Georgia State University Law Review

Volume 38
Issue 2 *Winter 2022*

Article 13

4-1-2022

Determining the Appropriate Reach of Escobar's Materiality Standard: Implied and Express Certification

Jake Summerlin
jsummerlin3@student.gsu.edu

DETERMINING THE APPROPRIATE REACH OF *ESCOBAR*'S MATERIALITY STANDARD: IMPLIED AND EXPRESS CERTIFICATION

Jake Summerlin*

ABSTRACT

In 2016, the Supreme Court altered the landscape of the False Claims Act by recognizing implied certification as a viable theory of liability. Before the Court decided Universal Health Services, Inc. v. United States ex rel. Escobar*, courts disagreed over the scope and legitimacy of the theory, arguing that it could create runaway liability if not held in check. The Court, although recognizing that implied certification expanded the reach of the False Claims Act, reassured itself and government contractors by reinforcing the common law antecedents of fraud, namely, that misrepresentations and omissions must be material to the government's decision to pay a claim. Moreover, Justice Thomas, writing for the unanimous Court, characterized the law's materiality standard as "demanding."*

In Escobar*, the Court sought to provide clarity for highly complex False Claims Act litigation. Instead, the decision created even more confusion as courts have attempted to apply the "demanding" standard for materiality. Specifically, some courts across the country have applied the new materiality standard to other theories of liability, including the express false certification theory which was not at issue in* Escobar*. Others have limited* Escobar *strictly to cases arising under implied certification. The two theories of liability, although similar, have vastly different implications for what constitutes fraud under the False Claims Act. Courts that apply* Escobar *to express certifications overlook this crucial, albeit subtle, difference.*

---

* Associate Research Editor, *Georgia State University Law Review*; J.D. Candidate, 2022. Thank you to my friends and classmates on the *Georgia State University Law Review* for your time, honesty, and hard work preparing this Note and others for publication. Thank you to Susan Gouinlock for your mentorship, wisdom, and guidance through this long process. Finally, thank you to my family—especially to Stephanie and Annie (the dog)—whose love and support make it all possible.

This Note argues that the "demanding" materiality standard articulated by the Court in Escobar *should be limited to the implied false certification theory of liability. This argument relies on the history, text, and purpose of the False Claims Act, as well as the appropriate role of the courts in determining what legislative and administrative actions are considered material. In doing so, this Note hopes to provide clarity as to when* Escobar's *"demanding" materiality standard should be applied and, more importantly, when it should not.*

CONTENTS

INTRODUCTION

Consider a hypothetical. The United States government contracts with a private company to construct a government office building with a requirement that all contractors and subcontractors must use American-made nails.[1] The contractor must complete the project in ten phases and must submit an invoice for payment at the end of each phase. If the nails used in the final phase of the project were in fact imported from China, would submitting an invoice to the government without disclosing the fact that the building was finished with imported nails make the contractor's claim for payment fraudulent? Is the use of imported nails enough to entitle the government to seek one of the harshest civil remedies warranted under federal law?[2] The law of contracts suggests not.[3] Although such may be true of the law between private parties, it has been said that people must "turn square corners when they deal with the Government."[4] The False Claims Act (FCA) makes it illegal to submit false or fraudulent claims to the government for payment or approval.[5] So, in the case of the hypothetical construction company, at what point does the apparent breach of contract become *fraudulent*?

This question was hotly debated in the world of government contracting before the United States Supreme Court's 2016 decision in

1. *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2004 (2016). Justice Thomas, writing for the unanimous Court, recounted the United States' position at oral argument to emphasize the government's "expansive view" of the False Claims Act. *Id.* Under that view, "[i]f the Government contracts for health services and adds a requirement that contractors buy American-made staplers, anyone who submits a claim for those services but fails to disclose its use of foreign staplers violates the False Claims Act." *Id.*

2. 31 U.S.C. § 3729. Violating the False Claims Act can subject defendants up to three times the amount they illegally obtained from the government. *Id.* § 3729(a) (flush language).

3. *See* Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 890 (N.Y. 1921) ("Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another."). As articulated by then-Judge Benjamin Cardozo, a contractor's substantial performance cannot be the basis for a total breach of the contract. *Id.* at 892. There, the contractor had used wrought iron pipe made in various other factories and not "'standard pipe' of Reading manufacture" as required in the contract. *Id.* at 890.

4. Rock Island, A. & L.R. Co. v. United States, 254 U.S. 141, 143 (1920) ("Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with.").

5. 31 U.S.C. § 3729(a)(1)(A).

Universal Health Services, Inc. v. United States ex rel. Escobar, and given the ambiguity in that decision, it remains unsettled to this day.[6] In *Escobar*, the question was whether the so-called implied false certification theory of liability under the FCA was viable as recognized by some but not all circuit courts.[7] Under the implied false certification theory, a defendant's submission of an invoice to the government while knowing that it is not in compliance with one or more statutory, regulatory, or contractual requirements makes the otherwise factually accurate claim for payment a false claim and therefore actionable under the FCA.[8] The plaintiffs in *Escobar* alleged that a healthcare provider seeking payment for its services to government healthcare beneficiaries while in breach of personnel licensing regulations constituted an implied false certification under the FCA.[9] Although the unanimous Court ultimately agreed that implied false certification is a viable theory of liability, it set boundaries on when this type of statutory or regulatory violation may subject a party to FCA liability.[10] According to the Court, a defendant's implied certification of

6. *See* Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (1994), *aff'd per curiam*, 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision). The Court of Federal Claims implied a False Claims Act violation where a contractor had breached the terms of a Small Business Administration program. *Id.* In *Escobar*, the United States Supreme Court granted certiorari to resolve longstanding disagreement in the courts of appeals over the so-called implied certification theory of False Claims Act liability. *Escobar*, 136 S. Ct. at 1998–99.

7. *Escobar*, 136 S. Ct. at 1998–99; *see also* Jacob J. Stephens, *Dicta Me This: Implied False Certification to Materiality Under the False Claims Act Post*-Escobar, 44 U. DAYTON L. REV. 273, 280–81 (2019) (discussing the circuit split).

8. *See* McNutt *ex rel.* United States v. Haleyville Med. Supplies, Inc., 423 F.3d 1256, 1259 (11th Cir. 2005) ("When a violator of government regulations is ineligible to participate in a government program and that violator persists in presenting claims for payment that the violator knows the government does not owe, that violator is liable, under the Act, for its submission of those false claims: 'The False Claims Act does not create liability merely for a health care provider's disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe.'" (quoting United States *ex rel.* Clausen v. Lab'y Corp. of Am., Inc., 290 F.3d 1301, 1311 (11th Cir. 2002))).

9. *Escobar*, 136 S. Ct. at 1997; *see also Ab-Tech*, 31 Fed. Cl. at 434 (finding that defendant implied compliance with all program requirements when it submitted requests for progress payments).

10. *Escobar*, 136 S. Ct. at 2001. The Court's first holding was that FCA liability can attach under an implied false certification theory of liability. *Id.* at 1995 ("We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability."). The Court qualified this holding with the "demanding" and "rigorous" standard for materiality. *Id.* at 2002–03 ("[A] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act.").

compliance is actionable under the FCA only where the certification is material to the government's payment decision.[11]

After *Escobar*, the imported nails might not translate to FCA liability for the hypothetical company.[12] But what if the United States and China are in a trade war? What if Congress enacts a law that requires all construction contracts with the government to include a provision that all nails must be American-made in an effort to boost domestic steel production? What if the contractor must promise on every invoice submitted to the government that "I certify, in recognition of the United States' effort to boost domestic steel production, that only American-made nails have been used in the construction of this office building"? How does *Escobar*'s materiality standard stack up against Congress's constitutional authority to legislate?[13]

These questions were unfortunately left unresolved by *Escobar*.[14] Many of the unresolved issues stem from the Court's analysis regarding what conduct is considered material under the Act.[15] Although the Court recognized that the FCA defines material as having the "natural tendency" to influence the government's payment decision, the Court went on to characterize the FCA's materiality

11. *Id.* at 2001.

12. *See generally* Thad Leach & Christina Randolph, Escobar *Case Limits False Claims Act Liability for Providers*, JD SUPRA (July 22, 2017), https://www.jdsupra.com/legalnews/escobar-case-limits-false-claims-act-11265/ [https://perma.cc/MV9M-HE2H] (discussing how merely labeling a representation does not determine materiality). The healthcare industry saw *Escobar* as an effective tool to limit healthcare providers' FCA liability. *Id. But see* Anthony Anikeeff & Jeremy Ball, *Risk and Uncertainty for Health Care Providers and Government Contractors in the Wake of* Universal Health Services v. Escobar, JD SUPRA (July 7, 2016), https://www.jdsupra.com/legalnews/risk-and-uncertainty-for-health-care-37826/ [https://perma.cc/N6UX-69K7] (*Escobar* decision "creates additional uncertainty about potential FCA" liability).

13. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819). Congress has the constitutional duty to make laws that are "calculated to effect any of the objects [e]ntrusted to the government . . . ." *Id.*; *see also* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

14. *Escobar*'s holding that "the implied certification theory can be a basis for liability" is silent on other theories of liability. *Escobar*, 136 S. Ct. at 2001; *see also* Joan H. Krause, *Reflections on Certification, Interpretation, and the Quest for Fraud that "Counts" Under the False Claims Act*, 2017 U. ILL. L. REV. 1811, 1835 (2017) ("[*Escobar*] . . . failed to clarify whether materiality is required only in suits brought under the implied certification theory or whether it applies to *all* suits under § 3729(a)(1)(A) . . . .").

15. *See* Stephens, *supra* note 7, at 284.

standard as "demanding."[16] The opinion has led to much litigation as courts attempt to apply the "demanding" standard for materiality to other theories of liability under the Act, including express false certifications of compliance not at issue in *Escobar*.[17] The debate is the result of the Court failing to articulate whether its materiality analysis for determining liability in cases involving implied false certifications extends to the express false certification theory of liability.[18] The answer to this question depends on who you ask.[19]

This Note addresses whether the Court's limits on implied false certifications apply equally to express false certifications under the FCA. Part I offers a brief history of the FCA, the basics of liability, and the context of the Court's decision in *Escobar*.[20] Part II analyzes the post-*Escobar* jurisprudence and its application in cases brought under both implied and express false certification theories of liability.[21] Part III revisits *Escobar* with a proposal that its application should be applied narrowly to the implied certification context because of the text and intent of the FCA as well as the fundamental separation of powers principle.[22]

16. *Escobar*, 136 S. Ct. at 2002–03.

17. *See* Krause, *supra* note 14.

18. *See* Matt Curley, *FCA Deeper Dive: Express Certification*, BASS, BERRY & SIMS: INSIDE THE FCA (June 1, 2017), https://www.insidethefca.com/fca-deeper-dive-express-certification/ [https://perma.cc/SD25-MJMG]. The FCA defense bar was quick to argue that *Escobar*'s "materiality requirement should apply equally to FCA cases where falsity is premised on an express certification." *Id.* (first citing United States *ex rel.* Thomas v. Black & Veatch Special Projects Corp., 820 F.3d 1162, 1174 (10th Cir. 2016); and then citing United States *ex rel.* Se. Carpenters Reg'l Council v. Fulton Cnty., No. 14-cv-4071, 2016 WL 4158392, at *5 (N.D. Ga. Aug. 5, 2016)). *But see* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 4:34.50, at n.4, Westlaw (database updated Apr. 2021) ("*Escobar* did not address so-called 'express certification' or expressly false statements and there is no reason to believe it affected claims based on such a theory." (first citing United States *ex rel.* Wood v. Allergan, Inc. 246 F. Supp. 3d 772 (S.D.N.Y. 2017), *rev'd on other grounds*, 899 F.3d 163 (2d Cir. 2018); then citing United States *ex rel.* Presser v. Acacia Mental Health Clinic, LLC, 836 F.3d 770 (7th Cir. 2016); and then citing Scollick *ex rel.* United States v. Narula, No. 14-cv-1339, 2020 WL 6544734 (D.D.C. Nov. 6, 2020))).

19. SYLVIA, *supra* note 18, § 4:34.50.

20. *See infra* Part I.

21. *See infra* Part II.

22. *See infra* Part III.

I. BACKGROUND

Congress enacted the FCA in 1863 in response to the rampant fraud and abuse that took place during the Civil War.[23] High wartime demand caused the federal government to accept almost any offer for war supplies at any price offered by private contractors.[24] As a result, the Union Army often received "spavined beasts and dying donkeys" when it bought horses or the "refuse of shops and foreign armories" when it purchased muskets and pistols.[25] The lack of response from the federal government made the prospect of getting into business with the Union Army very appealing for unscrupulous private contractors.[26]

To recoup some of the money lost to contractor fraud for the government treasury, Congress enacted the FCA, which attaches civil liability to any person or entity who submits false or fraudulent claims for payment to the government.[27] Although the FCA is a financial

23. S. REP. NO. 99-345, at 8 (1986); *see also* CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863) ("The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war; and it is said, and earnestly urged upon our attention, that further legislation is pressingly necessary to prevent this great evil; and I suppose there can be no doubt that these complaints are, in the main, well founded.").

24. *See* Robert Tomes, *The Fortunes of War: How They Are Made and Spent*, 29 HARPER'S NEW MONTHLY MAG. 227, 227 (1864) ("The Government, pressed by a necessity which admitted of no hesitation in regard to time, character, quantity, quality, and cost, accepted almost every offer, and paid almost any price.").

25. *Id.* at 228.

26. *See* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.01, at 1-6 (2d ed. Supp. 2002). Because the Department of Justice had not been created yet, the Attorney General could not coordinate with U.S. District Attorneys for an effective federal response. *Id*. § 1.01, at 1-7; *see also* Tomes, *supra* note 24, at 228 ("Poor men thus became rich men between the rising and setting of the same day's sun; while hundreds of thousands of dollars of the wealthy increased to millions in the same brief space of time. It is said that one of our great merchant princes gained from his transactions with Government two millions of dollars in a single year.").

27. 31 U.S.C. § 3729(a). Subsection (a) reads as follows:

> (a) Liability for certain acts.—
>
> (1) In general.—Subject to paragraph (2), any person who—
>
> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
>
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
>
> (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
>
> (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be

recoupment tool for the federal government, it operates just as much as a warning—any defendant in violation of the Act is liable to the United States up to three times the amount of money the government has lost.[28] Although the federal government is the party-in-interest under the Act, private individuals attribute in large part to the effectiveness of the FCA.[29] The Act's *qui tam* provisions incentivize private individuals aware of fraudulent conduct to bring an action in the name of the United States.[30] These individuals (called relators because they relate information to the federal government) are entitled to a portion of the proceeds recouped by the government.[31] After being revitalized in 1986 and again in 2009 with more expansive provisions

---

> delivered, less than all of that money or property;
> (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
> (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
> (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 . . . , plus 3 times the amount of damages which the Government sustains because of the act of that person.

Id.

28. *Id.* § 3729(a)(1) (flush language); *see also* S. REP. NO. 99-345, at 17. The 1986 amendments to the False Claims Act increased the government's damages from double to triple the amount the defendant obtained illegally. *Id.*

29. *See* Press Release, U.S. Dep't of Just., Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019 [https://perma.cc/R23L-64AP]. False Claims Act cases brought by *qui tam* relators accounted for $2.1 billion of the government's total $3 billion recovery. *Id.*; *see also* BOESE, *supra* note 26, at 1-4 ("*qui tam* enforcement of the Act can be expected to increase even more substantially in light of recent decisions that have awarded *qui tam* plaintiffs tens of millions of dollars as 'bounties' for bringing suits.").

30. *See* 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.").

31. *Id.* § 3730(d). In some cases, the relator is entitled to receive up to 25% of the government's total recovery. *Id.* § 3730(d)(2).

and greater clarity, today the FCA is the federal government's most effective tool in combatting financial fraud.[32]

A. Liability Under the False Claims Act

The FCA's liability language has remained largely intact over the century and a half since its passage in 1863.[33] But the original provisions of the Act could not have contemplated the complexities of the modern economy and the contemporary relationship between the government and private sector.[34] The drafters of the Act in 1863 could not have imagined a healthcare system where the federal government pays billions in Medicare claims to private hospitals or a housing market where private lenders issue billions in loans guaranteed by the government.[35] The result of the burgeoning relationship between the government and the private sector is that the courts have largely shaped the modern contours of FCA liability.[36]

The standard judge-made test for an actionable FCA claim is as follows: (1) a false or fraudulent claim is made; (2) the defendant has the requisite scienter; and (3) the claim is presented or caused to be

32. *See* BOESE, *supra* note 26, § 1.04, at 1-27 ("Since the [1986] [A]mendments, over $3.8 billion has been recovered in FCA cases."); *see generally* S. REP. NO. 111-10 (2009); Press Release, *supra* note 29 ("In addition to combating health care fraud, the False Claims Act serves as the government's primary civil tool to redress false claims for federal funds and property involving a multitude of other government operations and functions."). *See generally* S. REP. NO. 99-345.

33. *See* H.R. REP. NO. 99-660, at 17 (1986) ("With two exceptions, amendments made to the *qui tam* provisions in 1943 and a recodification of the Act in 1982, the statute has been largely unchanged since enacted 123 years ago.").

34. *See, e.g.*, BOESE, *supra* note 26, at 2-5 to -6 ("Few of [the FCA's] provisions are the result of reflection on the complex business practices of the modern era, or the degree of culpability surrounding inaccurate claims or statements in financial transactions with the government.").

35. *See HHS FY 2018 Budget in Brief–CMS–Overview*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/budget/fy2018/budget-in-brief/cms/index.html [https://perma.cc/5NWG-C3MF] (May 23, 2017) (spending about $15 billion dollars in government health care programs). The VA guaranteed over $180 billion in mortgage loans made by private lenders in 2017. *2017 All VA Lenders by Total Volume*, U.S. DEP'T OF VETERANS AFFS., https://www.benefits.va.gov/HOMELOANS/documents/docs/2017totalvolume.pdf [https://perma.cc/AK5U-MRY2] (July 7, 2021); *see also* Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 458–61 (1998) (discussing history of *qui tam* lawsuits and the False Claims Act).

36. *See* BOESE, *supra* note 26, at 2-6 (noting how the FCA has "engendered considerable judge-made law").

presented by the defendant to the United States.[37] Prior to the 2009 amendments, however, most courts created an implicit fourth element in FCA cases: the defendant's false claim must be material to the government's decision to pay the claim.[38] Courts that implied this fourth element of liability used a standard definition of materiality developed through the common law.[39] The "natural tendency" standard of materiality was generally recognized to be easier for an FCA plaintiff to satisfy because the false claim need only have the "potential to influence" the government's decision to pay the claim.[40] The 2009 amendments, part of the Fraud Enforcement and Recovery Act (FERA), codified this standard by defining the term "material" as "having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property."[41]

The FCA is intended to reach a broad range of fraud against the United States.[42] The Act separates causes of action into seven different

37. *See, e.g.*, United States *ex rel.* Walker v. R&F Props. of Lake Cnty., Inc., 433 F.3d 1349, 1355 (11th Cir. 2005). This test typifies the standard for a presentment claim under § 3729(a)(1)(A). *Id.* There are, however, seven causes of action under the FCA. *See supra* note 27 and accompanying text.

38. *See* United States v. Bourseau, 531 F.3d 1159, 1170 (9th Cir. 2008) (incorporating materiality element into FCA cases based on theory of promissory fraud); United States *ex rel*. Loughren v. Unum Grp., 613 F.3d 300, 307 (1st Cir. 2010) (previously finding FCA subject to "judicially-imposed" materiality requirement). Many of the circuits had read in a materiality requirement to FCA cases before the 2009 amendments. *See* United States *ex rel.* Spay v. CVS Caremark Corp., 875 F.3d 746, 760 (3d Cir. 2017). Rather than creating a new element to an FCA claim, the 2009 amendments "merely made explicit and consistent that which had previously been [] judicially[-]imposed." *Id.* at 761.

39. Kungys v. United States, 485 U.S. 759, 770 (1988) (defining material as having "'a natural tendency to influence, or [is] capable of influencing, the decision of' the decision[-]making body"); *see also* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2002 (2016) (recognizing that the materiality requirement in the False Claims Act "descends from 'common-law antecedents'" (quoting *Kungys*, 485 U.S. at 769)).

40. JAMES B. HELMER, JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION 281 (Bloomberg BNA 7th ed. 2017); *see also* United States *ex rel*. Longhi v. Lithium Power Techs., Inc., 575 F.3d 458, 470 (5th Cir. 2009) ("All that is required under the test for materiality, therefore, is that the false or fraudulent statements have the potential to influence the government's decisions.").

41. 31 U.S.C. § 3729(b)(4); *see* Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621–25 (codified as amended at 31 U.S.C. §§ 3729-3733); S. REP. NO. 111-10, at 12 (2009). The 2009 amendments changed the previous version of the Act to add the words "material to" that modified the phrase "false or fraudulent claim." *Id.* The materiality language was only added to two provisions of the amended Act: "false statement or records" claims under 31 U.S.C. § 3729(a)(1)(B) and "obligation" claims under 31 U.S.C. § 3729(a)(1)(G). *Id.* Importantly, the materiality language was not added to any other cause of action in the amended Act. *See infra* Section II.C.2.

42. *E.g.*, United States v. Neifert-White Co., 390 U.S. 228, 232 (1968) (FCA is "intended to reach all

categories.[43] The Act makes liable anyone who presents or causes to be presented a false or fraudulent claim for payment (a "presentment" claim under § 3729(a)(1)(A)); anyone who makes or uses a false record or causes another to make or use a false record material to the payment of a false claim (a "false record" claim under § 3729(a)(1)(B)); and anyone who conspires to violate any other provision of the Act.[44] The Act's scienter provision requires a defendant knowingly submit a false or fraudulent claim, although a defendant does not need the specific intent to defraud the United States.[45]

Even though the FCA includes false claims that take many forms, the courts have been left to assess the scope of liability.[46] One such

types of fraud, without qualification, that might result in financial loss to the Government."). The 1986 amendments intended to reinvigorate the FCA by increasing the financial incentives for *qui tam* relators to align with the broad interpretation of the Act offered by the Supreme Court in *Neifert-White Co*. *See* S. REP. NO. 99-345, at 2, 19 (1986).

43. 31 U.S.C. § 3729(a)(1)(A)-(G).

44. *Compare id.* § 3729(a)(1)(A) ("any person who knowingly *presents*, or causes to be *presented*, a false or fraudulent claim for payment or approval" (emphasis added)), *with id.* § 3729(a)(1)(B) ("any person who knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim") A claim under § 3729(a)(1)(B) does not require the presentment of a false claim but does require an affirmative false statement or false record. *See* United States *ex rel.* Fallon v. Accudyne Corp., 921 F. Supp. 611, 627 (W.D. Wis. 1995). At a functional level, the distinction serves to "remove any defense that the defendant did not personally submit a false claim directly to the government." BOESE, *supra* note 26, § 2.01, at 2-20.

45. 31 U.S.C. § 3729(b)(1). A defendant has the requisite knowledge under the FCA where it has "actual knowledge . . . [,] acts in deliberate ignorance of the truth or falsity of the information[,] or acts in reckless disregard of the truth or falsity of the information . . . ." *Id.* § 3729(b)(1)(A)(i)-(iii). The Act requires no specific intent to defraud. *Id.* § 3729(b)(1)(B). Before the 2009 amendments, the Supreme Court held in *Allison Engine Co. v. United States ex rel. Sanders* that a defendant must purposefully submit a false record for a relator to state a claim under the FCA. Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 665 (2008), *superseded by statute*, Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, 123 Stat. 1617. Many scholars believe that the 2009 amendments were a direct response to what Congress believed was an erroneous interpretation of the law. *See* HELMER, *supra* note 40, at 95 ("Within a year of the Supreme Court's decision in *Allison Engine*, Congress enacted and President Obama signed a bipartisan bill that overhauled the FCA to restore some of the vigor taken out of it by the courts, all under the heading: 'Clarifications to the False Claims Act to Reflect the Original Intent of the Law.' And, tellingly, the amendment to former [§] 3729(a)(2), now [§] 3729(a)(1)(B), was explicitly made retroactive to two days before the Supreme Court's decision in *Allison Engine*." (footnote omitted)); *see also* S. REP. NO. 111-10, at 12 (expressing intent of bill to correct *Allison Engine*).

46. S. REP. NO. 99-345, at 9 ("The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services. Accordingly, a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation."); SYLVIA, *supra* note 18, § 4:34 (tracing how the "malleable," judicially-created categories have been extended or limited throughout the federal courts).

judge-made distinction relates to whether claims are considered false under the Act. The straightforward factually false claim is one in which a contractor seeks payments for goods or services that were never provided, such as seeking payment for a horse but providing a donkey.[47] Legally false claims are claims made false by the law; although the invoices may be factually accurate, they are nevertheless false claims because the defendant submits the claim to the government despite knowing that it is in violation of a federal statute or regulation that is a condition of eligibility for the government program or benefit.[48] Under this theory, the claim is legally false despite being factually accurate about the goods or services provided.[49] Also known as the "false certification theory," legally false claims violate the FCA because the government pays the claim based on the defendant's certification of compliance with relevant statutes, regulations, or other contractual terms.[50]

The courts have further separated legally false claims into two separate theories of liability, which are both based on the defendant's certification of compliance to the government.[51] First, express false

47. *See* United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008). Express false certification applies when the defendant "falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment." *Id.* (quoting Mikes v. Straus, 274 F.3d 687, 698 (2d. Cir. 2001), *overruled by* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016)); *see also* Tomes, *supra* note 24, at 228 ("For sugar it often got sand; for coffee, rye; for leather, something no better than brown paper.").

48. *See* United States v. Hibbs, 568 F.2d 347, 351 (3d Cir. 1977). In *Hibbs*, an early false certification case, the defendant real estate broker caused the Federal Housing Authority (FHA) to guarantee mortgages based on the defendant's certifications that it complied with Housing and Urban Development regulations. *Id.* at 349, 351. Although the court decided that the defendant did not violate the FCA because he did not cause the mortgages to go into default and thus result in damage to the government, the case is an early example of the certification theory of liability. *Id.* at 352. According to the dissent:

> There can be no question but that Hibbs, as to the six properties in question, made false certifications concerning their condition to the FHA. The FHA relied on these statements in issuing its mortgage insurance and had the statements not been false, FHA insurance would not have issued regarding the six mortgages in question. It is clear that the defaults by the mortgagors on these six properties were not caused by nor were they in any way related to the conditions that were the subject of Hibbs' false certifications.

Id. at 353 (Meanor, J., dissenting).

49. *See* BOESE, *supra* note 26, § 2.03, at 2-121. Unlike a legally false claim, a factually false claim is false on its face without the need to reference the underlying statute or regulation. *Id.*

50. *Mikes*, 274 F.3d at 696.

51. *See Conner*, 543 F.3d at 1217.

certifications are made where the defendant is required to expressly certify compliance with a particular statute or regulation to obtain payment from the government.[52] The focus is on the defendant's actual statements and what effect those certifications have on the government's decision to pay.[53] Second, implied false certifications are those implied by the law from the defendant's silence regarding its noncompliance with underlying statutes and regulations.[54] The emphasis shifts to whether compliance with the underlying rules is necessary to entitle government payment.[55] The theory of implied false certification is based on the premise that when an entity submits a claim for payment to the government, the entity is certifying compliance with all of the legal prerequisites that make it eligible to be paid.[56] Defendants in noncompliance with the necessary statutes or regulations that the government reimburses violate the FCA even though they have not made any express statements of compliance.[57] In effect, liability through implied certification rests on the failure to disclose material noncompliance with the law rather than the

52. *Mikes*, 274 F.3d at 698. A defendant makes express certification where it makes a claim that "falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment." *Id.*

53. Express certifications are often made on claim forms submitted to the government. *Id.* For example, to obtain Medicare reimbursement, a physician has to certify on the HCFA-1500 form that "the services shown on this form were medically indicated and necessary for the health of the patient and were personally furnished by me or were furnished incident to my professional service by my employee under my immediate personal supervision." *Id.*; *see also Conner*, 543 F.3d at 1218 (plaintiff's premising an express certification theory on a hospital's annual cost report to Medicare); Krause, *supra* note 14, at 1817 ("Express certification applies when a defendant makes an explicitly false certification of compliance with an underlying program condition, such as by signing a false certification statement on an invoice."). Express certifications are made to the underlying prerequisite statutes and regulations. *Id.*

54. *See Conner*, 543 F.3d at 1218 ("Under an implied false certification theory, by contrast, courts do not look to the contractor's actual statements; rather, the analysis focuses on the underlying contracts, statutes, or regulations themselves to ascertain whether they make compliance a prerequisite to the government's payment." (first citing United States *ex rel.* Siewick v. Jamieson Sci. & Eng'g, Inc., 214 F.3d 1372, 1376 (D.C. Cir. 2000); and then citing Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 531–33 (10th Cir. 2000))).

55. *Id.*

56. *See Mikes*, 274 F.3d at 699 ("An implied false certification claim is based on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment.").

57. *See* Krause, *supra* note 14, at 1817.

affirmative or explicit statements required to obtain payment from the government.[58]

B. Implied Certification Before Escobar

The origin of implied certification can be traced back to *Ab-Tech Construction, Inc. v. United States*.[59] In *Ab-Tech Construction, Inc.*, the Court of Federal Claims found that when the defendant submitted progress payment vouchers to the government, it impliedly certified compliance with all requirements of participation in the Small Business Administration (SBA) program.[60] By entering into a subcontract with another construction company—which the SBA program prohibited—the payment vouchers submitted by the defendant were false because the court reasoned that the government paid the defendant with the mistaken belief that the government was furthering the goals of the program.[61]

In the decades following *Ab-Tech Construction, Inc.*, relators and defense counsel as well as the courts of appeals disagreed over the legitimacy and scope of implied certification.[62] The healthcare

58. *Id.* Professor Krause draws the distinction between a defendant's explicit misrepresentation and the defendant's silence regarding failure to comply with conditions. *Id.* "Sometimes, we lie when we speak; sometimes, we lie when we don't." *Id.* at 1812.

59. 31 Fed. Cl. 429 (1994), *aff'd per curiam*, 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision); *see* Krause, *supra* note 14, at 1818; *Mikes*, 274 F.3d at 699.

60. *See Ab-Tech*, 31 Fed. Cl. at 434. The Court of Federal Claims first applied the implied false certification theory of liability where a contractor had breached the terms of the SBA program:

> Seen from this broader perspective, Ab-Tech's claims clearly were fraudulent. The payment vouchers represented an implied certification by Ab-Tech of its continuing adherence to the requirements for participation in the 8(a) program. Therefore, by deliberately withholding from SBA knowledge of the prohibited contract arrangement with [a subcontractor], Ab-Tech not only dishonored the terms of its agreement with that agency but, more importantly, caused the Government to pay out funds in the mistaken belief that it was furthering the aims of the 8(a) program. In short, the Government was duped by Ab-Tech's active concealment of a fact vital to the integrity of that program. The withholding of such information—information critical to the decision to pay—is the essence of a false claim.

Id.

61. *Id.* ("The withholding of such information—information critical to the decision to pay—is the essence of a false claim.").

62. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1998–99 (2016); *see also* Stephens, *supra* note 7 (analyzing circuit split regarding implied certification in the decades leading up to *Escobar*).

industry was particularly concerned that implied certification would impose substantial FCA liability for minor violations of one of the hundreds of regulations which providers must comply with.[63] To limit the scope of the theory, a number of circuit courts held that a relator may bring an implied certification claim only where the government labels the relevant statute or regulation as an "express condition of payment"; that is, the language of the regulation explicitly states that the defendant must comply to be entitled to government reimbursement.[64] The most frequently cited case that adopted this view was *Mikes v. Straus* in the Second Circuit (the *Mikes* standard).[65] To hold otherwise, according to this view, would turn the FCA into a "general 'enforcement device' for federal statutes, regulations, and contracts."[66] Other courts followed the natural progression of the theory from *Ab-Tech Construction, Inc.* and held that the theory applies when a defendant submits a claim and fails to disclose that it is in violation of relevant statutes and regulations.[67] Finally, there were courts that rejected the theory all together on the basis that implied certification imposed blanket FCA liability.[68]

C. The Court Finds a Balance: Universal Health Services, Inc. v.

63. *See* BOESE, *supra* note 26, § 2.03, at 2-128; Meador & Warren, *supra* note 35, at 456; Anikeeff & Ball, *supra* note 12.

64. *Mikes*, 274 F.3d at 700 ("[I]mplied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid." (citing United States *ex rel.* Siewick v. Jamieson Sci. & Eng'g, Inc., 214 F.3d 1372, 1376 (D.C. Cir. 2000))). The term "express condition of payment" should not be confused with "express false certification." The former relates to what label the government puts on the underlying statute or regulation, specifically whether it explicitly says that the defendant must comply to be eligible for payment. Krause, *supra* note 14, at 1822 n.62. Express false certification describes the defendant's explicit statements made to induce the government to pay a claim. *See id.*

65. *Mikes*, 274 F.3d at 700.

66. United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 268–69 (5th Cir. 2010) (first quoting United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997); and then citing *Mikes*, 274 F.3d at 699) ("The prerequisite requirement has to do with more than just the materiality of a false certification; it ultimately has to do with whether it is fair to find a false certification or false claim for payment in the first place.").

67. Stephens, *supra* note 7, at 281; *see also* United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 387–88 (1st Cir. 2011) (declining to follow the *Mikes* standard because the text of the FCA does not require conditions of payment to be explicit in statutory or regulatory language).

68. *See* United States *ex rel.* Absher v. Momence Meadows Nursing Ctr., Inc., 764 F.3d 699, 712 (7th Cir. 2014) ("[E]ven a *single* regulatory violation would be a condition of *any and all* payments subsequently received . . . [,which] would be [an] absurd [result]." (citation omitted)).

United States *ex rel.* Escobar

The Supreme Court granted certiorari in *Escobar* to resolve the circuit split over implied certification.[69] The dispute at the center of *Escobar* involved a mental health facility owned and operated by the defendant, Universal Health Services, that employed unlicensed and untrained staff members who treated the plaintiffs' daughter.[70] The plaintiffs' implied certification theory alleged that defendant Universal Health Services, Inc. submitted reimbursement claims to the Massachusetts Medicaid program despite flagrantly violating staff qualification regulations and licensing requirements.[71] Writing the unanimous decision, Justice Thomas put an end to the disagreement among the circuits and held that implied certification is a legitimate theory of FCA liability.[72] Additionally, the Court disagreed with the *Mikes* standard that applies implied certification only when the defendant violates a contractual, statutory, or regulatory provision that the government has designated an express condition of payment.[73]

---

69. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1995 (2016).

70. *Id.* at 1997. The plaintiffs' complaint alleged that their daughter had an adverse reaction to medication prescribed by one of the unlicensed employees and eventually died after suffering a seizure. *Id.*

71. *Id.* at 1997–98. The plaintiffs' complaint alleged that staff members misrepresented their qualifications and licensing statuses to the government in order to obtain National Provider Identification (NPI) numbers that can be submitted with claims to Medicare and state Medicaid programs for financial reimbursement:

> The operative complaint asserts that Universal Health (acting through Arbour) submitted reimbursement claims that made representations about the specific services provided by specific types of professionals, but that failed to disclose serious violations of regulations pertaining to staff qualifications and licensing requirements for these services. . . . Universal Health allegedly flouted these regulations because Arbour employed unqualified, unlicensed, and unsupervised staff. The Massachusetts Medicaid program, unaware of these deficiencies, paid the claims. Universal Health thus allegedly defrauded the program, which would not have reimbursed the claims had it known that it was billed for mental health services that were performed by unlicensed and unsupervised staff.

Id. (footnote omitted) (citation omitted).

72. *Id.* at 2001. Justice Thomas, writing for the unanimous Court, established that a relator can establish FCA liability under the implied certification theory of liability where "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.*

73. *Id.* ("The second question presented is whether, as Universal Health urges, a defendant should face False Claims Act liability only if it fails to disclose the violation of a contractual, statutory, or regulatory

Escobar was not, however, a complete victory for the government and potential relators. Although rejecting one barrier to the applicability of implied certification, the Court in *Escobar* imposed another barrier of its own.[74] The policy concerns from defendants over the reach of implied certification were quelled with an emphasis on the FCA's materiality requirement.[75] The "demanding" materiality requirement, according to Justice Thomas, reinforces the idea that the FCA "is not an 'all-purpose antifraud statute[]' . . . or a vehicle for punishing garden-variety breaches of contract or regulatory violations."[76] Instead, the defendant's noncompliance with the underlying contractual, statutory, or regulatory rules must be substantial to satisfy the FCA's materiality standard.[77] The Court provided additional guidance over the circumstances that may satisfy the FCA's "demanding" materiality standard:

> [P]roof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular

provision that the Government expressly designated a condition of payment. We conclude that the Act does not impose this limit on liability."). This theory was held by the Second, Third, Sixth, Ninth, and Eleventh Circuits and is commonly referred to as the *Mikes* theory. *See* Stephens, *supra* note 7; *see also* Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001) ("[I]mplied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid." (citing United States *ex rel.* Siewick v. Jamieson Sci. & Eng'g, Inc., 214 F.3d 1372, 1376 (D.C. Cir. 2000))), *overruled by* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016).

74. *See Escobar*, 136 S. Ct. at 2002–04 ("As noted, a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act. We now clarify how that materiality requirement should be enforced.").

75. *Id.* Although Justice Thomas recognizes the policy implications of implied certification in rejecting Universal Health's "express condition" limitation, he nevertheless held that "policy arguments cannot supersede clear statutory text." *Id.* at 2002 (citing Kloeckner v. Solis, 568 U.S. 41, 55 n.4 (2012)). The fear of broad FCA liability under the implied certification theory of liability could instead be policed by the FCA's materiality requirement. *Id.*

76. *Id.* at 2003 (quoting Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 672 (2008), *superseded by statute*, Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, 123 Stat. 1617).

77. *Id.* Materiality "cannot be found where noncompliance is minor or insubstantial." *Id.* (first citing United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 543 (1943); and then citing Junius Constr. Co. v. Cohen, 178 N.E. 672, 674 (N.Y. 1931)).

> statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.[78]

Escobar is unique in that there is no clear winner.[79] The Supreme Court vastly expanded the FCA's reach by legitimizing implied certification at the same time it imposed the "demanding" barrier of materiality.[80] Yet, for all of the legal clarity *Escobar* sought to impose, there remains considerable disagreement as to its proper application.[81]

II. ANALYSIS

Consider again the private company that constructs the office building for the United States.[82] After *Escobar*, can the company be certain that the imported nails will not mean years of litigation that will end with a substantial financial penalty?[83] Remember, "those who do business with the government should turn square corners."[84] But *Escobar* also seems to require the government to treat "squarely" those who obtain money even though the law says they are not eligible to be

78. *Id.* at 2003–04.

79. *See* Krause, *supra* note 14, at 1844.

80. *Escobar*, 136 S. Ct. at 2002–04.

81. *See* Krause, *supra* note 14. *Escobar* left open the question whether its heightened materiality analysis applies to all theories of liability, not just implied certification. *Id.*

82. *See supra* INTRODUCTION.

83. In an FCA case brought under an implied certification theory, the damage to the United States is the amount the defendant was paid based on the alleged misrepresentation over the compliance with the underlying statutes, regulations, or contractual terms. *See* Joan H. Krause, *"Promises to Keep": Health Care Providers and the Civil False Claims Act*, 23 CARDOZO L. REV. 1363, 1378 (2002). In this hypothetical, the company could be subject to FCA liability for using imported nails.

84. United States v. Hibbs, 568 F.2d 347, 349 (3d Cir. 1977). Justice Holmes's quotation reminds private contractors that if the government "attaches even purely formal conditions . . . those conditions must be complied with." Rock Island A. & L.R. Co. v. United States, 254 U.S. 141, 143 (1920).

paid.[85] From the standpoint of the company, the imported nails surely qualify as a "garden-variety" breach that is not sufficient to impose FCA liability.[86] But recall that the company has not made a mere misrepresentation by omission—it has expressly certified to the government that it has only used American-made nails.[87] If the government brings an FCA case against the company under an express false certification theory, can the government be sure that it will not be defeated by *Escobar*'s stringent test for materiality?[88]

In the years following *Escobar*, federal courts have employed various theories to confront this conundrum.[89] Some have limited the reach of *Escobar* strictly to those cases arising under the implied false certification theory of liability.[90] Others have added considerable confusion and litigation by extending *Escobar* to all "legally false" theories, including express false certifications.[91] Relators and the government, sometimes experiencing opposite results within the same district, have borne the brunt of these competing theories.[92] The

85. *Hibbs*, 568 F.2d at 349 ("This appeal is by one who disregarded that warning but now asks that the government be required to treat him squarely in an action under the False Claims Act."); *see also Escobar*, 136 S. Ct. at 2003 (quoting Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 672 (2008), *superseded by statute*, Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, 123 Stat. 1617).

86. *Escobar*, 136 S. Ct. at 2003.

87. *See supra* INTRODUCTION.

88. *See supra* Section I.C.

89. *See infra* Section II.A; *see also infra* Section II.B.

90. *See* United States *ex rel.* Wood v. Allergan, Inc., 246 F. Supp. 3d 772, 811 (S.D.N.Y. 2017) ("[T]he Supreme Court did not address the theory of express certification. Thus, there is no reason to believe *Escobar* modified or eliminated existing law . . . pertaining to that theory of falsity."), *rev'd on other grounds*, 899 F.3d 163 (2d Cir. 2018).

91. *See* United States v. Strock, No. 15-CV-0887, 2018 WL 647471, at *11 (W.D.N.Y. Jan. 31, 2018) (*Escobar* applies to "*all* misrepresentations of compliance with statutory, regulatory or contractual requirements brought under the Act—not only those brought under an implied certification theory").

92. *Compare* United States *ex rel.* Lorona v. Infilaw Corp., No. 15-cv-959-J-34, 2019 WL 3778389, at *17 (M.D. Fla. Aug. 12, 2019) (finding relator's express certification claim defeated because *Escobar*'s materiality analysis is critical "as to both express and implied certifications"), *with* United States *ex rel.* Stepe v. RS Compounding LLC, No. 13-cv-3150-T-33, 2017 WL 5178183, at *8 (M.D. Fla. Nov. 8, 2017) (rejecting defendant's argument that *Escobar* applies to all theories of liability for the view that it applies only to "the judicially-imposed materiality requirement for . . . implied-false certification claims" (citing United States *ex rel.* Patel v. GE Healthcare, Inc., No. 14-cv-120-T-33, 2017 WL 4310263, at *9 (M.D. Fla. Sept 28, 2017)); United States v. DaVita Inc., No. 18-cv-01250, 2020 WL 3064771, at *8 (C.D. Cal. Apr. 10, 2020) (*Escobar*'s heightened materiality analysis applies to an FCA claim "regardless of whether it is based upon express or implied false certifications"), *with* United States *ex rel.* Dresser v. Qualium

disparity results from the lack of clarity from the Supreme Court's decision.[93] But the courts of appeals have been equally silent on the correct application of *Escobar*.[94] The clearest answer appeared in the Second Circuit in *Bishop v. Wells Fargo*, where the court remanded a case brought under an express certification theory because the district court did not apply the newly articulated *Escobar* standard.[95] In *United States v. Strock*, the Court of Appeals upheld the standard articulated in *Bishop*, which is evidence that the "demanding" materiality inquiry applies to all FCA claims in the Second Circuit—including those premised by an express certification.[96] Other courts have hinted that *Escobar* is limited only to the cases brought under an implied false certification theory of liability.[97] For example, in *United States v.*

Corp., No. 12-cv-01745, 2016 WL 3880763, at *5–6 (N.D. Cal. July 18, 2016) (allowing relator's complaint to proceed with express-certification allegations but granting defendant's motion to dismiss implied-certification claims because they do not meet *Escobar*'s standard); United States *ex rel.* Jackson v. DePaul Health Sys., 454 F. Supp. 3d 481, 500 (E.D. Pa. 2020) (granting motion for summary judgment on express certification claim on the basis that "[w]hether a false certification is express or implied, it must be 'material to the Government's payment decision' for liability to attach." (quoting United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 94 (3d Cir. 2018))), *with* United States *ex rel.* Schimelpfenig v. Dr. Reddy's Lab'ys Ltd., No. 11-4607, 2017 WL 1133956, at *5 (E.D. Pa. Mar. 27, 2017) (suggesting that relator's claim would have survived motion to dismiss if it was based on express rather than implied-certification theory).

93. *See* Krause, *supra* note 14.

94. United States *ex rel.* Nedza v. Am. Imaging Mgmt., Inc., No. 15 C 6937, 2020 WL 1469448, at *10 (N.D. Ill. Mar. 26, 2020) ("[A]s far as this Court can tell, neither the Supreme Court nor the Seventh Circuit has explicitly said that *Escobar*'s materiality requirement extends to all types of FCA claims.").

95. *See* Bishop v. Wells Fargo & Co., 870 F.3d 104, 107 (2d Cir. 2017) (per curiam). The First and Third Circuits have also come close to articulating a standard but not as close to as that of the Second Circuit. *See* Guilfoile v. Shields, 913 F.3d 178, 187 (1st Cir. 2019) (suggesting that "express or implied false representation[s] of compliance" are subject to *Escobar*); United States *ex rel.* Doe v. Heart Sol., PC, 923 F.3d 308, 317 (3d Cir. 2019) ("*Escobar* . . . held that 'materiality is an element of all FCA claims. . . .'").

96. *See generally* United States v. Strock, 982 F.3d 51 (2d Cir. 2020). In *Strock*, the government appealed the district court's dismissal of its claim based on both an express false certification and a fraud in the inducement theory of liability. *Id.* at 58. Under the theory of fraud in the inducement, the defendant makes fraudulent misrepresentations in the procurement of a contract with the government and is liable under the FCA even if the actual claims submitted are factual because, as the theory posits, the claims are derived from the original fraudulent misrepresentations. *Id.* at 60. On appeal, the Second Circuit narrowed its analysis to the government's fraud in the inducement theory but still applied the *Escobar* materiality inquiry. *Id.* at 60–61. Therefore, law in the Second Circuit seems to be that *Escobar*'s materiality inquiry applies to all FCA claims, not just to implied false certifications. *Id.* at 62.

97. *See* United States v. Melgen, 967 F.3d 1250, 1259 (11th Cir. 2020). In *Melgen*, the defendant argued that the jury instruction for materiality given in the district court was based on an objective standard and that *Escobar* created a new and more subjective standard. *Id.*; *see also* United States *ex rel.* Badr v.

Melgen, the Eleventh Circuit refused to extend *Escobar*'s materiality analysis to a criminal fraud case because implied false certification is "quite a different question," and *Escobar* "was geared toward addressing that issue."[98] What is clear, in the case of the hypothetical construction company, is that the outcome of an FCA case brought under a legally false theory of liability likely depends on which circuit the case is filed in.[99]

Part II of this Note analyzes how courts have assessed materiality after the Supreme Court's decision in *Escobar*. Section A discusses the courts that have chosen to extend *Escobar*'s stringent test for materiality to cases brought under the express certification theory of liability.[100] Section B analyzes the cases under which *Escobar* is limited only to those cases brought under the implied certification theory.[101] Finally, Section C discusses the nature of materiality under the FCA before and after *Escobar* with a close look at the Fourth Circuit's decision in *United States v. Triple Canopy* to illustrate the proper purpose and scope of the *Escobar*'s materiality standard.[102]

A. The End of the "Garden-Variety" Breach: Escobar *Applied*

Triple Canopy, Inc., 857 F.3d 174, 177 (4th Cir. 2017), *cert. dismissed*, 138 S. Ct. 370 (2017) (mem.). The court in *Triple Canopy* emphasized that *Escobar* serves to guard against abuse of the implied false certification theory. *See infra* Section II.C.3.

98. *Melgen*, 967 F.3d at 1259. The Court in *Melgen* notes that the Fourth Circuit reached a similar answer on the question of whether *Escobar* should be applied in criminal fraud cases:

> In two cases since *Escobar*, the Fourth Circuit has examined whether the precise statement from *Escobar* that Melgen latches onto actually alters the long-standing objective materiality standard in criminal fraud cases. According to that court? Doubtful. Like the Fourth Circuit, we think it unlikely that "the Court's examination of how materiality applies under 'implied false certification' FCA cases transfers to all cases charging fraud, or even all cases charging health care fraud."

Id. at 1259–60 (first citing United States v. Raza, 876 F.3d 604, 619–20 (4th Cir. 2017); and then citing United States v. Palin, 874 F.3d 418, 423 (4th Cir. 2017)).

99. *See* United States *ex rel.* Wood v. Allergan, Inc., 246 F. Supp. 3d 772, 811 (S.D.N.Y. 2017), *rev'd on other grounds*, 899 F.3d 163 (2d Cir. 2018). *But see* United States *ex rel.* Arnstein v. Teva Pharms. USA, Inc., No. 13 Civ. 3702, 2019 WL 1245656, at *7 (S.D.N.Y Feb. 27, 2019) ("The Supreme Court effectively abolished the need to divide cases into 'express' and 'implied' certifications . . . ."). Both *Allergan* and *Teva Pharmaceuticals* were decided in the Southern District of New York.

100. *See infra* Section II.A.

101. *See infra* Section II.B.

102. *See infra* Section II.C.

Broadly Across the FCA

It is of course no secret that the Supreme Court had policy considerations in mind when it imposed the "demanding" materiality standard in *Escobar*.[103] Even though the Court disagreed with the *Mikes* decision, where the implied certification theory should only apply when the underlying statutes or regulations are express conditions of payment, the heightened materiality inquiry is merely a substitute policy consideration with the goal of cabining liability.[104] If the main takeaway from *Escobar* is the Court's proclamation that the FCA "is not an all-purpose antifraud statute" or "a vehicle for punishing garden-variety breaches of contract or regulatory violations[,]" the line of cases that have extended *Escobar* to express certifications begins to make sense.[105]

1. Express Certification Claims Failing Escobar*'s Test*

Despite the lack of clear guidance from the circuit courts, some district courts have not hesitated to apply the *Escobar* standard to express certifications.[106] Following the Second Circuit's decision in *Bishop*, the district court in *United States v. Strock* decided that all of

103. *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2004 (2016) ("[I]f the Government required contractors to aver their compliance with the entire U.S. Code and Code of Federal Regulations, then under this view, failing to mention noncompliance with any of those requirements would always be material. The False Claims Act does not adopt such an extraordinarily expansive view of liability.").

104. *See* Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001), *overruled by* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016); *Escobar*, 136 S. Ct. at 2002 ("Universal Health nonetheless contends that False Claims Act liability should be limited to undisclosed violations of expressly designated conditions of payment to provide defendants with fair notice and to cabin liability. But policy arguments cannot supersede the clear statutory text." (citing Kloeckner v. Solis, 568 U.S. 41, 55 n.4 (2012))). The Court instead chose to cabin liability through the FCA's materiality requirement. *Id.* ("Moreover, other parts of the False Claims Act allay Universal Health's concerns. '[I]nstead of adopting a circumscribed view of what it means for a claim to be false or fraudulent,' concerns about fair notice and open-ended liability 'can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements.'" (quoting United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1270 (D.C. Cir. 2010))).

105. *Escobar*, 136 S. Ct. at 2003 (quoting Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 672 (2008), *superseded by statute*, Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, 123 Stat. 1617).

106. The circuit courts have mostly been silent as to whether *Escobar* should apply to all FCA claims, including those arising under an express certification theory. *See supra* note 95 and accompanying text.

the government's claims—those based on express certification, implied certification, and fraud in the inducement—had to survive scrutiny under *Escobar*.[107] *Bishop*'s conclusion convinced the court that *Escobar* created a standard of materiality for all FCA claims that was "divorced from any mention that the requirement applies only to specific theories of falsity."[108] Equally persuasive was the Second Circuit's opinion that express certifications "could 'be effectively addressed through strict enforcement of the [FCA]'s materiality and scienter requirements.'"[109] With the *Escobar* materiality standard in mind, the *Strock* court put the government's express certification claims through each of the indicia of materiality laid out in *Escobar*.[110] The court granted the defendant's motion to dismiss after determining that none of the factors in *Escobar* militated in favor of materiality, despite multiple express certifications from the defendant that it was in compliance with applicable laws and regulations.[111] The Second Circuit reversed the district court's decision on appeal but only after deciding that the government had plausibly plead materiality under *Escobar*.[112] As a result of *Strock*, the law in the Second Circuit seems to be that *Escobar*'s materiality inquiry applies to all theories of liability under the FCA.[113]

---

107. United States v. Strock, No. 15-CV-0887, 2018 WL 647471, at *12 (W.D.N.Y. Jan. 31, 2018) ("Based on the foregoing analysis, the Court finds that *Escobar*'s materiality standard applies to all of Plaintiff's claims brought under § 3729(a)(1)(A) regardless of whether those claims were brought under a theory of implied false certification, express false certification, or fraudulent inducement."). Under the theory of fraud in the inducement, the defendant's claims, even if they are factually accurate, are false because they are derived from fraudulent misrepresentations in procurement of the contract with the government. *Id.* at *8.

108. *Id.* at *11 (quoting Bishop v. Wells Fargo & Co., 870 F.3d 104, 106 (2d Cir. 2017) (per curiam)).

109. *Id.* (quoting *Bishop*, 870 F.3d at 107). This language from *Bishop* is quoted from the *Escobar* opinion. *Escobar*, 136 S. Ct. at 2002 (quoting *Sci. Applications*, 626 F.3d at 1270).

110. *Strock*, 2018 WL 647471, at *8–10. In *Strock*, the court focused primarily on the government's decision to make compliance with the underlying regulations a condition of payment, the defendant's knowledge that the government consistently refuses to pay claims in most cases based on the noncompliance with the underlying regulations, and the evidence that the government pays the claim in full despite actual knowledge of the defendant's noncompliance. *Id.* at *8–9.

111. *Id.* at *10. The defendant's alleged certifications included a representation of compliance in the initial contract with the government, a certification in an online database that it qualified under the government program, and an outright false statement made to the VA that it was qualified to participate in the program. *Id.* at *9.

112. United States v. Strock, 982 F.3d 51, 65 (2d Cir. 2020).

113. *Id.*

Not all courts that have chosen to expand *Escobar* to encompass express certifications have undertaken the extensive analysis as the court undertook in *Strock*.[114] In fact, some courts have disposed of the matter in a single sentence.[115] Although short shrift over the issue may seem harmless, failing to distinguish between express and implied certifications can have tangible negative consequences for an FCA case.[116] After agreeing that a relator had sufficiently plead an express certification claim to survive a motion for summary judgement, the court in *United States ex rel. Jackson v. DePaul Health System* determined that the certification, "[w]hether . . . express or implied," had to be put through *Escobar*'s test for materiality.[117] Even though the court agreed with the relator that a reasonable jury could find support for the express certification claim, the court reached the opposite conclusion for the materiality of the same claim after applying the *Escobar* standard.[118] Had the relator brought the claim in a different court, the outcome might have been different.[119]

2. Condition of Payment: Relevant or Irrelevant?

Perhaps the strongest support for *Escobar*'s broad applicability comes from the Supreme Court's holding that "[w]hat matters is not

114. The district court in *Strock* devoted an entire section of its analysis to consider the Second Circuit's opinion in *Bishop* in determining whether to apply the materiality standard to the government's express false certification claims. *Strock*, 2018 WL 647471, at *11.

115. United States *ex rel.* Jackson v. DePaul Health Sys., 454 F. Supp. 3d 481, 500 (E.D. Pa. 2020) ("Whether a false certification is express or implied, it must be 'material to the Government's payment decision' for liability to attach." (quoting United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 94 (3d Cir. 2018))); United States *ex rel.* Lacey v. Visiting Nurse Serv. of N.Y., No. 14-cv-5739, 2017 WL 5515860, at *6 (S.D.N.Y. Sept. 26, 2017) ("For a relator to make out a violation of the FCA under a legally false theory, it must be shown that the misrepresentation about compliance is 'material' to the government's decision to pay." (quoting Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2002 (2016))); United States *ex rel.* Gelbman v. City of New York, No. 14-CV-771, 2018 WL 4761575, at *6 (S.D.N.Y. Sept. 30, 2018) ("For a relator to state an FCA claim under a legally false theory, he must show that the misrepresentation about compliance is 'material' to the Government's decision to pay." (quoting *Escobar*, 136 S. Ct. at 2002–03)), *aff'd*, 790 F. App'x 244 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 1296 (2020) (mem.).

116. *Jackson*, 454 F. Supp. 3d at 502.

117. *Id.* at 500.

118. *Id.* ("Even if [the defendant] had made false certifications regarding compliance with federal or state regulations, [the relator] has not provided sufficient evidence to raise a genuine dispute of material fact that these certifications are material.").

119. *See infra* Section II.B.

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."[120] This part of *Escobar*'s holding was a repudiation of *Mikes*'s and other circuits' "express condition of payment" principle.[121] Instead, the Court considered the government's label of a condition of payment as relevant but not dispositive of materiality and added it to the holistic set of factors, which now constitutes the heightened materiality standard.[122] This proposition taken to its most extreme would seem to suggest that even the most egregious violations of law, even those which the government has made compliance with mandatory to receive payment, could be permissible as long as the alleged noncompliance is not material.[123] Not surprisingly, the district courts that have extended *Escobar* to express certification claims have relied heavily on this passage.[124]

In *United States ex rel. Arnstein v. Teva Pharmaceuticals USA, Inc.*, the relator argued that the defendant's express certifications of compliance with the Anti-Kickback Statute (AKS) were material as a matter of law and therefore did not need to withstand the rigorous materiality requirement under *Escobar*.[125] The relator relied on 2010 amendments to the AKS to the extent that "violation of [the AKS] constitutes a false or fraudulent claim for purposes of [the FCA]."[126] The court agreed with the relator, but only with regard to the claims that arose after the 2010 AKS amendments.[127] The express

120. *Escobar*, 136 S. Ct. at 1996.

121. *Id.* at 2001 ("The second question presented is whether, as Universal Health urges, a defendant should face False Claims Act liability only if it fails to disclose the violation of a contractual, statutory, or regulatory provision that the Government expressly designated a condition of payment. We conclude that the Act does not impose this limit on liability. But we also conclude that not every undisclosed violation of an express condition of payment automatically triggers liability. Whether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry.").

122. *Id.* at 2001, 2003.

123. *Id.* at 1996 ("[E]ven when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability.").

124. United States *ex rel.* Arnstein v. Teva Pharms. USA, Inc., No. 13 Civ. 3702, 2019 WL 1245656, at *32–33 (S.D.N.Y. Feb. 27, 2019).

125. *Id.* at *28.

126. *Id.* (quoting 42 U.S.C. § 1320a-7b(g)).

127. *Id.* ("I agree as to one subset of claims: those that Teva . . . caused to be presented in violation of subsection . . . 3729(a)(1)(A) *and* . . . were submitted after March 23, 2010.").

certification claims that arose before the 2010 AKS amendments, according to the court, had to face scrutiny under *Escobar*.[128] Even though the pre-2010 claims had to make an express certification of compliance with the AKS to be eligible for payment from the Medicare program, the court ultimately concluded that this evidence was "weak proof of materiality" under *Escobar*'s determination that express conditions of payment are "relevant [to] but not dispositive of the materiality inquiry."[129]

Luckily for the relator in *Teva Pharmaceuticals*, the court ultimately found its pre-2010 express certifications sufficiently material to survive a motion for summary judgement based on other *Escobar* indicia of materiality.[130] Other relators have not been as fortunate.[131] The relator in *United States ex rel. Mei Ling v. City of Los Angeles* argued that the City's express certifications of compliance with housing accessibility laws, which were conditions of eligibility for housing grants from the Department of Housing and Urban Development (HUD), were material because "Congress itself identified the violated requirements as conditions of payment."[132] Citing *Escobar*, the court disagreed and found the fact that Congress made the requirement a condition of payment "not dispositive of the materiality inquiry."[133]

---

128. *Id.*

129. *Id.* at *33 ("Although this evidence would have been persuasive when *Mikes* controlled, it is weak proof of materiality after *Escobar* . . . ."). The defendant, in order to receive Medicare reimbursement, had to expressly certify on CMS Form 855S that it "understand[s] that payment of a claim by Medicare is conditioned upon the claim and the underlying transaction complying with such laws, regulations and program instructions (including, but not limited to, the Federal Anti-Kickback Statute[.])." *Id.* at *32 (second alteration in original). Additionally, the defendant had to expressly certify to CMS compliance with "[f]ederal laws and regulations designed to prevent fraud, waste, and abuse, including but not limited to applicable provisions of Federal criminal law, the False Claims Act . . . and the anti-kickback statute . . . ." *Id.* (alteration in original) (citations omitted).

130. *Arnstein*, 2019 WL 1245656, at *33.

131. United States *ex rel.* Mei Ling v. City of L.A., No. CV 11-974, 2018 WL 3814498, at *22 (C.D. Cal. July 25, 2018); United States *ex rel.* Folliard v. Comstor Corp., No. 11-731, 2018 WL 5777085, at *7–8 (D.D.C. Nov. 2, 2018).

132. *Mei Ling*, 2018 WL 3814498, at *2, *13. The City of Los Angeles expressly certified in multiple grant applications to HUD that it complied with federal housing accessibility laws. *Id.* at *3. The relator brought the FCA case after a HUD "consistently observed accessibility deficiencies throughout the various units, developments, designated accessible routes and common areas." *Id.*

133. *Id.* at *13.

The relator in *United States ex rel. Folliard v. Comstor Corp.* fared no better.[134] In *Folliard*, the defendant was required to expressly certify compliance with the federal Trade Agreement Act (TAA) to contract with the government to supply communication technology.[135] Again, the relator insisted the compliance with the TAA was "inherently material" because "Congress passed the TAA, and Congress controls federal spending."[136] The court disagreed with the argument that compliance was material as a matter of law because *Escobar* does not care what label "the Government attaches to a requirement[.]"[137] The relators in both *Mei Ling* and *Folliard* staked the materiality of their express certification claims on the fact that Congress itself labeled compliance with federal law a condition of payment.[138] When relators and the government lose under this strict interpretation of *Escobar*, the question of materiality is taken away from the will and intent of Congress and given to the courts.[139]

3. United States *ex rel.* Bibby v. Mortgage Investors Corp.*: A Case Study*

United States ex rel. Bibby v. Mortgage Investors Corp. provides an illustrative example of the constitutional issues that can arise when courts decide, as a matter of law, that an express certification of compliance is not material under *Escobar*.[140] In *Bibby*, the relators alleged that the defendant mortgage lender orchestrated a fraudulent scheme that involved charging veteran mortgage borrowers hidden

134. *Folliard*, 2018 WL 5777085, at *8.

135. *Id.* at *1. The TAA required that products supplied to the government under the contract be "[American]-made or designated country end products." *Id.*

136. *Id.* at *7.

137. *Escobar*, 136 S. Ct. at 1996 ("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."); *see also Folliard*, 2018 WL 5777085, at *7 ("[A] condition's source is separate from its materiality. '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.'" (quoting *Escobar*, 136 S. Ct. at 2003)).

138. *Folliard*, 2018 WL 5777085, at *8; *Mei Ling*, 2018 WL 3814498, at *22.

139. *See infra* Section III.B.

140. United States *ex rel.* Bibby v. Mortg. Invs. Corp., No. 12-CV-04020, 2019 U.S. Dist. LEXIS 232351 (N.D. Ga. July 1, 2019), *aff'd in part, rev'd in part*, 987 F.3d 1340 (11th Cir.), *cert. denied*, 209 L. Ed. 2d 757 (2021) (mem.).

closing costs in violation of federal law and Veterans Administration (VA) regulations.[141] The defendant, a private mortgage lender, utilized a VA program that allowed military veterans to refinance their mortgages with loans guaranteed by the government at favorable interest rates.[142] If the veteran eventually defaulted on the mortgage, the government, as the guaranty, had to pay the remaining balance to the mortgage lender.[143]

To participate in the VA program, the mortgage lender had to expressly certify that it was not charging unallowable closing costs to the veteran borrower.[144] In fact, the VA regulations were very clear in stating that the mortgage lender could not participate in the program without its certification of compliance.[145] The relators pointed to the fact that the VA expressly conditioned participation in the program on the defendant's certification, and thus payment through the guaranty was in itself "proof [that] the requirement is material under the FCA."[146]

The court, citing *Escobar*, found that the VA's condition of obtaining the guarantee was relevant to materiality but was only "one piece of the puzzle" under *Escobar*.[147] The court went on to find the

141. *Id.* at *2–3.

142. *Id.*

143. Complaint at 13–14, *Bibby*, No. 12-CV-04020.

144. *Bibby*, 2019 U.S. Dist. LEXIS 232351, at *42–43.

145. *Id.* Mortgage lenders, to be eligible to participate in the VA loan program and sell a government-guaranteed loan to a veteran borrower, had to certify on every form submitted to the government that:

> No charge shall be made against, or paid by, the borrower incident to the making of a guaranteed or insured loan other than those expressly permitted under paragraph (d) or (e) of this section, and no loan shall be guaranteed or insured unless the lender certifies to the Secretary that it has not imposed and will not impose any charges or fees against the borrower in excess of those permissible under paragraph (d) or (e) of this section.

38 C.F.R. § 36.4313(a) (2020).

146. *Bibby*, 2019 U.S. Dist. LEXIS 232351, at *43 ("The fact that federal regulations make a truthful certification of compliance a condition precedent to the guaranty, and establish that fraud and misrepresentation are grounds for a complete defense to making payment on the guaranty, proves MIC's fraudulent certifications of compliance are material under the FCA.").

147. *Id.* at *46–47. Instead, the court relied on *Escobar*'s holding that the government's label of a statutory, regulatory, or contractual requirement as an express condition of payment was not dispositive of materiality:

> However, Relators fare no better in their attempt to characterize this regulatory

other factors outlined in *Escobar* as more persuasive of the materiality inquiry.[148] Specifically, the court treated the VA's knowledge of the impermissible closing costs and acquiescence to the lender's conduct as strong evidence of immateriality.[149] The court went on to grant the defendant's motion for summary judgement because the mortgage lender's express certifications to the government were not material to the government's decision to guarantee the loan.[150] The court reached this conclusion despite that the VA expressly conditioned participation in the loan guaranty program on the mortgage lender's certification with specific VA regulations.[151] As discussed later in this Note, courts that allow defendants to leverage *Escobar* against the express will of Congress raise important questions about separation of powers.[152]

B. The Formal Approach: Escobar *Limited to the Implied Certification Context*

A literal reading of *Escobar* suggests that the heightened materiality analysis is limited to the implied certification context.[153] The text of the opinion reveals that the "case requires [the Court] to consider [the implied certification] theory of liability and to clarify some of the

> section as dispositive on the materiality issue. Contrary to Relators' suggestion, the mere fact that this regulatory section qualifies as a condition of obtaining a loan guarantee does not lead to the inexorable conclusion that such a requirement is material on that basis alone. To the contrary, the Supreme Court in *Universal Health* made clear that "[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." Rather, "the Government's decision to expressly identify a provision as a condition of payment is relevant but not automatically dispositive."

Id. (citations omitted).

148. *Id.* at *80.

149. *Id.* at *52 ("The VA's apparent acquiescence—evidenced by its sole use of refunds to the exclusion of other administrative sanctions, mandating indemnification, voiding the loan guarantee or reducing the claim amount—to the widespread practice of lenders charging unallowable fees does not bode well for Relators.").

150. *Id.* at *86–87.

151. *Id.* at *42–43.

152. *See infra* Section III.B.

153. United States *ex rel.* Wood v. Allergan, Inc., 246 F. Supp. 3d 772, 811 (S.D.N.Y. 2017) ("[T]he Supreme Court *did not address* the theory of express certification." (emphasis added)), *rev'd on other grounds*, 899 F.3d 163 (2d Cir. 2018).

circumstances in which the False Claims Act imposes liability."[154] Further, the Court's two holdings might also suggest a narrow focus of inquiry.[155] First, when the Court legitimized the validity of implied certification, it necessarily established the subject matter of the decision.[156] The Court's second holding—that "failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment"—is more instructive.[157] Courts have long articulated the concept of implied certification as the "active concealment" of important information.[158] The Court's specific reference to liability for "failing to disclose" suggests that the focus of *Escobar*'s materiality analysis should be limited to implied certification cases.[159]

Not long after *Escobar* was decided, the district court in *United States ex rel. Wood v. Allergan, Inc.* had the opportunity to apply the Supreme Court's newly minted test.[160] There, the relator alleged that the defendant pharmaceutical company expressly certified compliance with the AKS on various Medicare and Medicaid claim forms as well

154. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1995 (2016).

155. *Id.* at 1995.

156. *Id.* ("We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability.").

157. *Id.* at 1996. This part of the Court's holding is a response to the circuits who held that the implied certification theory is only valid where the government designates the underlying contractual, statutory, or regulatory requirements as an "express condition of payment." *See* Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001) (holding that "implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid."), *overruled by* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016). The Supreme Court in *Escobar* disagreed with this limitation of the implied certification theory and instead imposed the "demanding" materiality requirement in an attempt to cabin liability. *See Escobar*, 136 S. Ct. at 2004.

158. Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (1994), *aff'd per curiam*, 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision).

159. The act of failing to disclose noncompliance with statutory, regulatory, and contractual requirements has long been the language that describes liability under the implied certification theory. *See* United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1267–68 (D.C. Cir. 2010) (holding that liability under an implied false certification theory depends on if the defendant "*fails to disclose* the violation of a contractual condition that is material to the government's decision to pay" (emphasis added)); United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 305 (3d Cir. 2011) (Liability for implied false certification attaches when "a claimant seeks and makes a claim for payment from the Government *without disclosing* that it violated regulations that affected its eligibility for payment." (emphasis added)).

160. United States *ex rel.* Wood v. Allergan, Inc., 246 F. Supp. 3d 772, 811 (S.D.N.Y. 2017), *rev'd on other grounds*, 899 F.3d 163 (2d Cir. 2018).

as impliedly certified compliance with all "applicable Federal [and] State laws" in other certifications to the government.[161] The court prefaced its analysis of the relator's false certification claims with the "relevant takeaways" from *Escobar* that "the Supreme Court did not address the theory of express certification" and that "there is no reason to believe *Escobar* modified or eliminated existing law [] pertaining to that theory of falsity."[162] From that vantage, the court separated the express and implied certification claims into two distinct inquiries and decided that the relator could proceed on both after it was clear that the relator's implied certification claims survived *Escobar* scrutiny.[163]

1. *Express and Implied Certifications Treated as Separate and Distinct Inquiries*

The courts that have adopted the formal interpretation of *Escobar* have similarly assessed the validity of implied and express false certification claims as separate and distinct inquiries.[164] In *United States v. Crumb*, the court denied the defendant's motion to dismiss after deciding that the government had plausibly pled falsity under both an express and implied certification theory, with only the implied certification claim receiving the *Escobar* materiality analysis.[165] Similarly, in *United States ex rel. Lee v. Northern Adult Daily Health Care Center*, the court dismissed the relators' express certification theory but granted leave to amend claims based on implied certification because "[w]hen the Amended Complaint was drafted, Relators did not have the benefit of [*Escobar*'s] recent guidance on

161. *Id.* at 813.

162. *Id.* at 811.

163. *Id.* at 813–18. In *Wood*, the court altogether separates the analyses to the relator's express and implied certification claims. *Id.* But the court limited the *Escobar* materiality standard to the implied certification analysis. *Id.* at 815–18.

164. *See* United States *ex rel.* Lee v. N. Adult Daily Health Care Ctr., 205 F. Supp. 3d 276, 293–96 (E.D.N.Y. 2016); United States v. Crumb, No. 15-0655, 2016 WL 4480690, at *23–24 (S.D. Ala. Aug. 24, 2016); United States *ex rel.* Dresser v. Qualium Corp., No. 12-cv-01745, 2016 WL 3880763, at *5–6 (N.D. Cal. July 18, 2016); United States v. Walgreen Co., 417 F. Supp. 3d 1068, 1085–87 (N.D. Ill. 2019).

165. *Crumb*, 2016 WL 4480690, at *23 (The defendant challenged the government's complaint "insofar as the Government is proceeding on a theory of implied certifications, rather than express certifications.").

materiality."[166] The court limited the relators' amended complaint only to the implied certification claims.[167]

Some courts have been willing to differentiate the two theories of legal falsity even when the plaintiff fails to specifically plead under either theory.[168] For example, in *United States v. Walgreen Co.*, the court relied on a prior decision that interpreted implied certification to conclude that the government's claim could proceed under the theory, reasoning that the government did not allege any "facially untruthful statements" and that the defendant "omitted" that it was in violation of relevant Illinois law.[169] The court ultimately concluded that the government's implied certification claim failed under *Escobar*, but its willingness to delineate between the two theories of legal falsity remains illustrative of the formalistic theory of *Escobar*'s materiality standard.[170]

2. Escobar *Limited to Presentment Claims Under Section 3729(a)(1)(A)*

Other courts, although still identifying the analytical differences between express and implied certifications, go a step further and limit *Escobar*'s materiality analysis only to implied certifications under a certain subsection of fraud arising under the FCA.[171] In *United States ex rel. Patel v. GE Healthcare*, the court dismissed the relator's implied certification claim with leave to amend but disagreed with the defendant that the amended claim had to satisfy *Escobar* scrutiny.[172] The court held that because the relator's claim was a "false statement[] or record[]" claim brought under § 3729(a)(1)(B), and not a

166. *Lee*, 205 F. Supp. 3d at 296.

167. *Id.* The court in *Qualium Corp.* reached a nearly identical conclusion regarding the relator's implied certification claims. *Qualium Corp.*, 2016 WL 3880763, at *6. The court granted the relator leave to amend its implied certification claims in the wake of *Escobar*. *Id.*

168. *Walgreen Co.*, 417 F. Supp. 3d at 1085 ("As an initial matter, the Government does not clarify whether it brings its FCA claim under an express or implied false certification theory.").

169. *Id.* at 1086 (citing United States *ex rel.* Lisitza v. Par Pharm. Cos., 276 F. Supp. 3d 779, 794 (N.D. Ill. 2017)).

170. *Id.* at 1090.

171. *See* United States *ex rel.* Patel v. GE Healthcare, Inc., No. 14-120-T-33, 2017 WL 4310263, at *9 (M.D. Fla. Sept. 28, 2017).

172. *Id.*

"presentment" claim under § 3729(a)(1)(A), it was not required to pass muster under the heightened materiality standard.[173] The court reasoned that *Escobar* only applied to implied certifications brought under presentment claims under § 3729(a)(1)(A).[174] The justification for the court's holding is that false record claims under § 3729(a)(1)(B) have an express materiality requirement in the statutory language, unlike presentment claims where the statute is silent on materiality.[175] The court recognized that although implied certification is a "judicially-imposed doctrine" designed "to ensure that only significant omissions trigger the FCA's considerable penalties," the Supreme Court's *Escobar* analysis is limited to presentment claims because materiality has to be imposed by the judge into the statutory language.[176]

---

173. *Id.*

174. *See* 31 U.S.C. § 3729(a)(1)(A)-(G). The FCA identifies seven different types of fraud that give rise to liability. *Id.* Presentment claims under § 3729(a)(1)(A) and false statement or record claims under § 3729(a)(1)(B) "overlap significantly," but they remain separate causes of action. *See* United States *ex rel.* Hussain v. CDM Smith, Inc., No. 14-CV-9107, 2017 WL 4326523, at *8 (S.D.N.Y. Sept. 27, 2017) ("Courts generally treat these two provisions together, as their elements overlap significantly." (first citing United States *ex rel.* Wood v. Allergan, Inc., 246 F. Supp. 3d 772, 810 (S.D.N.Y. 2017), *rev'd on other grounds*, 899 F.3d 163 (2d Cir. 2018); and then citing United States *ex rel.* Kester v. Novartis Pharms. Corp., 23 F. Supp. 3d 242, 252–53 (S.D.N.Y. 2014)). *But see* United States *ex rel.* Fallon v. Accudyne Corp., 921 F. Supp. 611, 627 (W.D. Wis. 1995) ("These two provisions are fundamentally different to the extent which an express false statement must be made to the government."). In *GE Healthcare*, the court takes a highly formal approach to conclude that because the implied certification in *Escobar* was brought as a presentment claim, the heightened materiality analysis only applies to implied certifications under those claims. *GE Healthcare*, 2017 WL 4310263, at *9.

175. *Compare* 31 U.S.C. § 3729(a)(1)(A) ("knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval"), *with id.* § 3729(a)(1)(B) ("knowingly makes, uses, or causes to be made or used, a false record or statement *material* to a false or fraudulent claim" (emphasis added)). Materiality in § 3729(a)(1)(B) is defined in § 3729(b)(4). *Id.* § 3729(b)(4) ("[T]he term 'material' means having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property.").

176. *GE Healthcare*, 2017 WL 4310263, at *9; *see also* United States *ex rel.* Stepe v. RS Compounding LLC, No. 13-cv-3150-T-33, 2017 WL 5178183, at *8 (M.D. Fla. Dec. 4, 2017). In *RS Compounding*, the court dismissed the relator's false record or statement claim under § 3729(a)(1)(B), again disagreeing that *Escobar*'s analysis extends further than presentment claims under § 3729(a)(1)(A). *Id.* Instead,

> *Escobar* deals with the judicially-imposed materiality requirement for § 3729(a)(1)(A) implied-false certification claims. . . . In contrast, the materiality requirement for §§ 3729(a)(1)(B) and (G) claims is created by the statute's language, and thus the definition of "material" used is that found in the statute. The parties have not presented case law indicating that *Escobar*'s rigorous materiality standard applies to these claims.

Id. (citation omitted).

Although *GE Healthcare*'s highly formal approach to interpreting *Escobar* may represent a granular look at the details, its attention to the statutory language of the FCA might suggest an appropriate purpose and function for *Escobar*.[177] Specifically, whether the heightened materiality requirement applies to all FCA claims, as some courts hold, or whether the actual text of the FCA suggests that only a narrow set of claims needs to satisfy the "demanding" materiality standard.[178]

C. The FCA's Materiality Standard Before and After Escobar

The FCA defines material as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[179] This standard has long been recognized as more lenient for relators and the government because it looks to the potential effect the defendant's claim has on the government's decision to pay instead of the claim's actual effect.[180] Despite the unambiguous materiality standard defined in the FCA, the Court in Escobar explicitly avoided the question of whether the statutory standard applied to the relator's implied certification claim.[181] The Court instead acknowledged the roots of materiality through the common law and relied on a definition of materiality that "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation."[182] Then Justice Thomas, without citation or

177. *See infra* Section II.C.3.

178. *Compare* United States *ex rel.* Arnstein v. Teva Pharms. USA, Inc., No. 13 Civ. 3702, 2019 WL 1245656, at *7 (S.D.N.Y. Feb. 27, 2019) ("The Supreme Court effectively abolished the need to divide cases into 'express' or 'implied' certification claims."), *with RS Compounding*, 2017 WL 5178183, at *8 ("*Escobar* deals with the judicially-imposed materiality requirement for § 3729(a)(1)(A) implied-false certification claims.").

179. 31 U.S.C. § 3729(b)(4).

180. HELMER, *supra* note 40; *see also* United States *ex rel.* Longhi v. Lithium Power Techs., Inc., 575 F.3d 458, 470 (5th Cir. 2009) ("All that is required under the test for materiality, therefore, is that the false or fraudulent statements have the potential to influence the government's decisions.").

181. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2002 (2016) ("We need not decide whether § 3729(a)(1)(A)'s materiality requirement is governed by § 3729(b)(4) or derived directly from the common law.").

182. *Id.* (emphasis added). The Court recognizes that a "matter is material" in the common law of torts if "a reasonable man would attach importance to [it] in determining his choice of action in the transaction." *Id.* at 2002–03. Additionally, the Court acknowledges the common law of contracts definition of material as something that would "induce a reasonable person to manifest his assent." *Id.* at 2003.

analysis, characterized the materiality standard in the FCA as "demanding."[183]

The courts that have applied the *Escobar* standard to all FCA claims, including those premised by an express false certification, have relied on the Court's test that explains how the demanding materiality standard should be enforced. Defendants have successfully emphasized the government's payment of the claim despite knowledge of the alleged statutory violation as well as the government's decision to label compliance as a condition of payment as relevant but not dispositive of materiality.[184] These considerations follow the Court's insistence that materiality looks to the effect of the government's behavior—likely or actual.[185] Yet they also seem to be in conflict with the "natural tendency" standard from the text of the FCA, which only requires that the defendant's actions "be *capable* of influencing" the government's decision.[186] The Court seemingly avoids this discrepancy by stating that the "effect on the likely or actual behavior" and the more lenient statutory standard are one and the same.[187] But questions remain as to whether *Escobar* created a standard for materiality that is different from the FCA's statutory definition.[188]

---

183. *Id.* at 2003.

184. *See* United States *ex rel.* Hartpence v. Kinetic Concepts, Inc., No. 08-cv-01885, 2019 WL 3291582, at *13 (C.D. Cal. June 14, 2019) (Relator's claim was not material because the defendant "presented evidence of payment in full by the government on [claims] despite the government's knowledge of [defendant's] noncompliance . . . ."); United States *ex rel.* Folliard v. Comstor Corp., No. 11-731, 2018 WL 5777085, at *7 (D.D.C. Nov. 2, 2018) (Relator's insistence that Congress expressly conditioned payment with compliance with relevant statutes was not material because "a condition's source is separate from its materiality.").

185. *Escobar*, 136 S. Ct. at 2002.

186. 31 U.S.C. § 3729(b)(4) (emphasis added).

187. *Escobar*, 136 S. Ct. at 2002 ("We need not decide whether § 3729(a)(1)(A)'s materiality requirement is governed by § 3729(b)(4) or derived directly from the common law. Under any understanding of the concept, materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'").

188. *See* Deborah R. Farringer, *From Guns that Do Not Shoot to Foreign Staplers: Has the Supreme Court's Materiality Standard Under* Escobar *Provided Clarity for the Health Care Industry About Fraud Under the False Claims Act?*, 83 BROOK. L. REV. 1227, 1255 (2018). Courts interpreting the *Escobar* standard are confronted with two apparent standards of materiality: the statutory definition found in § 3729(b)(4) and the Supreme Court's "demanding" formulation:

> Two observations arise in connection with this particular issue. First, the *Escobar* Court's decision not to address the relationship between the statutory definition of 'material' found in Section 3729(b)(4) and the guidance it set forth regarding how

1. Before Escobar*: Materiality under the Fraud Enforcement and Recovery Act (FERA)*

Long before the Supreme Court's decision in *Escobar*, most courts created an implicit requirement that any actionable false claim had to be material to the government's payment decision.[189] Courts had to fashion the materiality requirement themselves because "material" was not present anywhere in the statutory language.[190] This practice culminated with the Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, where the Court held that a defendant must have the purpose of getting a false claim paid by the government when submitting a false statement or record under § 3729(a)(1)(B).[191] Failing to require an element of intent, according to the Court, would make the reach of the FCA "almost boundless."[192] In addition to requiring intent, the Court also required that the defendant's false record or statement be material to the government's payment

---

> to assess materiality has caused confusion among the lower courts about how to square these two standards. Despite the Court's clear choice not to utilize the statutory definition in *Escobar*, many courts seem compelled by either precedent or statutory interpretation to utilize the definition as part of any analysis. It would seem then, that the DOJ is realizing some success as it relates to its argument that *Escobar* has not really altered the broadly-applied natural tendency standard. It does appear, however, that while courts may be applying the statutory definition, they are simultaneously endorsing the idea that *Escobar* firmly establishes that the materiality standard for FCA cases is intended to be demanding and rigorous.

Id.

189. SYLVIA, *supra* note 18, § 4:57; HELMER, *supra* note 40, at 278.

190. The predecessor provision of 31 U.S.C. § 3729(a)(1)(B) was 31 U.S.C. § 3729(a)(2) and imposed liability on a defendant who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, 1621 (codified as amended at U.S.C. § 3729(a)).

191. Allison Engine Co. v. United States *ex rel*. Sanders, 553 U.S. 662, 665, 668–69 (2008) ("'[T]o get' denotes purpose, and thus a person must have the purpose of getting a false or fraudulent claim 'paid or approved by the Government' in order to be liable under § 3729(a)(2)."), *superseded by statute*, Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, 123 Stat. 1617.

192. The Court in *Allison Engine* was particularly concerned with the potential for the FCA to reach into fields not traditionally considered part of the federal government:

> Eliminating this element of intent, as the Court of Appeals did, would expand the FCA well beyond its intended role of combating "fraud against the *Government*." As the District of Columbia Circuit pointed out, the reach of § 3729(a)(2) would then be "almost boundless: for example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants—as most of them do."

Id. at 669 (citations omitted).

decision.[193] Therefore, although the Court's decision in *Allison Engine* concerned the implied element of intent, in so holding, the Court parroted the consensus view that the FCA had an implicit requirement of materiality.[194]

The members of Congress did not share the Court's concern of "boundless" liability. Less than a year after the Court's *Allison Engine* decision, Congress enacted the Fraud Enforcement and Recovery Act (FERA) to clarify aspects of the FCA that it thought had been undermined by the courts.[195] Congress did not mince words, believing that "[t]he effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law and, in some cases, allow subcontractors paid with Government money to escape responsibility for proven frauds."[196]

In response to *Allison Engine*, through FERA, Congress amended the language of the FCA to remove any doubt that the defendant need not intend to defraud the government.[197] Additionally, to allay concerns of runaway liability, the FERA amendments added an express materiality requirement to two amended provisions of the Act: false statement or record claims under § 3729(a)(1)(B) and "obligation" claims under § 3729(a)(1)(G).[198] It is important to note that FERA did not add an express materiality requirement to any other subsection of fraud under the FCA, including the more common

193. *Id.* at 665 ("Instead, a plaintiff asserting a [false statement or record] claim must prove that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim."); *see also* HELMER, *supra* note 40, at 279 (the Court "seemingly impl[ied] a materiality requirement from the phrases 'to get' in Section 3729(a)(2) and 'getting' in Section 3729(a)(3)").

194. HELMER, *supra* note 40, at 278–79. The author points out that the Court in *Allison Engine*, rather than explaining why the imposition of materiality is appropriate, "simply did so." *Id.* at 279.

195. *Id. See generally* S. REP. NO. 111-10, at 10 (2009).

196. S. REP. NO. 111-10, at 4.

197. *Id.* at 12. The words "to get" were removed from the previous provision of 31 U.S.C. § 3729(a)(2):

> To correct the *Allison Engine* decision, S. 386 contains three specific changes to existing section 3729(a)(2) and (a)(3). In section 3729(a)(2) the words ''to get'' were removed striking the language the Supreme Court found created an intent requirement for false claims liability under that section. In place of this language, the Committee inserted the words ''material to'' a false or fraudulent claim.

Id.

198. *Id.*; *see also* Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, § 4(a)(2), 123 Stat. 1617, 1622–23 (codified as amended at 31 U.S.C. § 3729(b)).

"presentment" claim under § 3729(a)(1)(A), which was the subject of *Escobar*.[199]

Additionally, FERA added several definitions of important terms, including the "natural tendency" definition of materiality.[200] In doing so, FERA settled a dispute in the circuit courts as to the proper FCA standard of materiality.[201] Although most circuits had adopted the natural tendency standard which looked to the potential effect of the defendant's conduct, other circuits utilized a more stringent "outcome materiality" test where the relator must prove that the government was actually influenced by the defendant's fraudulent conduct.[202] The functional consequence of the outcome materiality standard is that the defendant's alleged fraud becomes subjective and, therefore, much harder to prove.[203] By adopting the natural tendency standard in the statutory text, FERA rejected outcome materiality in favor of a more lenient, objective standard.[204] In the FCA landscape leading up to *Escobar*, courts interpreted FERA as imposing the natural tendency test as the standard theory of materiality.[205]

---

199. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1997–98 (2016). The relators in *Escobar* filed a presentment claim under § 3729(a)(1)(A):

> In 2011, respondents filed a *qui tam* suit in federal court . . . alleging that Universal Health had violated the False Claims Act under an implied false certification theory of liability. The operative complaint asserts that Universal Health . . . submitted reimbursement claims that made representations about the specific services provided by specific types of professionals, but that failed to disclose serious violations of regulations pertaining to staff qualifications and licensing requirements for these services.

Id.

200. S. REP. NO. 111-10; § 4(a)(2), 123 Stat. at 1622–23.

201. Joan H. Krause, *Holes in the* Triple Canopy*: What the Fourth Circuit Got Wrong*, 68 S.C. L. REV. 845, 851 (2017).

202. *Id.*; *see also* HELMER, *supra* note 40, at 103–04; United States *ex rel.* Longhi v. Lithium Power Techs., Inc., 575 F.3d 458, 468–69 (5th Cir. 2009) ("Some courts have defined the standard to require 'outcome materiality'—'a falsehood or misrepresentation must affect the government's ultimate decision whether to remit funds to the claimant in order to be "material."'" (quoting United States v. Southland Mgmt. Corp., 288 F.3d 665, 676 (5th Cir. 2002))).

203. Krause, *supra* note 201 ("The distinction essentially rested on whether a misrepresentation had to have the actual *ability* to affect the government's payment decision or merely the *potential* to do so.").

204. *Id.*

205. *See Longhi*, 575 F.3d at 470 ("If Congress intended materiality to be defined under the more narrow outcome materiality standard, it had ample opportunity to adopt the outcome materiality standard in FERA.").

*2. The Materiality Standard Post-*Escobar

A strict reading of the FCA may suggest that materiality is not required at all for the majority of actionable false claims defined in the statute.[206] The amendments added by FERA imposed the materiality requirement to only two provisions, which, by fair inference, may exclude the requirement to the remaining five provisions.[207] Whether this is a fair reading of the FCA or not, Justice Thomas clearly did not undertake his normal textual approach in *Escobar* when he imposed materiality into the relator's presentment claim. Materiality appears nowhere in the presentment provision of § 3729(a)(1)(A), but the Court nevertheless held that the requirement is implicit.[208]

In another departure from a textual reading of the FCA, Justice Thomas characterized the materiality requirement as "demanding."[209] The only context or analysis provided by the Court for the demanding standard is a reference to *Allison Engine*'s pronouncement that the FCA is not an "all-purpose antifraud statute."[210] Nowhere does the FCA's text suggest that materiality is demanding or rigorous, and the Court's characterization of the standard is even harder to square with the actual statutory definition.[211] After all, "tendency" is described by an "inclination" or a "disposition," and "capable" is defined as "able to take in, receive, contain, or hold."[212] The Court's wordplay is hard to reconcile, but it makes sense regarding the Court's policy considerations for government contractors. Just like in *Allison Engine*,

206. Krause, *supra* note 201 ("However, implied certification cases arise instead under the basic false claims prohibition in § 3729(a)(1)(A), which Congress did *not* amend. As a purely textual matter, then, it would appear that the statute does not require materiality for a basic false claim, regardless of whether that falsity is 'legal' or 'factual' in nature.").

207. *See id.*; *see also* HELMER, *supra* note 40, at 280.

208. 31 U.S.C. § 3729(a)(1)(A); *see also* HELMER, *supra* note 40, at 283–84.

209. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2003 (2016).

210. 31 U.S.C. § 3729(b)(4). Interestingly, *Allison Engine* represents another textualist departure where Justice Alito imposed an intent requirement that appeared nowhere in the text of the FCA. Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 669 (2008), *superseded by statute*, Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, 123 Stat. 1617. Justice Alito interpreted the words "to get" in the pre-FERA provision of the Act as somehow requiring an intent element. *Id.* at 668–69 ("'[T]o get' denotes purpose, and thus a person must have the purpose of getting a false or fraudulent claim 'paid or approved by the Government' in order to be liable under § 3729(a)(2).").

211. 31 U.S.C. § 3729(b)(4).

212. *Tendency*, OXFORD ENGLISH DICTIONARY (2d ed. 1989); *Capable*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

the Court in *Escobar* reassured itself and contractors that recognizing implied certification will not create "boundless" liability because the reach of the FCA can be curtailed "through strict enforcement of the Act's materiality and scienter requirements."[213]

The factors set out in *Escobar* that constitute the heightened materiality standard are not exhaustive and no one factor is dispositive of the materiality inquiry.[214] Yet courts applying the standard uniformly agree that the Supreme Court's test is demanding and rigorous.[215] What courts and scholars have disagreed on is the scope of the FCA's materiality standard as a whole in the wake of *Escobar*.[216] Specifically, some scholars note the Court's departure from the "natural tendency" test as a sign that *Escobar* created a new standard for materiality.[217] Relators and the government are quick to point out that *Escobar* did nothing to change the existing materiality standard, and the demanding characterization from the Court is just a way of illustrating the natural tendency test.[218] With billions of dollars in penalties at stake, the appropriate scope of the FCA's materiality standard cannot be understated.

*3. Post-*Escobar *Materiality and* United States *ex rel.* Badr v.

213. *Allison Engine*, 553 U.S. at 669; *Escobar*, 136 S. Ct. at 2002 (quoting United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1270 (D.C. Cir. 2010)).

214. *Escobar*, 136 S. Ct. at 2003–04; HELMER, *supra* note 40, at 283.

215. Farringer, *supra* note 188. The author notes that some of the courts that apply the "natural tendency" statutory definition of materiality simultaneously agree that the standard is "demanding and rigorous" after *Escobar*. *Id.*

216. HELMER, *supra* note 40, at 284 ("[T]he Court's pronouncements on 'materiality' have clouded the test for deciding whether a statutory, regulatory, or contractual requirement is material."); SYLVIA, *supra* note 18, § 4:58 (*Escobar* "affirmed the existing standards of materiality upon which the 2009 amendments drew. The Court described the standard as 'demanding,' but did not adopt a different standard." (footnote omitted)); Krause, *supra* note 201, at 856 ("[T]he Court instead adopted a standard that strongly resembled the more stringent 'outcome materiality' approach.").

217. Krause, *supra* note 201, at 856. Professor Krause argues that the Court's decision in *Escobar* requires that the plaintiff show more than the mere potential for harm. *Id.* at 857; *see also* Krause, *supra* note 14 ("Yet the Court utterly failed to consider the effect of grafting a potentially distinct '*Escobar* materiality' standard on to the FERA definition in the statute. By stating that the common law and FERA materiality standards were equivalent—and then applying an interpretation not seen outside the few circuits adopting the pre-FERA 'outcome' materiality approach—the Court created an intriguing dilemma.").

218. *See* Farringer, *supra* note 188, at 1253.

Triple Canopy, Inc.

The Fourth Circuit's decision in *United States ex rel. Badr v. Triple Canopy, Inc.* provides a clue for how the standard of materiality should be applied in the wake of *Escobar*.[219] The Fourth Circuit decided *Triple Canopy I* before the Supreme Court granted certiorari to *Escobar* and was one of the several cases remanded for further proceedings after *Escobar* was decided.[220] The relator in *Triple Canopy I* alleged two counts of fraud under the FCA: (1) a presentment claim under § 3729(a)(1)(A) and (2) a false statement or record claim under § 3729(a)(1)(B).[221] The relator's presentment claim was based on an implied certification theory that alleged the defendant defense contractor submitted claims for payment while using security guards who did not satisfy the marksmanship requirements in the contract with the United States military.[222] The false records claim was based on the falsified scorecards that were presented along with the invoices to the United States.[223] The district court dismissed both of the FCA claims, and the relator appealed.[224]

The Fourth Circuit reversed the district court's decision in part because it found that the defendant's claims presented to the government were material to the government's payment decision.[225] The court found that both the implied certification presentment claim and the false record claim easily met the natural tendency standard of the FCA because "[m]ateriality focuses on the 'potential effect of the

219. United States *ex rel.* Badr v. Triple Canopy, Inc. (*Triple Canopy II*), 857 F.3d 174 (4th Cir. 2017), *cert. dismissed*, 138 S. Ct. 370 (2017) (mem.).

220. United States *ex rel.* Badr v. Triple Canopy, Inc. (*Triple Canopy I*), 775 F.3d 628 (4th Cir. 2015), *vacated*, 136 S. Ct. 2504 (2016) (mem.), *aff'd on other grounds*, 857 F.3d 174 (4th Cir. 2017), *cert. dismissed*, 138 S. Ct. 370 (2017) (mem.). *Triple Canopy* was one of many cases that the Supreme Court could have decided to hear to determine the fate of implied certification. Krause, *supra* note 201, at 846 ("A strong argument could be made that *Triple Canopy* was the most important of these cases, raising the specter of the federal government relying on security guards who lacked the basic skills needed to use their weapons. Yet the Fourth Circuit's rather dry analysis of 'Theater-Wide Internal Security Services Task Orders' lacked the emotional heft of *United States* ex rel. *Escobar v. Universal Health Services, Inc.*, a First Circuit case brought by the parents of a young woman, Yarushka Rivera, who died after receiving Medicaid-covered mental health treatment from a Massachusetts clinic.").

221. *Triple Canopy I*, 775 F.3d at 633.

222. *Id.* at 632.

223. *Id.*

224. *Id.* at 633.

225. *Id.* at 639–40.

false statement when it is made, *not on the actual effect of the false statement when it is discovered.*'"[226] Importantly, the court in *Triple Canopy I* suggests that the natural tendency standard applied to the relator's implied certification claim even though there is no express materiality requirement in § 3729(a)(1)(A).[227]

The outcome of *Triple Canopy I* was subject to the Fourth Circuit's application of *Escobar* on remand from the Supreme Court.[228] But, after having the original decision vacated, the Fourth Circuit in *Triple Canopy II* reached the same conclusion—albeit through a different route.[229] The court applied *Escobar*'s "demanding" standard to the relator's implied certification claim to conclude that the relator sufficiently plead materiality and held that its decision in *Triple Canopy I* would not be altered.[230] More important, however, was the fact that the court's *Escobar* analysis was dedicated solely to the relator's implied certification claim under § 3729(a)(1)(A).[231] The court held that *Escobar* had no impact on the relator's false record claim under § 3729(a)(1)(B) and decided that it did not need to alter its analysis from *Triple Canopy I*.[232]

A close reading of *Triple Canopy II* indicates that *Escobar* did not create an altogether different standard of materiality but rather a separate and more rigorous standard for implied certification claims arising under § 3729(a)(1)(A).[233] The Fourth Circuit chose not to alter the materiality analysis of the relator's false records claim because the statutory language already requires the natural tendency standard, and

226. *Id.* at 639 (first quoting United States *ex rel.* Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 916–17 (4th Cir. 2003); and then citing United States *ex rel.* Feldman v. van Gorp, 697 F.3d 78, 96 (2d Cir. 2012)).

227. *See* Krause, *supra* note 201, at 853–54 ("[T]he judges clearly applied the FERA definition of materiality to the implied certification allegations, indicating that they believed the FERA 'natural tendency' test governed both FCA sections at issue.").

228. *Triple Canopy II*, 857 F.3d 174, 175 (4th Cir.), *cert. dismissed*, 138 S. Ct. 370 (2017) (mem.).

229. *Id.*

230. *Id.* at 178.

231. *Id.* at 177 ("Our task is straightforward: we must determine whether [*Escobar*] alters our earlier conclusion that the Government stated a claim under § 3729(a)(1)(A).").

232. *Id.* at 179 ("We also reinstate those portions of our opinion that were *not impacted* by *Universal Health* . . . ." (emphasis added)).

233. *Id.* at 177 n.2 ("Nothing in *Universal Health* affects our conclusion that the Government properly pled a false records claim under § 3729(a)(1)(B) or that Badr failed to state a claim regarding his allegations that Triple Canopy operated a similar scheme at several others bases in Iraq.").

the court already concluded that the relator sufficiently plead the standard in *Triple Canopy I*.[234] Conversely, the relator's presentment claim had no express materiality requirement, and therefore, *Escobar* directed the court to reconsider the claim in light of the demanding standard imposed by the Supreme Court for implied certification claims.[235] Other district courts have found the Fourth Circuit's treatment of *Escobar* and implied certifications instructive.[236] Although *Triple Canopy II* does not implicate an express certification claim, the decision provides strong evidence that *Escobar* is limited to implied certifications.

III. PROPOSAL

The consequence of courts applying *Escobar*'s heightened standard of materiality to cases brought under express false certifications is that meritorious FCA claims are defeated at the motion to dismiss or summary judgement stages where they would otherwise be successful.[237] Although the Supreme Court does not articulate whether express certifications are safe from scrutiny under *Escobar*, Part III of this Note contends that the context of the Court's decision, a close reading of the 2009 FERA amendments, and fundamental constitutional principles require that *Escobar*'s materiality standard be limited to implied false certifications. Section A discusses the nature of the FCA's "natural tendency" materiality standard as codified by

234. 31 U.S.C. § 3729(a)(1)(B) ("knowingly makes, uses, or causes to be made or used, a false record or statement *material* to a false or fraudulent claim" (emphasis added)). Materiality in § 3729(a)(1)(B) is defined in § 3729(b)(4). 31 U.S.C. § 3729(b)(4) ("[T]he term 'material' means having a natural tendency to influence, or be[ing] capable of influencing, the payment or receipt of money or property.").

235. *Triple Canopy II*, 857 F.3d at 177 ("*Universal Health* made two rulings relevant here. First, the Court held (as we did in our earlier panel decision) that the implied certification theory of liability is valid in certain circumstances. Second, the Court counseled that *concerns about abuse of the theory* should be addressed by employing a rigorous materiality requirement." (emphasis added)).

236. *See* United States *ex rel.* Stepe v. RS Compounding LLC, No. 13-cv-3150-T-33, 2017 WL 5178183, at *8 (M.D. Fla. Nov. 8, 2017) ("*Escobar* deals with the judicially-imposed materiality requirement for § 3729(a)(1)(A) implied-false certification claims. . . . Indeed, the Fourth Circuit has declined to alter its analysis under § 3729(a)(1)(B) following *Escobar*." (citations omitted)); United States *ex rel.* Patel v. GE Healthcare, Inc., No. 14-cv-120-T-33, 2017 WL 4310263, at *9 (M.D. Fla. Sept. 28, 2017).

237. *See generally supra* Section II.A.

the 2009 FERA amendments and concludes that express false certifications satisfy that standard.[238] Section B discusses the constitutional questions that arise when courts decide that express false certifications are not material to the government's payment decision under *Escobar*.[239]

A. Express Certifications Satisfy the Existing FCA Materiality Standard

Triple Canopy II indicates that the heightened *Escobar* materiality standard is reserved for false claims premised by implied certifications to guard against abuse of the theory.[240] The district courts that have found the Fourth Circuit's analysis useful have acknowledged that *Escobar*'s standard is a judicially-imposed doctrine used to ensure that FCA liability attaches only to significant violations of statutory, regulatory, or contractual requirements.[241] *Triple Canopy II* also suggests that *Escobar* did not alter the natural tendency standard for materiality in other FCA claims.[242]

The problem for relators alleging false claims based on express certifications is that the allegations can take the form of § 3729(a)(1)(A) claims which, under *Escobar*, have the judicially-imposed materiality requirement.[243] The practice of requiring all presentment claims, including express certifications, to pass muster under *Escobar* stems from an overly broad reading of the Supreme Court's opinion.[244] It is true that the Court imposed a materiality requirement onto § 3729(a)(1)(A) claims, and it is equally true that Justice Thomas characterized the requirement as

238. *See infra* Section III.A.
239. *See infra* Section III.B.
240. *Triple Canopy II*, 857 F.3d at 177.
241. *GE Healthcare*, 2017 WL 4310263, at *9 ("GE cites no case holding that *Escobar*'s heightened definition of materiality applies to a claim under § 3729(a)(1)(B). Indeed, the Fourth Circuit has declined to alter its analysis under § 3729(a)(1)(B) following *Escobar*." (citing *Triple Canopy II*, 857 F.3d at 179)).
242. *Triple Canopy II*, 857 F.3d at 177 n.2. *Triple Canopy II* left intact its holding from *Triple Canopy I*, which held that the relator's § 3729(a)(1)(B) claim satisfied the FCA's natural tendency standard. *Id.* at 179.
243. HELMER, *supra* note 40, at 282. Express and implied certifications are only theories of falsity and are not limited to any particular provision of the FCA. *See* SYLVIA, *supra* note 18, § 4:34.
244. *See supra* Section II.B.

"demanding" and "rigorous."[245] But it is also important to remember that the Court imposed a requirement that appears nowhere in the text of the FCA.[246] One could infer from a strict textual reading of the FCA that § 3729(a)(1)(A) claims do not have to be material because Congress had the opportunity to add an express materiality requirement in FERA and chose not to do so.[247]

The Court obviously considered materiality to be required for all forms of fraud under the Act because "the common law could not have conceived of 'fraud' without proof of materiality."[248] If the Court decided that the materiality inherent in all types of fraud is characterized by the natural tendency standard defined in the FCA, then perhaps *Escobar* would not have been extended beyond its intended purpose. The real damage done by the court came from characterizing the standard as "demanding."[249] In doing so, the Court imposed a requirement that does not exist anywhere in the statutory text and characterized the standard as far more stringent than the standard actually defined in the FCA.[250] The court's imposition of the demanding standard has defeated cases premised by express certifications where they otherwise could have succeeded under the more lenient understanding of the FCA's materiality requirement.[251]

Reading the FERA amendments and *Escobar* in the proper context would provide a workable solution. Before FERA, Congress clearly believed the courts had been limiting the reach of the FCA out of concern that the law was imposing significant liability on the private

245. HELMER, *supra* note 40, at 282–84; Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2002, 2003 (2016).

246. 31 U.S.C. § 3729(a)(1)(A); HELMER, *supra* note 40, at 282.

247. Krause, *supra* note 201; *see also* HELMER, *supra* note 40, at 278 ("Prior to [FERA], whether materiality was a required element of civil FCA action was doubtful in this author's view. . . .").

248. *Escobar*, 136 S. Ct. at 2002 (quoting Neder v. United States, 527 U.S. 1, 22 (1999)).

249. *Id.* at 2003.

250. Krause, *supra* note 201, at 856 ("As interpreted under the FCA, the various definitions of materiality have most assuredly *not* been interpreted as equivalent, nor as particularly 'demanding.' Far from being viewed as a high bar, FERA's 'natural tendency to influence' language has been interpreted as signifying a relatively low threshold for implied certification cases.").

251. *See supra* Section II.A.2.

sector.[252] This judicial intervention culminated with *Allison Engine*.[253] The Supreme Court believed that requiring an implicit intent requirement would prevent the FCA from creating "boundless" liability.[254] Congress disagreed and amended the law to provide clarity.[255] Congress explicitly singled out the Court's decision in *Allison Engine* to make its intention clear: "The *Allison Engine* decision created a significant question about the scope and applicability of the FCA to certain false claims, effectively limiting FCA coverage for some Government programs and funds."[256]

Fast forward to *Escobar*, where the Court was again tasked with interpreting the FCA in a way that could vastly extend the reach of the law.[257] Even though the Court legitimized the implied certification theory of liability, the pervasiveness of the theory was significantly hampered by the demanding materiality standard.[258] As with *Allison Engine*, the Court imposed a standard that is nowhere in the text of the statute out of concern for an "extraordinarily expansive view of liability."[259] The problem with the Court's interpretation is that Congress arguably does view the FCA expansively.[260] The

252. S. REP. NO. 111-10, at 10 (2009).

253. *Id.*; *see also* HELMER, *supra* note 40, at 92 (characterizing *Allison Engine* decision as the "final straw").

254. Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 669 (2008) ("Eliminating this element of intent, as the Court of Appeals did, would expand the FCA well beyond its intended role of combating 'fraud against the Government.'" (citing Rainwater v. United States, 356 U.S. 590, 592 (1958))), *superseded by statute*, Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, 123 Stat. 1617.

255. Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, 1621–22 (codified as amended at 31 U.S.C. § 3729(a)). The section of FERA that amended portions of the FCA was conveniently titled, "Clarifications to the False Claims Act to Reflect the Original Intent of the Law." *Id.* § 4, 123 Stat. at 1621.

256. S. REP. NO. 111-10, at 11.

257. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1998 (2016) (acknowledging circuit split and granting certiorari to "resolve the disagreement among the Courts of Appeals over the validity and scope of the implied false certification theory of liability").

258. *Id.* at 2002 ("[C]oncerns about fair notice and open-ended liability 'can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements.'" (quoting United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1270 (D.C. Cir. 2010))).

259. *Id.* at 2004.

260. S. REP. NO. 99-345, at 19 (1986). The Senate committee "strongly" endorsed a view of the FCA that is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Id.* (quoting United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)); *see also* S.

amendments in 1986 and again in 2009 reflect Congress's intent to use the FCA as the primary vehicle to recover illegally obtained money from the treasury.[261] In fact, Senator Chuck Grassley, who is well-known for being the FCA's biggest supporter in Congress, has made it known that he believes the courts are applying *Escobar* too strictly.[262] Senator Grassley introduced a bill in July 2021 that seeks to "clarif[y] the current law following confusion and misinterpretation of the Supreme Court decision in *Universal Health Services[, Inc.] v. United States ex rel. Escobar*[.]"[263] The bill would require defendants to rebut a showing of materiality by clear and convincing evidence.[264]

Therefore, to avoid another correction from Congress, courts should recognize *Escobar* for what it is—a policy limitation of the FCA to prevent government contractors from paying billions of dollars for minor statutory violations. The fear with implied certification is that it could turn minor statutory violations into significant FCA penalties.[265] In response, the Supreme Court fashioned a higher standard for relators and the government to meet if they succeed in prosecuting those

---

REP. NO. 111-10, at 10. Congress believed that *Allison Engine*'s limitation of the scope of the FCA was "contrary to Congress's original intent in passing the law and creates a new element in a FCA claim and a new defense for any subcontractor that are inconsistent with the purpose and language of the statute." *Id.*

261. S. REP. NO. 99-345, at 2; S. REP. NO. 111-10, at 10.

262. Senator Chuck Grassley, Chairman, Senate Judiciary Comm., Interpreting the False Claims Act: Prepared Senate Floor Statement (Feb. 13, 2018), https://www.grassley.senate.gov/news/news-releases/interpreting-false-claims-act [https://perma.cc/L2TN-GR85]; *see* Emily Reeder-Ricchetti & Christian D. Sheehan, *Senator Grassley at It Again, Proposes New False Claims Act Amendments*, ARNOLD & PORTER KAYE SCHOLER LLP (July 28, 2021), https://www.arnoldporter.com/en/perspectives/blogs/fca-qui-notes/posts/2021/07/senator-grassley-at-it-again [https://perma.cc/XB39-8TQF] (calling Senator Grassley a "long-time . . . champion" of the FCA). Senator Grassley lamented that the courts "are trying to outdo each other in applying Thomas' analysis inappropriately or as strictly as possible—to the point of absurdity." Grassley, *supra*.

263. Press Release, Chuck Grassley, Senators Introduce Bipartisan Legislation to Fight Government Waste, Fraud (July 26, 2021), https://www.grassley.senate.gov/news/news-releases/senators-introduce-of-bipartisan-legislation-to-fight-government-waste-fraud [https://perma.cc/BVA9-US9K].

264. False Claims Amendments Act of 2021, S. 2428, 117th Cong. § 2(e)(2) (2021). It is unclear what effect this amendment would have on the *Escobar* materiality standard. As it stands now, relators and the government must first prove materiality by a preponderance of the evidence. 31 U.S.C. § 3731(d). The bill, therefore, appears to put a higher burden on the defendant to rebut materiality. Brian Dunphy, Laurence Freedman & Samantha Kingsbury, *Senator Grassley and Others Propose Amendments to the False Claims Act*, JD SUPRA (Aug. 2, 2021), https://www.jdsupra.com/legalnews/senator-grassley-and-others-propose-3704208/ [https://perma.cc/A9FA-VLT3].

265. Anikeeff & Ball, *supra* note 12.

specific claims.[266] Yet the fear of runaway liability does not exist with express certifications. In those cases, the defendant makes explicit false statements of compliance to obtain money from the federal government that it otherwise would not be entitled to.[267] The defendant cannot receive payment without first lying to the government.[268] Moreover, these types of express false statements fit squarely within Congress's expansive view of the FCA to "reach all types of fraud, without qualification, that might result in financial loss to the Government."[269]

Fortunately for the government and potential relators, recent case law suggests a trend toward limiting *Escobar* to the context of implied false certification.[270] In *Ruckh v. Salus Rehabilitation, LLC*, the Eleventh Circuit made short shrift over the materiality of the defendant nursing home's affirmative representations about its billing practices on Medicare claim forms.[271] The court did not apply the indicia of materiality set out in *Escobar* and, instead, described the defendant's affirmative statements on Medicare claim forms as "plain and obvious materiality" because the certifications were the essence of the defendant's economic relationship with the government.[272] *Ruckh* illustrates the principle that a defendant's explicit lies always have the natural tendency to influence the government's payment decision and, therefore, easily satisfy the FCA's standard for materiality.

266. *Triple Canopy II*, 857 F.3d 174, 177 (4th Cir.), *cert. dismissed*, 138 S. Ct. 370 (2017) (mem.).

267. *See* Mikes v. Straus, 274 F.3d 687, 698 (2d Cir. 2001), *overruled by* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016). A defendant makes express certification by making a claim that "falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment." *Id.* Unlike implied certifications, express certifications implicate the defendant's actual statements, which are fully within its control. *Id.*

268. *See* United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008) (quoting *Mikes*, 274 F.3d at 698). The defendant expressly certifies compliance with an underlying statutory, regulatory, or contractual requirement that is "a prerequisite to payment." *Id.*

269. S. REP. NO. 99-345, at 19 (1986); United States v. Neifert-White Co., 390 U.S. 228, 232 (1968).

270. Ruckh v. Salus Rehab., LLC, 963 F.3d 1089, 1105 (11th Cir. 2020); United States *ex rel.* STF, LLC v. Vibrant Am., LLC, No. 16-cv-02487, 2020 WL 4818706, at *18 (N.D. Cal. Aug. 19, 2020). In *Vibrant America*, the court refused to apply *Escobar*'s materiality inquiry to the defendant's violation of the Anti-Kickback Statute because the relator was "not seeking to turn a 'garden-variety' regulatory violation into an FCA claim." *Id.*

271. *Ruckh*, 963 F.3d at 1104.

272. *Id.* at 1105.

To dismiss express certification claims because they do not meet *Escobar*'s materiality standard is not only to misinterpret the Court's opinion, it is also contrary to how Congress believes the FCA should function.[273] Courts can continue to follow *Escobar* by reading materiality into express certifications, but the standard imposed should be the statutorily defined natural tendency test for materiality.[274] By recognizing that *Escobar*'s heightened materiality standard is judicially-imposed to guard against the reach of implied certifications, courts can adhere to *Escobar* as well as the intent of the FCA.

B. Separation of Powers Requires that Express Certifications Imposed by Congress Are Material as a Matter of Law

At oral argument in *Escobar*, Chief Justice Roberts asked the attorney representing the government whether a defendant who contracts for health services would violate the FCA if it used foreign-made staplers when the contract called for staplers made in the United States.[275] The attorney replied by admitting that in some circumstances the government has an interest in enforcing ancillary policy goals through government contracting.[276] The colloquy, although brief (and apparently cursory), certainly made an impression on Justice Thomas, who incorporated the exchange in the Court's opinion as an example of an impermissibly expansive view of FCA liability.[277] The Court's position is entirely understandable—a government contractor certifying compliance with the entire United States Code and Code of Federal Regulations could certainly impose blanket FCA liability.[278]

Such was the view from FCA defendants leading up to *Escobar*. Recall that the debate over whether a statutory, regulatory, or

273. S. REP. NO. 99-345, at 8; *Neifert-White*, 390 U.S. at 232.

274. HELMER, *supra* note 40, at 282. Regardless of whether *Escobar* applies equally to implied and express false certifications, one key takeaway is that the Court required materiality to be read in to all § 3729(a)(1)(A) claims. *Id.*

275. Transcript of Oral Argument at 40, Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016) (No. 15-7); *Escobar*, 136 S. Ct. at 2004.

276. Transcript of Oral Argument at 40, *Escobar*, 136 S. Ct. 1989 (2016) (No. 15-7).

277. *Escobar*, 136 S. Ct. at 2004; *see also* SYLVIA, *supra* note 18, § 4:58. The exchange at oral argument quickly moved on to a different topic, and the government's answer to the hypothetical was never returned to. *Id.*

278. *Escobar*, 136 S. Ct. at 2004.

contractual requirement was an express condition of payment was a big point of contention in the circuit courts leading up to *Escobar*.[279] The majority of courts that upheld implied certification cautioned that the theory was only viable where Congress had expressly designated compliance with the law as a condition of payment.[280] In fact, Universal Health argued in the alternative that this was the only way to limit the reach of implied certification.[281] The Court rejected this argument because adopting the intended limitation would have the opposite effect: the government could easily condition payment on any contract with compliance with the entire United States Code and Code of Federal Regulations.[282] Such a blanket imposition of compliance with the law would make materiality under the FCA even more arbitrary.[283] The Court attempted to find a balance by characterizing the government's label of a condition of payment as "relevant, but not automatically dispositive" of materiality.[284] Yet defendants have seized upon this holding as an effective way of defeating relators' claims on motions to dismiss or at summary judgement—regardless of which theory of falsity the relator argues.[285]

Treating the government's label of statutory requirements as not automatically dispositive of materiality is understandable enough for implied certifications. Ultimately, the Court's heightened standard is designed to prevent abuse of that theory of liability.[286] Whether this is

279. *Id.* at 1999 ("Other courts have accepted the theory [of implied certification], but limit its application to cases where defendants fail to disclose violations of expressly designated conditions of payment.").

280. *Id.*

281. *Id.* at 2002 ("Universal Health nonetheless contends that False Claims Act liability should be limited to undisclosed violations of expressly designated conditions of payment to provide defendants with fair notice and to cabin liability.").

282. *Id.*

283. *Id.*

284. *Escobar*, 136 S. Ct. at 2003.

285. *See* United States *ex rel.* Mei Ling v. City of Los Angeles, No. CV 11-974, 2018 WL 3814498, at *13 (C.D. Cal. July 25, 2018) (The City of Los Angeles expressly certified compliance in multiple grant applications to HUD); United States *ex rel.* Folliard v. Comstor Corp., No. 11-731, 2018 WL 5777085, at *7 (D.D.C. Nov. 2, 2018) ("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." (first quoting *Escobar*, 136 S. Ct. at 2003; and then citing *Escobar*, 136 S. Ct. at 2004)).

286. *Triple Canopy II*, 857 F.3d 174 (4th Cir.), *cert. dismissed*, 138 S. Ct. 370 (2017) (mem.).

true for express certifications is a different question. Although the Court interpreted the government's response to Chief Justice Roberts's hypothetical as an overly broad view of FCA liability, the answer to the hypothetical raises important questions regarding the materiality of express certifications. After all, it is Congress and the Executive Branch that label statutory and regulatory requirements as express conditions of payment.[287] What if, as the government suggested at oral argument, the United States wants to enforce ancillary policy goals by adding express conditions of payment into government contracts?[288] What are the consequences of the courts invalidating the legislative and administrative policy of the other two branches of government?

Take, for example, the district court's dismissal for lack of materiality in *United States ex rel. Bibby v. Mortgage Investors Corp.*[289] The *Bibby* court did not recognize that the VA program at issue was "solely intended to assist veterans by allowing their monthly payments to be reduced . . . ."[290] It is evident that Congress enacted the legislation to ensure that low-income veterans can participate in the housing market where they would otherwise be excluded from.[291] The VA program allows low-income veterans "to finance home purchases even though they may not have the resources to qualify for conventional loans."[292] The disallowance of certain closing costs, although seemingly inconsequential, is present in the statutory framework because they are inexorably related to the overall purpose of the legislation, which is to provide a financial benefit to low-income veterans.[293] The express certification of compliance with the VA

287. *See* United States *ex rel.* Bibby v. Mortg. Invs. Corp., No. 12-CV-04020, 2019 U.S. Dist. LEXIS 232351, at *42–43 (N.D. Ga. July 1, 2019) (citing 38 C.F.R. § 36.4313(a) (2018)), *aff'd in part, rev'd in part*, 987 F.3d 1340 (11th Cir.), *cert. denied*, 209 L. Ed. 2d 757 (2021) (mem.); *Folliard*, 2018 WL 5777085, at *1 (to be eligible to contract with the government, contactors had to certify compliance with the Trade Agreement Act, which Congress passed).

288. Transcript of Oral Argument at 40, *Escobar*, 136 S. Ct. 1989 (2016) (No. 15-7).

289. *See supra* Section II.A.3.

290. H.R. REP. NO. 96-1165, at 3 (1980).

291. *Id.*

292. *Id.* at 2.

293. *See* United States *ex rel.* Bibby v. Mortg. Invs. Corp., No. 12-CV-04020, 2019 U.S. Dist. LEXIS 232351, at *24–25 (N.D. Ga. July 1, 2019) ("Based upon the fact that the 'VA home loan program involves a veteran's benefit[,] VA policy has evolved around the objective of helping the veteran to use

regulation disallowing closing costs is intended to ensure that the mortgage lender is providing the financial benefit of the VA program to the veteran.[294]

By requiring mortgage lenders to expressly certify regulatory compliance to be eligible for a government guaranteed loan, the VA chose to enforce ancillary policy goals through the vehicle of government contracting.[295] In doing so, the VA made a policy decision about what conduct from the mortgage lender is material to its decision to issue the guaranteed loan. The lender's express certification has more than the natural tendency to influence the VA's decision—it is the foundation of their legal and financial relationship.[296] Without the lender's express certification of compliance, the VA does not issue the loan. Yet the court in *Bibby*, following the lead from *Escobar*, decided that the lender's express certification was in fact not material to the VA's decision.[297] The court did this despite the fact that it was Congress, not the courts, that chose to enact legislation to provide a financial benefit to veterans, and it was the VA, not the courts, that decided that the lender's express certification was a material requirement of Congress's legislative agenda.[298] On appeal, the Eleventh Circuit reversed the district court's grant of summary judgment.[299] According to that opinion, the district court gave too much weight to the government's subjective behavior after the false certifications were made and, instead, should have let a jury weigh the

his or her home loan benefit.' In light of this objective, 'VA regulations limit the fees that the veteran can pay to obtain a loan.' As such, '[l]enders must strictly adhere to the limitations on borrower-paid fees and charges when making VA loans.'" (alterations in original) (emphasis omitted) (citations omitted)), *aff'd in part, rev'd in part*, 987 F.3d 1340 (11th Cir.), *cert. denied*, 209 L. Ed. 2d 757 (2021) (mem.).

294. *See* Complaint at 15–16, *Bibby*, No. 12-CV-04020 ("This policy is violated when the lender charges unallowable fees to the veteran, circumventing the underlying objectives of the [VA Program].").

295. Transcript of Oral Argument at 40, Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016) (No. 15-7).

296. Complaint at 17, *Bibby*, No. 12-CV-04020 ("Lenders are required to affirmatively represent to the VA, by written certifications, that they have fully complied with the law and with VA rules and regulations in processing [the loan]. The lender's written certifications are a condition precedent to the VA's issuance of a loan guaranty.").

297. *Bibby*, 2019 U.S. Dist. LEXIS 232351, at *46–47.

298. *See id.* at *22–27 (discussing statutes and regulations of VA loan program).

299. United States *ex rel.* Bibby v. Mortg. Invs. Corp., 987 F.3d 1340, 1344 (11th Cir.), *cert. denied*, 209 L. Ed. 2d 757 (2021) (mem.).

"holistic" set of factors from *Escobar*.[300] One such factor, according to the Eleventh Circuit, was that the defendant's loan certifications went to the "very essence of the bargain" with the government.[301]

The mistake of the district court in *Bibby* was to tether the strength of materiality with seemingly minor violations of the federal code and to give much more weight to the government's post hoc subjective actions.[302] This type of subjective analysis is reasonable in the context of implied false certification where contractors must certify compliance with a myriad of statutes and regulations.[303] But there is an important distinction to be made when Congress conditions payment with the contractor's express certification with a specific law or regulation.[304] After all, an express certification is a promise made by the contractor to provide the benefit that Congress bargained for.[305] That benefit is designed through the legislative process with the intent of implementing public policy, and the contractor's promise ensures that the intended policy is being effectively carried out.[306] By conditioning payment with an express certification, Congress itself has decided that the contractor's promise to keep its end of the bargain is material to the legislative purpose.

---

300. *Id.* at 1352.

301. *Id.* at 1347–48.

302. *Bibby*, 2019 U.S. Dist. LEXIS 232351, at *52 ("The VA's apparent acquiescence—evidenced by its sole use of refunds to the exclusion of other administrative sanctions, mandating indemnification, voiding the loan guarantee or reducing the claim amount—to the widespread practice of lenders charging unallowable fees does not bode well for Relators.").

303. *See* United States v. Sanford-Brown, Ltd., 788 F.3d 696, 711 (7th Cir. 2015), *vacated sub nom.* United States *ex rel.* Nelson v. Sanford-Brown, Ltd., 136 S. Ct. 2506 (2016) (mem.). The decision in *Sanford-Brown* is representative of the courts who outright rejected implied certification as a viable theory of liability because it is unreasonable to require "continued compliance with the thousands of pages of federal statutes and regulations" as a basis for FCA liability. *Id.*; *see also* Stephens, *supra* note 7, at 281–82.

304. *Bibby*, 2019 U.S. Dist. LEXIS 232351, at *42–43 (mortgage lenders must comply with specific VA regulations to be eligible for government-guaranteed loans); United States *ex rel.* Mei Ling v. City of Los Angeles, No. CV 11-974, 2018 WL 3814498, at *2 (C.D. Cal. July 25, 2018) (cities must certify compliance with specific housing accessibility laws and Housing and Urban Development regulations in order to be eligible for housing loans); United States *ex rel.* Folliard v. Comstor Corp., No. 11-731, 2018 WL 5777085, at *1 (D.D.C. Nov. 2, 2018) (companies must certify compliance to the Trade Agreement Act in order to be paid under government contracts).

305. *See* 38 C.F.R. § 36.4313(a) (2020) ("[N]o loan shall be guaranteed or insured *unless the lender certifies* to the Secretary that it has not imposed and will not impose any charges or fees against the borrower in excess of those permissible under paragraph (d) or (e) of this section." (emphasis added)).

306. *See generally* H.R. REP. NO. 96-1165 (1980).

Applying *Escobar* to express certifications, therefore, takes the question of materiality away from Congress and transfers it to the courts. To avoid such constitutional problems, courts should limit *Escobar* to the implied certification context where the question of materiality is not always clear. Doing so appreciates *Escobar* for its appropriate purpose and does not run the risk of the courts deciding important policy issues, which should always be the province of the political branches.

CONCLUSION

Reconsider the hypothetical.[307] The United States contracts with a private construction company to build a government office building. As a result of an ongoing trade war with China, Congress enacts a piece of legislation with the intent of boosting production of American steel. This new legislation requires that for any construction project with the government, the contractor must use American-made nails to be eligible for payment. The contractor must expressly certify on every invoice submitted to the government that it has only used American-made nails in each phase of the project. If the construction company requests payment from the government with the knowledge that it has used Chinese-made nails in the final phase of the project, has the company's statutory violation become *fraudulent*?

The lesson from *Escobar* is that what separates a mere breach of contract from fraud is the materiality of the broken promise. In the case of an implied certification of compliance, the contractor has not expressly promised anything. Therefore, for his conduct to become fraudulent, it must be intentional and highly material to the government's decision to approve his claim.

Where he has expressly made a promise to follow the law but chooses not to, however, the materiality of his conduct is straightforward. First, the contractor's lies are more than capable of influencing the government's decision.[308] To require more than the

307. *See supra* p. 1.
308. *See supra* Section III.A.

natural tendency of his actions to influence the government is to ignore the text and purpose of the FCA. Second, and more importantly, the materiality of his actions has already been decided by Congress.[309] To take the question of materiality away from Congress is to mistake the appropriate constitutional role of the courts.

309. *See supra* Section III.B.