No. 18-10500

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, et al., ex rel. ANGELA RUCKH,
Plaintiff-Appellant,

v.

SALUS REHABILITATION, LLC, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida
(Case No. 8:11-cv-01303)

WASHINGTON LEGAL FOUNDATION'S *AMICUS CURIAE* BRIEF SUPPORTING DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus curiae Washington Legal Foundation certifies under Rule 26.1, Federal Rules of Appellate Procedure, that it has no parent company and that no publicly held company owns 10% or more of its stock.

WLF states, in accord with Eleventh Circuit Rule 26.1-1, that it believes the Certificates of Interested Persons in the Briefs of Relator-Appellant and Defendants-Appellees are complete.

DATE: September 18, 2018

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all fifty states. WLF promotes free enterprise, individual rights, limited government, and the rule of law. In several significant federal cases, WLF has appeared as an *amicus curiae* to argue for a proper interpretation of the False Claims Act's materiality element. See, e.g., *Univ. Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645 (5th Cir. 2017). Only a rigorous materiality standard—one that reads "material" to mean "material to the government's decision to pay a claim"—adheres to the False Claims Act's words and structure.

Congress enacted the False Claims Act long ago to check the misbehavior of war profiteers. Today, unfortunately, the courts often must check the misbehavior of False Claims Act profiteers. WLF believes that applying the materiality element properly is one of the

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

best ways to ensure that the False Claims Act is used only for its intended purpose—as a curb on those who defraud the United States.

STATEMENT OF THE ISSUES

This brief will address whether the United States' *amicus curiae* brief supports reversal of the judgment.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Angela Ruckh worked for a few months as a nurse at two skilled-nursing homes. SuppApp. 101-02. Acting as a relator for the United States—which declined to join her lawsuit—Ruckh sued the two nursing homes, the successor of the homes' administrative manager, and a defunct rehabilitation provider under the False Claims Act. App. 219. Although Ruckh had worked at only two nursing homes, the action turned into an audit of 53 nursing homes overseen by the management entity. Ruckh said the defendants defrauded the government in two ways: (1) by "upcoding" and "ramping" Medicare claims—basically, overbilling for care—and (2) by submitting Medicaid claims for care provided without regulation-mandated care plans. See ROB 6-12, 16-17, 20-21. A jury sided with Ruckh. SuppApp. 49.

Application of the False Claims Act's treble-damages and penalty provisions produced damages of about $348 million. *Id.*

Granting a post-trial motion, the district court vacated the judgment. First, applying the "rigorous" and "demanding" materiality standard of *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), the district court found that "the record is effectively barren of evidence on how the [federal or state government] might have addressed the [defendants'] disputed practices," and that "the dearth of evidence left the jurors to guess." App. 522. Second, the district court held that "the evidence fails to show that the Management Entity produced, or caused the production of, a 'false record or statement' material to a false claim." App. 530.

II. LEGAL BACKGROUND

Before *Escobar* the standard for False Claims Act materiality was "profoundly uncertain." *Marsteller ex rel. United States v. Tilton*, 880 F.3d 1302, 1315 (11th Cir. 2018). Some authority applied a "'natural tendency test' for materiality, which focuse[d] on the potential effect of the false statement when it is made rather than on the false statement's actual effect after it is discovered." *United States v.*

Bourseau, 531 F.3d 1159, 1171 (9th Cir. 2008). Some authority applied "a more restrictive 'outcome materiality test,'" *id.*, under which a misrepresentation is material only if it "caus[es] the United States to pay out money," *United States ex rel. Costner v. United States*, 317 F.3d 883, 887 (8th Cir. 2003). Before a 2009 amendment, some authority doubted whether the False Claims Act contained a materiality requirement to begin with. *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001); *United States ex rel. Cantekin v. Univ. of Pittsburgh*, 192 F.3d 402, 415 (3d Cir. 1999). According to this authority, liability turned on whether the government labeled a regulation a condition of payment.

In an *amicus* brief in *Escobar*, the United States proposed that materiality can attach both (1) to a misstatement that "might" affect payment and (2) to a misstatement about compliance with a regulation the government has declared a condition of payment. Brief of the United States at 12, 30, *Escobar*, Case No. 15-7 (U.S.). The United States proposed the union of a diluted standard of materiality with a whatever-the-government-says standard of faux-materiality. But *Escobar* rejects that proposal. *Escobar* adopts instead a standard of materiality that focuses on whether a misstatement is likely—in the

real world—to affect the government's payment decision. 136 S. Ct. at 1996.

SUMMARY OF ARGUMENT

The False Claims Act is harsh: it subjects a party that defrauds the government to treble damages and a civil penalty of up to $10,000 per false claim. No surprise therefore that, to be actionable, a misrepresentation "must be material to the Government's payment decision." *Escobar*, 136 S. Ct. at 1996. Not every regulatory infraction meets this standard. Nor, under *Escobar*, does every failure to complete a task that the government simply *says* is required for payment. "A misrepresentation," *Escobar* concludes, "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.

In its *amicus curiae* brief in this appeal, the United States argues (1) that the district court misapplied *Escobar*'s materiality standard, (2) that sufficient evidence supports the jury's finding of materiality, and (3) that sufficient evidence supports the jury's finding that the

management entity caused 53 nursing homes to submit false claims. These arguments, however, do not support reversal of the judgment:

1. The United States contends that, under *Escobar*, an analysis of materiality must freeze at the moment the government first pays a claim. In the United States' view, in other words, the government's decision not to seek disgorgement, upon later learning of a misstatement about a paid claim, is irrelevant (or barely relevant) to materiality. But this position finds no support in *Escobar*, which places no temporal limit on the "payment decision" pertinent to materiality. 136 S. Ct. at 1996. Nor, in any event, is this the case to consider whether *Escobar* contains such a limit. The district court found that zero competent evidence supports the jury's finding of materiality. Applying the United States' confined reading of *Escobar* would not affect that conclusion.

2. The United States says that the materiality of the contested practices is either self-evident or apparent from what the government, the defendants, or third parties say about them. After *Escobar*, however, none of that evidence supports a finding of materiality. "What matters," *Escobar* says, "is not the label the Government"—never mind

anyone else—"attaches to a requirement," but whether the defendant's conduct is in fact "material to the Government's payment decision." *Id.* at 1996. Further, much of the evidence the United States cites neither says nor signifies what the United States claims it does.

3. The United States' discussion of management-entity liability reads like a proposal to outlaw the profit motive. Amid the countless thousands of emails sent or comments made by the employees of a large private entity, at least a few are bound to encourage revenue maximization. Such maximization is necessary to the survival of most private entities. Emails or comments encouraging revenue maximization are not emails or comments encouraging fraud. Disregard emails and comments about revenue maximization, however, and the United States (and the relator) are left with no evidence showing a causal connection between the management entity's conduct and the submission of a false claim.

The United States' *amicus* brief does not support reversal of the judgment.

ARGUMENT

I. THE UNITED STATES ATTEMPTS TO REVIVE AN OBSOLETE STANDARD OF FALSE CLAIMS ACT MATERIALITY.

The United States' retrograde interpretation of *Escobar* is baseless. And in any event, this is not the right case to consider the United States' cramped reading of *Escobar*, because that reading does not undermine the decision below.

A. The United States Argues For A Standard Of Materiality Inconsistent With The Supreme Court's Recent *Escobar* Decision.

The United States proposes that materiality hinges on the government's initial, rather than final, decision to pay a claim. If the government pays a claim, learns a year later of a misstatement, and declines to seek disgorgement, materiality hinges, the United States proposes, only on what the government hypothetically would have done had it learned of the misstatement before first paying the claim.

The United States supports its proposal in two ways. First, the United States downplays the importance of what the government does (whether it in fact denies payment) and inflates the importance of what the government says (whether it asserts that something is a condition of payment). Second, the United States focuses on a misstatement's

"natural tendency" to affect what the government "might" do. The United States attempts, in short, to revive both prongs of the weak materiality standard that it proposed in *Escobar*—and that *Escobar* rejects.

1. The United States Attempts To Re-Center Materiality Around What The Government Says (As Opposed To What It Does).

The United States repeatedly calls *Escobar*'s materiality standard "holistic." *Escobar* says the materiality standard is "demanding" and "rigorous"; it never uses the word "holistic." A "holistic" analysis of materiality might belong in an all-purpose anti-fraud statute. But "the False Claims Act is not an all-purpose antifraud statute." *Escobar*, 136 S. Ct. at 2003.

The United States uses the word "holistic" as part of a larger effort to depict disparate types of evidence for or against materiality as equal. The United States attempts, in particular, to diminish the importance of what the government does and to increase the importance of what the government says. The United States elides *Escobar*'s statement that what the government does—that is, whether it pays a claim despite knowing of a regulatory infraction—is "very strong

evidence" about materiality. 136 S. Ct. at 2003. Meanwhile, citing *Escobar*, the United States announces that what the government says—that is, whether it declares a requirement a condition of payment—is "highly relevant for a factfinder." U.S. Br. 19. But *Escobar* casts what the government says as merely "relevant," 136 S. Ct. at 2003; *Escobar* does not use the adverb "highly." On the contrary, *Escobar*'s acknowledgement that "billing parties are often subject to thousands of complex statutory and regulatory provisions," *id.* at 2002, and its discussion of the ease with which the government can call everything under the sun a condition of payment, *id.* at 2004, confirms that what the government merely says is not "highly" relevant.

If one word absent from *Escobar* describes *Escobar*, it is not "holistic"; it is "realistic." *Escobar* concludes that "materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." 136 S. Ct. at 2002. Materiality is not about postures; it is about actions. "What matters," *Escobar* says, "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.

In focusing on what the government says, rather than on what it does, the United States attempts "to confine and dilute *Escobar*'s 'rigorous and demanding' materiality requirement." App. 522.

2. The United States Attempts To Revive The Natural-Tendency Test And To Insert A Timing Element Into *Escobar*'s Materiality Rule.

If *Escobar* supported the United States' reading of *Escobar*, one would expect the United States to focus heavily on *Escobar*. The United States focuses instead on the authorities *Escobar* cites and on legislative history. U.S. Br. 13-15. Not only is this is a bad way to read a case, but the underlying sources do not support the United States' proposed standard of materiality.

Trying to force a case to say what you want it to say by picking over its citations is, obviously, a tricky maneuver. Take for example the United States' discussion of *Escobar*'s reference to *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The sentence attached to the *Marcus* citation says: "Materiality, in addition, cannot be found where noncompliance is minor or insubstantial." 136 S. Ct. at 2003. According to the United States, however, the Supreme Court meant to say something like: 'The materiality inquiry focuses on the initial payment

in a transaction.' U.S. Br. 14. No amount of literary criticism (see U.S. Br. at 14-15) will transform the actual statement into the desired statement.

The United States cites (U.S. Br. 14) various sources that say a misstatement is material if it affects a person's conduct "in the transaction in question" or "with respect to the transaction involved." These statements say nothing about timing. A "transaction" can include both the payment of a claim and a later disgorgement. See Transaction, *Black's Law Dictionary* (10th ed. 2014) (defining a "transaction" as, among other things, "The act or an instance of conducting business" or "Any activity involving two or more persons").

Similarly, the United States invokes (U.S. Br. 15) *Marsteller*, 880 F.3d at 1315, which says that materiality after *Escobar* is a matter of "whether the Government would have attached importance to the violation in determining whether to pay the claim." *Marsteller* does little more than remand a case for further consideration in light of *Escobar*. The *Marsteller* panel would be surprised to learn that, simply by using the words "in determining whether to pay the claim," it ruled that only government knowledge at the time of an initial payment

affects materiality. At any rate, a government determining whether to demand disgorgement is still "determining whether to pay the claim." As with "transaction," no time element resides in the phrase the United States quotes.

The United States says a Senate Report "indicated" that a 2009 amendment of the False Claims Act codifies the materiality standard adopted by various court of appeals decisions. U.S. Br. 15. But these decisions apply the natural-tendency test. See *Bourseau*, 531 F.3d at 1171. As we have seen, this test differs from the outcome test. See *Costner*, 317 F.3d at 887. And *Escobar* "announced a new approach to materiality closer to the outcome test than to the less stringent [natural-tendency test]." *Johnson v. District of Columbia*, 144 A.3d 1120, 1137 (D.C. 2016). The United States seeks to revive the defunct natural-tendency test.

When it turns (U.S. Br. 16) to the words in *Escobar* itself, the United States again introduces an alien time element. When, the United States says, *Escobar* discusses a government that pays a claim despite knowing of a regulatory violation, *Escobar* means to exclude instances when the government pays a claim, learns of a violation, and

seeks no refund. But *Escobar* contains no such caveat. "What matters," to repeat, is whether the violation is "material to the Government's payment decision." 136 S. Ct. at 1996. That "payment decision" is still occurring as the government decides whether to seek disgorgement.

The United States asserts (U.S. Br. 16-17) that the government's declining to seek disgorgement is less probative of materiality than the government's refusing to pay a claim at the outset. The United States offers no evidence, however, for the notion that rejecting a claim is more onerous at time B than at time A.

More than that, when the United States says that "the government may have good reasons (having nothing to do with materiality) for electing not to pursue recoupment" (U.S. Br. at 16), the United States misses that, under *Escobar*, the government's deployment of "good reasons" as a basis for "electing not to pursue recoupment" *is* the materiality analysis. If the government will pay a claim despite knowing of a regulatory violation, the violation is immaterial. 136 S. Ct. at 1996. *Escobar* never suggests that why the government elects to pay matters. The reason might be pragmatic: the

government might not want to cripple a strategically important healthcare provider.

The United States acknowledges (U.S. Br. 17) that the government might pay imperfect claims if refusing to do so would harm a nursing home and, by extension, its patients. But if the government would pay a claim to avoid hurting a nursing home, why would the government support a relator's using that claim to impose litigation costs, treble damages, and penalties on the nursing home? The "significant collateral effects" the United States fears (*id.*) do not disappear when a relator rather than the government imposes them. Thus the wisdom of *Escobar*, under which only a regulatory violation that can trigger government nonpayment can trigger False Claims Act liability.

Finally, the United States claims (U.S. Br. 17) that the district court "erroneously justified its approach by noting that relator accused defendants of widespread fraud, and used statistical techniques in her presentation." This statement is inaccurate. The district court did not rule against the relator because she alleged "widespread fraud" or because she "used statistical techniques." The district court noted,

rather, that the relator had increased her task (1) by trying to connect her few weeks of experience at two nursing homes to four years of conduct at 51 nursing homes and (2) by trying to achieve this extrapolation with "the diciest possible form of sparse and attenuated statistical sampling." App. 527. The district court did not "espous[e] a rule" that "some fraudulent schemes are effectively 'too big to be material.'" U.S. Br. 17. To the contrary, the district court held (1) that *no* competent evidence suggested materiality and (2) that the relator failed to identify *any* fraudulent scheme, big or small. App. 521-22, 529-30.

The Court should reject the United States' attempt to subvert *Escobar*.

B. To Argue For Its Proposed Standard Of Materiality, The United States Overemphasizes A Non-Dispositive Part Of The District Court's Decision.

The district court concluded that the relator presented no evidence suggesting the government's likely response to the defendants' disputed practices. The district court concluded also that the relator presented no evidence suggesting the government's likely response to discovering that the disputed practices affect four years' worth of claims from 53

nursing homes. Itching to hold a discussion about a broad standard of materiality—a discussion of no moment to the district court's first conclusion—the United States erroneously treats the district court's second conclusion as its only conclusion.

1. The District Court's Conclusion That The Relator Escalated The Scope Of The Dispute Was Not Dispositive To The District Court's Materiality Holding.

The relator's failure to prove materiality, the district court observed, was absolute. "The evidence shows," wrote the court, "not a single threat of non-payment, not a single complaint or demand, and not a single resort to an administrative remedy or other sanction for the same practices that result in the enormous verdict at issue." App. 512. This "dearth of evidence," the court concluded, "left the jurors to guess" how the government "might have addressed the disputed practices." App. 522. After discovering that a claim lacks full documentary support, does the government simply pay the claim, giving the claimant—which sags under an enormous regulatory burden—the benefit of the doubt? Does the government pay the claim but increase administrative oversight of the claimant? Does the government pay the claim but at a discount? Or, finally, does the government refuse to pay anything? Only

the last of these approaches would support the jury's verdict. But the record, the district court observed, offered the jury no way to arrive at a reasoned determination of which approach the government would likely adopt. App. 521-22. The jury's verdict, therefore, could not stand. *Id.*

Later in its decision—several pages after it concluded that the verdict "cannot stand," App. 522—the district court raised another problem with awarding the government and the relator nine figures in damages. At issue here, said the court, is not merely whether the government "might refuse to pay one or two or several invoices." App. 527. That is not the issue, said the court, because the relator insisted that it not be the issue. Insisting that the action instead address the practices of 53 nursing homes over a span of four years, the relator "immeasurably escalated" the dispute into "a systemic dispute that forces a systemic challenge that requires systemic answers." *Id.*

The relator submitted no evidence that, to punish the defendants' disputed practices, the government would threaten the public interest—no evidence, that is, that the government would irrationally or vindictively penalize the defendants to a degree that endangers the defendants' patients—yet the relator won a nine-figure penalty that

threatens the public interest and the defendants' patients. App. 528-29. The district court therefore concluded that, *in addition* to failing to show how the government would likely react to discovering even a single upcoded or ramped or care-plan-less claim, the relator failed to show how the government would likely react to discovering such claims in a number so large that disgorgement would likely pose an existential threat to the claimant healthcare provider.

2. The United States Erroneously Treats The District Court's Discussion Of The Relator's Escalation As Dispositive.

The United States says that the district court "expressly rejected any approach to materiality focused on . . . individual claims." U.S. Br. 10. Not so. The United States cites the end of the district court's decision, where the district court discusses the problem created by the scale of the relator's action. *Id.* (citing App. 527-29). But the district court said nothing "explicit" in that section about "reject[ing]" consideration of individual claims.

The United States neglects the middle of the district court's decision, where the district court (1) discusses the absence of evidence of how the government would react to finding discrete Medicare or

Medicaid claims lacking full documentary support and then (2) declares that, because of this absence, the verdict "cannot stand." App. 521-22. Also, the United States ignores the district court's conclusion that the relator's failure to establish materiality was total. The district court's conclusion was unqualified: the relator "offered no meaningful and competent proof" establishing the United States' likely reaction to "the disputed practices." App. 511.

The district court said, it is true, that at some point the scope of a *qui tam* action lacking evidence of claims denied by the government becomes so large that the relator faces "the insurmountable burden of proving that the government would not do exactly what history demonstrates the government in fact did." App. 531-32. But contrary to the United States' assertions (e.g., U.S. Br. 1), the district court did not treat this 'scale burden' as dispositive.

The relator's choice to transform this action into a radical audit, one spanning several years and dozens of institutions, created a big problem. The relator failed to show that, faced with the practices at issue here, the government would abruptly imperil vulnerable seniors by rejecting many millions of dollars' worth of long-ago approved claims.

But neither did the relator show that, faced with the practices here, the government would reject even a few claims. At any scale, the jury was left "to launch a wild guess" about what the government would do. App. 527.

The United States' recalcitrant reading of *Escobar* is irrelevant to this appeal. Even if the United States' reading were valid, the district court's core holding—that no evidence supports materiality—would still stand.

II. IN CRITIQUING THE DECISION BELOW, THE UNITED STATES MISCONSTRUES THE RECORD.

"The record," the district court observed, "suffers an entire absence of evidence of the kind a disinterested observer, fully informed and fairly guided by *Escobar*, would confidently expect on the question of materiality: evidence of how government has behaved in comparable circumstances." App. 519. The United States enlists various forms of stand-in evidence—purported evidence, for example, of what *the defendants* thought the government might do—none of which fills the void identified by the district court.

The district court found also that "the evidence fails to support a verdict against the Management Entity." App. 530. The relater "fail[ed]

entirely," the court wrote, "to connect the testimony about '[coding] budgets,' '[management] meetings,' and 'corporate profits' to any particular claim 'actually submitted' to the governments." *Id.* In other words, evidence meant to depict the management entity as profit-hungry is not evidence of fraud. The United States rehashes this evidence, but nothing it invokes overcomes the trial court's conclusion. The evidence shows the management entity watching its margins—as each private entity must. The evidence does not show the management entity ordering or otherwise causing the submission of false claims.

A. The Evidence Cited By The United States Does Not Support The Jury's Finding Of Materiality.

1. Medicare Upcoding and Ramping.

The United States treats the materiality of upcoding and ramping as self-evident. U.S. Br. 18-19. The United States calls upcoding, for example, "a classic and well-understood form of healthcare fraud." U.S. Br. 19. But evidence-free assertions cannot support a verdict. As the district judge explained at trial: "We don't know anything. I certainly don't know anything about what the government does in these situations and I think the jury is left to guess. . . . There's no evidence that [the government] cared." Supp.App. 195:23-25, 197:6.

The supposed obviousness of the materiality of upcoding or ramping is further diminished by the relator's choice not to argue that any medical care provided by the defendants was unnecessary. Supp.App. 88:16-18, 77:4-6 ("We're not going to argue that anybody got 500 minutes of therapy when they should have gotten 600 or they got 600 – 500."). No evidence shows that if the government knew at once (1) that a vendor was upcoding or ramping claims but (2) that each upcoded or ramped part of a claim denoted a dose of care that benefited the patient, the government would have refused to pay for the beneficial care. If anything, the government might applaud itself for creating an incentive structure that maximizes the amount of beneficial care supplied by private entities participating in the Medicare program.

2. Medicaid Care Plans.

When addressing care plans, the United States attempts (U.S. Br. 21-22) to fill an evidentiary hole—the lack of evidence of what the government does when it discovers a missing care plan—by citing (1) the post-hoc say-so of witnesses not competent to testify about government practices, (2) the say-so of the government, and (3) snippets

that, the United States says, show the defendants' awareness of the materiality of their conduct. None of this supports the jury's verdict.

1. The United States says the relator presented "expert testimony" on materiality. U.S. Br. 19. The United States never mentions the district court's conclusion that "none" of these witnesses "were competent or qualified to testify or disclosed as experts to testify" on "the controlling question, that is, on the actual and expected conduct of the federal or state government." App. 526. In the testimony the United States cites, moreover, the witnesses' claims about the government's payment practices are no more than either naked assertions or recitations of requirements the government labels a condition of payment. That is not enough under *Escobar*.

2. "Whether a provision is labeled a condition of payment is . . . not dispositive of the materiality inquiry." *Escobar*, 136 S. Ct. at 2001. A government agency's assertion, deep in the fine print of its regulations, that a care plan is "essential to reducing risk" (U.S. Br. 19 [quoting App. 1276]) shows at most that the government might treat the care-plan rule as a condition of payment. Even that conclusion is probably unwarranted. After all, the same regulatory fine print

concedes that a "significant percentage of residential care plans" are inadequate. No evidence suggests that, absent evidence of defective *care*, the government, citing only problems with care *plans*, would cripple numerous healthcare providers by refusing to pay a "significant percentage" of claims. App. 1276. Anyway, as *Escobar* shows, the government's designating something a condition of payment cannot by itself establish materiality. 136 S. Ct. at 2001.

3. In *Escobar* the United States proposed that the "'test' for materiality 'is whether the person knew that the government could lawfully withhold payment.'" 136 S. Ct. at 2004. *Escobar* rejects the United States' proposal. *Id.* The United States' discussion (U.S. Br. 21-22) of an email containing the phrase "please delete this!" and of a report instructing therapists to seek approval for treatments "verbally" amount, at most, to evidence that the defendants "knew the government could lawfully withhold payment." Under *Escobar*, such evidence does not establish materiality. (*Escobar*'s rule makes sense. Evidence of a person's fear of being seen jaywalking by the police does not establish that the person, if seen, is likely to be ticketed for jaywalking.)

At a more granular level, moreover, the government misconstrues the import of the evidence it cites:

- The comment "please delete this!" must be viewed in context. The full sentence reads: "Kristen – here is all the stuff that I have made up in the past for the tardo's that don't know what they are doing (please delete this!!!)." App. 875. The author clearly wants the email deleted because she refers to co-workers as ignorant "tardo's," not because she says anything nefarious about billing procedure.
- The United States cites the following sentence from the notes attached to the 'please delete this!' email: "The [director of rehabilitation] then goes to the [executive director] and makes a sheet out showing how much it will cost for treatment and she will OK it." App. 886 (caps removed). It should worry every Medicaid provider that, according to the United States, this bland administrative statement is evidence that the defendants somehow

"brazenly ignored the needs of Medicaid patients." U.S. Br. 21.

- The relator's counsel said repeatedly that the case is not about the quality of care the defendants provided. The question, then, is simply whether the government would likely treat the lack of a care plan as a ground for rejecting payment. Even if it showed that the defendants "ignored the needs" of Medicaid patients—it does not—the United States' evidence says nothing about the government's approach to missing care plans.

The United States fails to support the jury's finding of materiality.

B. The Evidence Cited By The United States Does Not Support The Jury's Finding Of Management-Entity Liability.

The United States writes: "A full discussion of how [the proximate cause] standard applies here is beyond the scope of this amicus brief. But for illustrative purposes we observe that there is ample evidence supporting the jury's conclusion that the management entity caused numerous false claims to be submitted." U.S. Br. 25. The United States apparently means to say that although its discussion of the law is

complete, its discussion of the evidence, and of how the law and the evidence connect, is merely "illustrative." Rather than address point by point the United States' concededly incomplete treatment of the evidence, we will focus on an important overarching point.

At trial the relator's counsel acknowledged that the relator presented no direct evidence of a fraudulent scheme. Supp.App. 87:12-15. "The way we argue [fraud]," he said, "is from the focus on the money. . . . [T]he jury has to infer from the obsession with the money over the care that when they sent this bill in they knew it was false." Supp.App. 87:17-20. The supposed "obsession with the money," however, boils down to a smattering of emails and testimony on efforts by the management entity to maximize revenue. See ARB 50-51. If pressuring employees to maximize revenue is enough to open an entity to liability for orchestrating a fraudulent scheme, almost every private entity in the nation is open to liability for orchestrating a fraudulent scheme.

Instructing an employee to maximize revenue is categorically different from instructing an employee to falsify records. A law firm that orders an associate to bill the highest rate the client will pay does

not proximately cause an associate to falsify billing sheets. Likewise, a nursing-home management company that orders its nursing homes to avoid undercoding claims does not proximately cause a nursing home to falsify claim records. See ARB 47-49 (discussing case law). Telling a runner to race her best, in short, is not telling her to break the rules. The only proximate cause of the cheating is the person who elects to cheat.

The record contains insufficient evidence for a jury reasonably to infer that the management entity proximately caused the creation of false records or the submission of false claims.

CONCLUSION

The United States' *amicus* brief does not support reversal of the judgment.

Dated: Sept. 18, 2018

Respectfully submitted,

/s/ Cory L. Andrews

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 5,390 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2010 in 14-point font.

Dated: September 18, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2018, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

Under Eleventh Circuit Rule 25-3(a), no service by other means is required.

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