No. 17-15111

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel.
SCOTT ROSE, MARY AQUINO, MITCHELL NELSON, and LUCY STEARNS,

Plaintiffs-Appellees,

v.

STEPHENS INSTITUTE d/b/a ACADEMY OF ART UNIVERSITY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING APPELLEES

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INTRODUCTION AND STATEMENT OF INTEREST

The False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq.*, is the federal government's primary tool to combat fraud and recover losses due to fraud in federal programs. Accordingly, the United States has a substantial interest in ensuring that courts properly interpret and apply the FCA.

This is a declined qui tam suit against an educational institution, doing business as Academy of Art University (AAU), which has received millions of dollars in federally-subsidized grants and student loans from the Department of Education (DOE) under Title IV of the Higher Education Act. In order to receive Title IV funds, a college or university must first enter a program participation agreement (PPA) with DOE in which the school promises compliance with federal requirements, including a prohibition on making incentive payments to recruiters on a per capita basis, commonly known as the incentive compensation ban (ICB). The relators allege that AAU violated the ICB by paying its recruiters based on the number of students they enrolled, and that AAU submitted "false or fraudulent" claims for Title IV funds while knowing that it was violating this prerequisite for receiving those funds.

The district court denied AAU's motion for summary judgment and, following the Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), denied AAU's motion for reconsideration. The court held that *Escobar* did not overrule prior circuit precedent and restrict the implied certification theory of FCA liability to cases in which the defendant made "specific

representations" in its claim for payment about the goods or services provided. ER 8. Stressing that *Escobar* reserved judgment on the question "whether all claims for payment implicitly represent that the billing party is legally entitled to payment," *Escobar*, 136 S. Ct. at 2000, the district court explained that *Escobar* did not establish a mandatory two-part test for application of the implied certification theory. In the alternative, the court found that AAU made "specific representations" in its claims for Title IV funds that rendered them "misleading half-truths" under *Escobar*. ER 8-9. Finally, the district court held that violations of the ICB would, at a minimum, have a natural tendency to influence the decision to pay claims or allow a school to continue participating in the Title IV program, and that a reasonable jury could thus find that ICB violations are material under the standard articulated in *Escobar*. ER 9-12. The district court certified these questions for interlocutory appeal, and this Court granted AAU's petition for permission to appeal under 28 U.S.C. § 1292(b).

Pursuant to 28 U.S.C. § 517 and Fed. R. App. P. 29, the United States is filing this amicus brief to urge affirmance of the district court on each of these issues.

First, the district court correctly held that *Escobar* did not limit the implied certification theory to circumstances where a claim for payment makes "specific representations" about the goods or services provided. Because the Court expressly declined to resolve "whether all claims for payment implicitly represent that the billing party is legally entitled to payment," *Escobar*, 136 S. Ct. at 2000, it did not overrule existing circuit precedent, such as *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993,

998 (9th Cir. 2010), adopting the implied certification theory without requiring a "specific representation" in the claim for payment. Nor is there any reason for this Court to hold that claims are misleading *only* if they contain "specific representations" about the goods or services provided. Under *Escobar*, the touchstone for application of the implied certification theory is whether the omission of certain information renders the claim a misleading half-truth. When a claimant discloses some information (*i.e.*, makes some representations about the goods or services provided) in a claim for payment, this may increase the likelihood that the omission of other information will render the claim materially misleading. But that is not the only way a claim can be a misleading half-truth actionable under the implied certification theory. At the very least, a claim for payment implies that the claimant is keeping the specific promises that it made to gain initial entry into a program. That alone is a sufficient basis for treating AAU's payment requests as implicit representations that the school was complying with the ICB, as it previously promised to do.

Second, the district court correctly held, in the alternative, that AAU's claims for Title IV funds made "specific representations" sufficient to render them misleading half-truths under *Escobar*. The court focused on certifications in a sample claim form that the student borrower is "eligible" and enrolled in an "eligible program," which strongly suggest that the school has complied with all Title IV eligibility requirements. Even if these eligibility certifications were not expressly false (*i.e.*, if one accepts AAU's argument that they are limited to "institutional eligibility," which does not turn

on ICB compliance, *see* AAU Br. 28-35), they are plainly misleading in context because they would lead a recipient of the claim to reasonably – but wrongly – conclude that the school has satisfied all the prerequisites for receiving Title IV funds.

Third, the district court correctly held that a reasonable factfinder could conclude that the ICB violations alleged here are material. After noting that this Court has already held that compliance with the ICB is material under the False Claims Act, *see United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), the district court made an independent finding that ICB compliance is material applying the criteria identified in *Escobar*. Because ICB compliance is an express prerequisite to receiving Title IV funds under the statute, regulation, and PPA, and because DOE has made clear through various enforcement actions that it cares about ICB violations, the district court correctly held that, at a minimum, a jury could reasonably conclude that the serious and systemic violations of the ICB alleged here were material.

STATEMENT

A. Regulatory Background

1. The False Claims Act

The False Claims Act is "the Government's primary litigative tool" for combatting fraud. S. Rep. No. 99-345, at 2 (1986). The Act applies broadly to address a wide variety of fraudulent schemes, and it was drafted "expansively . . . to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003).

Under the current statute, a violation can occur when a person "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). A violation can also occur when a person "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." *Id.* § 3729(a)(1)(B). The term "material" under the FCA "means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *Id.* § 3729(b)(4).

2. The Higher Education Act

Under Title IV of the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 219, Congress established a variety of federal student loan and grant programs, including Pell Grants, Perkins Loans, and other student financial assistance programs. *See generally* 20 U.S.C. §§ 1070, *et seq.* In order to receive funds under Title IV, an eligible university or other educational institution must first enter into a PPA with DOE. 20 U.S.C. § 1094(a). Such an agreement "shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with" a variety of requirements set forth in the statute. *Id.* The regulations reiterate that "initial and continuing eligibility" to receive Title IV funds is conditioned upon compliance with these requirements. 34 C.F.R. § 668.14(a)(1). *See also Leveski v. ITT Educ. Servs. Inc.*, 719 F.3d 818, 820 (7th Cir. 2013).

The Title IV eligibility requirement at issue in this case is the incentive compensation ban. 20 U.S.C. § 1094(a)(20). The ICB prohibits a school from paying

any of its recruiters a "commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid." *Id. See also* 34 C.F.R. § 668.14(b)(22)(i). As this Court has recognized, the ICB "is meant to curb the risk that recruiters will 'sign up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans.'" *Hendow*, 461 F.3d at 1168-69 (quoting *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005)). The ICB was a response to serious abuses of student lending programs, such as sales contests where recruiters earned prizes for enrolling the highest number of students regardless of their ability to benefit from the program or to repay their loans. *See* S. Rep. No. 102-58, at 8 (1991); H.R. Rep. No. 102-447, at 10 (1992). Compliance with the ICB is thus a basic prerequisite for the receipt of any federal funds under Title IV.

The Department of Education has frequently emphasized the importance of the ICB in safeguarding Title IV funds. In the initial regulations implementing that requirement, DOE explained that incentive payment structures are prone to abuse and fraud even when based solely on the number of students retained. *See* 59 Fed. Reg. 22,348, 22,377 (April 29, 1994). And, in proposing regulations to repeal certain safe harbors, DOE emphasized that, "[w]hen admissions personnel are compensated substantially, if not entirely, upon the numbers of students enrolled, the incentive to deceive or misrepresent the manner in which a particular educational program meets a student's need increases substantially." 75 Fed. Reg. 34,806, 34,817 (June 18, 2010).

B. Factual and Procedural Background

In this *qui tam* action, the relators allege that AAU violated the False Claims Act by submitting claims for Title IV funds while knowingly violating the ICB. The district court denied AAU's motion for summary judgment, and allowed the relators to proceed on the theory that AAU's claims were impliedly false because AAU knowingly violated a prerequisite for receiving Title IV funds.

About a month after the district court's summary judgment ruling, the Supreme Court issued its decision in *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). In that case, the Court validated the implied false certification theory of FCA liability and rejected the defendant's argument that the theory only applies where the complaint alleges violations of requirements that are expressly designated as conditions of payment. Stressing that what 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 1996, the Court explained that requirements are material if they are capable of affecting the government's payment decisions.

In light of *Escobar*, AAU filed a motion for reconsideration, arguing that the relators failed to satisfy the requirements the Supreme Court identified for implied certification claims. The district court denied that motion. ER 1-12.

The court first rejected AAU's argument that *Escobar* had overruled circuit precedent and "establishes a rigid 'two-part test' for falsity that applies to every single

implied false certification claim." ER 8. The district court stressed that the Supreme Court had declined to "resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment." ER 8 (quoting *Escobar*, 136 S. Ct. at 2000). In the alternative, the district court found that, even if *Escobar* established a mandatory, "two-part test" for all implied certification claims, AAU made "specific representations" that qualified as "misleading half-truths" under *Escobar*. ER 9. Finally, the court held that *Escobar* did not overrule this Court's prior decision in *Hendow* holding that ICB compliance is material under the FCA. Moreover, the district court made an independent finding that violations of the ICB would, at a minimum, have a natural tendency to influence DOE's decision to pay claims or allow a school to continue to participate in the Title IV program, and that there was therefore "a triable issue as to whether the ICB is material under the *Escobar* standard." ER 12.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT *ESCOBAR* DID NOT OVERRULE CIRCUIT PRECEDENT AND ESTABLISH A MANDATORY TWO-PART TEST FOR APPLICATION OF THE IMPLIED CERTIFICATION THEORY.

A. *Escobar* Did Not Impose A "Specific Representation" Requirement For Implied Certification Claims.

1. In *Escobar*, the Supreme Court validated a theory of liability under the False Claims Act commonly called "implied false certification," confirming that a statement may be "false or fraudulent" under the FCA if it omits information necessary to keep it from being misleading, even if the statement itself contains no express untruths.

The Court held that where "a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided." *Escobar*, 136 S. Ct. at 1999.

The parties in *Escobar*, and the United States as amicus curiae, vigorously disputed the circumstances under which an omission renders a claim misleading and therefore actionable under the FCA. On the one hand, the United States and the relators invoked the common-law rule that "'[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter' is actionable." *Id.* at 1999 (citing Restatement (Second) of Torts § 529, at 62 (Am. Law Inst. 1976)). Because "every submission of a claim for payment implicitly represents that the claimant is legally entitled to payment," the United States and the relators argued that "failing to disclose violations of material legal requirements renders the claim misleading." *Id.* at 1999-2000. On the other hand, the defendant in *Escobar* argued "that submitting a claim involves no representations," and thus relied on a different common-law rule: that "nondisclosure of legal violations is not actionable absent a special duty to exercise reasonable care to disclose the matter in question." *Id.* at 2000 (internal quotation marks omitted) (quoting Restatement (Second) of Torts § 551(1), at 119).

The Supreme Court found it unnecessary to decide which of these competing common-law principles most naturally applies to claims for payment submitted to the

government. The Court stated that it "need not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment," because it found that the claims in that case "d[id] more than merely demand payment." *Escobar*, 136 S. Ct. at 2000. The Court explained that the defendant had "submitt[ed] payment codes that corresponded to specific counseling services," and that its staff had submitted "National Provider Identification numbers corresponding to specific job titles." *Id.* Those representations "were clearly misleading in context," because they suggested (falsely) that the defendant was complying with the basic legal requirements governing the payment of Medicaid claims for mental health counseling services. *Id.* The Court thus ruled narrowly, holding

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

Id. at 2001 (emphasis added).

2. In light of *Escobar's* limited holding and its language reserving judgment on the scope of the implied certification theory, the district court correctly held that the Supreme Court did not establish a rigid, two-part test for application of that theory. See ER 8 (concluding that *Escobar* "does not purport to set out, as an absolute requirement, that implied false certification liability can attach *only* when these two conditions are met"). While the Court made clear that the two conditions it identified

were sufficient for application of the implied certification theory, it had no need to resolve, and therefore did not resolve, whether they were necessary. In short, *Escobar* did not call into question, much less overrule, decisions by this Court and others that previously adopted the implied certification theory without requiring any "specific representations" in the claims for payment. *See, e.g.*, *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) ("Implied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim."); *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010) ("*SAIC*") (same).

AAU asserts that "*Escobar* established the minimum showing required to state an FCA claim under the implied certification theory of liability." AAU Br. 22. But AAU nowhere addresses – or even acknowledges – the Supreme Court's narrow holding or its statement that it was not "resolv[ing] whether all claims for payment implicitly represent that the billing party is legally entitled to payment." *Escobar*, 136 S. Ct. at 2000. Lacking any support for its position in the language of *Escobar* itself, AAU argues primarily that this Court and various district courts have already held that *Escobar* establishes two mandatory conditions for the implied certification theory. As explained below, that is incorrect.

To our knowledge, the Fourth Circuit is the only court of appeals that has squarely addressed this issue, and it reached the same conclusion as the district court in this case. In *United States ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174 (4th Cir. 2017), the Fourth Circuit explained that it had "already answered" the question "left open" in *Escobar* by "holding that the Government pleads a false claim when it alleges a request for payment under a contract where the contractor withheld information about its noncompliance with material contractual requirements." *Id.* at 178 n.3. In addition, as the relators summarize, see Appellee Br. at 29-31, the majority of district courts to consider this issue have rejected AAU's restrictive reading of *Escobar* and held that the Supreme Court did not overrule circuit precedent recognizing a broader form of the implied certification theory. *See, e.g.*, *United States v. Celgene Corp.*, 226 F. Supp. 2d 1032, 1044-45 (C.D. Cal. 2016). *United States ex rel. Landis v. Tailwind Sports Corp.*, 2017 WL 573470, at *11 (D.D.C. Feb. 13, 2017); *United States ex rel. Wood v. Allergan, Inc.*, 2017 WL 1233991, at *24 (S.D.N.Y. Mar. 31, 2017).

AAU contends that *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 326 (9th Cir. 2017), "makes clear that an implied certification claim in the Ninth Circuit must meet *Escobar's* two conditions." AAU Br. at 23. But the parties in *Kelly* never raised this issue, and this Court thus never considered or addressed the reservation language in *Escobar*. Moreover, *Kelly's* entire discussion of the conditions necessary for the implied certification theory was dicta. In that case, the relator alleged that the defendant used an improper billing format when charging for its work under a government contract,

but this Court found that it was "undisputed" that neither the contract nor the applicable regulations required the defendant to use the accounting method the relator alleged was mandatory. *Kelly*, 846 F.3d at 331. Because the relator's claim would thus have failed under even the broadest conception of the implied certification theory, this Court had no occasion in *Kelly* to consider whether *Escobar* limited that theory to circumstances where a claim makes specific representations about the goods or services provided, much less to consider whether *Escobar* overruled *Ebeid*. In short, although there is language in *Kelly* suggesting that *Escobar* established two conditions for implied certification claims, dicta in a case where the relevant issue was never squarely presented does not bind this Court. On the contrary, to the extent *Kelly* is inconsistent with *Ebeid,* the latter decisions controls absent a finding (never made in *Kelly*) that *Ebeid* is "clearly irreconcilable" with *Escobar*. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (explaining that one panel cannot overrule an earlier panel decision unless intervening authority has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable").[1]

[1] For all the same reasons, dicta in this Court's recent decision in *United States ex rel. Campie v. Gilead Sciences, Inc.*, 2017 WL 2884047 (9th Cir. July 7, 2017), suggesting that "two conditions must be satisfied" for implied certification claims, *id.* at *6-7, does not advance AAU's argument. As in *Kelly*, the panel in *Campie* did not consider or address the language in *Escobar* reserving judgment on the requirements for implied certification claims. That was at least in part because the *Campie* panel found that the relator's claims satisfied the "two conditions" set forth in *Escobar* and the panel thus had no occasion to consider this issue further.

Finally, AAU argues that *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445 (7th Cir. 2016), supports its argument that implied certification claims must satisfy "both *Escobar* conditions." AAU Br. 25. As in *Kelly*, however, the Seventh Circuit did not consider the limited language in *Escobar* reserving judgment on the parameters of implied certification claims; the court simply found that the relator offered no evidence that the defendant "made any representations at all in connection with its claims for payment," or that the violations alleged were material to the government's payment decision. *Sanford-Brown*, 840 F.3d at 447.

In sum, loose language in decisions characterizing the two conditions for implied certification claims identified in *Escobar* as necessary rather than merely sufficient cannot, and does not, limit that theory to circumstances where the defendant's claim makes "specific representations" concerning the goods or services provided. That is particularly true in circuits, like this one, where a prior panel has already adopted a broader implied certification theory.

B. There Is No Valid Basis For Imposing A "Specific Representation" Requirement For Implied Certification Claims.

Even if this Court were not bound by *Ebeid*, there would be no valid basis for engrafting a "specific representation" requirement onto the implied certification theory. In rejecting a similar argument by the defendant in *Escobar* – that only requirements that are expressly designated as conditions of payment may trigger liability under the implied certification theory – the Supreme Court cautioned against "adopting a circumscribed

view of what it means for a claim to be false or fraudulent," emphasizing that such concerns are better addressed through "strict enforcement of the Act's materiality and scienter requirements." *Escobar*, 136 S. Ct. at 2002 (quoting *SAIC*, 626 F.3d at 1270). Indeed, vigorous enforcement of those requirements ensures that false claims liability may be found only where a defendant has violated a condition that is significant to the payment scheme or federal program at issue.

As explained below, there are compelling reasons to recognize that claims that merely demand payment, without making any other representations, may be "misleading half-truths" actionable under the implied certification theory.

First, at least insofar as government claimants are concerned, every claim for payment constitutes an affirmative representation that the claimant is entitled (or at least eligible) to be paid. Consistent with the oft-cited rule that "[m]en must turn square corners when they deal with the Government," *Rock Island A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920), a person who claims entitlement to federal funds has a heightened obligation not to omit information that may render him ineligible (or less likely) to be paid.

Second, the FCA was adopted in response to contractors delivering defective munitions and other equipment to the military during the Civil War. *See Escobar*, 136 S. Ct. at 1996. No one thought it mattered whether those contractors made "specific representations" about those goods. Indeed, the Supreme Court has consistently upheld FCA liability in cases where the "government's money would never have

been" given over "had its agents known" the information that was withheld. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943). *See also United States v. Bornstein*, 423 U.S. 303, 311 (1976). Nothing in these cases suggests that the presence or absence of "specific representations" in the claims was important, much less dispositive.

Third, many government programs and contracts involve sequential steps in which would-be recipients of federal funds obtain initial access to a program by contracting with the government or establishing their program eligibility. When claimants submit periodic requests for payment, as goods are delivered or services performed, they are often not required to reaffirm their continued compliance with all relevant conditions. But a claimant's continued compliance with those conditions still lies at the heart of what the government bargained for, regardless of whether the claimant makes any additional representations in the claims themselves. *See United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005) (where school used its "phase-one" application to establish eligibility and then violated eligibility requirements, its "phase-two" claims for Title IV funds were false under the FCA).

In the event this Court concludes that *Ebeid* is not controlling on this issue, the Court need not decide whether every request for payment constitutes an implicit representation of compliance with all material conditions. At the very least, this Court should not impose a "specific representation" requirement where, as here, a claimant is violating a requirement for receiving federal funds that it expressly promised to satisfy in order to gain initial entry into the program. In order to establish its initial

eligibility to receive Title IV funds, AAU signed a PPA in which it expressly agreed to comply with the ICB and various other statutory and regulatory requirements. Under these circumstances, AAU's payment requests are properly understood as implicit representations that the school is complying with the ICB, as it previously promised to do. Put another way, "[a]nyone informed" of the course of dealing between AAU and DOE "would probably – but wrongly – conclude that" AAU "had complied with core . . . requirements" for Title IV funds when it requested payment. *Escobar*, 136 S. Ct. at 2000. At a minimum, there is sufficient evidence from which a jury could conclude that AAU's requests for payment were misleading in context, thereby making summary judgment inappropriate.

In sum, this Court should reject AAU's plea to adopt a rigid rule that payment requests may be misleading only if they contain "specific representations" about the goods or services provided. Instead, the Court should adopt a functional approach more consistent with *Escobar*, asking simply whether the claimant's request for payment was misleading in context, considering factors such as the prior course of dealings between the government and the claimant, the governing legal requirements, and the importance of the omitted information.

II. IN THE ALTERNATIVE, THE DISTRICT COURT CORRECTLY HELD THAT AAU'S CLAIMS FOR TITLE IV FUNDS MADE "SPECIFIC REPRESENTATIONS" SUFFICIENT TO RENDER THEM MISLEADING HALF-TRUTHS UNDER *ESCOBAR*.

Because there is no "specific representation" requirement for implied certification claims, this Court need not reach the district court's holding, in the alternative, that AAU's claims for federal funds made "specific representations" sufficient to qualify as misleading "half-truths" within the meaning of *Escobar*. ER 9. In the event the Court reaches this issue, it should affirm that ruling.

The district court focused on certifications made in a sample loan claim form that the borrower is "eligible" and enrolled in an "eligible program." ER 183. These certifications were, at a minimum, misleading, and arguably expressly false, because a school must be "eligible" to participate in Title IV programs, and the "initial and continuing eligibility of an institution to participate in a program" is conditioned upon compliance with various requirements, 20 U.S.C. § 1094(a), including the incentive compensation ban, 20 U.S.C. § 1094(a)(20). Applicable regulations reiterate that initial and continuing participation in Title IV programs is conditioned upon compliance with these requirements, 34 C.F.R. § 668.14(a)(1), including the incentive compensation ban, 34 C.F.R. § 668.14(b)(22). As a result, this Court held long ago that a university's "eligibility" for Title IV funds "is *explicitly* conditioned, in three different ways, on compliance with the incentive compensation ban." *Hendow*, 461 F.3d at 1175 (emphasis in the original).

In light of the provisions in the statute, regulations, and PPA conditioning eligibility for Title IV funds on compliance with requirements such as the ICB, the district court correctly concluded that, "[i]f AAU was not in compliance with the ICB, failure to disclose this fact would render the loan forms misleading because AAU would not have been an 'eligible' institution." ER 9. But the court's focus on whether violations of the ICB automatically render a school ineligible for Title IV funds (the second question the court certified for interlocutory appeal, ER 42) was misplaced. While that question would be relevant to determining whether AAU's certifications of eligibility were expressly false, the "specific representations" identified in *Escobar* need not be express false statements. In order to support an implied certification claim, such statements need only by misleading half-truths.[2]

The claims form for Title IV funds in this case readily satisfies the "specific representation" requirement set forth in *Escobar*. Where a school makes broad certifications of program eligibility while violating a basic condition of eligibility, those representations qualify as misleading "half-truths" regardless of whether the violations would result in automatic termination of eligibility, thus rendering those certifications

[2] Before any sample claim form was introduced into evidence, the district court granted AAU's motion for summary judgment on the relators' express false certification claim. ER 23-24. Because the question whether AAU's certifications of eligibility were expressly false is not presented in this appeal, we have not addressed AAU's argument that those statements were accurate in some technical sense. *See* AAU Br. 28-35. That issue is largely irrelevant to the question whether those statements qualify as misleading half-truths of the sort the Supreme Court found adequate to support an implied certification claim in *Escobar*.

expressly false. The billing codes that the Supreme Court held were misleading half-truths in *Escobar* illustrate this point. In that case, the defendant used "payment codes that corresponded to specific counseling services" and "National Provider Identification numbers corresponding to specific job titles" that were literally true, but the Court had no difficulty concluding that those representations were misleading half-truths in light of the defendant's undisclosed violations of licensing and supervision requirements for mental health counselors. *Escobar*, 136 S. Ct. at 2000. So, too, a school's representations of "eligibility" to receive Title IV funds are misleading half-truths, even if literally true where DOE has not (yet) terminated the school's eligibility, when those claims fail to disclose that the school is violating a condition for participation in the Title IV program, such as the ICB.

In addition to the eligibility certifications that the district court focused on, the claim form contains a variety of other representations implying compliance with all material requirements for the receipt of Title IV funds. For example, the form requests a "School Code," ER 183, a unique number that a school can only obtain by entering into a PPA expressly promising to comply with all program requirements, including the ICB. Like the Medicaid billing codes in *Escobar*, the School Code on a Title IV claim is misleading in context because it references, and implicitly reaffirms, prior commitments to comply with all requirements for the receipt of Title IV funds. In short, just as anyone reviewing the claims forms in *Escobar* "would probably – but wrongly – conclude that the clinic had complied with core Massachusetts Medicaid

requirements," *Escobar*, 136 S. Ct. at 2000, anyone reviewing a school's claim for Title IV funds would probably – but wrongly – conclude that the school had complied with core Title IV eligibility requirements, including the ICB.

III. A REASONABLE FACTFINDER COULD CONCLUDE THAT VIOLATIONS OF THE ICB ARE MATERIAL UNDER THE FCA.

The term "material" is defined under the FCA to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). In *Escobar*, the Supreme Court cited that definition and stressed that this was the same definition employed in "other federal fraud statutes," which came from "common law antecedents." 136 S. Ct. at 2002. The Court explained that the basic concept of materiality is the same in all of these contexts, focusing upon "the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Id.* (*quoting* 26 R. Lord, *Williston on Contracts* § 69:12, at 549 (4th ed. 2003)). The Court stated that a matter is material if: (1) a reasonable person would attach importance to it in determining a choice of action, or (2) 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, regardless of whether a reasonable person would do so. *Id.* at 2002-03.

The Court clarified that a variety of factors are relevant to the materiality inquiry and stressed that no one factor is automatically dispositive. *Escobar*, 136 S. Ct. at 2001 (citing *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39 (2011)). For

example, the Court explained, "[a] misrepresentation cannot be deemed material *merely because* the Government designates compliance with a particular statutory, regulatory or contractual requirement as a condition of payment." *Id.* at 2003 (emphasis added). But while designation as a condition of payment is "not automatically dispositive," the Court recognized that it is relevant to the materiality inquiry. *Id.*

In addition, the Supreme Court identified at least three other factors bearing on the materiality inquiry, including whether the violation goes to the "essence of the bargain," *Escobar*, 136 S. Ct. at 2003 n.5 (quoting *Junius Constr. Co. v. Cohen*, 178 N.E. 672, 674 (1931)), whether the violation is significant or "minor or insubstantial," *id.*, and whether the government took action when it had actual knowledge of similar violations, *id.* at 2003-04. Because none of these factors is automatically dispositive, materiality cannot be decided at the pleadings stage unless no reasonable jury considering these factors in the light most favorable to the plaintiff could conclude that the alleged violation had no "natural tendency to influence" or was not "capable of influencing" the government's payment decision. *Id.* at 2002.

Long before *Escobar*, this Court held that compliance with the ICB is material under the FCA because a school's eligibility for Title IV funds "is explicitly conditioned, in three different ways, on compliance with the incentive compensation ban." *Hendow*, 461 F.3d at 1175. Rejecting a distinction the defendant sought to draw between conditions of payment and conditions of participation, this Court explained that the requirements set forth in the PPA are "'the *sine qua non*' of federal funding, for

one basic reason: if the University had not agreed to comply with them, it would not have gotten paid." *Id.* at 1176.

As the district court recognized, *Escobar* makes clear that designation as a condition of payment is no longer dispositive on the question of materiality, but such designation remains highly probative. ER 10. Thus, although *Escobar* identified additional factors relevant to the materiality inquiry it did not overrule *Hendow*. In any event, the district court correctly concluded that the ICB "is a material condition under the standard articulated in *Escobar*." *Id.* At a minimum, the court did not err in concluding that there was sufficient evidence for a reasonable jury to find that violations of the ICB are material under *Escobar's* multi-factor inquiry.

First, the ICB goes to the "essence of the bargain," *Escobar*, 136 S. Ct. at 2003 n.5, with schools like AAU because the purpose of that requirement is to ensure that Title IV funds are disbursed to students who enroll in institutions likely to meet their educational needs and who are thus more likely to repay their loans. *See Hendow*, 461 F.3d at 1168-69 (noting that the ICB "is meant to curb the risk that recruiters will 'sign up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans'"). *See also Main*, 426 F.3d at 916 (same). Congress adopted the ICB in order to guard against abuses of student lending programs that resulted in high default rates among students, *see* S. Rep. No. 102-58, at 8 (1991); H.R. Rep. No. 102-447, at 10 (1991), and ICB compliance is thus central to the government's bargain. *See United States ex rel. Escobar*

v. Universal Health Servs., 842 F.3d 103, 111 (1st Cir. 2016) (*Escobar II*) (holding, on remand from the Supreme Court, that compliance with licensing and supervision requirements for mental health counselors "is central to the state's Medicaid program and thus material to the government's payment decision").

Second, the violations of the ICB alleged in this case were significant rather than "minor or insubstantial." *Escobar*, 136 S. Ct. at 2003. As the relators explain in detail in their brief, Appellee Br. 9-15, AAU is alleged to have: paid recruiters up to $30,000 for hitting enrollment goals over a multi-year period, devised a "scorecard" system to pass off incentive payments as qualitative salary adjustments, and attempted to cover up its unlawful scheme after a government investigation was initiated. Based on this evidence, a jury could reasonably find that AAU's violations of the ICB were serious and systemic and that they were, at a minimum, capable of influencing DOE's decisions to pay claims or allow AAU to continue participating in the Title IV program. Indeed, the Fourth Circuit recently confirmed that a defendant's attempt to hide its violation of a contractual requirement is strong evidence not only that the requirement is material, but that the defendant knew it was material. *See Triple Canopy*, 857 F.3d at 178

Third, as this Court held in *Hendow*, compliance with the ICB is an express prerequisite to receiving Title IV funds under the statute, 20 U.S.C. § 1094(a)(2), regulation, 34 C.F.R. § 668.14(b)(22)(i), and PPA. While *Escobar* has since clarified that mere designation as a condition of payment is not "automatically dispositive," the

Supreme Court has recognized that such express language remains relevant to the materiality inquiry. 136 S. Ct. at 2003.

Fourth, the actions DOE has taken upon discovering ICB violations confirm that this requirement is material. Neither AAU nor the relators have identified any instances in which DOE knew about a school's non-compliance with the ICB at the time it acted on payment requests. AAU has not identified any instances where DOE knew about ongoing ICB violations but paid claims anyway, and the relators have not identified any instances where DOE refused to pay claims based on ICB violations. As the district court recognized, however, the record demonstrated substantial enforcement actions taken by DOE when it learned of ICB violations after the fact. The court specifically found that DOE has pursued a variety of strategies in response to alleged ICB violations: taking various types of corrective action, imposing fines, entering settlement agreements that involved the partial withholding of Title IV funds, and in at least one case completely revoking Title IV funding. *See* ER 11 (summarizing treatment of 54 incentive compensation case between 1998 and 2009).

In light of this evidence, the district court properly found that "[t]he government's actions show that the DOE cared about the ICB and that it did not always pay the claims 'in full' despite knowledge of the ICB violations." ER 11 (quoting *Escobar*, 136 S. Ct. at 2003). At a minimum, that evidence supports an inference that ICB violations would have a "natural tendency" to influence DOE's

payment decisions, and the agency's willingness to allow a school to remain eligible for Title IV funds, if the agency was aware of those violations at the relevant time.

On appeal, AAU largely ignores the multi-factor, holistic analysis that the Supreme Court prescribed for assessing materiality and argues primarily that the ICB is not material as a matter of law because DOE has not taken what AAU deems to be sufficiently vigorous enforcement action in response to violations of the ICB. But other courts of appeals have properly rejected arguments focused exclusively on the government's purported failure to take serious enforcement action or withhold payments upon learning of alleged violations. For example, the Eighth Circuit recently rejected a for-profit school's argument that a requirement to maintain accurate student records was not material as a matter of law where the evidence showed that "DOE *sometimes* terminates otherwise eligible institutions for falsifying student and grade records." *United States ex rel. Miller v. Weston Educ., Inc.*, 840 F.3d 494, 505 (8th Cir. 2016) (emphasis added). Likewise, in the remand in *Escobar* itself, the First Circuit held that the state Medicaid agency's inaction in the face of alleged violations of licensing and supervision requirements for mental health counselors was not sufficient to overcome all the other factors demonstrating that these requirements were material. *See Escobar II*, 842 F.3d at 111.

In sum, this Court should reject AAU's argument that DOE's failure to take more aggressive enforcement action in response to alleged ICB violations overrides all the other factors relevant to materiality and compels a grant of summary judgment in

AAU's favor. AAU has never argued, much less offered any evidence, that DOE routinely allows educational institutions to participate in Title IV programs despite having actual knowledge that the school was currently violating core prerequisites for eligibility such as the ICB. Nothing in *Escobar* suggests that the government must always initiate the most serious enforcement proceedings or immediately stop all payments in order to ensure that certain types of violations are deemed material.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order denying AAU's motion for reconsideration and remand for additional proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced typeface. I further certify that this brief complies with Fed. R. App. P. 29(d) and Rule 32(a)(7)(B) because it contains 6,948 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Charles W. Scarborough
CHARLES W. SCARBOROUGH

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Charles W. Scarborough
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