ("disagree[ing]" with the view that "any * * * violation is material so long as the defendant knows that the Government would be *entitled* to refuse payment were it aware of the violation") (emphasis added). Instead, the Court offered several factors for courts to consider in evaluating claims of materiality:

- "[P]roof 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 2003-2004 (emphases added).

Finally, the Court repeatedly emphasized the "demanding" and "rigorous" nature of an FCA relator's burden to plead and prove materiality. *Escobar*, 136 S. Ct. at 1996, 2002, 2003, 2004 n.6. As the Court explained, "[t]he False Claims Act is not 'an all-purpose antifraud statute,' or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Id.* at 2003 (quoting *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662, 672 (2008)); see also *id.* at 2004 ("We emphasize * * * that the False Claims Act is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations."). And the Court further made clear, expressly, that materiality is not "too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment." *Id.* at 2004 n.6.

B. Factual and procedural background.

1. Petitioner William "Bill" Edwards—a Marine Corps veteran who served in the Vietnam War—founded and served as president of Mortgage Investors Corporation. MIC, a mortgage lender, participated for many years in the U.S. Department of Veterans Affairs' Interest Rate Reduction Refinance Loan (IRRRL) program, which "seeks to help veterans stay in their homes by allowing them to refinance existing VA-backed mortgages at more favorable terms." App., *infra*, 4a. Under the auspices of the IRRRL program, MIC extended refinance loans to veteran borrowers, and upon approval, the VA would issue guaranties on those loans, assuming an obligation to pay MIC (or any subsequent holder of the loan) if the borrower defaulted. *Id.* at 4a-6a, 50a-52a; see generally 38 C.F.R. § 36.4307 (IRRRL program criteria).

Respondents filed this FCA lawsuit under seal in 2006, alleging widespread wrongdoing by IRRRL mortgage lenders. App., *infra*, 6a. Respondents' central allegation is that lenders, including MIC, charged borrowers certain closing fees that were unallowable under the IRRRL program regulations, yet falsely certified compliance with those same regulations to the VA. *Ibid.*; see 38 C.F.R. § 36.4313(a), (d) (VA permissible fee regulations and certification requirement). Those certifications, the theory goes, "induced the VA to guaranty IRRRLs and to ultimately honor those guaranties when borrowers defaulted." App., *infra*, 6a.

After filing the complaint, respondents served the government with "substantially all material evidence" in their possession (31 U.S.C. § 3730(b)(2)), and engaged in extensive discussions over the next five years with both the Department of Justice and the VA's Office of the Inspector General regarding the alleged fraud. App., *infra*, 84a. The government declined to intervene in this action. *Ibid.*

Following the unsealing of the complaint in 2011, this case has followed a long and tortuous path through the district court. Of the 28 lenders named as defendants in the original complaint, only MIC (along with Edwards, who was later added) remains. See App., *infra*, 3a n.2. Upon the eventual completion of discovery, petitioners moved for summary judgment on the grounds that, among other things, the undisputed evidence establishes that their alleged regulatory noncompliance was not material under this Court's decision in *Escobar*.

2. In a thorough opinion canvassing both the law on materiality and the factual record developed below, the district court entered summary judgment for petitioners. See generally App., *infra*, 33a-115a. In sum, the court concluded that the whole body of evidence in the record—especially the "evidence pertaining to the VA's generalized and particularized knowledge of MIC's alleged noncompliance and its responses to the same"—"significantly belies the notion that the VA characterized the alleged noncompliance in this case as material." *Id.* at 99a. Ultimately, in "faithfully apply[ing]" *Escobar* to the undisputed facts here, the court found itself "constrained to find that this 'rigorous standard'" for materiality "has not been met." *Id.* at 105a.

In reaching this conclusion, the court first acknowledged that compliance with the fee regulations allegedly violated by MIC is an express condition of payment for the IRRRL program. App., *infra*, 69a-72a. But as the court recognized, *Escobar* explicitly rejected the notion that condition-of-payment status, standing alone, is sufficient to establish materiality. *Id.* at 72a (citing *Escobar*, 136 S. Ct. at 2003). The court thus found this factor "relevant," but properly considered it as "but one piece of the puzzle" as to materiality. *Ibid.*

In keeping with *Escobar*, the court next evaluated the extensive evidence regarding the VA's actual knowledge of fee noncompliance—and what the VA did when armed with that knowledge.

As a factual matter, the court found that "[t]here is *no question* that during the relevant timeframe * * * the VA was generally aware that lenders were charging unallowable fees to borrowers in the context of originating IRRRL loans." App., *infra*, 72a (emphasis added); see also *ibid.* (testimony that "the VA has been aware of" widespread fee noncompliance "for as long as [the VA has] been sampling loans," and that it was "not a surprise to the VA that lenders charge unallowable fees to borrowers").

Especially relevant here, the government—both the Department of Justice and the VA—was aware of respondents' allegations of fraud since 2006, when respondents filed their complaint and began discussions with both agencies. App., *infra*, 84a-86a. And after being put on notice of the alleged fraud, the VA conducted additional audits of MIC in particular—both routine audits "from 2009 onward as well as two extensive on-site audits conducted by the Loan Guarantee Service Monitoring Unit in 2010 and 2012—*all of which found violations akin to those at issue in this case*." *Id.* at 91a (emphasis added); see also *id.* at 92a-93a (detailing how the VA's post-complaint audits "unearthed the same unallowable fees and charges violations at issue in this lawsuit," and the in-depth 2010 and 2012 audits "flagged 'noncompliance with 38 CFR 36.4313(d) – fees and charges' as a 'major deficiency.'") (alterations incorporated).

Notwithstanding the VA's actual knowledge of alleged noncompliance with the fee regulations—including specifically knowledge of alleged violations by MIC itself (App., *infra*, 92a-93a)—"the Government's payment decision" (*Escobar*, 136 S. Ct. at 1996) remained unchanged.[2] What is more, "the VA never withdrew a guarantee on any loan or required the lender to execute an indemnification agreement due to a fee issue uncovered during loan audits." App., *infra*, 75a. While the VA may have requested a noncompliant lender to refund unallowable fees to the borrower, the government's payment decision—the issuance of loan guaranties—was unaffected. *Id*. at 76a.

In this way, "the VA's behavior after being apprised of the specific allegations contained in this lawsuit serves as the ultimate death knell with regard to materiality." App., *infra*, 81a. The agency never denied payment of claims. Rather, "the VA's actual practice upon learning of widespread fee violations was limited *solely* to directing that the lender issue refunds to veteran borrowers, to the exclusion of all else, despite the many other arrows available in its quiver." *Ibid*. (emphasis added); see, *e.g.*, *id.* at 73a ("[T]he VA never took any action under any set of circumstances * * * involving unallowable fees other than directing the lender to issue a refund."); see generally *id.* at 73a-77a (additional evidence of VA's "pattern and practice of

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[2] Relevant here, the payment decision—all agree—is "obtaining the loan guarantee" from the VA (App., *infra*, 71a), as that guarantee obligates the government to pay a claim in the event of a default. See *id*. at 100a-101a & n.25; see also *id*. at 16a-17a & n.7.

exclusively utilizing the refund mechanism in the face of unearthing unallowable fees"). That is, there is no evidence that the VA ever imposed any "other administrative sanctions, mandat[ed] indemnification, void[ed] the loan guarantee or reduc[ed] the claim amount" when faced with "the widespread practice of lenders charging unallowable fees." *Id.* at 76a-77a.

The court thus found that the VA's own conduct foreclosed this lawsuit:

> [I]t is difficult for the Court to envision exactly how MIC could be affirmatively charged with knowledge that the certification requirement concerning charges or fees is material (*i.e.*, central) in view of the VA's seemingly complacent and lackadaisical attitude * * * in the face of widespread violations of that requirement by lenders over the course of many years.

App., *infra*, 77a.

Indeed, despite actual knowledge of fee noncompliance by MIC itself, "the VA never so much as issued even a written warning" to MIC. App, *infra*, 91a. To the contrary, "where continued violations were uncovered, the VA merely required that MIC issue refunds to borrowers, without fail." *Id.* at 97a. Based on this "evidence of what actually happened" when the VA learned about MIC's noncompliance with the fee regulations (*id.* at 92a), the court found materiality lacking as a matter of law. *Id.* at 98a-105a.

3. The court of appeals reversed in relevant part.[3]

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[3] The Eleventh Circuit reissued its opinion on panel rehearing. See App., *infra*, 2a. The rehearing opinion added a section addressing a personal jurisdiction question not at issue in this petition, but the panel's analysis of materiality was reproduced verba-

The court first determined that because the VA is obligated to honor even guaranties procured by fraud or misrepresentation—at least when payment is claimed by a subsequent holder of the loan, rather than the loan originator—the relevant "payment decision" for materiality purposes (*Escobar*, 136 S. Ct. at 1996), was the decision to issue the guaranties in the first place, not the decision to pay guaranties after default. App., *infra*, 16a-17a & n.7; see 38 U.S.C. § 3721 (making VA loan guaranties incontestable as to subsequent holders in due course, but not as to loan originators).

Next, the court expressly affirmed the district court's finding that the VA had actual knowledge of MIC's regulatory noncompliance while it continued approving MIC loans: "[I]t is *undisputed* that VA audits had revealed MIC's violations of IRRRL fee requirements by 2009. Therefore, the VA had actual knowledge of MIC's noncompliance during the relevant time frame." App., *infra*, 15a (emphasis added); see also *id.* at 14a.

Despite this undisputed evidence that the VA knew of MIC's noncompliance yet took no action against MIC (or other lenders) other than "consistently requir[ing] lenders to refund any improperly charged fees that [the VA] discovered," the court of appeals held that the district court had improperly "weigh[ed] conflicting evidence" in deciding the materiality question as a matter of law. App., *infra*, 19a-20a.

The court thus discounted the VA's continued issuance of guaranties (and payment of those guaranties) in the face of knowledge of regulatory noncompliance, on grounds that the VA had (1) released a circular "reminding lenders of the applicable fee regulations

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tim from the original, now-vacated panel opinion. Compare App., *infra*, 9a-21a, with 985 F.3d at 830-836.

and warning of the consequences of noncompliance";[4] (2) "implemented more frequent and more rigorous audits"; and (3) required reimbursement of unallowable fees where discovered. App., *infra*, 18a-19a; see *id.* at 19a (characterizing these steps as "some enforcement actions").

The court of appeals, moreover, held that it "was error" to address materiality as a matter of law—not because the relevant historical facts were in question, but because two of the *Escobar* materiality factors (in its view) counseled in favor of materiality, while others suggested a lack of materiality:

> [E]ven if we viewed the VA's continued issuance of guaranties as "strong evidence" of immateriality * * * [a] factfinder would still have to weigh that factor against others, including, as relevant here, the fee and charges requirement being a condition to payment and essential to the IRRRL program. * * * [W]e must leave that determination to the factfinder.

App., *infra*, 21a (quoting *Escobar*, 136 S. Ct. at 2004). The court of appeals therefore reversed the district court's grant of summary judgment to petitioners. *Ibid.*

REASONS FOR GRANTING THE PETITION

Further review is warranted. The decision below conflicts with the holdings of at least three other circuits; the petition cleanly presents a question of substantial importance to the proper application of the False Claims Act, addressing cases that routinely implicate liabilities reaching hundreds of millions—if not billions—of dollars; and the decision is plainly incon-

[4] Again, it is undisputed that none of these "consequences" were ever actually imposed on any noncompliant lenders. See, *e.g.*, App., *infra*, 81a.

sistent with this Court's reasoning in *Escobar*. In all, the Court should grant the petition and resolve this important question.

A. The circuits are divided.

In view of the decision below, the courts are divided regarding a question crucial to the application of the False Claims Act: whether a relator can demonstrate materiality where a federal agency has actual knowledge of regulatory noncompliance, but nonetheless continues to pay claims.

Three circuits hold that, in these circumstances, the government's actual payment of claims precludes a finding of materiality. Thus, evidence of government activity *apart from* the payment decision does not create a triable question of fact. By contrast, the Eleventh Circuit here concluded that, while the agency in fact continued to make affirmative payment decisions after learning of the challenged conduct, evidence of agency action apart from payment decisions could support a finding of materiality.

1. Multiple circuits have understood *Escobar* to create a straightforward, common-sense rule: If an agency is actually aware of noncompliance with certain regulatory conditions yet continues to pay claims, the regulatory noncompliance is not material for purposes of the FCA. That the agency took *other* corrective actions cannot create a dispute regarding materiality, because the government's own conduct resolves the issue.

The **Third Circuit** found that a relator's case was "doom[ed]" when the complaint's allegations showed "that the Government would have paid the claims with full knowledge of the alleged noncompliance." *United States ex rel. Petratos* v. *Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017). There, because the relator "essentially concede[d] that CMS would *consistently reim-*

burse * * * claims with full knowledge of the purported noncompliance," the claim failed to demonstrate materiality. *Ibid*.; see also *ibid.* (relying on the fact that relator disclosed evidence of noncompliance to the FDA, and "[s]ince that time, the FDA has not merely continued its approval of Avastin for the at-risk populations that Petratos claims are adversely affected by the undisclosed data, but has *added* three more approved indications for the drug").

The **Tenth Circuit** similarly addressed an FCA claim where a third party "conducted an investigation over several months into the central allegations presently at issue and made [the government] aware of the quality issues complained of." *United States ex rel. Janssen* v. *Lawrence Mem'l Hosp.*, 949 F.3d 533, 542 (10th Cir. 2020). Notwithstanding the government's actual knowledge, it "continue[d] to pay" the "claims" at issue. *Ibid*. There, the government's knowledge was *less* than that here—as the government had not conducted its own investigation. Nonetheless, "its inaction in the face of detailed allegations from a former employee suggest[ed] immateriality." *Ibid*.

The **Fifth Circuit** has also held that, "though not dispositive, continued payment by the federal government after it learns of the alleged fraud *substantially increases the burden* on the relator in establishing materiality." *United States ex rel. Harman* v. *Trinity Indus. Inc.*, 872 F.3d 645, 663 (5th Cir. 2017) (emphasis added) (collecting cases). There, the Fifth Circuit held that the defendant was entitled to judgment as a matter of law on materiality, notwithstanding a jury verdict to the contrary, because of the government's "continued reimbursement of state purchases" of the supposedly noncompliant product after "the government was aware of all the charges of noncompliance." *Id.* at 660, 665; see also *Abbott* v. *BP Expl. & Prod., Inc.*, 851

F.3d 384, 388 (5th Cir. 2017) (affirming summary judgment for FCA defendant because, "when the [government] decided to allow the [defendant] to continue drilling after a substantial investigation into Plaintiffs' allegations, that decision represents 'strong evidence' that the requirements in those regulations are not material") (quoting *Escobar*, 136 S. Ct. at 2004); *United States ex rel. Porter* v. *Magnolia Health Plan, Inc.*, 810 F. App'x 237, 241-242 (5th Cir. 2020) (similar).[5]

2. By contrast, the Eleventh Circuit here subordinated undisputed evidence that the VA continued issuing guaranties for MIC's loans after gaining "actual knowledge of MIC's noncompliance" (App., *infra*, 15a), to evidence of other "actions to address noncompliance," which amounted to (1) issuing a circular and (2) making more frequent audits, but (3) continuing to take no action against MIC or any other lender apart from requiring reimbursement of any noncompliant fees it found. *Id.* at 18a-19a.

That is, the court of appeals "consider[ed] the VA's issuance of a guaranty to be the relevant government action," and acknowledged that the VA "issue[d] loan guaranties related to a 'particular type of claim' despite its knowledge of audit findings that MIC imposed impermissible fees on a certain percentage of its loans."

[5] The D.C. Circuit has similarly rejected materiality where "we have the benefit of hindsight and should not ignore what actually occurred: the DCAA investigated McBride's allegations and did not disallow any charged costs." *United States ex rel. McBride* v. *Halliburton Co.*, 848 F.3d 1027, 1034 (D.C. Cir. 2017) (affirming summary judgment to defendant). Likewise, the Seventh Circuit found that there was no materiality where "the subsidizing agency and other federal agencies in this case 'have already examined SBC multiple times over and concluded that neither administrative penalties nor termination was warranted.'" *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445, 447 (7th Cir. 2016).

App, *infra*, 17a-18a (quoting *Escobar*, 136 S. Ct. at 2004). *Escobar* teaches that such governmental behavior is "strong evidence" of immateriality. 136 S. Ct. at 2004. Yet the court of appeals found this evidence counteracted by *other* "enforcement" actions that had no bearing on the ultimate payment (here, guaranty) decision. See *infra* pages 11-13.

This decision is irreconcilable with the holdings of multiple other circuits, which conclude instead that evidence that the government continued to pay notwithstanding actual knowledge of regulatory noncompliance defeats a relator's allegation of materiality. Evidence that a government payor took action *apart from* its decision to pay does not, in those circumstances, create a triable question of fact regarding materiality.

B. This is a suitable vehicle to address an exceptionally important question.

1. The proper interpretation of the FCA's materiality requirement is a question of exceptional importance. Dozens of FCA cases are decided in the federal courts every year, and materiality—as an essential element—must be properly alleged and proved in every one of them. Indeed, a search of Westlaw returns no fewer than 523 circuit and district court decisions citing *Escobar* for its materiality holding in the five years since it was decided.[6]

Moreover, because of the FCA's treble damages provision and statutory fines that have grown so weighty as to be "essentially punitive in nature" (*Escobar*, 136 S. Ct. at 1996), the amount at stake in any individual FCA proceeding is often enormous. See, *e.g.*, *Harman*, 872 F.3d at 651 (reversing $663,360,750

6 This Westlaw search looked for the words "material" or "materiality" in the same paragraph as a citation to *Escobar*.

judgment on materiality grounds); Dep't of Justice, *Press Release* (Oct. 21, 2020), perma.cc/V8A5-JFSW (announcing $2.8 billion settlement of opioid manufacturer's FCA liability); see also Dep't of Justice, *Remarks of DAAG Michael D. Granston* (Dec. 2, 2020), perma.cc/2R9W-S9F8 (government recovered $11.4 billion under the FCA in FY 2017-2020, which does not include the opioid settlement). Indeed, relators here assert that "MIC's liability in this case is well in excess of $500 million." D. Ct. Dkt. 363, ¶ 146 (Fourth Amended Complaint) (emphasis omitted).[7]

Given this enormous prospective liability—in both this action and all others like it—it is critical that this Court supply the public with further guidance governing the standards for materiality. Allowing improper claims to proceed past a motion for summary judgment inflicts material injury on the defendant: Because the possible liability is so staggering, many defendants are obligated to settle, even in the face of decidedly low-quality claims. That is why summary judgment is such an important safeguard. Indeed, the Court recognized just that when it explicitly noted that materiality in False Claims Act cases can be appropriately resolved "on a motion to dismiss or at summary judgment." *Escobar*, 136 S. Ct. at 2004 n.6.

In all, the question presented is quite consequential. And, whatever answer the Court may ultimately provide, it is imperative that the issue be resolved with clarity.

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[7] To be sure, petitioners vigorously dispute this damages calculation. But respondents' own statements highlight the enormous consequence of these cases—and the crucial importance of appropriately resolving them via summary judgment.

2. What is more, this is a suitable vehicle for review because the question posed here is presented in its most stark form. The court of appeals could not have been more explicit that, as a factual matter, "it is undisputed that the VA was aware of MIC's violation of fee regulations" (App., *infra*, 14a; see also *id.* at 15a (same)), and that the VA "did issue loan guaranties related to a 'particular type of claim' despite [that] knowledge" (*id.* at 18a). Accord *id*. at 97a ("[W]here continued violations were uncovered, the VA merely required that MIC issue refunds to borrowers, without fail.").

This petition thus poses the central question unhindered by any factual dispute. The court of appeals *agreed* that the agency knew of the alleged regulatory noncompliance and that it nonetheless *continued* to affirmatively agree to pay claims (here, by issuing guaranties). The sole issue, therefore, is whether the government's own conduct—continuing to pay claims notwithstanding actual knowledge of regulatory noncompliance—bars a finding of materiality. That issue is cleanly presented for review.

C. The decision below is wrong.

Finally, review is warranted because the decision below is wrong. The court of appeals' decision disregards *Escobar*'s repeated instruction that the core question for materiality purposes is "the effect * * * of the alleged misrepresentation" on "the Government's payment decision." *Escobar*, 136 S. Ct. at 2002 (quoting *Williston*, *supra*, § 69:12, p. 549); see also *id.* at 1996 ("What matters is * * * whether the defendant knowingly violated a requirement that the defendant knows is material *to the Government's payment decision*.") (emphasis added).

Here, the court of appeals determined that the relevant government decision was not the ultimate payment of guaranties—which is statutorily mandated with respect to holders in due course—but the initial issuance of those guaranties. App., *infra*, 17a-18a. The court erred by subordinating evidence that directly illuminates that very question—what the government actually did with respect to the guaranty decision when it had actual knowledge of noncompliance—to evidence that does not.

That is, while the materiality inquiry may be "holistic" (App., *infra*, 9a), evidence of the government's *actual* payment decisions while knowing of the alleged noncompliance answers precisely the question that materiality "looks to" (*Escobar*, 136 S. Ct. at 2002 (alteration incorporated)): Would the government still have paid (here, issued a guaranty), had it known of the noncompliance? With that question answered, evidence that the government takes notice of the regulatory noncompliance for purposes *apart from* the payment decision itself, such as recovering improperly charged fees for the benefit of borrowers, adds nothing to the materiality analysis—because that analysis is already complete. Cf. *Escobar*, 136 S. Ct. at 2004 (rejecting the idea that materiality could be established "irrespective of whether the Government routinely pays claims despite knowing" of contractual or regulatory noncompliance).

The district court recognized this principle, prioritizing "evidence of what actually happened" when the VA learned of MIC's alleged noncompliance: It kept approving MIC's loans. App, *infra*, 92a. Because this evidence goes directly to the central question for materiality as articulated in *Escobar*—"the effect * * * of the alleged misrepresentation" on "the Government's payment decision" (136 S. Ct. at 2002)—the court of appeals was wrong to reject it in favor of a gestalt sense, from "some enforcement actions" by the VA apart from its decision to continue paying (App., *infra*, 19a), that the government cared about fee noncompliance generally. Ultimately, *Escobar* instructs that "[w]hat matters" is whether the imposition of unallowable fees "is material *to the Government's payment decision*." *Escobar*, 136 S. Ct. at 1996 (emphasis added). Here, the government's continued issuance of guaranties for MIC loans, after learning of MIC's fee noncompliance, is undisputed evidence that it is not.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

MICHAEL J. KING
Greenberg Traurig LLP
3333 Piedmont Rd. NE
Suite 2500
Atlanta, GA 30305
(678) 553-2100

Counsel for William L. "Bill" Edwards

PAUL W. HUGHES
Counsel of Record
LESLI C. ESPOSITO
BRIAN J. BOYLE
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Mortgage Investors Corporation