No. _____

# In The
# Supreme Court of the United States

UNITED STATES OF AMERICA ex rel.
STACEY L. JANSSEN, as Special Administrator of
the Estate of Megen Corin Duffy,

*Petitioner,*

v.

LAWRENCE MEMORIAL HOSPITAL,

*Respondent.*

**On Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

*Universal Health Services, Inc. v. Escobar*, 136 S.Ct. 1989, 2002 (2016) held that "[u]nder any understanding of the concept, materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'" (quoting 26 R. Lord, Williston on Contracts § 69:12, p. 549 (4th ed. 2003) (Williston)). The Court recognized that materiality, as employed in federal statutes including the False Claims Act, "descends from 'common law antecedents'" (quoting *Kungys v. United States*, 485 U.S. 759, 769 (1988)), and discussed those antecedents in tort and contract law. *Id.* (citing Restatement (Second) of Torts § 538, at 80 and Restatement (Second) of Contracts § 162(2), and Comment c, pp. 439, 441 (1979)). The Petition presents the following questions:

> Whether a Medicare provider's knowing falsifications of hospital patient arrival times, known by the hospital to be material to statutory quality reporting programs directly affecting the hospital's Medicare reimbursement rate, are immaterial under the False Claims Act, as held by the Tenth Circuit in conflict with the Fifth, Eighth, Ninth, and Eleventh Circuits, absent additional evidence of impact on the payment behavior of the decisionmaking agency.
>
> Whether change in payment behavior of the Government is the controlling factor in determining materiality under the False Claims Act, as held by the Tenth Circuit, or whether

**QUESTIONS PRESENTED**—Continued

determining materiality instead requires a holistic analysis allowing for objective and subjective evidence, as held by the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits.

## PARTIES TO THE PROCEEDING

Petitioner, The United States of America ex rel. Stacey L. Janssen, as Special Administrator of the Estate of Megen Corin Duffy, was Plaintiff and Appellant below.

Respondent Lawrence Memorial Hospital was Defendant and Appellee below.

## RELATED CASES

- *United States of America ex rel. Megen Duffy v. Lawrence Memorial Hospital,* No. 14-2256–SAC–TJJ, U.S. District Court for the District of Kansas. Judgment entered October 3, 2018.
- *United States of America ex rel. Stacey L. Janssen, as Special Administrator of the Estate of Megen Corin Duffy v. Lawrence Memorial Hospital,* No. 19-3011, U.S. Court of Appeals for the Tenth Circuit. Judgment entered February 7, 2020.

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## PETITION FOR WRIT OF CERTIORARI

The United States of America ex rel. Stacey L. Janssen, as Special Administrator of the Estate of Megen Corin Duffy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.

## OPINIONS BELOW

The decision of the court of appeals, reported at 949 F.3d 533, is reprinted in the Appendix (App.) at App. 1-28. The district court's opinion, reported at 2018 WL 4748345, is reprinted at App. 29-55. The district court's order denying Petitioner's motion to alter or amend the judgment, reported at 2018 WL 9669749, is reprinted at App. 56-70.

## JURISDICTION

The court of appeals entered its judgment on February 7, 2020, and denied a petition for rehearing and rehearing en banc on March 30, 2020. App. 71-72. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 31, United States Code, Section 3729 is reproduced in the Appendix at 73-77. Relevant excerpts

from Title 42, United States Code, Sections 1395l(t), 1395ww(b), and 1395ww(o) are reproduced in the Appendix at 78-79. Relevant excerpts from Title 42, Code of Federal Regulations, Section 412.64 are reproduced in the Appendix at 79.

## INTRODUCTION

Since the Court's decision in *Escobar*, lower courts are in a state of unprincipled confusion as to when a false claim is sufficiently material to impose False Claims Act ("FCA") liability. Some have equated materiality to reliance or causation, there being no liability without evidence that payment would have been withheld if the Government had known of the contractor's deception. These courts believe *Escobar* created something new—a heightened standard unique to the FCA.

Others take an approach they describe as holistic and commonsense, finding materiality where there is evidence the contractor believed the false claim would impact payments, or where a reasonable person would consider the misrepresentation to be important, or where the false claim mechanically impacts a payment rate. These courts believe *Escobar* mandates the familiar rigorous inquiry into materiality that is required in criminal and civil prosecutions under other federal statutes having a materiality element.

Disparate views of the distinct element of materiality undermine a uniform application of the False Claims Act to those claiming Government funds. The

consequence of equating materiality with reliance or causation is that Government contractors are free to misrepresent facts relating to their claims for money, as long as the deception is so successful as to prevent detection by the paying agency. The growing relaxation of False Claims Act enforcement is driven by misreadings of *Escobar*. "Men must turn square corners when they deal with the Government." *Rock Island, Arkansas & Louisiana R.R. Co. v. United States*, 254 U.S. 141 (1920). Settling this difference in views is an important question of federal law warranting certiorari.

## STATEMENT OF THE CASE

LMH is a Medicare-participating hospital. Two percent[1] of its Medicare dollars hinge on accurate reporting of quality measures specifically selected for their clinical importance to mortality and morbidity.[2] App. 78. Several of the measures require determination of the "arrival time" of emergency department

[1] Through fiscal year 2014, Appellee submitted purportedly accurate quality data to avoid a two percent reduction of the scheduled increase in its Medicare reimbursement rate. App. 3, 78-79. For fiscal years 2015 and later, the reduction is one-fourth of the scheduled increase. *Id.* For brevity, Petitioner refers to the government funds at issue in this case as "two percent."

[2] In addition to the exchange of purportedly accurate quality data for a two percent increase, a "value-based purchasing program" provides additional financial incentive for improvements in certain measures. App. 3, 59, 78-79. Because the value-based purchasing program is unavailable to hospitals that are (or should have been) ineligible to receive the two percent, it presents no separate materiality question. App. 78-79.

patients. An "arrival time" is the earliest *documented* time the patient was present at the hospital. App. 6-8. Knowing a patient's arrival time is critical to making improvements in the care of cardiac patients because delays in treatment can result in permanent loss of heart muscle and death. Accordingly, arrival times are used to calculate measures such as how many minutes pass from patient arrival to administration of an electrocardiogram, to angioplasty treatment, and to discharge from the emergency department.

LMH hatched a scheme to make sure documentation of the earliest cardiac patient events was omitted or destroyed, thereby improving its performance on timed measures. App. 6-8. Emergency department managers instructed nurses that omitting and destroying these records was necessary to maximize Medicare reimbursements. The scheme caused several timed measures to be false. For example, in many reporting periods LMH's median time from patient arrival to electrocardiogram was zero minutes. After LMH submitted the false data, its Medicare reimbursement rate did, in fact, include the additional two percent paid in exchange for ostensibly accurate quality data. App. 37.

LMH's executives testified they knew the two percent could be earned only by reporting accurate quality data, including accurate arrival times. App. 48. They knew the hospital's opportunity to receive the additional two percent was jeopardized if the quality data were not accurate or were not timely submitted.

LMH had actually experienced the automatic nature of the two percent reduction where a program requirement was unmet. In 2012, LMH missed a quality data submission deadline by mere hours. In response, the Centers for Medicare and Medicaid Services issued a letter stating LMH's Medicare rate would be reduced by two percent. Accuracy of the quality data is even more critical to payment than timely submission. App. 3-4, 20, 48. Moreover, certifying the accuracy of the quality data is an express condition of payment of the two percent. App. 43.

Megen Duffy, a former nurse in LMH's emergency department, was witness to Respondent's intentional falsification and destruction of arrival time documents. She brought suit as a qui tam relator under subsections (A), (B) and (G) of the False Claims Act, 31 U.S.C. § 3729(a)(1).[3]

The district court, exercising jurisdiction under 28 U.S.C. Section 1331, found that Relator had presented sufficient evidence to create a jury issue as to whether LMH reported false arrival times. App. 43 (fn4). It further found it undisputed that "arrival time" is a component of some of the measures reported in exchange for the two percent. App. 46. It found even that there is "clear and substantial" evidence that LMH's Medicare reimbursement rate is positively impacted by the quality data it reports. App. 46. But the court held that

[3] The district court substituted Megen Duffy's estate as the qui tam relator after entering summary judgment and prior to appeal to the Tenth Circuit.

"plaintiff has not presented evidence showing that LMH's alleged arrival time manipulations actually affected a reimbursement decision or reimbursement rate, or would likely have had an effect." App. 47.

On appeal, the Tenth Circuit found three factors to be dispositive of materiality. First, it credited LMH's suggestion that Relator made allegations of Medicare fraud but that there was no change in payment behavior. App. 17-19. Second, the court created a requirement that there be "widespread deficiencies" before a false claim can be deemed more than a minimal regulatory infraction. App. 20-23. Third, the court recognized that an express condition of payment is evidence of materiality, but found the specific statutory and regulatory bargain at issue—accurate and timely quality data in exchange for an additional two percent—to be "generic." App. 24.

## REASONS FOR GRANTING THE PETITION

### I. The Tenth Circuit created a bar for materiality under the FCA that is radically different than materiality under every other federal statute, in conflict with *Escobar*.

This Court has not eviscerated the element of materiality by equating it with common-law concepts of reliance or causation, yet the Tenth Circuit has. The Seventh Circuit articulated this very problem:

> At common law, *both* materiality (in the sense of tendency to influence) and reliance (in the

> sense of actual influence) are essential in private civil suits for damages. Reliance is not, however, an ordinary element of federal criminal statutes dealing with fraud. It will not do for appellate judges to roll reliance into materiality; that would add through the back door an element barred from the front. *United States v. Rosby*, 454 F.3d 670, 674 (7th Cir. 2006) (italics in original).

The Tenth Circuit's own precedents reveal an untenable chasm between its view of materiality under the FCA and its view of materiality under every other federal statute proscribing fraud against the Government. In a recent criminal case, the court stated, "[a] false statement can be material regardless of its influence on the decisionmaker and can also be material even if the decisionmaker had already arrived at her conclusion before the statement is made [or] even if the decisionmaker did not consider it at all." *U.S. v. Williams*, 934 F.3d 1122, 1129 (10th Cir. 2019). The court was applying the established rule that a statement is material if "it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *Id.* at 1128. The FCA's definition of materiality is nearly identical: "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) (App. 77).

Materiality standards do not differ among federal statutes. *Escobar*, 136 S.Ct. at 2002-2003; *Kungys v. United States*, 485 U.S. 759, 769-770 (1988). "[T]he

materiality analyses are 'identical' for bank fraud, mail fraud, wire fraud, and false-statement offenses." *Williams*, 934 F.3d at 1134, fn.7. "In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning. We therefore avoid interpretations that would attribute different meanings to the same phrase." *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S.Ct. 1507, 1512 (2019).

The courts below have read into *Escobar* unique rules that this Court did not announce. In *Escobar*, the Court was presented with an argument that express "conditions of payment" are *de facto* material. 136 S.Ct. at 2001. Taking guidance from the holistic means by which materiality has been assessed under centuries of federal and state law, this Court held only that no such shorthand litmus test for materiality is sufficient. *Id.* at 2001-2004.

Determining materiality requires a rigorous measurement of the *likelihood* of a false claim's impact on payor behavior. *Escobar* at 2002. That measurement cannot be taken by weighing only the payor's past actions and not the subjective, objective, and obvious importance of the misrepresentation to payment. *Id.* at 2002-2004; *Ruckh v. Salus Rehabilitation*, LLC, 963 F.3d 1089, 1105 (11th Cir. 2020) (materiality is "plain and obvious" where the defendant indicates it provided more to the Government than it actually provided). No doubt, where evidence of actual past Government payor behavior exists, *Escobar* attributes importance to it because what a payor has done in the past tips the scale toward the direction it likely would lean in the

future. *Escobar* at 2003-2004. But this Court did not hold that Government contractors escape FCA liability where their false claims are novel or go undetected, or where the contractor rigs a ratemaking system knowing Government funds will follow. That would be perverse.

In *Kungys v. United States*, this Court stated, "[t]he federal courts have long displayed a quite uniform understanding of the 'materiality' concept as embodied in . . . federal statutes criminalizing false statements to public officials." 485 U.S. at 769-770. *Escobar* relied on *Kungys* in applying that uniform understanding to the FCA. 136 S.Ct. at 2002; *see also* S. Rep. No. 111-110, at 12 & n.6 (2009) (FCA's 2009 amendments codified the "materiality" definition from *Neder v. United States*, 527 U.S. 1, 16 (1999), which had applied the definition in *Kungys*). The Court should now correct the outgrowth of FCA cases that have destroyed the uniform meaning of "material."

## II. This case presents an ideal vehicle for addressing the circuit split over the proper evidentiary focus for materiality.

The Tenth Circuit held that, unlike materiality in criminal, contract, or tort law, the False Claims Act's materiality requirement may not be shown by objective or even subjective means, but only by reference to the behaviors and decisions of the paying agency. App. 14-15. The court noted, cryptically, that evidence of objective or subjective materiality is "not irrelevant,"

but that it is "relevant primarily because it casts light on the likely reaction of the recipient, not because it holds any isolated independent importance." App. 16, fn. 11.

*Escobar* did not create a hyper-nuanced distinction between adducing evidence of materiality and casting light on materiality. To cast light on the likeliness of payor behavior is to evidence that likeliness. 136 S.Ct. at 2002-2003.

Justice Thomas, writing for the unanimous Court, stated:

> We need not decide whether § 3729(a)(1)(A)'s materiality requirement is governed by § 3729(b)(4) or derived directly from the common law. 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." 26 R. Lord, Williston on Contracts § 69:12, p. 549 (4th ed. 2003) (Williston). In tort law, for instance, a "matter is material" in only two circumstances: (1) "[if] a reasonable man would attach importance to [it] in determining his choice of action in the transaction"; or (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter "in determining his choice of action," even though a reasonable person would not. Restatement (Second) of Torts § 538, at 80. Materiality in contract law is substantially similar. See Restatement (Second) of Contracts § 162(2), and Comment c, pp. 439,

> 441 (1979) ("[A] misrepresentation is material" only if it would "likely . . . induce a reasonable person to manifest his assent," or the defendant "knows that for some special reason [the representation] is likely to induce the particular recipient to manifest his assent" to the transaction).

*Id.* The Court was not referencing these familiar objective and subjective types of evidence without purpose. It did so to "now clarify how [the] materiality requirement should be enforced." *Id.* at 2002.

The Tenth Circuit set itself at odds with the express language of this Court and with other circuits ruling on the issue.

The unevenness of the materiality landscape was recently made explicit by the Eleventh Circuit. In *United States v. Melgen*, an ophthalmologist charged with Medicare fraud argued for a jury instruction substituting *Escobar*'s statement that materiality "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation" for the pattern instruction "[a fact is material] if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decisionmaker actually relied on the statement or knew, or should have known, that the statement was false." 2020 U.S. App. LEXIS 24208 at *9-10, 12-13 (11th Cir. July 31, 2020).

The Eleventh Circuit held that the requested substitution does not help Melgen:

> [W]e are not at all sure that *Escobar* didn't approve of the objective standard that our current materiality standard is based on. "Capable of influencing" is not so very different than looking to the "effect on the likely or actual behavior" of the actor. Moreover, the *Escobar* standard for materiality is not made out of whole cloth. Following the statement that Melgen relies on, the Supreme Court tied the concept to our understanding of materiality in tort and contract. *See id.* at 2002-2003. As part of that discussion, it explicitly referenced the—objective—"reasonable man" standards in both tort and contract. *Id.* The Court explained, for instance, that in tort the materiality of a statement may be shown where "a reasonable man would attach importance to [it] in determining his choice of action" and that materiality "in contract law is substantially similar." *Id.*

Just months after the Tenth Circuit's ruling below, the Eleventh Circuit found that "upcoding" by Medicare providers, "a simple and direct theory of fraud" whereby the providers "indicated they had provided more services—in quantity and quality—than they, in fact, provided," resulted in Medicare paying them "higher amounts than they were truly owed." *Ruckh v. Salus Rehabilitation*, *LLC*, 963 F.3d 1089, 1105 (11th Cir. 2020). This ended the materiality inquiry. Materiality, held the court, was "plain and obvious." The same is true here. In *Ruckh*, the providers bargained for

Medicare funds in exchange for specific services. *Id.* Here, LMH bargained for a two percent Medicare rate increase in exchange for accurate patient data. Medicare paid LMH more than it was truly owed.

Meanwhile, the Fifth Circuit holds the view that *Escobar*'s citations to the familiar objective and subjective means by which to show materiality were not some academic lead-in to a unique, heightened standard applicable only to FCA cases. It adopted in its entirety this Court's language from the Restatement of Torts as its test for materiality. *United States ex rel. Lemon v. Nurses to Go*, 924 F.3d 155, 163 (5th Cir. 2019). "A violation is material if a reasonable person 'would attach importance to [it] in determining his choice of action in the transaction' or 'if 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.* (quoting *Escobar* at 2002-2003 (alteration in original)) (quoting Restatement (Second) of Torts § 538 (1976)). The court applied this test not only to the materiality analysis generally, but also to the issue of what constitutes a "minor or insubstantial" violation. *Id.* Here, the test is satisfied by deposition testimony and internal emails stating LMH's understanding that it would not be paid the two percent if its patient quality data was not accurate and complete.

The Sixth Circuit similarly adopts the view that objective or subjective evidence of materiality meets the element. *U.S. ex. rel. Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822, 831 (6th Cir.

2018). In *Prather*, the Medicare provider failed to comply with a regulation requiring written physician certification of the medical necessity of treatments given, yet still certified full compliance. *Id.* at 825. The Sixth Circuit held that "[w]hether the party on the other side of a transaction complied with the regulations aimed at preventing unnecessary or fraudulent certifications is a fact that a *reasonable person* would want to know before entering into that transaction." *Id.* at 835. The court noted that "[t]he analysis of materiality is 'holistic' " and that none of the example considerations given in *Escobar* "is dispositive alone, nor is the list exclusive." *Id.* at 831.

In polar contrast to the Tenth Circuit's holding, *Prather* confirms that regulations designed to stop fraud are material to payment and are not *de minimus* or generic record-keeping violations. *Id.* The misrepresentations and false certifications by LMH violate significantly more robust sources of law than the regulation at issue in *Prather*. They violate statutes and regulations expressly conditioning the two percent on compliance. App. 78-79.

According to the Eighth Circuit, *Escobar* declined "to resolve whether an FCA materiality requirement was governed by statute or common law because *identical principles applied*." *United States ex rel. Miller v. Weston Educational, Inc.*, 840 F.3d 494, 508, fn. 3 (8th Cir. 2016) (emphasis added). Therefore, "[a] false statement or record is material for FCA purposes if either (1) a reasonable person would likely attach importance to it or (2) the defendant knew or should have known

that the government would attach importance to it." *Id.* at 503 (citing *Escobar* at 2002-2003). So, a school's certifications of compliance with a Department of Education regulation conditioning funds on accurate reporting of student achievement data, while school officials knowingly falsified some student achievement data, were material. *Id.* at 498-499, 503-505. The facts in *Miller* are functionally equivalent, as to materiality, to the facts of this case. The two holdings cannot be reconciled.

On remand from this Court, the First Circuit had no trouble finding materiality in a Medicaid provider's false certifications of compliance with licensing and supervision requirements, leading to the death of a patient. *U.S. ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 111 (1st Cir. 2016). "The language that the Supreme Court used in [*Escobar*] makes clear that courts are to conduct a holistic approach to determining materiality in connection with a payment decision, with no one factor being necessarily dispositive." *Id.* at 109. The First Circuit noted that "mere awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance." *Id.* at 112. It found materiality because the licensing and supervision provisions were an express condition of payment and were central to the regulatory scheme at issue. *Id.* at 110. Unlike the Tenth Circuit, the First Circuit did not require evidence of an actual change in payor behavior or decisionmaking, and did not impose a "widespread deficiencies" threshold.

The Fourth Circuit adopted the objective factor of "common sense" in determining that certifying compliance with marksmanship standards while hiring individuals who could not shoot with accuracy was material to a contract that required the ability to shoot with accuracy. *United States v. Triple Canopy, Inc.*, 857 F.3d 174, 178-179 (4th Cir. 2017). *Triple Canopy* stands in stark contrast to the Tenth Circuit's holding below, that a bargain centered on accurate patient data is nevertheless unconcerned with accuracy if the actual effect on the paying agency is not shown.

Yet, the Fourth Circuit also concluded that "the applicable materiality test verges toward a subjective standard." *United States v. Raza*, 876 F.3d 604, 621 (4th Cir. 2017); see also *United States v. Robertson*, 760 Fed.Appx. 214, 220 (4th Cir. 2019) (characterizing *Escobar*'s materiality standard for FCA cases as a "subjective materiality standard"). The Fourth Circuit's embrace of both objective and subjective avenues of proof is anathema to the Tenth Circuit's holding that neither avenue constitutes any evidence at all.

The Seventh Circuit held that a lawyer's concealment of his criminal history in order to participate in the Fair Housing Act's insurance program was "material as a matter of law." *United States v. Luce*, 873 F.3d 999, 1009 (7th Cir. 2017). The court focused on *Escobar*'s statement that "[w]hat matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that *the defendant knows is material* to the Government's payment decision." *Id.* at 1006 (quoting

*Escobar*, 136 S.Ct. at 1996) (emphasis in *Luce*). Thus, the Seventh Circuit allows for evidence of materiality by "subjective" means—where "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." *Escobar*, 136 S.Ct. at 2003 (internal citations and quotation marks omitted).

The Ninth Circuit views *Escobar* as merely "creating a 'gloss' on the analysis of materiality." *United States ex rel. Rose v. Stephens Institute*, 909 F.3d 1012, 1020 (9th Cir. 2018). In *Rose*, a school falsely certified compliance with the "incentive compensation ban," prohibiting rewards to admissions officers for enrolling higher numbers of students. *Id.* at 1015-1016. The court first looked for evidence of materiality in *defendant's knowledge* "that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance." *Id.* at 1021 (quoting *Escobar*, 136 S.Ct. at 2003). It found none. *Id.* The court then emphasized that only "actual knowledge" by the Government of the defendant's violation of a payment condition could be relevant to materiality. It found no such evidence. But the court held that "[t]he 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." *Id.* at 1022. Lastly, the court rejected an argument that the noncompliance was "minor or insubstantial" because the admissions representatives "stood to gain as much as $30,000 and

a trip to Hawaii simply by hitting their enrollment goals." *Id.* Thus, presented with no evidence of the actual effect of the misrepresentations on Government payment behavior, the Ninth Circuit still denied summary judgment to the school. In sharp dissent, Senior Circuit Judge N. Randy Smith asserted, much like the Tenth Circuit, that *Escobar*'s use of terms like "rigorous" and "demanding" created a unique new FCA materiality standard that required reversal for further discovery. 909 F.3d at 1023-1027.

Like the Tenth Circuit, the Second Circuit requires evidence of actual influence on Government payment behavior, equating materiality to reliance or causation. "[T]o be material the government must have made the payment 'as a result of the defendant's alleged misconduct.'" *Coyne v. Amgen*, *Inc.*, 717 Fed.Appx. 26 (2d Cir. 2017) (unpublished) (quoting *United States ex rel. Ge v. Takeda Pharm. Co. Ltd.*, 737 F.3d 116, 124 (1st Cir. 2013); see also *Grabcheski v. American Int'l. Group, Inc.*, 687 Fed.Appx. 84, 87 (2d Cir. 2017) (unpublished) ("The district court correctly concluded that Grabcheski failed adequately to allege that the Agreements would have been different absent the alleged misrepresentation.").

Having noted the clear and substantial impact of the reporting of quality data on two percent of the reimbursement rate, the Tenth Circuit and district court still felt *something more* was required to evidence materiality. They gave no hint as to what type of evidence would be sufficient given the statutory, mechanical impact reporting the quality data has on the two percent.

As the district court noted, there was "[no] question that the Government expects to receive accurate information from LMH. LMH expressly represents, through Data Accuracy and Completeness Acknowledgement certification forms and warranties made with claims for payments, that the information submitted is accurate and complete. LMH also impliedly represents that the information it submits for the Government is accurate. Several witnesses have testified as to this understanding." App. 48.

In giving weight to Ms. Duffy's reports of Medicare fraud, the courts below did not discuss the question of whether evidence of the Government's awareness of mere allegations, as opposed to the Government's "actual knowledge" violations occurred (*Escobar*, 136 S.Ct. at 2002), have bearing on the materiality analysis. Nor did they explain why allegations of fraud coupled with continued payment would defeat materiality where the fraud directly impacted government ratemaking, or in other words, where it is the Government's payment *behavior*, and not some discretionary *decisionmaking*, that is impacted.[4]

The Government itself has weighed in many times in cases since *Escobar*, restating that continuing payment cannot be a dispositive test for materiality.

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[4] At least one court has declared, "[t]his Court doubts that the hospital industry would warmly welcome a rule that required the Government to cut off hospital funding whenever a qui tam action is filed or forfeit its right to seek reimbursement." *United States ex rel. Longo v. Wheeling Hospital, Inc.*, 2019 WL 4478843 at *7 (N.D. W.Va. Sept. 18, 2019).

"[E]ven where the government has actual knowledge of the defendant's wrongful conduct and continues to pay claims, such action does not necessarily undermine a materiality finding because there are many good reasons why the government might continue to pay claims in such circumstances." *U.S. ex rel. Escobar v. Universal Health Services, Inc.*, Case No. 14-1423, Brief of the United States as Amicus Curiae at 24 (1st Cir. Aug. 22, 2016); see also *U.S. ex rel. Bibby and Donnelly v. Mortgage Investors Corp*., Case No. 19-12736, Brief of the United States as Amicus Curiae at 22 (11th Cir. Sept. 24, 2019); *U.S. ex rel. A1 Procurement, LLC v. Thermcor, Inc.*, Case No. 15-cv-0015, ECF No. 188, Statement of Interest at 11-13 (E.D. Va. Apr. 26, 2017); *U.S. ex rel. Clark v. Aegerion Pharmaceuticals, Inc., et al.*, Case No. 13-cv-11785, ECF No. 181, Statement of Interest at 8 (D. Mass. Aug. 10, 2018); *U.S. ex rel. Prather v. Brookdale Senior Living Communities, Inc*., Case No. 3:12-cv-00764, ECF No. 107, Statement of Interest at 2 and 6 (M.D. Tenn. May 3, 2017).

Certainly, this Court stated that one of many types of evidence that might be relevant to materiality is Government payment with "actual knowledge" of the underlying falsity. *Escobar*, 136 S.Ct. at 2003-2004. But some circuits, including the Tenth, have erroneously ignored both the "actual knowledge" threshold, by making it synonymous with "awareness of allegations" and the fact that, even where present, it is not dispositive. See, e.g. *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 35 (1st Cir.

2017) (affirming dismissal because "the FDA allowed [defendant's] device to remain on the market" after relators informed the FDA about defendant's alleged misrepresentations); *United States ex rel. Porter v. Magnolia Health Plan, Inc.*, 810 Fed.Appx. 237, 242 (5th Cir. 2020) (affirming dismissal where an agency "continued payment and renewed its contract with [defendant] several times" after learning about relator's allegations); *United States ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174, 179 (4th Cir. 2017) (considering the Government's actions after learning of the allegations); *D'Agostino v. ev3, Inc.*, 845 F.3d 1, 7 (1st Cir. 2016) (agency's continued reimbursement "casts serious doubt" on materiality).

The Tenth Circuit equated LMH's knowing fraud directed toward maximizing Medicare reimbursements with imperfect regulatory compliance. App. 20-21. It noted that arrival times are, in fact, a component of the measures required in exchange for the two percent. But it then engaged in a weighing of the evidence and found that Relator could not meet the court's "widespread deficiencies" requirement. The court further found that Relator had no evidence of a "cover-up," although the very heart of Relator's claim is that LMH made sure no evidence of actual arrival times exists. App. 22-23.

The Tenth Circuit did not discuss or find a need to construe the statutory provisions at hand (App. 78-79) and made no mention of the undisputed evidence that Respondent's officers and employees knew that

accurate reporting was required to receive the two percent.

The Tenth Circuit required evidence that the Government actually relied on false claims and that those false claims actually caused a Government decisionmaker to exercise discretion and change a payment decision. It disregarded this Court's affirmation that materiality is present where the misrepresentation has the capacity to influence, a natural tendency to influence, or likely influenced, the payment behavior. *Escobar*, 136 S.Ct. at 2002.

## CONCLUSION

Imposing liability for statements that are not only false, but materially false, is not new and is certainly not unique to the FCA. The Tenth Circuit believes *Escobar* shifted the evidentiary focus away from the well-established, holistic approach measuring the importance of a misrepresentation by reference to objective reason, to statutory language, to the belief of the defendant that the misrepresentation will yield money, or to any combination of these or other indicia of importance. It believes this shift reduces the universe of material misrepresentations to cases of "widespread deficiencies," where there is evidence that the Government's payment behavior or decisions actually changed as a result of fraud.

The Tenth Circuit has collapsed materiality into elements of reliance or causation not found in the text or meaning of the FCA. The decision below should be vacated and the case remanded for trial with respect to Petitioner's claim that two percent of LMH's Medicare dollars in the affected years were wrongly paid for knowingly falsified data under this pay-for-reporting program of Medicare. Left uncorrected, the course charted by the Tenth Circuit's new and unique standard for materiality in FCA cases poses a danger of even more radically conflicting results among the circuits than already exists. It provides an incentive and opportunity for unscrupulous contractors to invent schemes to game Government payment systems in ways that appear facially legitimate so as to avoid agency detection. The FCA is not a mere backstop to regulatory checks and balances. It gives teeth to the independent actions of whistleblowers and the Attorney General to root out "all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968). Granting this Petition will provide this Court the opportunity to supply clarity

throughout the circuits in achieving the FCA's purpose.

Respectfully submitted,

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