15-2449-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PAUL BISHOP, ROBERT KRAUS, UNITED STATES OF AMERICA, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS,

Plaintiffs-Appellants,

STATE OF NEW YORK, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF DELAWARE, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, DISTRICT OF COLUMBIA, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS,

(Caption continued on inside cover.)

On Appeal from the United States District Court for the Eastern District of New York, No. 1:11-cv-5457-BMC, District Judge Brian M. Cogan

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CLEARING HOUSE ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

Kate Comerford Todd
Steven P. Lehotsky
U.S. CHAMBER
LITIGATION CENTER, INC.
1615 H St., N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

John P. Elwood
Ralph C. Mayrell
VINSON & ELKINS LLP
2200 Pennsylvania Ave, NW, Ste. 500W
Washington, D.C. 20037
(202) 639-6500
jelwood@velaw.com

Counsel for Amici Curiae

STATE OF FLORIDA, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF HAWAII, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF CALIFORNIA, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF INDIANA, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF ILLINOIS, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF MINNESOTA, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF NEVADA, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF NEW HAMPSHIRE, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, COMMONWEALTH OF MASSACHUSETTS, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF NEW MEXICO, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF MONTANA, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF NORTH CAROLINA, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF NEW JERSEY, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF OKLAHOMA, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF RHODE ISLAND, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, STATE OF TENNESSEE, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS, COMMONWEALTH OF VIRGINIA, ex rel. PAUL BISHOP, ex rel. ROBERT KRAUS,

Plaintiffs,

—v.—

WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A.,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, each of the *amici curiae* certifies that it has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

Dated: July 20, 2017

/s/ John P. Elwood

Counsel for Amici Curiae

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community, including cases involving the False Claims Act ("FCA").

The Clearing House, established in 1853, is the oldest banking association and payments company in the U.S. It is owned by the world's largest commercial banks, which hold more than half the deposits and employ over one million people in the U.S. They have more than two million employees worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., is regulated as a systemically important financial market utility. It owns and operates payments technology infrastructure that provides

[1] No party's counsel authored this brief. No party, party's counsel, or person other than *amici curiae*, their members, or their counsel provided money for the brief's preparation or submission. Both parties have consented to the filing of this brief.

safe and efficient payment, clearing, and settlement services to financial institutions, and clears almost $2 trillion every day.

Amici have a substantial interest in the issues presented in this case. Businesses from all sectors of the American economy have been forced to defend scores of FCA cases arising out of government contracts, grants, and programs in courts nationwide. With increasing frequency, private relators (only infrequently joined by the government itself) have invoked the "implied false certification" theory in an effort to transform minor deviations from obscure contract terms or regulations into FCA violations. Such FCA suits dramatically increase the cost of doing business with the government, resulting in contractors charging the government higher prices and disrupting the careful balance agencies set in administering programs. Those concerns are heightened when the FCA is applied to banking, subjecting interactions with the Federal Reserve (the "Fed") that are the backbone of monetary policy and financial stability efforts to the Act's essentially punitive regime of treble damages and severe penalties. Allowing self-interested private relators to second-guess the Fed's decisions in extending credit and imposing penalties poses a serious risk of disrupting the Fed's control of monetary policy, and could result in economic instability harmful to the well-being of *amici*'s members—and to the American economy as a whole.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should reject relators' invitation to overrule its precedent prohibiting FCA claims based on broad express certifications, which would allow relators to

second-guess Fed regulatory decisions and would jeopardize the Fed's ability to administer monetary and financial stability policy.

I. Relators' far-reaching theory of FCA liability would place the FCA in direct conflict with the Fed's statutory grant of authority to administer monetary policy and maintain financial stability. While the Fed's legal authority is substantial, its ability to administer these policies is sensitive to disruption, and depends on banks' willingness to borrow from the Fed. If borrowing from the Fed exposes banks to potentially billions of dollars in FCA liability based on little more than generic certifications of compliance with the law, it will undercut the Fed's ability to restore liquidity to markets. Because the Justice Department has rarely exercised its authority to dismiss FCA cases disruptive to agency policies, this Court should interpret the FCA in a manner that harmonizes the statute with the Fed's own statutory authorities.

II. This Court already drew a line in *United States ex rel. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), that helped harmonize these statutory schemes. *Mikes* correctly held that overbroad express certifications, like those here, do not support FCA liability. *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016)—an implied (not express) certification case—did not expressly or implicitly overturn *Mikes'* rule, which thus remains binding for express certification claims. That rule aligns with *Escobar*'s rejection of "extraordinarily expansive" certifications of compliance with whole bodies of law. *Mikes*' rule is also correct because broad certifications of compliance with all relevant laws are so unlikely to be entirely accurate that no agency

reasonably could rely upon them in making payment and lending decisions. The materiality of the generic certifications here is even less plausible, where the Fed's concern was maintaining a liquid financial market and it announced it looked to other considerations; where the Fed was well aware of the relators' allegations when it lent to defendants; and where relators have failed to plead with specificity how these certifications were actually (not just theoretically) material.

ARGUMENT

I. Application of the FCA Based on Generic Certifications Has the Potential to Disrupt the Fed's Authority to Manage Monetary Policy and Maintain Financial Stability

A. This Court Should Harmonize the FCA with the Fed's Independent Authority Over Monetary Policy

In its prior decision in this case, this Court was rightly wary of allowing "individuals to bring suit" under the FCA to seek damages for supposed violations of banking regulations "without regard for the larger implications on the financial system." *U.S. ex rel. Bishop v. Wells Fargo & Co.*, 823 F.3d 35, 46 (2d Cir. 2016). Relators "are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 949 (1997). Relators "pursue different goals and respond to different incentives than do public agencies" and have no "direct accountability" to the public. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 574 (2000). They disrupt agencies' procurement,

enforcement, and regulatory choices by bringing FCA cases.[2] Allowing suits like this one to proceed would jeopardize the Fed's power to administer monetary policy and maintain financial stability.

1. "The Fed's mission is to ensure the stability of the nation's monetary and financial system." *Bishop*, 823 F.3d at 46. But the Fed has only a few levers over the monetary system, of which the discount window, the reserve requirement, and open market operations are the best known; and the effectiveness of those tools depends in substantial part upon banks' cooperation. *How Monetary Policy Works*, Fed. Reserve Bank of St. Louis, http://goo.gl/FWJ5EX. Fed policymakers carefully evaluate how much to use each lever based on market conditions. *What Is the Relationship Between the Discount Rate and Mortgage Rates?*, Fed. Reserve Bank of San Francisco (June 2002),

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[2] *See, e.g.*, *U.S. ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008) (improper use of *qui tam* suits can "undermine the government's own administrative scheme for ensuring that hospitals remain in compliance and for bringing them back into compliance when they fall short of what the Medicare regulations and statutes require"); *U.S. ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000) (permitting FCA claim based on statutory violation could "unilaterally divest[] the government of the opportunity to exercise . . . the discretion to accept or disaffirm the contract on the basis of complex variables reflecting the officials' views of the government's longterm interests"); *U.S. ex rel. Brooks v. Stevens-Henager College*, 174 F. Supp. 3d 1297, 1311 (D. Utah 2016) ("[C]ourts are equally ill-equipped to determine the proper balance between enhancing access to education by allowing schools to retain eligibility for Title IV funding and adequately enforcing the requirements of program participation." (citation omitted)); *cf. U.S. ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694, 702 (4th Cir. 2014) ("[A]llowing FCA liability based on regulatory non-compliance could 'short-circuit the very remedial process the Government has established to address non-compliance with those regulations.'" (quoting *U.S. ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 310 (3d Cir. 2011))).

http://goo.gl/fmE6WK. Access to primary credit from the discount window is granted at the Fed's discretion, which includes "discretion to lend 'to a depository institution that is not eligible for primary credit if, in the judgment of the Reserve Bank, such a credit extension would be consistent with a timely return to reliance on market funding sources.'" *Bishop*, 823 F.3d at 40 (quoting 12 C.F.R. § 201.4(b)).

The discount window is sensitive to disruption even without interference from relators. Banks historically have been reluctant to use the discount window because it might be perceived as a sign of financial weakness and that they could not borrow elsewhere. Olivier Armantier et al., *Is There Stigma to Discount Window Borrowing?*, Fed. Reserve Bank of N.Y.: Liberty St. Econ. (Aug. 31, 2011), http://goo.gl/FDXtqa. During the 2007-2008 financial crisis, the Fed was forced to take measures to encourage borrowing from the discount window. *Id.* The Fed decreased the interest rate, extended the term from overnight to thirty days, and stated that it viewed borrowing as a sign of strength. *Id.* The Fed also created the Term Auction Facility ("TAF") as an alternative without the discount window's stigma. *Id.* The Fed succeeded in encouraging use of the discount window and TAF to restore liquidity to financial markets, narrowly averting a deeper crisis. *See* Donald L. Kohn, *The Federal Reserve's Policy Actions During the Financial Crisis and Lessons for the Future*, Fed. Reserve (May 13, 2010), http://goo.gl/GNPyjo.

Could the Fed have persuaded banks to borrow in a timely manner if banks had known that the blanket representations in the Fed's Operating Circular No. 10 would

later expose them to billions in FCA liability—to say nothing of onerous discovery obligations and debilitating litigation costs? There is enough uncertainty that it should give this Court pause in extending liability. Except for the decisions in this case, there have been no reported decisions and no settlements in FCA cases arising out of borrowing from the Federal Reserve.[3] Banks therefore had little reason to expect that borrowing from the discount window would expose them to the risk that bounty-seeking relators would later scour their balance sheets for loans arguably inconsistent with boilerplate representations on a lending circular. Had banks priced the risk of billions in FCA treble damages and penalties into the cost of borrowing from the discount window or TAF, that "could [have] discourage[d] banks from accessing the discount window." *Bishop*, 823 F.3d at 46. At a minimum, the risk of FCA damages and penalties would be equivalent to a significant rate increase, undermining Fed policies by leading banks to wait to borrow until it was too late to avoid a fire sale of their assets. The economy would have suffered had banks spurned Fed loans to avoid FCA liability.

2. Congress charged *the Fed*—not the Justice Department, and certainly not relators—with nearly exclusive control over the tools of monetary policy, and in particular the discount window. Congress also gave the Fed (and other regulators, such as the

[3] A search of Westlaw's federal cases database for "Federal Reserve" and "False Claims Act" cases reveals no FCA cases alleging banks deceived the Fed to access funds. A similar Google search of the Justice Department's web site likewise reveals no FCA settlements based on misrepresentations made to improperly obtain Fed funds.

Office of the Comptroller of the Currency) authority to access bank records, regulate banks' conduct, and impose penalties on banks. Yet the relators here, with the Justice Department's seeming acquiescence, would stretch the FCA to use generic certifications to second-guess the Fed's lending and enforcement decisions and impose liability for actions the Fed undertook to implement federal monetary policy and protect financial stability. That poses a grave risk of undermining the Fed's ability to use monetary-policy tools in a future crisis. No bank confronting a financial crisis would dare borrow from the discount window if, despite the Fed's intimate familiarity with the bank's condition, the bank could later face FCA treble damages and civil penalties exceeding the value to the bank of accessing the discount window, based on a generic claim of compliance with law.

This Court can avoid conflict between the FCA and the Fed's authorizing legislation, and can harmonize the statutes, by "read[ing] [the FCA in a way that] give[s] effect to [the Fed's authorizing statutes] . . . [and] preserv[es] [both statutes'] sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Here, maintaining *Mikes*' prohibition on imposing FCA liability based on generic certifications of compliance with the law would minimize that potential conflict. While *Escobar* cautioned against imposing atextual limits on the FCA, 136 S. Ct. at 2002, that caution does not require this Court to abdicate its responsibility to reconcile the FCA with the Fed's independent authority. *Cf. King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015) ("reject[ing] [an] interpretation" of a statute's plain text that ran contrary the "statutory scheme").

B. DOJ Offers No Check on Relators' Interference with Agency Policy

Contrary to the assurances of the United States, U.S. Br. 14-15, the government has in the past virtually never exercised its authority to dismiss *qui tam* actions, 31 U.S.C. § 3730(c)(2)(A), and cannot be relied upon to protect the Fed's policy interests. The reason is only too clear: As the Justice Department's Civil Division acknowledged, the FCA makes litigation a "profit center for the US Treasury." U.S. Dep't of Justice Civil Division, FY2013 Budget & Performance Plans (Feb. 2012) (capitalization deleted), http://goo.gl/rr6I3N

. In fact, at a January 2017 FCA conference in New York City, one Civil Division chief acknowledged that the government is reluctant to dismiss such cases because there are "big recoveries" in declined *qui tam* cases, and the government wishes to make relators "feel[] comfortable" bringing cases to the Justice Department.

Instead, the government routinely lets relators "proceed with[] thousands of non-meritorious qui tam suits." Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-65 (2008). Decisions whether to dismiss such actions are made by the Justice Department, rather than affected agencies. *See* 28 C.F.R. §§ 0.45(d), 0.160(d)(2), 0.161. The government's easy default has been to let such cases proceed and reap the bounty if a defendant elects to settle or a relator ultimately prevails. Rich, *supra*, at 1265-66. It is thus unsurprising that the government has rarely exercised its authority to dismiss. One 460-case sample of *qui tam* actions "revealed exactly *none* in

which DOJ exercised its termination authority." David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1717 (2013). Another study showed the government terminated less than 1% of cases. Defs.' Suppl. Br. 14 n.4.

Even when the government intervenes and takes over a case's litigation, there is no guarantee that the agency's interests will be honored. DOJ has pursued cases where the contracting agency itself does not believe the case has merit. *See, e.g.*, *United States v. BAE Sys. Tactical Vehicle Sys., LP*, No. 15-cv-12225, 2017 WL 1457493, at *2 (E.D. Mich. Apr. 25, 2017) (noting Army withdrew underlying contract claim while DOJ persisted in FCA action). DOJ has incentives not to drop a case when there might be money on the table—regardless of the client agency's wishes. The Court should take no comfort from DOJ's assurances to the contrary.

II. Claims Based on Generic Certifications of Compliance with All Laws Should Fail at the Pleadings Stage

A. *Mikes*' Restrictions on Claims Based on Broad Express Certifications Remain Good Law

This Court correctly ruled that express certifications support FCA claims only if they "falsely certif[y] compliance with a *particular* statute, regulation or contractual term." 823 F.3d at 44. Collecting authorities from this Circuit and the Fifth and Tenth Circuits, this Court refused to recognize "overbroad" express certifications that were "too broad or vague" as supporting false claims. *Id.* at 44-45. *Escobar* does not call that result into question; in fact, it supports this Court's previous decision.

1. *Escobar* was an implied certification case, not an express certification case. 136 S. Ct. at 1995. *Escobar* criticized *Mikes* only for limiting implied certification to "cases where defendants fail to disclose violations of expressly designated conditions of payment." *Id.* at 1999. *Escobar* did not mention, much less call into question, *Mikes*' conclusion that express certifications must certify compliance with a "particular statute" to be actionable. *Id.* at 2001-02. *Escobar* never addressed the requirements of an express certification claim precisely because *Escobar* solely addressed implied certification.

As a result, "this panel [remains] bound by" *Mikes* because not only did *Escobar* not expressly overrule *Mikes*, *Escobar*'s reasoning did not "cast[] doubt on" the decision or create a "fundamental" "conflict, incompatibility, or 'inconsisten[cy]' between this Circuit's precedent and the intervening Supreme Court decision." *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 154-58 (2d Cir. 2015) ("declin[ing] to conclude" Supreme Court implicitly overruled precedent despite "cast[ing] a shadow on [precedent] in several ways").

2. Prohibiting claims based on broad express certifications is consistent with *Escobar*. *Escobar* rejected FCA liability based on requirements that contractors "aver their compliance with the entire U.S. Code and Code of Federal Regulations," because "[t]he False Claims Act does not adopt such an extraordinarily expansive view of liability." 136 S. Ct. at 2004. This suggests the Supreme Court would not be sympathetic to relators using broad express certifications to impose liability. It undercuts the idea that *Es-*

cobar overruled *Mikes* without ever discussing express certification. Further, *Escobar* required relators bringing implied certification claims to plead that contractors (or banks) made a "specific representation" that "omit[ed] *critical* qualifying information," making the "specific representation" a "half-truth." *Id.* at 2000-01 (emphasis added). Requiring a specific representation connected to the violation is important to set expectations about risk.

An express certification of compliance with *all* laws—here, that the borrower "is not in violation of *any laws or regulations* in *any* respect which could have *any* adverse effect whatsoever upon the validity, performance or enforceability of *any* of the terms of the Lending Agreement," *Bishop*, 823 F.3d at 41-42 (emphasis omitted)—is no different from making no "specific representation" at all. Broad certification provides a bank no more notice of what it is actually certifying and what is important to the government than a simple invoice. Tr. 31:6-25, *Escobar*, 136 S. Ct. 1989 (2016) (No. 15-7), http://goo.gl/k34mPK (relators conceded broad certifications provide no notice) . *Escobar* prohibited implied certification claims based on the submission of a simple invoices—or, at a minimum, left open the possibility of such a prohibition, 136 S. Ct. at 2000. *Escobar* thus poses no obstacle to forbidding claims based on broad generic claims of compliance with law.

B. Generic Express Certifications Do Not Support an Inference of Materiality—or Knowledge of Materiality

Escobar made clear that courts could dismiss claims on the pleadings based on

materiality if relators cannot "plead . . . with plausibility and particularity . . . facts to support allegations of materiality." 136 S. Ct. at 2004 n.6. *Escobar* emphasized that materiality turns not merely on what the government *says* is important to its decision to pay, but what in practice is *actually* important to the government's payment decision. 136 S. Ct. at 2002-04. To plead materiality plausibly, relators must plead facts showing that supposed misrepresentations were important to the Fed's lending decisions.

Relators fail to meet that bar. To show materiality, relators cite the structure of the discount window lending agreement. Pls.' Suppl. Br. 10 (citing A32-34, A43). But that is really no different from the government's labelling a rule a condition of payment, and as *Escobar* held, "A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular . . . requirement as a condition of payment." 136 S. Ct. at 2003. Lacking specific allegations or evidence of materiality, relators are left with little more than strained inferences from banks' broad certifications. But a broad certification simply does not "nudge[] the[] claim[]" of materiality "across the line from conceivable to plausible," as is required to survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

The Court should be wary of drawing inferences of materiality from broad certifications because, just as in the antitrust litigation at issue in *Twombly*, FCA "discovery can be expensive." *Id.* at 558. Discovery imposes heavy burdens on defendants, which can spend hundreds of thousands or even millions of dollars fielding discovery demands in an FCA case. *See Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (discovery

in "complex litigation can be so steep as to coerce a settlement . . . even when [plaintiff's] claim is very weak"). This Court should also be wary of drawing broad inferences of materiality because "mistaken inferences in cases such as this one . . . chill the very conduct" the Fed seeks to encourage: use of its discount window. *Cf. Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 593-94 (1986).

There is no reason to infer that generic certifications of compliance with all law would be material. Banks, just like contractors and others interacting with the government, face an overwhelming number of laws and regulations enforced by numerous federal and state regulators. As a result, blanket representations of 100% compliance are so unlikely to be fully accurate that it is facially implausible that any Fed official would rely upon such boilerplate certifications—rather than on the agency's detailed knowledge of the bank's actual condition—in deciding whether to lend. In any event, as the district court noted, it "defies common sense" to believe that the Fed intended the "obtuse" certification here to require a bank to "disclos[e] . . . any historical regulatory violation[s] that could conceivably" affect the Fed's decision to lend. *U.S. ex rel. Kraus v. Wells Fargo & Co.*, 117 F. Supp. 3d 215, 221 n.4 (E.D.N.Y. 2015).

Moreover, such blanket representations are simply not germane to Fed lending undertaken not to turn a profit but "to ensure the stability of the nation's monetary and financial system." *Bishop*, 823 F.3d at 46. The information the Fed actually considered to be material is reflected in its contemporaneous statements. For instance, TAF explicitly relied on the Fed's examinations—not representations in a lending circular—to

determine eligibility, which turned not on 100% compliance with a host of statutory and regulatory requirements, but overall health: "All depository institutions that are judged to be in generally sound financial condition by their local Reserve Bank are eligible to participate in TAF auctions." Press Release, Federal Reserve (July 30, 2008), http://goo.gl/mu1fY7. The immateriality of broad certifications is likewise reflected in the Fed's continued lending *even after* relators reported their allegations. *See* Defs.' Suppl. Br. 23-24. Broad certifications also provide no notice to the contractor or bank about what is important to the deciding official, and so it would be inappropriate to infer from a generic certification that the defendant knew what the regulator considered material. *See Escobar*, 136 S. Ct. at 2003-04 (requiring knowledge of materiality).

Further, the certification here also incorporates a materiality requirement, such that the certification *cannot be false* unless there is *both* a violation *and* that violation "could have an[] adverse effect" upon terms of the lending agreement—i.e., the violation was material. *Bishop*, 823 F.3d at 41-42 (emphasis omitted). Because the certification incorporated a materiality requirement, relators knew even before *Escobar* that they needed to show materiality, and not only a condition of payment. *Contra* Pls.' Suppl. Br. 1, 15. Because relators had notice of the need to plead materiality but did not articulate materiality with specificity, they should not be allowed to amend, especially given their inability to explain what new allegations they would plead post-*Escobar*, *id.* at 14-15.

CONCLUSION

This Court should affirm the decision of the district court.

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Respectfully submitted,

/s/ John P. Elwood
John P. Elwood
Ralph C. Mayrell
VINSON & ELKINS LLP
2200 Pennsylvania Ave, NW, Ste. 500W
Washington, D.C. 20037
(202) 639-6500
jelwood@velaw.com

Counsel for Amici Curiae

Kate Comerford Todd
Steven P. Lehotsky
U.S. CHAMBER
LITIGATION CENTER, INC.
1615 H St., N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

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Dated: July 20, 2017

/s/ John P. Elwood

Counsel for Amici Curiae

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I hereby certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on July 20, 2017. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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/s/ John P. Elwood

Counsel for Amici Curiae