No. 22-16715

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA AND STATE OF CALIFORNIA EX REL. TAMARA EVANS,

Relator-Appellant,

v.

SOUTHERN CALIFORNIA INTERGOVERNMENTAL TRAINING AND DEVELOPMENT CENTER,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of California
Case No. 2:15-cv-00619-MCE-CKD (Hon. Morrison C. England, Jr.)

APPELLANT'S REPLY BRIEF

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INTRODUCTION

With briefing in this case complete, it remains undisputed that SDRTC was legally and contractually required to bill POST only for the actual costs that SDRTC incurred in providing Violence Against Women Act (VAWA) training and to substantiate those costs with supporting documentation. It also remains undisputed that from 1997 through 2009, SDRTC invoiced POST for *projected* costs, not its actual costs, even though SDRTC had already provided the trainings and thus had no need to submit bills based on its projections. Nor does SDRTC disagree that those "budgeted" costs often exceeded its actual costs, resulting in hundreds of thousands if not millions of dollars in overpayments of federal taxpayer dollars that SDRTC admits it was not legally entitled to receive.

Nevertheless, SDRTC insists that its claims were not false, because "*POST* orally modified its annual VAWA Contracts" with SDRTC to allow SDRTC to submit budget-based bills rather than bills for actual costs as those contracts required every year. 1-SER-9 (emphasis added). But again, SDRTC admits that the VAWA only allows recoupment of actual costs. As fully explained in the Opening Brief (Br.) and the *amici curiae* briefs submitted by the U.S. Department of Justice (Gov't Br.) and Taxpayers Against Fraud (TAF Br.), it is well established that a mismatch between the claim for monies owed and the legal requirements to obtain federal dollars is all that is required to show falsity under the False Claims Act. Br.28-35; Gov't Br.13-14; TAF Br.3-6. In SDRTC's response brief (Resp.), SDRTC conflates falsity with *scienter*, the same error

committed by the District Court. *See* Resp.33. There is no doubt that SDRTC's claims were false.

Nor can there be any doubt as to *scienter*. SDRTC knew or should have known it was submitting false claims because it hired a grant administrator to fill out POST's applications to CEMA for VAWA grant money and thus knew it was receiving federal VAWA funds, and SDRTC promised in every one of its annual contracts with POST that it would submit invoices for actual expenditures when it had no intention of ever doing so. SDRTC says that POST agreed to "orally modify" the written actual-cost requirement year after year. 1-SER-9. But still, SDRTC contracted with POST to submit actual-cost invoices for federal VAWA funds and then knowingly did not. POST's agreement to bypass the actual-cost billing requirement at most goes to whether the requirement was material to POST. (Of course, as Relator and the Government both explain, materiality is evaluated from the standpoint of the federal Government, not a passthrough entity like POST.)

Even if this Court disagrees, it should recognize that at a minimum, a reasonable jury could easily find that SDRTC was at least reckless or deliberately indifferent to the VAWA's actual-cost billing requirement. SDRTC admits that "scienter exists when a party engages in ostrich-like behavior and fails to make 'simple inquiries which would alert [it] that false claims are being submitted.'" Resp.34-35 (quoting *United States v. Bourseau*, 531 F.3d 1159, 1168 (9th Cir. 2008)). Again, SDRTC assisted POST in obtaining VAWA subgrants from CEMA and knew it was receiving VAWA funds from

POST yet argues that it should be excused for failing to assure itself of the VAWA's legal requirements. And the parties agree that "POST knew … that the grants required actual cost invoicing with supporting documentation." Resp.42. SDRTC attempts to draw a hard line between itself and POST, disavowing any responsibility for failing to understand the VAWA's legal requirements. But no such hard line exists. SDRTC hired a grant administrator in January 2007 and physically stationed her at POST to write POST's grant applications to CEMA for the benefit of both POST and SDRTC, and then assist the entities in administering the VAWA subgrants. FER-17-18; FER-21; FER-127-128. And she testified that she would "read the grant handbook from cover to cover" every year, which "use[d] 'actual expenditure' language." FER-136-137. It strains credulity to assert that SDRTC was not at least reckless or deliberately indifferent for failing to appreciate the VAWA's legal requirements when there is evidence its own contractors did.

Moreover, the invoices that SDRTC submitted after it provided its trainings nowhere indicate that they were for projected costs rather than actual expenditures. On their face, the invoices appear to request reimbursement for actual costs incurred. Indeed, the same grant administrator SDRTC paid and stationed at POST testified that neither she nor the person responsible for approving SDRTC's payments realized that SDRTC's invoices weren't for actual expenditures "until [CEMA's March 2010] audit, because the assumption was that this is the cost for the [training] program and [SDRTC] had the receipts to back it up." FER-138-139. Again, SDRTC's grant administrator

understood that the VAWA only allowed reimbursement for "'actual expenditure[s].'" *See* FER-137. It is highly suspicious that, in all their written documentation, SDRTC and POST continuously represented they would bill and pay for actual costs, respectively, and their principals only "orally" agreed that instead they would bill and pay for the higher budgeted amounts.

As to materiality, SDRTC largely ignores Relator's and *amici*'s arguments that the falsity was material. Like the District Court, SDRTC insists that subgrantee POST's continued payment of the invoices, despite *its* knowledge of their falsity, is dispositive. Resp.38-45. But under the FCA, only the federal Government's knowledge and subsequent actions are relevant to evaluating whether a federal legal requirement is material. The Government's own brief argues that the falsity of SDRTC's claims was material under the FCA. Gov't Br.14-20. POST's conduct as a middleman could never modify the VAWA's legal requirements; holding to the contrary would seriously jeopardize the federal Government's ability to work with intermediaries to administer federal grants. Further, SDRTC's position risks immunizing even knowingly fraudulent schemes from FCA liability. In any event, SDRTC does not respond to Relator's and *amici*'s argument that materiality is a holistic inquiry under which it was improper to rule against Relator based on a single consideration, given the strong evidence of materiality pointing in the other direction.

Finally, as explained in the Opening Brief and by *amicus* TAF, the relevant Fraud Enforcement and Recovery Act of 2009 (FERA) amendments to the FCA, Pub. L.

No. 111-21, 123 Stat. 1617 (2009), apply retroactively to all of SDRTC's false claims, because those amendments by terms apply retroactively to *cases* pending on or after the FERA was enacted. Br.17-24; TAF Br.11-19. The FERA's retroactivity clause at § 4(f)(1) applies to "claims *under the False Claims Act*," which can only reasonably be interpreted to mean FCA causes of action. This Court has not resolved the issue in a dispositive holding. Now that the issue is squarely before the Court, it should join the Second, Third, Sixth, and Seventh Circuits in holding that FERA's amendments apply to all alleged false claims in FCA *cases* that were pending on or after the date the FERA amendments were enacted—like this one.

ARGUMENT

I. SDRTC Submitted False Claims For Reimbursement Because Its Invoices Admittedly Violated Federal Law.

It is undisputed that SDRTC submitted budget-based bills that violated the VAWA's legal requirements. *See* Resp.30 (admitting that SDRTC "submit[ted] budged-based invoices, contrary to [its] annual contracts, the federal VAWA grant, and the state subgrant"). That is all that is required to establish falsity under the FCA. As this Court has explained, falsity "is determined by whether [the defendant's] representations were accurate in light of applicable law." *See United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999). Moreover, SDRTC submitted invoices that facially looked like they were for actual costs when, instead, they were for the budgeted projections, which were often higher.

1. As explained in the Opening Brief, SDRTC's submissions were false for two reasons. *See* Br.28-35. *First*, SDRTC committed "promissory fraud." SDRTC does not dispute that it promised year after year to submit bills for actual costs with no intention of actually doing so. As this Court has described, "'each and every claim submitted under a contract … which was originally obtained by means of false statements or other corrupt or fraudulent conduct … constitutes a false claim.'" *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170-71 (9th Cir. 2006) (quoting S. Rep. No. 99-345, at 9 (1986)) (alteration removed).

Again, "making a promise while planning not to keep it *is* fraud." *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009); *see UPPI LLC v. Cardinal Health, Inc.*, 2022 WL 3594081, at *2 (9th Cir. Aug. 23, 2022) (reasoning that "false promises in the contract can constitute false statements under the FCA" because "making a promise that one *intends* not to keep is fraud" (quotation marks omitted)). Year after year, SDRTC unambiguously agreed to submit invoices for actual expenditures. Yet instead, and as planned, SDRTC continued its practice of invoicing for budgeted costs based on what it describes as an unwritten agreement to "orally modif[y]" this requirement. 1-SER-9. These false contractual promises tainted every subsequent claim or payment under the contracts. *See, e.g.*, *Univ. of Phoenix*, 461 F.3d at 1170-71. SDRTC fails to specifically respond to Relator's "promissory fraud" argument.

Second, Relator also explained that SDRTC's invoices were false on their face, because SDRTC flouted its contractual and legal obligations by knowingly submitting

invoices for budgeted costs instead of incurred costs. Br.30. And during the entire relevant period, the invoices were misleading because they gave no indication that the invoiced costs were based on budgeted projections. Br.30-32. SDRTC responds that it "never stated in its invoices … that its invoices were for actual costs or that they complied with the grants." Resp.30. But neither did the invoices set forth that they were for projected costs. Because those invoices were submitted after SDRTC's trainings had already taken place, a reasonable jury could look at the invoices and conclude they misleadingly represent they are for actual costs, since they do not indicate otherwise.

Indeed, the grant administrator SDRTC hired to fill out POST's applications to CEMA for the VAWA subgrants and then assist in administering the subgrants testified that she believed these invoices were for actual expenses incurred rather than projected costs. D'Karla Assagai was hired by SDRTC in January 2007 and physically stationed at POST. FER-17; FER-21 (testifying that she was "paid by [SD]RTC" but "physically worked at POST"); *see* FER-112 (testifying that she "was a contractor that was hired through" SDRTC). She was tasked with filling out POST's grant applications to CEMA "except the budget," which was separately provided by SDRTC. FER-127-128. She would then assist with monitoring "the spending and collecting" of SDRTC's "invoices." FER-113. Ms. Assagai testified that neither she nor the person responsible for "verify[ing] whether any of [SD]RTC's invoices represented actual expenditures" knew that SDRTC's claimed costs "weren't even actual expenses until the [CEMA's

March 2010] audit, because the assumption was that this is the cost for the program and [SDRTC] had the receipts to back it up." FER-138-139.

CEMA's efforts to audit SDRTC is itself good evidence that the invoices were misleading. If it were clear that the invoices submitted after the trainings had already taken place were for budgeted costs, some of which were never actually incurred, then why would CEMA have requested that SDRTC provide all its receipts to substantiate its invoices? *See* FER-99 (Ms. Assagai testifying that SDRTC asked her during the CEMA audit why she was "asking for these receipts" and said "they need[ed] more time to gather it," and Ms. Assagai explaining that it was the "State of California asking" for the information and "setting these dates"). A reasonable jury could disagree with SDRTC's contention that it "never concealed that its invoices were budget-based." *Contra* Resp.31.

The Opening Brief presented a specific example of how SDRTC's invoices affirmatively (and falsely) implied that they were for incurred costs. *See* Br.31 (reproducing 2-ER-67 (invoice with highlighting added by SDRTC)). A reasonable jury could surely look at these invoices and interpret them—just as Ms. Assagai had—to be seeking payment for the actual costs incurred in the "training program" indicated. The invoice nowhere suggests that SDRTC sought—and obtained—payment for the higher costs it *projected* for that class.

Relatedly, the failure to include substantiating documentation is further evidence that SDRTC was concealing its budget-based billing. As Relator explains in the Opening

Brief, SDRTC admitted that from 1997 until January 1, 2010, "'[SD]RTC did not include the supporting documentation with its invoices, but instead retained the documentation and agreed to provide copies upon POST's request.'" Br.28-29 (quoting 2-ER-45 ¶ 7). But the "supporting documentation" SDRTC agreed to retain was the same specific information required by its contracts with POST to establish the actual costs incurred by SDRTC in providing the training. *See* 2-ER-55. By failing to include this information—indeed, by failing ever to have this supporting documentation in the first place given that at least some of the budgeted costs were never actually incurred—a jury could reasonably conclude that SDRTC concealed information that would have shown that SDRTC was billing for budgeted projections that were often higher than its costs. SDRTC does not dispute that it routinely charged amounts far in excess of the amount it was entitled to recoup under the VAWA. *Cf.* Br.33-34. Nor could it. Looking solely at the six-month period after SDRTC began complying with federal law—from January 2010 through June 2010—SDRTC's invoices show that it budgeted a total of approximately $319,267.00 for trainings but claimed actual costs totaling approximately $271,643.42—a difference of $47,623.58. 2-ER-79-110.

2. Instead of analyzing the falsity element, SDRTC's response focuses solely on an alleged unwritten oral agreement between SDRTC and POST's principals, which provided the context that allowed only those individuals to know that SDRTC's invoices were for projected rather than actual costs. Thus, the bulk of SDRTC's argument on *falsity* is that SDRTC and subgrantee POST "knew and agreed beginning

in 1997 and continuing until January 1, 2010, that [SD]RTC would submit budget-based VAWA invoices, without supporting documentation, and POST would pay them." Resp.33. SDRTC thus insists that "there is no fraud or falsity on [SD]RTC's part." *Ibid.*

SDRTC is wrong. POST cannot modify the requirements of federal law. If it could, then SDRTC would not have been required to cease the unlawful billing practice after the 2010 CEMA audit. SDRTC's deceptive invoices constituted false statements because, when "'an entity has *previously* undertaken to expressly comply with a law, rule, or regulation but does not,'" and then submits claims for payment that implicate that obligation "'even though the defendant was not in compliance with that law, rule or regulation,'" the claim is false. *United States ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012, 1017-18 (9th Cir. 2018) (quoting *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010)) (cleaned up). As the Government explains, because "it is undisputed that the federal grant required actual-cost billing, that the contract reflected that requirement, and that the defendant instead submitted budget-based bills," there can be no dispute that SDRTC submitted false claims under the FCA. Gov't Br.14; *see also* TAF Br.5 (explaining that RTC's "invoices, or claims for payment, are false because they do not comply with 'the applicable law'").

Even if that were not the case, an alleged *oral* understanding between SDRTC and POST's principals would not *require* a jury to find a lack of falsity. Assuming that a defendant's state of mind is relevant to falsity, it would only be one part of the competing evidence in the record for a jury to consider. Of course, the only operative

question as to falsity is whether a defendant's "representations were accurate in light of applicable law." *Parsons Co.*, 195 F.3d at 463. SDRTC already admitted that the applicable law required actual-cost billing. Although SDRTC may wish it to be different, this Court has made clear that a defendant's incorrect beliefs about its legal obligations, even if held in good faith, do not preclude a finding of falsity, because such beliefs speak to whether "the defendant knew the claim was false," the *scienter* element of the claim. *See id.* at 464. They have nothing to do with falsity.

II. SDRTC Knew Or Should Have Known Of The VAWA's Actual-Cost Billing Requirement.

All Relator needs to show is that SDRTC knew, or was reckless or deliberately indifferent in failing to appreciate, the VAWA's actual-cost billing requirement. *See United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 44 F.4th 838, 851 (9th Cir. 2022); 31 U.S.C. § 3729(b)(1)(A). There should be little question that, at the very least, there is a material dispute of fact as to the *scienter* requirement of the FCA.

1. SDRTC's primary argument is that because its "annual contracts did not" *themselves* "disclose to [SD]RTC that the actual cost requirement was derived from the federal grant," it had zero responsibility to apprise itself of the federal legal requirements even though it knew it was receiving federal funds. Resp.37-38. SDRTC further contends that Relator "has not identified any evidence in the record that would have given [SD]RTC reason to investigate the billing requirement." Resp.38. The Government narrowly agrees that "there is no evidence in the record that [SDRTC]

knew that the terms of the federal VAWA grant … had any requirement that actual costs be used" and that Relator did not present "evidence in the record that would have given the defendant reason to further investigate the billing requirement." Gov't Br.11-12.

Although SDRTC's contracts with POST did not tie the actual-cost requirement to the VAWA, it does not follow that SDRTC had no "reason to investigate the billing requirement" when it admittedly knew it was receiving federal funds it helped POST to obtain in the first place. SDRTC and the Government are simply mistaken that Relator failed to present "evidence in the record that would have given the defendant reason to further investigate."

First, SDRTC and the Government fail to acknowledge the record evidence showing that SDRTC itself paid Ms. Assagai and physically embedded her in POST's offices to assist with filling out POST's grant applications and then administering the passthrough of the VAWA subgrants to SDRTC. FER-17-18; FER-127-128. Moreover, the parties agree that "POST knew the terms of the VAWA subgrants it received from CEMA, knew it was subject to those terms, knew that in accepting the subgrants, it agreed to abide by their terms, and knew that the grants required actual cost invoicing with supporting documentation." Resp.42. For her part, Ms. Assagai testified that she "read the grant handbook from cover to cover" every year, that "the grant handbook use[d] 'actual expenditure' language," and that neither she nor the person tasked with approving SDRTC's invoices could even tell the invoices were for budgeted projections

rather than actual costs. FER-136-138; *see supra* pp.7-8. Instead, Ms. Assagai testified that POST "gave [SDRTC] the benefit of" the doubt "of the integrity of their invoices" despite SDRTC's failure to substantiate the claimed training costs with receipts, "since they set the budget and said that's how much it costs." FER-139.

In short, there is evidence that SDRTC hired a contractor to assist POST in applying for the VAWA subgrants who testified that she knew the VAWA required actual-cost billing, and on top of that SDRTC admits (1) that POST knew the federal legal requirements and (2) that SDRTC's annual contracts consistently reflected the VAWA's actual-cost billing requirement that POST only orally agreed to modify year after year. Based on this evidence, the Court should hold as a matter of law that SDRTC was at least reckless or deliberately indifferent for failing to understand that the VAWA only allowed invoicing for costs actually incurred. At a bare minimum, a jury could certainly find that SDRTC acted with recklessness or deliberate indifference when it submitted budget-based bills. Holding to the contrary artificially limits the bounds within which *scienter* may be found when Congress expressly defined the *scienter* requirement of the FCA to be broad. As Relator already explained, Congress defined the "knowing/knowingly" state of mind requirement to include deliberate indifference and reckless disregard, in part to reject restrictive interpretations by some circuits that would require a showing of specific intent. *See* Br.36-37.

Second, as set forth above, it is highly suspicious that POST and SDRTC would agree in annual contracts—spanning more than a decade—to actual-cost billing to

recoup federal VAWA funds, but orally agree that this written requirement should be ignored year after year with invoices that nowhere indicate they were for higher projected rather than lower actual costs. *Supra* pp.7-11. In fact, SDRTC terminated Ms. Assagai after she disclosed that the audits uncovered the improper billing (itself an unlawful act), and then stationed another of "its own employees" at POST to "monitor the money" and "the spending and collecting" of "its own invoices." FER-113. Even if all this highly suspicious behavior were innocent, SDRTC was "expected to know the law" and not permitted to "rely on the conduct of Government agents," here, POST, "contrary to law." *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984). At a minimum, it is for a jury to decide whether SDRTC had a least "some duty to make a limited inquiry so as to be reasonably certain they [we]re entitled to the money they s[ought]." *Bourseau*, 531 F.3d at 1168 (quoting S. Rep. No. 99-345, at 21). This is especially so given that Ms. Assagai was paid by SDRTC as a grant administrator and testified that she, at least, read the VAWA grant handbook "from cover to cover … for every year" and understood the "actual expenditures" requirement. FER-136-138.

SDRTC also admits that it billed for projected costs because it wished to recover administrative costs and expenses that were *not* otherwise reimbursable under the VAWA grants. *See* Br.40. Said differently, SDRTC *knew* it was obligated to submit invoices based on actual expenditures with supporting documentation, but purposefully submitted budget-based invoices without any such documentation instead to receive federal grant money to which it wasn't entitled. *See Bourseau*, 531 F.3d at 1167

(concluding that the defendant acted with actual knowledge when he submitted claims for which he knew he did not have sufficient justification or supporting documentation).

Third, this Court has held that a defendant who seeks reimbursement for a non-existent rental expense would have had at least deliberate ignorance, if not actual knowledge, of the falsity of that claim. *Bourseau*, 531 F.3d at 1168. Relator explained in her Opening Brief that on at least one occasion, SDRTC requested reimbursement for a hotel room expense that it never incurred. Br.41 (citing 4-ER-564-65 (114:14-115:31)). And Ms. Assagai testified that SDRTC "would bill for the use of rooms or venues to give its classes" even when SDRTC was permitted to use those spaces free of charge and thus "did not actually incur" those costs. FER-78-79. She further testified that SDRTC "would double bill" for instructors, for example billing for "three instructors" when "only two instructors would show up." FER-78. SDRTC disputes none of this. A reasonable jury could rationally determine that invoicing for expenses never incurred would have to have been at least deliberately ignorant of the fact that the invoice was fraudulent.

So too, SDRTC nowhere responds to Relator's argument that evidence for reimbursement based on seriously deficient billing records independently constitutes reckless disregard under the FCA. *See United States v. Krizek*, 111 F.3d 934, 936 (D.C. Cir. 1997). For example, SDRTC regularly invoiced budgeted costs of staff hourly time even though its employees did not track their time. *See* Br.41-42 (citing 4-ER-502-04

(52:19-54:24) (explaining that it incurred no direct costs for SDRTC's employees' time preparing for presentations); 4-ER-560-64 (110:25-114:12) (Ms. Cooney could not answer how SDRTC could justify $15 an hour costs for its employees' time where the same was never tracked or recorded in any way)). According to Ms. Assagai, SDRTC "[did]n't track their hours that way" and chafed at such "additional administrative kind of nuisance." FER-38.

As noted above, "contractors receiving public funds" like SDRTC "have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek." *Bourseau*, 531 F.3d at 1168 (quoting S. Rep. No. 99-345, at 21). "Protection of the public fisc," according to the Supreme Court, "requires that those who seek public funds act with scrupulous regard for the requirements of law." *Heckler*, 467 U.S. at 63. Thus, a defendant must undertake reasonable and prudent steps to prevent even inadvertently submitting false claims to avoid liability. *See id.* at 1174-77. Ignorance of federal laws or requirements is not a defense. *See, e.g.*, *United States v. Mackby*, 261 F.3d 821, 828 (9th Cir. 2001) (concluding that defendant's failure to inform himself of Medicare requirements could support a finding of reckless disregard or deliberate indifference of those requirements). When a defendant fails to take steps to ensure the accuracy, completeness, and truthfulness of claims submitted for reimbursement of federal monies, the FCA's *scienter* requirement is met. *See United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1174 (9th Cir. 2016) (quoting *Bourseau*, 531 F.3d at 1168).

SDRTC thus recognizes that "scienter exists when a party engages in ostrich-like behavior and fails to make 'simple inquiries which would alert him that false claims are being submitted.'" Resp.34-35 (quoting *Bourseau*, 531 F.3d at 1168). That is precisely what occurred here. Given the evidence just described, at the very least, a rational jury could easily determine that SDRTC should have taken steps to assure itself that it was complying with the requirements of federal law to receive federal funds.

2. Nowhere does SDRTC address Relator's legal argument that the District Court failed to apply the correct *scienter* standard when it focused on whether "[SD]RTC submitted budget-based VAWA invoices to POST knowing or recklessly believing that *POST believed* they were for actual expenditures." 1-ER-25 (emphasis added). As Relator explained, what matters is whether SDRTC acted with *scienter* vis-à-vis the federal legal requirements. Br.42-43; *see* 31 U.S.C. § 3729(b)(1)(A). As set forth previously, falsity is established because SDRTC acknowledges that it was not legally entitled to some of the budgeted costs for which it received federal VAWA funds.

SDRTC leans into the defunct specific-intent *scienter* standard that some circuit courts applied a long time ago, arguing that because it did not intend to mislead or deceive *POST*, it could not have acted with *scienter*. Resp.35. Put differently, SDRTC focuses on what POST knew regarding SDRTC's billing practices in an attempt to shore up the District Court's resurrection of the defunct specific-intent *scienter* requirement that Congress abrogated decades ago. *See* Br.43; *supra* pp.11, 13. This is reversible error. *See Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1049-50 (9th Cir. 2012).

III. SDRTC's Use Of Budget-Based Billing Would Have Been Material To The Government's Payment Decision.

Three briefs—the Relator's and the two *amici* briefs of the Government and TAF—all demonstrate that SDRTC's practice of inflating its invoices by using higher projections rather than incurred costs would be material to the federal Government's payment decision. In the Government's words, "the district court ignored the strongest evidence demonstrating that the actual-cost requirement was material: once [CEMA] discovered the budget-based billing practice, it immediately required a shift to actual-cost billing, as required by the federal grant." Gov't Br.17. "That action, by an entity charged with enforcing compliance with the rules for disbursing program funds," the Government explains, "is strong evidence that the actual-cost billing requirement was material." *Ibid.*

1. Critically, SDRTC agrees that "POST knew the terms of the VAWA subgrants it received from CEMA, knew it was subject to those terms, knew that in accepting the subgrants, it agreed to abide by their terms, and knew that the grants required actual cost invoicing with supporting documentation." Resp.42. But rather than dispute whether the *federal Government* would find SDRTC's false claims material, SDRTC repeats the mistake of the District Court: SDRTC focuses entirely on what subgrantee *POST* believed regarding whether that falsity was material. Because SDRTC "presented invoices to POST," SDRTC argues that "'the relevant inquiry [was] the grantees' knowledge of the invoicing arrangements in question.'" Resp.41 (quoting 1-

ER-5-6) (alteration in original). And because "the actual cost requirement in [SD]RTC's annual contracts was not material to *POST's* payment decision," SDRTC argues that no jury could find the actual-cost billing requirement material. Resp.44 (emphasis added).

To agree with SDRTC and affirm the District Court's summary judgment holding on materiality, this Court would have to hold that a subgrantee, such as POST, can render a federal legal requirement immaterial, such that the federal Government's own view of whether a federal legal requirement is material becomes entirely irrelevant. That is wrong under all existing law; this Court should reverse.

First, as the Government explains, "it is doubtful whether POST's actions as a pass-through subgrantee say anything at all about whether the requirement is material." Gov't Br.16. On the materiality question, the only relevant view is that of the federal Government. No doubt should remain regarding whether the federal Government viewed the falsity in SDRTC's claims as material, given that the practice was halted by CEMA immediately upon becoming aware that SDRTC was submitting budget-based bills rather than invoicing for actual costs. The fact that POST established a practice of paying the budget-based invoices is immaterial. Under the FCA, it is the *federal* Government's knowledge of noncompliance that matters when a party offers continued payment of a federal claim as evidence of materiality. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 194 (2016); *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 663 (5th Cir. 2017) ("[C]ontinued payment by the *federal* government after it learns of the alleged fraud substantially increases the burden on the

relator in establishing materiality." (emphasis added)); *see also United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 113 (2d Cir. 2021) (quoting *Harman*, 872 F.3d at 663), *cert. denied,* 142 S. Ct. 2679 (2022).

This materiality standard exists for good reason. The federal Government often relies on subgrantees to assist with distribution of federal funds. Most recently, for example, the federal Government provided hundreds of billions of dollars in COVID-related relief, which was largely administered by state and local subgrantees such as POST. *See* Ken Dilanian & Laura Strickler, *"Biggest Fraud in a Generation": The Looting of the Covid Relief Plan Known as PPP*, NBC (Mar. 28, 2022), https://tinyurl.com/4re5p55c. The federal Government and relators like the Relator here are now pursuing the perpetrators of rampant fraud who illegally obtained federal funds administered through the federal Government's COVID-related relief programs. *See ibid.*

If this Court agrees with SDRTC that the recipients of federal funds can avoid FCA liability by relying solely on the views and practices of pass-through entities like POST, it will have implications that extend far beyond this case. The FCA is the primary litigation tool for the federal Government to recover losses it sustains as a result of fraud and was enacted "to combat widespread fraud by government contractors who were submitting inflated invoices … to the government." *Hooper*, 688 F.3d at 1047 (cleaned up). Allowing the views of pass-through entities to defeat materiality by accepting noncompliant or unlawful conduct without the federal Government's

knowledge would frustrate the entire legislative reason for passing the FCA because those entities have no financial incentive to safeguard federal funds.

SDRTC believes that because the FERA amendments broadened the definition of "claim" to include claims submitted to non-federal agencies receiving federal funds, like POST, those agencies' knowledge should now be the relevant vantage point for a materiality examination. Resp.44-45. But SDRTC does not address Relator's or the Government's explanation that neither FERA's plain language nor precedent supports that view. As Relator explained, FERA's expansion of liability for claims submitted to non-federal agencies says nothing about, and certainly does not manifest, any intention by Congress to make non-federal entities arms of the federal Government with full authority to unilaterally modify the conditions for payment of federal funds. Br.51-52. And as the Government explains, "Congress's effort to clarify that liability can attach even where a party obtains federal funds by submitting false claims to an intermediary does not speak to the materiality inquiry, much less override the holistic inquiry for materiality subsequently articulated in *Escobar*." Gov't Br.19; *see infra* pp.21-22. Congress clearly "did not empower intermediaries to supplant the government's prerogatives to determine what requirements are material." Gov't Br.19.

Second, even were it the case that POST's continued payment of SDRTC's budget-based invoices were relevant, that would still just be one factor for the jury to consider. *Escobar*, 579 U.S. at 194-95; *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 904-05 (9th Cir. 2017). It cannot be, as SDRTC argues, that the federal

Government's view of what is a material federal requirement is entirely irrelevant such that summary disposition is appropriate. At "a minimum, the federal government's view of a requirement must also be relevant to the materiality inquiry." Gov't Br.17. That is why the Government argues that this "Court need not definitively resolve" whether "the actions of a subgrantee multiple layers below the federal source of funds could entirely negate a material requirement even where the federal government is completely unaware of the subgrantee's actions." Gov't Br.16-17.

Materiality is a holistic factual inquiry that is rarely appropriate for resolution at the summary judgment stage. *United States v. Gaudin*, 515 U.S. 506, 512-13 (1995) (collecting cases); *see Escobar*, 579 U.S. at 191 (citing *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39 (2011), for the proposition that "materiality cannot rest on 'a single fact or occurrence as always determinative'"). Several circuits, including this Circuit, have recognized that materiality should not be resolved as a matter of law in the context of FCA claims if the evidence related to materiality points in different directions on the merits. *Rose*, 909 F.3d at 1020 n.5; *Campie*, 862 F.3d at 905-07. There "is not a bright-line test for determining whether the FCA's materiality requirement has been met." *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1213 (9th Cir. 2019). At a minimum, on this record it was inappropriate for the District Court to rule in SDRTC's favor on materiality as a matter of law.

2. Like the District Court, SDRTC contends the *Escobar* Supreme Court measured materiality from the standpoint of the Massachusetts Medicaid program, not

the federal Government. But, as Relator explained, that issue was never presented or addressed in *Escobar*. The *Escobar* court only resolved that (1) "at least in certain circumstances, the implied false certification theory can be a basis for liability," and (2) "False Claims Act liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment." *Escobar*, 579 U.S. at 181.* SDRTC has no response to the fact that the *Escobar* parties did not argue, and the Supreme Court did not consider, whether a *state* agency's payment decisions are relevant to the materiality inquiry when the responsible *federal* entity lacks knowledge of an alleged fraudulent claim.

Nor does SDRTC address the fact that the Massachusetts Medicaid program is "a joint state-federal program." *Escobar*, 579 U.S. at 183. The VAWA program is not. Unlike Massachusetts Medicaid, the VAWA is not jointly administered by the federal government and the State of California. Whereas States have substantial authority to promulgate regulations that affect conditions of payment under jointly administered Medicaid programs, the VAWA alone dictates the terms for payment in this case. SDRTC does not dispute that POST does not have the same incentives to conserve

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* *Escobar*'s holdings are fatal to SDRTC's defense. The facially ambiguous invoices SDRTC submitted, *see supra* pp.7-8, fall neatly within "the implied false certification theory" that "can be a basis for liability." *See* 579 U.S. at 181. And SDRTC's FCA liability "does not turn upon whether [the VAWA's] requirements were expressly designated as conditions of payment" in SDRTC's contracts with POST. *See ibid.*

federal resources that a jointly administered agency would, or that, unlike a state Medicaid agency, POST is simply a state passthrough entity.

SDRTC does not go so far as to argue that the VAWA delegates an entity like POST any authority to issue regulations or to alter or amend the grant requirements in any way. If POST did have this ability, SDRTC would not have been forced to suddenly change its billing practice following the 2010 CEMA audit. Only one conclusion can arise from this fact: that POST's knowledge and acceptance of SDRTC's budget-based invoicing has no bearing on materiality.

IV. The FERA Amendments Apply To All The Claims That SDRTC Submitted Within The Ten-Year Statute Of Limitations.

Rather than address the persuasive and well-reasoned authority from several of this Court's sister circuits, which hold that the FERA amendments apply retroactively to pending FCA *cases*, SDRTC argues by *ipse dixit* that this Court "should affirm its holding in *Cafasso*." Resp.45. But Relator explained that *Cafasso*'s unexamined footnote was dicta, because none of the claims in that case had been submitted to a passthrough entity or otherwise implicated the FERA's amendments to the FCA. Br.25-26. The *Cafasso* parties and *amici* did not even brief the issue.

On the merits of this question, the Third Circuit recently examined the "Circuit split" on whether "Congress used 'claims'" in the FERA's retroactivity provision "in the FCA-specific sense as 'requests for payment' (*i.e.*, underlying conduct) or generically to mean 'cases.'" *United States ex rel. Int'l Bhd. of Elec. Workers Loc. Union No. 98 v. Farfield*

Co., 5 F.4th 315, 330 (3d Cir. 2021). The court noted that the "Eleventh Circuit has interpreted FERA to apply § 3729(a)(1)(B) retroactively only to demands for payment that were pending on or after June 7, 2008." *Ibid.* (citing *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009)). And the Third Circuit described "Fifth and Ninth Circuit decisions," specifically citing this Court's decision in *Cafasso*, as "endors[ing] *Hopper*," and even then, only in footnotes "with little analysis." *Id.* at 330-31 (citing *Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 475 n.4 (5th Cir. 2012); *Cafasso*, 637 F.3d at 1051 n.1).

"By contrast," the Third Circuit explained, "the Sixth and Seventh Circuits have rejected *Hopper*'s reading in thorough opinions, holding that Congress used the term 'claims' in § 4(f) of FERA simply to mean cases or lawsuits." *Farfield*, 5 F.4th at 331 (citing *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 637-41 (7th Cir. 2016); *Sanders v. Allison Engine Co., Inc.*, 703 F.3d 930, 936-42 (6th Cir. 2012)). "The Second Circuit has seemingly reached the same conclusion." *Ibid.* (citing *United States ex rel. Kirk v. Schindler Elev. Corp.*, 601 F.3d 94, 113 (2d Cir. 2010) (holding that 31 U.S.C. § 3729(a)(1)(B) applied "[b]ecause Kirk's [FCA] claim was filed in March 2005, and was pending as of June 7, 2008"), *reversed on other grounds by Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401 (2011)). The Third Circuit "agree[d] with the more comprehensive decisions and conclude[ed], following the Sixth and Seventh Circuits, that Congress used 'claims' generically in FERA's retroactivity provision to mean cases or lawsuits." *Ibid.*

In reasoning that aligns with that of the Sixth and Seventh Circuits, the Third Circuit reasoned that in "context, 'claims'" as used in the FERA's retroactivity provision, which applies to "'claims *under the False Claims Act*,'" can "only mean cases." *Farfield*, 5 F.4th at 331 (quoting FERA § 4(f)(1)). The court began by explaining that the FERA amendments to the FCA variously use the term "'claims' as synonymous with cases," so "Congress did not use 'claims' in its technical sense in FERA's retroactivity clause." *Ibid.* The court further explained that "in the specific context of the retroactivity provision, replacing 'claims' with the word's technical definition 'makes no sense,'" and would "render[] superfluous the phrase 'under the False Claims Act.'" *See id.* at 331-32 (quoting *Kmart*, 824 F.3d at 640). "Second," according to the court, the FCA itself "uses 'claims' synonymously with 'cases,'" and "when the FCA uses the term in its technical [defined] sense, 'claim' usually comes after 'false' or 'fraudulent,'" in contrast with the FERA's retroactivity provision. *Id.* at 332.

Moreover, the Third Circuit explained that Congress passed the FERA amendments as a repudiation of the Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008), "with clear intent for full retroactivity." *Farfield*, 5 F.4th at 333. And holding that the FERA's amendments apply only to allegedly fraudulent claims for payment made on or after the date of enactment "would subvert Congress's intent to undo the effect of *Allison Engine* to the maximum extent possible." *Id.* at 334-35 (citing *Kmart*, 824 F.3d at 640).

For these reasons and those set forth in the Opening Brief and by *amicus* TAF,

this Court should follow suit and join the Second, Third, Sixth, and Seventh Circuits—all of which have held that the FERA's amendments retroactively apply to *cases*, like this one, that were pending on or after the FERA's date of enactment, and are not limited to allegedly false *claims for payment* that were pending on or after that date.

CONCLUSION

Relator has established every element of violations of 31 U.S.C. § 3729(a)(1)(A) and 31 U.S.C. § 3729(a)(1)(B). Because the FERA's amendments to the FCA apply retroactively to all of SDRTC's false statements, SDRTC's unlawful conduct is actionable throughout the full ten years preceding Relator's commencement of this action. This Court should therefore reverse the grant of summary judgment in favor of SDRTC and denial of Relator's motion for summary judgment on liability, and remand for trial solely on damages. At a minimum, Relator has established a material dispute of fact as to each element of her FCA claims, and this Court should reverse and remand for a trial on both liability and damages. In either alternative, this Court should reverse the District Court's order granting summary judgment to SDRTC.

May 30, 2023

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Appellant's Reply Brief to be filed using the Court's CM/ECF system on May 30, 2023. All counsel to parties in this case are registered CM/ECF users and will be electronically served via the CM/ECF system.

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