No. 26-

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
W. BENSON CHILES, *et al.*,

Petitioners,

v.

COOKE INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act (FCA) prohibits various forms of fraud against the Government. Among other things, it imposes "reverse false claim" liability on anyone who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G). The FCA defines "obligation" as an "established duty, whether or not fixed, arising from . . . statute or regulation." § 3729(b)(3).

The Third, Fourth, Tenth, and Eleventh Circuits hold that this provision is satisfied when an entity commits misconduct that makes it liable for a penalty or other payment, and then covers up the misconduct to prevent the Government from discovering it and assessing the penalty. By contrast, the Second, Fifth, Sixth, and D.C. Circuits hold that the provision is not satisfied where a cover-up conceals the misconduct and prevents the Government from assessing the penalty, because the obligation to pay the penalty was never established.

The question presented is: When a defendant commits misconduct that makes it liable to the Government for a penalty, and then covers up its misconduct to prevent the Government from assessing the penalty, has the defendant violated the "reverse false claim" provision of the False Claims Act, which prohibits "knowingly concealing or improperly avoiding" an "established duty, whether or not fixed, arising from [a] statute" to pay money to the Government?

PARTIES TO THE PROCEEDING

Petitioners are the United States ex rel. W. Benson Chiles and the United States ex rel. Chris Manthey, who were relators and plaintiffs-appellants below.

Respondents are Cooke Inc.; Cooke Aquaculture Inc.; Cooke Omega Investments Inc.; Cooke Seafood USA Inc.; Omega Protein Corporation; Omega Protein, Inc.; Glenn Cooke; Bret D. Scholtes; BMO Capital Markets Corp.; Alpha VesselCo Holdings, Inc., also known as Ocean Fleet Services, Inc.; Alpha VesselCo LLC, doing business as Ocean Harvesters; Seth Gregory Dunlop; Gregory Lawson Dunlop; and Montgomery Deihl, who were defendants-appellees below. There are no current ticker symbols for any of the non-natural entities. BMO Capital Markets is an indirect wholly owned subsidiary of Bank of Montreal, whose common shares trade on the TSX and NYSE under the ticker BMO.

RELATED PROCEEDINGS

- *United States ex rel. Chiles* v. *Cooke Inc.*, No. 21-cv-5743 (JMF) (S.D.N.Y.) (order granting motion to dismiss entered January 3, 2025).
- *United States ex rel. Chiles* v. *Cooke Inc.*, No. 25-155 (2d Cir.) (judgment entered August 5, 2026).

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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The decision of the United States Court of Appeals for the Second Circuit is reported at 185 F.4th 12 and reproduced at Appendix ("Pet. App.") 1a. The decision of the United States District Court for the Southern District of New York is unreported but available at 2025 WL 27662 and reproduced at Pet. App. 37a.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2026. This petition is therefore timely. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Section 3729(a)(1)(G) of title 31 of the United States Code creates liability for any person who:

(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.

* * *

(b) Definitions.—For purposes of this section—

* * *

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-

licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment;

Section 12151(c) of title 46 of the United States Code provides:

(c) Engaging in Fishing After Falsifying Eligibility.—In addition to other penalties under this section, the owner of a documented vessel for which a fishery endorsement has been issued is liable to the Government for a civil penalty of not more than $100,000 for each day the vessel engages in fishing (as defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802)) within the exclusive economic zone, if the owner or the representative or agent of the owner knowingly falsified or concealed a material fact, or knowingly made a false statement or representation, about the eligibility of the vessel under section 12113(c) or (d) of this title in applying for or applying to renew the fishery endorsement.

STATEMENT OF THE CASE

Combating fraud against the United States is an urgent priority. This Court has repeatedly granted certiorari to resolve differing interpretations of the FCA, but it has not yet addressed the reverse false claims provisions. As a result, lower courts' analyses of reverse false claims are all over the map. Different circuits have ruled inconsistently on what constitutes an "obligation" under the FCA. In doing so, many lower courts (including the Second Circuit below) continue to rely on a 1999 case interpreting the word "obligation," but that is the very case that Congress specifically rejected and replaced with a

statutory definition of "obligation" in 2009. And many lower courts (including the Second Circuit here) fail to reconcile their holdings with the amended text stating that avoiding a duty to pay gives rise to a reverse false claim even if it was "not fixed."

The correct interpretation of the amended FCA is straightforward. If an entity's prior misconduct gives rise to a legal duty to pay a penalty or to make some other payment, and if the entity then covers up that misconduct to prevent the Government from finding out about it and from assessing the penalty, then the entity has "knowingly concealed or avoided" an "established duty, whether or not fixed, arising from [a] statute or regulation." That is the law in the Third, Fourth, Tenth, and Eleventh Circuits.

In contrast with those four circuits, the Second, Fifth, Sixth, and D.C. Circuits hold that if a cover-up successfully prevented the Government from discovering the misconduct and assessing the penalty, the duty to pay the penalty was never established. By requiring that the penalty must first be "assessed"—that is, fixed—before anyone can avoid or conceal it, this approach conflicts with the text of the amended FCA, which says the payment does *not* need to be "fixed." It also conflicts with the statutory text that targets knowing concealment, *i.e.*, cover-ups. The approach of these circuits means a *successful* cover-up will *preclude* reverse false claim liability. That makes no sense.

A. Legal Background

1. The False Claims Act

a. The FCA prohibits obtaining public funds or property by fraud. *See* 31 U.S.C. § 3729(a)(1)(A).

The FCA establishes "a civil penalty" for each fraudulent act "plus 3 times the amount of damages which the Government sustains" because of the fraud. § 3729(a)(1).

Congress understood that penalties would not be enough to deter fraud on the Government. Congress therefore established a monetary incentive for whistleblowers to call the Government's attention to fraud that it might otherwise never discover. § 3730(d)(1)-(2). Without these whistleblowers (known as "relators"), and without adequate incentives for them to come forward, far more fraud on the Government would go undetected, and bad actors would keep money that would otherwise go to the public fisc.

b. When expanding the FCA in 1986, Congress recognized that improperly avoiding or concealing an obligation to pay money *to* the Government is also fraudulent, and also harms the public fisc, just as much as false claims to obtain money *from* the Government. To address that scenario, the FCA establishes so-called "reverse false claim" liability. § 3729(a)(1)(G).

Under the "reverse false claim" provision, an entity is liable if it "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." *Ibid.* By targeting "knowing concealment," this provision addresses intentional cover-ups that deceive the Government and prevent the Government from receiving a payment it is entitled to receive.

Congress did not initially define the term "obligation," and courts gave the term various definitions. One of those decisions, *American Textile Manufacturers Institute, Inc.* v. *The Limited, Inc.*, held that the term "obligation" covered only fixed duties. 190 F.3d 729, 736-42 (6th Cir. 1999) ("*ATMI*"). Congress amended the FCA in 2009 to abridge that decision and others like it. *See United States ex rel. Customs Fraud Investigations, LLC* v. *Victaulic Co.*, 839 F.3d 242, 253 (3d Cir. 2016) (discussing Congress's abrogation of *ATMI*). Among other amendments, Congress added a definition of "obligation," defining it as an "established duty, *whether or not fixed*, arising from . . . statute or regulation." § 3729(b)(3) (emphasis added).

2. The American Fisheries Act

Congress enacted the American Fisheries Act (AFA) "to give U.S. interests a priority in the harvest of U.S.-fishery resources by increasing U.S.-citizen ownership, control and financing" requirements for vessels that fish in U.S. waters. 66 Fed. Reg. 11,365 (Feb. 23, 2001).

Eligibility to take fish from U.S. waters turns on control by U.S. citizens: "at least 75 percent of the interest in the entity" that owns a fishing vessel must be "owned *and controlled* by citizens of the United States." 46 U.S.C. § 12113(c)(1) (emphasis added). Congress defined "control" to include the

right to direct the entity's business; limit or replace senior management; or direct the transfer, operation, or manning of a vessel. 46 U.S.C. § 12113(c)(2). Any "agreement," "understanding," "influence," "or any other means whatsoever" that gives a foreign entity "control" over a U.S. vessel is illegal. 46 C.F.R. §§ 356.3(d)(1), 356.11(a)-(b).

The AFA confers on the U.S. Maritime Administration (MARAD) initial responsibility for administering the control requirement for large vessels. 46 U.S.C. § 12113(e)(1). When a vessel is sold to a new owner, the owner must file a citizenship affidavit "setting forth all relevant facts regarding vessel ownership and control." *Ibid.*; 46 C.F.R. § 356.13. Congress directed MARAD to "rigorously scrutinize[]" vessel transfers to ensure that the vessels are not subject to illegal foreign control. 46 U.S.C. §§ 12113(e)(3), (e)(3)(B).

In addition to submitting a citizenship affidavit when the vessel is first transferred to a new owner, the vessel owner must submit a new citizenship affidavit each year to renew the vessel's eligibility. 46 C.F.R. § 356.17(a)-(b).

Lying to the Government during the application and renewal process makes the applicant liable for a statutory penalty. Specifically, if the owner "knowingly falsified or concealed a material fact . . . about the eligibility of the vessel" in its submissions to the Government, the owner "*is liable* to the Government for a civil penalty." 46 U.S.C. § 12151(c) (emphasis added). A civil penalty first "accrues" at the moment of the underlying violation. *See Gabelli* v. *S.E.C.*, 568 U.S. 442, 448 (2013); 28 U.S.C. § 2462.

Because of the seriousness of the offense, and because U.S. fishery resources are strictly reserved

for Americans, the penalty is high. For each vessel, the amount of the penalty is capped at "$100,000 for each day the vessel engages in fishing" in the U.S. exclusive economic zone. 46 U.S.C. § 12151(c). By statute, the amount of that penalty is adjusted for inflation and is currently $192,476 per vessel, per day of fishing. 46 C.F.R. § 356.49(b).

B. Factual Background

Cooke, Inc. is a foreign, family-run seafood conglomerate. In 2017, it acquired Omega Protein, a U.S. fishing company that owned dozens of vessels, for $500 million. As a result of Cooke's acquisition, Omega became a non-citizen under the AFA. Because the AFA prohibits non-citizen control of covered fishing vessels, Omega created Alpha, a purportedly independent domestic shell, to own the vessels. Pet. App. 7a, 38a-39a.

But Alpha was just a front. Cooke needed a U.S. citizen to be the nominal owner of Alpha, and Cooke found one: Seth Dunlop, a Cooke employee and the nephew of the Cooke CEO. The complaint alleges Dunlop was "just a figurehead," and "Cooke and Omega retained control" over the vessels and "operate[d] [the vessels] for their own financial benefit." Pet. App. 7a, 39a, 40a. Cooke and Omega structured the transaction to make Alpha a sham that would give "the illusion of independent ownership, while ensuring that Cooke and Omega would retain total control via a figurehead." Pet. App. 7a, 39a.

To complete Cooke's acquisition of Omega in 2017, Respondents made submissions to MARAD certifying compliance with the AFA's citizenship and control requirements. Each submission included a

sworn citizenship affidavit that "expressly and falsely represent[ed] that there is no 'understanding' by which a non-citizen controls the nominal owner of the Omega Vessels." Pet. App. 40a. The submissions "omit[ted] material information that undermines that false representation"—namely, each Respondent's "understanding that Cooke and Omega would continue to control the Omega Vessels and [Alpha]." Pet. App. 7a, 40a.

By statute, this fraudulent submission obligated Alpha to pay a penalty under 46 U.S.C. § 12151(c), which says anyone who lies about foreign control in its application "is liable to the Government for a civil penalty."

Thereafter, beginning in 2018, Alpha submitted annual attestations stating, falsely, that the vessels remained free from improper foreign control. Pet. App. 6a-7a, 40a. As a result, these later filings concealed Alpha's obligation to pay the penalty triggered by the fraudulent 2017 submission. Pet. App. 26a. Because the Alpha-Omega fleet is so large, and because Alpha-Omega fishes as frequently as it can, Alpha's cover-up avoided billions of dollars in penalties.

C. Proceedings Below

Petitioners filed a *qui tam* action in the Southern District of New York, alleging Respondents made fraudulent claims for property (fish in public waters) and reverse false claims for money (penalties). The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. The district court granted Respondents' motion to dismiss the complaint under Rule 12(b)(6). Regarding the reverse false claim, the district court held that a recent Second Circuit

decision controlled. The district court held that because the Government had never assessed a penalty under the AFA for the 2017 submissions that were alleged to be fraudulent, Respondents' alleged cover-up of those fraudulent submissions could not constitute a reverse false claim. Pet. App. 58a (quoting *Miller* v. *United States ex rel. Miller*, 110 F.4th 533, 543 (2d Cir. 2024)).

The Second Circuit affirmed. The Second Circuit recited Petitioners' contention that the false certifications starting in 2018 "covered up illegal fishing conducted the prior year," which concealed Respondents' obligation to pay statutory penalties under the AFA "for their illegal fishing and fraudulent statements." Pet. App. 26a. The court rejected that claim based on its 2024 decision in *Miller*. There, the Second Circuit "h[e]ld that a duty to pay is 'established' only when it triggers an immediate and self-executing duty to pay." 110 F.4th at 545. Applying that precedent, the Second Circuit rejected Petitioners' claim, concluding Alpha's duty to pay statutory penalties was not "immediate and self-executing" because, at the time of the cover-up, the Government had not yet assessed a penalty. Pet. App. 28a.

In neither *Miller* nor here did the Second Circuit explain how their conclusions were consistent with the "whether or not fixed" language that Congress added to the FCA in 2009. Instead, the Second Circuit cited, among other cases, a ruling from the District of Delaware that relied on the *ATMI* case Congress abrogated. Pet. App. 29a-30a (citing *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 196 F. Supp. 3d 436, 447 (D. Del. 2016) (citing *ATMI*)).

The Second Circuit also relied on cases where the defendant was not alleged to have concealed a preexisting duty to pay a penalty. Pet. App. 31a (citing *United States ex rel. Simoneaux* v. *E.I. duPont de Nemours & Co.*, 843 F.3d 1033 (5th Cir. 2016)). In cases like *Simoneaux*, the defendant breached a disclosure obligation but had not previously done anything that could have given rise to any penalty, so there was no "established duty" to pay that its cover-up "avoided." The Second Circuit extended these cases to mean that an already existing duty to pay a penalty remains contingent until the Government later discovers, assesses, and collects the penalty. Pet. App. 28a.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Evenly Divided

A. Four Circuits Hold that Covering Up an Existing Duty to Pay Constitutes a Reverse False Claim

The Third, Fourth, Tenth, and Eleventh Circuits all hold that when a defendant covers up an existing obligation to pay, reverse-FCA liability may attach regardless of whether the Government has discovered or enforced that obligation.

1. The Fourth Circuit's decision in *United States ex rel. Wheeler* v. *Acadia Healthcare Co.,* 127 F.4th 472 (4th Cir. 2025), exemplifies this rule. There, the defendant had committed Medicaid fraud and reached a settlement with the Government that included a "corporate integrity agreement," which mandated "annual trainings on the requirements of federal healthcare programs" plus a requirement to

disclose violations of healthcare laws. *Id.* at 483, 495-96. Failure to comply carried "monetary penalties." *Id.* at 496. A relator alleged the defendant failed to conduct the trainings, failed to disclose reportable events, and falsely certified that it was in compliance, thereby covering up the penalties that its misconduct had triggered. *Id.* at 495-96. The defendant contended no "obligation" to pay the penalties was avoided, arguing any obligation was "contingent" on the Government finding out about the misconduct and taking steps to enforce the penalty provisions.

The Fourth Circuit rejected that argument. The court held that a defendant violates the FCA's reverse false claim provision by covering up misconduct that triggered the penalties. The court did not impose any prerequisite that the Government must first determine that the training had not in fact been provided, or that the reportable events had in fact occurred. *Id.* at 496. As it explained, "the government is unable to enforce [the penalty] provision without notice" that it has been triggered. *Id.* at 497. Under these circumstances, "there is nothing contingent" about the "obligation," and it does not matter that it was left "to the discretion of the government whether to enforce the stipulated penalty provision." *Id.* at 496. The court emphasized that "discretion to enforce an obligation does not eliminate the existence of that obligation." *Id.* at 496-97.

2. Similarly, the Tenth Circuit recognizes that a defendant who conceals an existing duty to pay is liable under the reverse-FCA provision, even where the Government is unaware of the duty or has not yet enforced it. *See United States ex rel. Bahrani* v.

Conagra, Inc., 465 F.3d 1189 (10th Cir. 2006). In *Conagra*, the defendant exported products for which the USDA required export certificates. *Id.* at 1192-93. The USDA also required that when certain "major" or "significant" information on a certificate needed updating, exporters must obtain, and pay the Government for, a new certificate. *Id.* at 1200-01. The defendant discovered that its certificates needed updating, which triggered its duty to pay for new certificates. But rather than obtain new certificates, the defendant doctored the existing ones, thereby "avoid[ing]" the payments it "would have been required to" make. *Id.* at 1194, 1202.

The Tenth Circuit "acknowledge[d] that there is some discretion in play here" but concluded it did not affect the reverse false claim analysis. For example, under the applicable regulation, the USDA "has discretion" to not "require" the replacement certificate at all; in that event, no obligation to pay would *ever* have arisen. *Id.* at 1204. And even "if a new or replacement certificate is required, the [regulator] has discretion to charge a fee or not." *Ibid.* The Tenth Circuit rejected the defendant's theory (adopted by the Second Circuit below) that any payment was merely contingent and that no obligation existed until "the USDA charge[d] the established fee." *Id.* at 1201.

Thus, the Tenth Circuit held that "[t]he fact that [regulators] may have some subsequent discretion whether to actually charge the authorized fee does not mean that the 'obligation' is a contingent one outside the scope of" the reverse false claims provision. *Ibid.* In other words, the Government had not determined that any violation occurred in the first place, and the Government had not yet

exercised its discretion to impose or not impose the payment. But the defendant tried to hide the truth from the Government in hopes of preventing the Government from imposing the payment. That sufficed to state a reverse false claim.

3. The Third Circuit in *Victaulic* likewise held that a defendant faces reverse-FCA liability for concealing an already-existing duty to pay, even though the Government had not yet discovered or enforced that obligation. In *Victaulic*, the defendant had imported pipe fittings that were marked improperly, triggering a 10% customs duty by statute, but the defendant failed to disclose the improper marking and instead "falsif[ied] its entry documents." *Victaulic*, 839 F.3d 242, 245-46.

The Court held that these circumstances establish reverse-FCA liability. Once goods escape detection and enter the United States, the defendant has to pay, and a defendant's failure to disclose the mismarking constitutes evasion of an established obligation to pay. *Id.* at 254-55. Like in *Wheeler*, the defendant's deception "conceal[ed] information customs officials needed to know in order to" enforce the obligation to pay the 10% duty. *Id.* at 255-56.

4. Like the foregoing cases, the Eleventh Circuit holds that a defendant has "an existing, legal 'obligation'" even when future discretionary acts by the Government are necessary before the obligation to pay is crystallized. *See United States* v. *Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236-37 (11th Cir. 1999). In *Pemco*, the defendant held excess aircraft parts and was required to submit an inventory of the parts so the Government could elect to either take them back or sell them to the defendant at the end of the project. *Id.* at 1235-36. Before the end of the

project, the defendant submitted an inventory that was fraudulent because it identified the parts as obsolete parts that were worthless, but in fact they were new parts that were valuable. *Ibid.* The defendant argued its obligation to pay hadn't crystallized yet and that the Government had not expressed any preference for what to do with the parts, much less accepted any offer to purchase them. The court found a reverse false claim because the defendant lied to cover up a "pre-existing" obligation to pay the Government the market price or return the property. *Id.* at 1236-38.

* * *

Together these cases show the rule: once a duty to pay money to the Government already exists as a result of prior acts, a defendant's fraudulent cover-up of that duty is a reverse false claim because the cover-up wrongly prevents the Government from discovering and enforcing the payment obligation. Whereas the initial acts that gave rise to the duty to pay do *not* constitute a reverse false claim, the *second* act—the fraudulent cover-up—is a reverse false claim because it "conceals" that the defendant is liable to pay the Government money.

B. Four Circuits Hold that Successfully Covering Up a Duty to Pay Is Not a Reverse False Claim

In contrast, the Second, Fifth, Sixth, and D.C. Circuits hold that when an entity successfully covers up misconduct that gives rise to liability to pay a penalty, and thereby prevents the Government from discovering the misconduct and assessing a penalty, there is no reverse false claim liability.

1. Before the 2009 FCA amendments, the Fifth Circuit held that where a defendant emitted excessive amounts of vinyl chloride into the air, subjecting it to a penalty, and then doctored its emissions logs to cover it up, the cover-up did not constitute a reverse false claim. *See United States ex rel. Bain* v. *Georgia Gulf Corp.*, 386 F.3d 648, 650 (5th Cir. 2004). The court held the reverse false claims provision could not apply unless the obligation "ar[o]se out of an economic relationship between the government and the defendant," as opposed to a "regulatory" relationship. *Id.* at 657. The 2009 FCA amendment later defined "obligation" to include duties that arise out of various economic relationships *or* arise out of a "statute or regulation." 31 U.S.C. § 3729(b)(3).

2. Also before the 2009 FCA amendments, the D.C. Circuit held that covering up liability for penalties does not constitute a reverse false claim. *Hoyte* v. *Am. Nat'l Red Cross*, 518 F.3d 61 (D.C. Cir. 2008). There, the defendant had violated a consent decree with the Government, "for which conduct the FDA was authorized to assess financial penalties," and the defendant covered up its misconduct to prevent the Government from assessing the penalties. *Id.* at 63. In a divided decision, the court held that because the penalties were "unassessed," the cover-up to prevent the Government from assessing the penalties was not a reverse false claim. *Id.* at 67.

3. After the 2009 FCA amendments, the Sixth Circuit reached the same holding as *Hoyte*, but the only authority it cited was the *ATMI* case Congress had abrogated, and the court did not mention the amended text of the statute. *United States ex rel.*

Ibanez v. *Bristol-Myers Squibb Co.*, 874 F.3d 905, 922 (6th Cir. 2017) (citing *ATMI*). This case featured the same type of regulatory penalties as in *Wheeler*, *Hoyte*, and *Miller*.

4. The Second Circuit reached a similar result in *Miller*. In *Miller*, a defendant bank had entered into "consent orders" with regulators including the Office of the Comptroller of the Currency (OCC). 110 F.4th at 537. By statute, "[a]ny insured depository institution which . . . violates any final order [including OCC consent orders] shall forfeit and pay a civil penalty." *Id.* at 543. The relator alleged the bank "hid" violations of the OCC consent order, which "permitted the bank to avoid paying the government at least $150 million in fines or penalties." *Id.* at 539. The Second Circuit found no reverse false claim, holding that, notwithstanding the statutory duty to "pay a civil penalty" for violations of a consent order, "[t]here is no obligation to pay unless and until the government has determined that a fine must be paid." *Id.* at 545-46. That ruling meant that, because the bank's cover-up was successful, the Government never learned of the violation and thus never "determined that a fine must be paid," which meant the bank successfully avoided the fine *and* successfully avoided reverse false claims liability.

In the order below, the Second Circuit followed *Miller*, holding that until the executive branch "take[s] affirmative steps to communicate, confirm, and collect the penalties," the "obligation" to pay is merely "contingent" and is not an "established duty." Pet. App. 28a.

5. The Second Circuit's decisions in *Miller* and *Cooke* cannot be squared with the Fourth Circuit's

decision in *Wheeler* and the Tenth Circuit's decision in *Conagra*. In *Miller* and *Cooke*, there is no "obligation" to pay penalties until they are "assessed" or "imposed." By contrast, in *Wheeler*, it was not necessary for the Government to determine that any violation had occurred that would trigger the penalty provisions. Rather, the defendant knew it failed to comply with its obligations and therefore knew the penalty had already been triggered. The defendant then covered up the violations to prevent the Government from assessing that penalty. And in *Conagra*, even though the regulator expressly had "discretion whether to actually charge the authorized fee," that did not change that the duty to pay the fee had already been triggered. The defendant understood that the fee had already been triggered, and the defendant fraudulently tried to cover it up to prevent the Government from imposing it.

The Second Circuit reached its holdings by extending cases that arose under different circumstances. Unlike *Wheeler* and *Conagra*, where the defendant was already "liable" to pay a penalty before the cover-up occurred, other cases address a scenario where, until the alleged reverse false claim occurs, no payment obligation existed at all.

For example, in *Simoneaux*, the defendant chemical company had caused or was aware of certain chemical leaks, but the leaks themselves were not associated with any penalties. Rather, the statute (the Toxic Substances Control Act (TSCA)) imposed an obligation to *report* leaks. A failure to report a leak (not the leak itself) was, by statute, subject to a penalty. 843 F.3d at 1034. The defendant failed to report the leak. The relator

alleged a reverse false claim, contending that the failure to report the leak prevented the Government from imposing a penalty for failure to report a leak. The court rejected that argument as circular.

Before the defendant's alleged deception—before it failed to report the leak—it had not committed any violations that might trigger penalties. Therefore, by definition, the deception could not have "avoided" or "concealed" any preexisting obligation to pay penalties. The most the deception could have accomplished was to prevent a duty to pay from ever arising in the first place. That, the court held, was insufficient to constitute a reverse false claim, because the FCA requires that the reverse false claim must avoid an established—existing—duty, not a potential future one. The court described any potential future penalty as "contingent" and "unassessed" (*id.* at 1039), which in context referred to the dispositive fact that, before the alleged deception, nothing had occurred that would have triggered any penalty whatsoever. Under those circumstances, the complaint alleged only a generic failure to follow the law (a failure to report a leak), not an attempt to avoid a preexisting payment obligation. *Id.* at 1037. The D.C. Circuit followed *Simoneaux* in an identical case under the TSCA. *United States ex rel. Kasowitz Benson Torres LLP* v. *BASF Corp.*, 929 F.3d 721, 725-26 (D.C. Cir. 2019). The D.C. Circuit also relied on *Simoneaux* to apply *Hoyte* after the 2009 FCA amendments. *United States ex rel. Schneider* v. *JPMorgan Chase Bank, N.A.*, 878 F.3d 309, 315 (D.C. Cir. 2017).

Miller expressly adopted and applied *Simoneaux*, 110 F.4th at 533, 544-45 & n.5, but in *Simoneaux*, before the act occurred that supposedly

constituted the reverse false claim, the defendant had not committed any misconduct that triggered any penalty. The Second Circuit extended those cases to factual circumstances in which a defendant *had* committed earlier misconduct that triggered a statutory penalty. The Third, Fourth, Tenth, and Eleventh Circuits do not extend *Simoneaux* in this manner, creating a conflict. In those circuits, the preexisting liability for the penalty was the "established duty, whether or not fixed" that the defendant improperly avoided.

In the decision below, the Second Circuit applied *Miller* and held that no duty to pay existed because no penalty was ever assessed. Pet. App. 29a-30a. Unlike the Third, Fourth, Tenth, and Eleventh Circuits, that fails to distinguish between penalties that were never assessed because no conduct giving rise to a penalty ever existed (as in *Simoneaux*) and penalties that were never assessed because they existed but the defendant successfully covered them up.

* * *

In sum, in the Third, Fourth, Tenth, and Eleventh Circuits, once a defendant has engaged in wrongdoing giving rise to liability to pay money to the Government, the defendant's fraudulent cover-up of that duty is a "reverse false claim" because the cover-up wrongly prevents the Government from discovering and enforcing the payment obligation. By contrast, in the Second, Fifth, Sixth, and D.C. Circuits, a defendant who engages in a similar cover-up does not violate the FCA precisely because it prevented the Government from assessing a penalty.

II. The Decision Below Is Wrong

The decision below conflicts with the plain text of several FCA provisions. The amended text makes clear that a reverse false claim exists when a defendant covers up or "conceals" existing liability to pay, whether or not the penalty was assessed.

1. The decision below conflicts with the new definition of "obligation" that Congress added because some courts were construing that term too narrowly. *See Victaulic*, 839 F.3d at 253. Congress amended the FCA in 2009 to define the word "obligation" as "an established duty, whether or not fixed, arising from . . . statute or regulation." A defendant thus makes a reverse false claim when it "knowingly conceals" (covers up) an established duty, whether or not fixed, arising from a statute.

When the amended statute refers to an "established duty, whether or not fixed," it means the duty must already *exist* before the cover-up (the reverse false claim) occurred, but it doesn't need to be "fixed." That is exactly what the Third, Fourth, Tenth, and Eleventh Circuits hold. Because the amended statute expressly says it doesn't need to be "fixed," that means a penalty doesn't need to be previously "assessed." To "assess" a penalty is to "fix" it.

The ordinary meaning of the statute's words supports the Third, Fourth, Tenth, and Eleventh Circuits. In 2009 when the FCA was amended, "establish" was defined as "to bring about or into existence." *Establish*, Black's Law Dictionary (9th ed. 2009). That definition means an "established duty" is a duty that has already been brought into existence. That definition is consistent with the

many courts that have interpreted the reverse-FCA provision as applying to an attempt to cover up an existing obligation that the Government doesn't know about yet. And although the dictionary supplies an alternative definition, the FCA's "whether or not fixed" language confirms that alternative definition is not the one that made it into the statute: "to settle, make, or *fix* firmly." *Ibid.* (emphasis added). When the Second Circuit in *Miller* looked to Black's to define the word "established," the Second Circuit cited only the latter definition—and when it did so it cut off the definition using ellipses to omit "or fix firmly," which is the key language demonstrating that the Second Circuit's conclusion is inconsistent with the statute's plain text. *See Miller*, 110 F.4th at 545.

The decision below conflicts with the definition's "whether or not fixed" language in additional ways. The Second Circuit held there is no reverse false claim unless the Government took "affirmative steps to . . . collect the penalties," but "collecting" a penalty obviously requires that the penalty was "fixed"—otherwise there is nothing to "collect." Again, that is inconsistent with the text of the statute. And the Second Circuit holds that a duty to pay must be "self-executing," *Miller*, 110 F.4th at 545, but a payment obligation that is "not fixed" is obviously not "self-executing," so the Second Circuit conflicts with the "not fixed" clause yet again.

In short, any requirement that a penalty be "assessed" or "imposed," or that the Government has "taken affirmative steps to communicate, confirm, and collect the penalties" is inconsistent with the statutory text saying the payment obligation can be "not fixed." Instead, all that is required to satisfy the

"established duty, whether or not fixed" clause is that the defendant had previously committed misconduct that made it liable to pay a penalty, and the defendant tried to conceal that liability by covering it up.

2. The decision below is also inconsistent with the statutory text instructing that reverse false claims include efforts to "conceal" an obligation, and with the longstanding legal principles that text reflects. As the Fourth Circuit observed in *Wheeler*, "[t]he purpose of penalizing 'knowingly and improperly avoided' obligations is made plain in cases" where "the government is unable to enforce" an obligation because it does not know of its existence. 127 F.4th at 497. Precisely because covering up preexisting penalty liability blocks the Government from discovering it and enforcing the penalty, the FCA creates liability for that act of "concealment." Under the Second Circuit's rule, however, reverse-FCA liability wouldn't apply to the very cover-ups the FCA exists to penalize.

The plain text of the FCA's "concealment" clause thus incorporates a familiar concept: the prevention doctrine. As Justice Cardozo explained, "he who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned." *R.H. Stearns Co.* v. *United States*, 291 U.S. 54, 61 (1934). This principle has particular force in fraud cases: "if acts have by fraud been prevented from being done by the parties," it will "treat the case exactly as if the acts had been done." *Moore* v. *Crawford*, 130 U.S. 122, 128 (1889) (quoting 1 Story, Eq. Jur. § 187). That principle applies here, as the FCA incorporates "the common-law meaning of fraud." *Universal Health Servs., Inc.*

v. *United States ex rel. Escobar*, 579 U.S. 176, 187 (2016). The FCA has long been understood to reach "all fraudulent attempts to cause the Government to" lose out on money to which it is entitled. *See United States* v. *Neifert-White Co.*, 390 U.S. 228, 233 (1968). Thus, a defendant cannot evade reverse-FCA liability by pointing to the Government's non-assessment of a penalty when the defendant's fraudulent concealment is what prevented the Government from discovering the misconduct and assessing the penalty.

The FCA creates liability for knowing concealment to serve an important deterrence function. As the Third Circuit observed in *Victaulic*, if a party "believes the value" of covering up an existing obligation "exceeds the risk that the deception will be discovered," it "may decline" to be forthright because covering up earlier misconduct would be a "net gain to the company." 839 F.3d at 255-56. The FCA's "possibility of treble damages" for "[r]everse false claims liability changes that value proposition." *Id.* at 256. But under the Second Circuit's approach, it would always be a "net gain" to attempt the cover-up because there's nothing to lose. If the cover-up succeeds, then the bad actor avoids the penalty for the misconduct it covered up. If the cover-up doesn't succeed, it is no worse off than if it had come clean. The text of the FCA does not countenance that result.

3. The correct application of the FCA here is straightforward. The instant case is substantially similar to the Fourth Circuit's decision in *Wheeler* and the Tenth Circuit's decision in *Conagra*.

Once Alpha made fraudulent statements in its initial submissions to MARAD in 2017, Alpha was,

by statute, "liable to the Government for a civil penalty." 46 U.S.C. § 12151(c). Then, beginning in 2018, Alpha was required to make annual recertifications that there was no understanding for Cooke to control Alpha. Because Alpha knew its 2017 statements were materially misleading, making it "liable" to pay a penalty, Alpha made false recertifications in 2018 and thereafter to cover up the earlier misstatements and prevent the penalty from being assessed. Just like the defendants in *Wheeler* and *Conagra*, no regulator had formally assessed any penalty or concluded that a violation occurred. But just like the defendants in *Wheeler* and *Conagra*, Alpha knew by 2018 that the earlier violation had already occurred and that it was "liable" to pay penalties. When Alpha covered up its 2017 violation by making false certifications in 2018, Alpha improperly avoided or concealed its obligation to pay 2017-related penalties. The 2017 submission was not a reverse false claim, but the 2018 and later submissions were.

And as cases like *Wheeler* demonstrate, it does not matter where the duty to pay comes from. The amended FCA covers attempts to conceal duties "arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, *from statute or regulation*, or from the retention of any overpayment." § 3729(b)(3) (emphasis added). The text of the statute furnishes no basis for treating these sources as unequal. Nor does the text of the statute say that some unspecified subset of statutory duties gives rise to reverse false claims liability, while another unspecified subset of statutory duties does not. In *Wheeler*, the duty arose from a regulatory "penalty" in a settlement of prior

violations of healthcare laws; in *Conagra*, it arose from a regulatory fee; and in *Victaulic*, it arose from a statute. Here, Cooke avoided a statutory penalty. As the plain text of the amended FCA confirms, these distinctions don't make any difference.

III. The Question Presented Is Important and Recurs Frequently

The FCA—its reverse-FCA provision included—is an important enforcement tool to combat financial fraud and protect taxpayers. Last year alone, the FCA brought more than $6.8 billion in settlements and judgments for the public fisc. Press Release, U.S. Dep't of Just., *False Claims Act Settlements and Judgments Exceed $6.8B in Fiscal Year 2025* (Jan. 16, 2026), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-68b-fiscal-year-2025. Since the 1986 expansion to the FCA, which expansion included § 3729(a)(1)(G), the FCA has brought taxpayers more than $85 billion. *Ibid*. The Department of Justice describes the FCA as "one of the government's most powerful weapons against fraud," and it identified among its current priorities a use of the reverse-FCA provision. *Ibid*. These efforts depend significantly on relators, who bring to light defendants' avoidance of their obligations that the Government had previously not known. It is crucial that courts not deprive the Government and taxpayers of the full force of this law as written.

Because the FCA is a crucial tool for fighting fraud, this Court has repeatedly granted review in FCA cases. Within the last decade, the Court has reviewed FCA cases regarding materiality, *Escobar*, 579 U.S. 176; seal violations, *State Farm Fire & Cas.*

Co. v. *United States ex rel. Rigsby*, 580 U.S. 26 (2016); the statute of limitations, *Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, 587 U.S. 262 (2019); scienter, *United States ex rel. Schutte* v. *SuperValu Inc.*, 598 U.S. 739 (2023); the Government's dismissal authority, *United States ex rel. Polansky* v. *Executive Health Res., Inc.*, 599 U.S. 419 (2023); and the statutory definition of a "claim," *Wisconsin Bell, Inc.* v. *United States ex rel. Heath*, 604 U.S. 140 (2025).

The question of what constitutes a reverse-FCA obligation, including whether the Government's discovery and enforcement is necessary, recurs frequently across federal programs. Some among the many contexts in which this important question arises are: regulatory penalties for prior violations of the law, *Wheeler*, 127 F.4th at 496-97; statutory customs marking duties, *Victaulic*, 839 F.3d at 255-56; antidumping duties and tariffs, *Island Indus., Inc.* v. *Sigma Corp.*, 142 F.4th 1153, 1164-66 (9th Cir. 2025); export-certificate fees, *Conagra*, 465 F.3d at 1202-04; Medicare and Medicaid overpayment obligations, *United States* v. *Bourseau*, 531 F.3d 1159, 1169-70 (9th Cir. 2008); *United States ex rel. Hernandez-Gil* v. *Dental Dreams, LLC*, 307 F. Supp. 3d 1224, 1268-70 (D.N.M. 2018); GSA schedule price-reduction and price-adjustment obligations, *United States ex rel. Morsell* v. *Symantec Corp.*, 130 F. Supp. 3d 106, 110-14 (D.D.C. 2015); and excess Government property accounting and valuation under government contracts, *Pemco*, 195 F.3d at 1237-38. In all these contexts and more, courts will apply different rules of law as to whether a duty to pay the Government is an "obligation" under § 3729(a)(1)(G) regardless of whether the Government has discovered and enforced that duty.

If the Court does not intervene, there is risk that more lower courts will follow the wrong side of the split. *See, e.g.*, *United States ex rel. Booker* v. *Pfizer, Inc.*, 9 F. Supp. 3d 34 (D. Mass. 2014) (directly conflicting with *Wheeler*).

IV. This Case Provides an Excellent Vehicle

Petitioners squarely pressed these issues below, expressly urging the Second Circuit to limit *Miller* and instead to follow *Wheeler*, *Conagra*, *Victaulic*, and *Pemco*, but the Second Circuit adhered to its precedent and expressly considered Petitioners' claim on the pleadings.

This case is an excellent vehicle because the allegations furnish a unique opportunity for the Court to establish a limiting principle. Most reverse-FCA cases discuss *either* a preexisting penalty (as in *Wheeler*) or no preexisting penalty (as in *Simoneaux*); courts have conflated those two fact patterns, causing significant confusion. Here, by contrast, the facts feature both, so the Court can announce a clean rule that clearly distinguishes between them. To illustrate, Petitioners do not contend that Alpha's 2017 misrepresentations created reverse-FCA liability. In its 2017 fraudulent filing, Alpha failed to follow its "duty to obey the law," but it had no already-existing "duty to pay" a penalty. *See Simoneaux*, 843 F.3d at 1040. Instead, the complaint alleges reverse-FCA liability arose with Alpha's 2018 filings, which concealed Alpha's liability for the AFA penalty arising from its misrepresentations in 2017. Through the facts of this case, this Court may fully establish the limiting principle of reverse-FCA liability: covering up a penalty regarding preexisting misconduct

constitutes a reverse false claim because it prevents the Government from assessing a penalty, but no reverse-FCA claim exists when the defendant never committed any prior misconduct that triggered a penalty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 5, 2026

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 25-155

UNITED STATES EX REL. W. BENSON CHILES, UNITED STATES EX REL. CHRIS MANTHEY,

Plaintiffs-Appellants,

ABC, UNITED STATES OF AMERICA, EX REL.,

Plaintiffs,

v.

COOKE INC., COOKE AQUACULTURE INC., COOKE OMEGA INVESTMENTS INC., COOKE SEAFOOD USA INC., OMEGA PROTEIN CORPORATION, OMEGA PROTEIN, INC., GLENN COOKE, BRET D. SCHOLTES, BMO CAPITAL MARKETS CORP., ALPHA VESSELCO HOLDINGS, INC., ALSO KNOWN AS OCEAN FLEET SERVICES, INC., ALPHA VESSELCO LLC., DOING BUSINESS AS OCEAN HARVESTERS, SETH GREGORY DUNLOP, GREGORY LAWSON DUNLOP, MONTGOMERY DEIHL,

Defendants-Appellees,

DEF,

Defendant.

August Term 2025
Argued: September 24, 2025
Decided: August 5, 2026

Appendix A

Appeal from the United States District Court
for the Southern District of New York
No. 21-CV-5743, Jesse M. Furman, *Judge*.

Before: WESLEY, BIANCO, and ROBINSON, *Circuit Judges*.

Plaintiffs-Appellants W. Benson Chiles and Chris Manthey filed this *qui tam* action, as relators on behalf of the United States ("Relators"), against Defendants-Appellees Cooke Inc. ("Cooke"), Cooke Aquaculture Inc., Cooke Omega Investments Inc., Cooke Seafood USA Inc., Omega Protein Corporation ("Omega"), Omega Protein, Inc., Glenn Cooke, Bret D. Scholtes, BMO Capital Markets Corp., Alpha VesselCo Holdings, Inc., a/k/a Ocean Fleet Services, Inc., Alpha VesselCo LLC., d/b/a Ocean Harvesters, Seth Gregory Dunlop, Gregory Lawson Dunlop, and Montgomery Deihl, alleging that Defendants defrauded the United States when they applied for and secured fishing endorsements. In their amended complaint, Relators assert that this alleged fraudulent scheme violated the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA"), by misrepresenting to the Maritime Administration ("MARAD") the citizenship of the entity that applied for fishing endorsements, thereby inducing the issuance of fishing endorsements to an ineligible non-U.S. entity and permitting that entity to fish for menhaden, a commercially valuable fish, in United States waters.

On January 3, 2025, the United States District Court for the Southern District of New York (Jesse M. Furman, Judge) dismissed the amended complaint, concluding that

Relators could not establish that Defendants made a claim for property as required under 31 U.S.C. § 3729(a)(1)(A), (B), (C), or that Defendants avoided or decreased any established obligation to pay money to the United States, as required for a "reverse false claim" under 31 U.S.C. § 3729(a)(1)(G). The district court also denied Relators' request for leave to file a further amended complaint. On appeal, Relators argue that: (1) wild fish in public waters are property under the FCA; (2) unassessed civil penalties allegedly incurred by the Defendants, for violations of the American Fisheries Act of 1998 ("AFA"), can support a reverse false claim; and, alternatively, (3) the district court abused its discretion in denying leave to add a cause of action under the FCA.

We agree with the district court and hold that wild fish are not "property" under the FCA, foreclosing the amended complaint's first three causes of action, and that the amended complaint fails to state a reverse false claim because unassessed civil penalties for alleged violations of the AFA do not constitute an "obligation to pay" under the FCA. We also conclude that the district court did not abuse its discretion in denying leave to file a second amended complaint.

Accordingly, we **AFFIRM** the judgment of the district court.

Appendix A

JOSEPH F. BIANCO, *Circuit Judge*:

Plaintiffs-Appellants W. Benson Chiles and Chris Manthey filed this *qui tam* action, as relators on behalf of the United States ("Relators"), against Defendants-Appellees Cooke Inc. ("Cooke"), Cooke Aquaculture Inc., Cooke Omega Investments Inc., Cooke Seafood USA Inc., Omega Protein Corporation ("Omega"), Omega Protein, Inc., Glenn Cooke, Bret D. Scholtes, BMO Capital Markets Corp., Alpha VesselCo Holdings, Inc., a/k/a Ocean Fleet Services, Inc., Alpha VesselCo LLC., d/b/a Ocean Harvesters, Seth Gregory Dunlop, Gregory Lawson Dunlop, and Montgomery Deihl, alleging that Defendants defrauded the United States when they applied for and secured fishing endorsements. In their amended complaint, Relators assert that this alleged fraudulent scheme violated the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA"), by misrepresenting to the Maritime Administration ("MARAD") the citizenship of the entity that applied for fishing endorsements, thereby inducing the issuance of fishing endorsements to an ineligible non-U.S. entity and permitting that entity to fish for menhaden, a commercially valuable fish, in United States waters.

On January 3, 2025, the United States District Court for the Southern District of New York (Jesse M. Furman, *Judge*) dismissed the amended complaint, concluding that Relators could not establish that Defendants made a claim for property as required under 31 U.S.C. § 3729(a)(1)(A), (B), (C), or that Defendants avoided or decreased any established obligation to pay money to the United States, as required for a "reverse false claim" under 31 U.S.C.

§ 3729(a)(1)(G). The district court also denied Relators' request for leave to file a further amended complaint. On appeal, Relators argue that: (1) wild fish in public waters are property under the FCA; (2) unassessed civil penalties allegedly incurred by the Defendants, for violations of the American Fisheries Act of 1998 ("AFA"), can support a reverse false claim; and, alternatively, (3) the district court abused its discretion in denying leave to add a cause of action under the FCA.

We agree with the district court and hold that wild fish are not "property" under the FCA, foreclosing the amended complaint's first three causes of action, and that the amended complaint fails to state a reverse false claim because unassessed civil penalties for alleged violations of the AFA do not constitute an "obligation to pay" under the FCA.[1] We also conclude that the district court did not abuse its discretion in denying leave to file a second amended complaint.

Accordingly, we **AFFIRM** the judgment of the district court.

BACKGROUND [2]

The AFA requires that vessels 100 feet or greater in registered length hold a "fishery endorsement" to "engage

1. Because we affirm the district court's dismissal of the claims on these grounds, we need not address Defendants' alternative arguments for affirmance.

2. The following facts are taken from Relators' amended complaint.

in the fisheries." 46 U.S.C. § 12113(a), (b)(1). "A vessel owned by an entity is eligible for a fishery endorsement only if at least 75 percent of the interest in the entity, at each tier of ownership and in the aggregate, is owned and controlled by citizens of the United States" (the "citizenship requirement"). *Id.* § 12113(c)(1). Vessel owners must "file a statement of citizenship setting forth all relevant facts regarding vessel ownership and control with [MARAD] on an annual basis to demonstrate compliance." *Id.* § 12113(e)(1); *see also* 46 C.F.R. § 356.5(d) (providing the form affidavit that entities use to affirm their citizenship and their vessel's eligibility for a fishing endorsement). If MARAD determines that a vessel owner meets the citizenship requirement, it produces a determination letter that is filed with the U.S. Coast Guard, which, in turn, issues the fishery endorsement. Failure to comply with, or violation of, the citizenship requirement results in revocation of the fishery endorsement, 46 U.S.C. § 12113(h), and liability for a civil penalty that accrues for each day of a continuing violation, *id.* § 12151(a)(1). In addition, if a vessel owner "knowingly falsified or concealed a material fact, or knowingly made a false statement or representation, about the eligibility of the vessel under [the citizenship requirement]," the owner is liable for a civil penalty of up to $100,000 for each day the vessel engages in fishing. *Id.* § 12151(c).

The fishing of menhaden, a commercially valuable fish that is processed for use in fish oil supplements, animal feed, and bait, is the second largest fishery by tonnage in the United States. Prior to 2017, Omega was a publicly traded U.S. company and the "dominant player" in U.S.

menhaden fishing, with a fleet that included 37 vessels over 100 feet in registered length. App'x at 79. In April 2017, Cooke, a private Canadian conglomerate, approached Omega with an acquisition offer. The amended complaint alleges that, upon realizing during the negotiations that a straightforward acquisition of Omega would render its vessels ineligible to receive a fishery endorsement, Defendants structured the transaction to give "the illusion of independent ownership, while ensuring that Cooke and Omega would retain total control via a figurehead" and to conceal Defendants' noncompliance with the citizenship requirement. *Id.* at 101. More specifically, the amended complaint alleges that Omega's vessels were transferred to a new Omega subsidiary, which was then sold to a holding company that was 20% owned by Omega and 80% owned by a U.S. citizen and Cooke employee, Seth Dunlop, whose uncle is Cooke's Chief Executive Officer, Glenn Cooke. The amended complaint further alleges that Defendants "defrauded the [g]overnment by falsely certifying that they complied with the [citizenship requirement] and by concealing from MARAD numerous facts that were material to MARAD's citizenship determinations under the [AFA]." *Id.* at 113. Finally, the amended complaint alleges that Defendants' knowing violation of the citizenship requirement and fraudulent procurement of fishery endorsements has defrauded the United States government and resulted in the harvesting of "millions of dollars' worth of [menhaden]." *Id.* at 82.

Relators initiated this *qui tam* action in July 2021. In March 2024, the government declined to intervene. In their amended complaint, Plaintiffs assert four causes

of action under the FCA, alleging that: (1) Defendants presented false or fraudulent claims, 31 U.S.C. § 3729(a)(1)(A); (2) Defendants knowingly made, or caused to be made, a false statement material to a false claim, *id.* § 3729(a)(1)(B); (3) Defendants conspired to submit, or caused to be submitted, a false claim, *id.* § 3729(a)(1)(C); and (4) Defendants knowingly made a false statement material to an obligation to pay the government, or a "reverse false claim," *id.* § 3729(a)(1)(G).

Defendants moved to dismiss the amended complaint and the district court granted the motion. *See generally United States v. Cooke Inc.*, No. 21-CV-5743 (JMF), 2025 U.S. Dist. LEXIS 867, 2025 WL 27662 (S.D.N.Y. Jan. 3, 2025). As an initial matter, the district court noted that Relators' first three causes of action "all require a showing that Defendants made a request for 'money or property' within the meaning of the [FCA]." 2025 U.S. Dist. LEXIS 867, [WL] at *3. The district court then held that those three causes of action failed because "neither the fishery endorsements Defendants obtained for their fishing vessels nor the menhaden fish Defendants were able to harvest from U.S. waters are 'property' within the meaning of the FCA." 2025 U.S. Dist. LEXIS 867, [WL] at *7. Finally, the district court concluded that Plaintiffs' fourth cause of action, the reverse false claim, failed because the underlying statutory penalties are discretionary, as opposed to mandatory. *See* 2025 U.S. Dist. LEXIS 867, [WL] at *7-9. The district court also denied Relators' request for leave to amend to add a new cause of action under the FCA. *See* 2025 U.S. Dist. LEXIS 867, [WL] at *9. This appeal followed.

Appendix A

DISCUSSION

"We review *de novo* a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), accepting as true all factual allegations in the complaint and drawing all reasonable inferences in favor of the plaintiff." *Carruthers v. Colton*, 153 F.4th 169, 179 (2d Cir. 2025) (internal quotation marks and citation omitted). Similarly, we review *de novo* the district court's statutory interpretation that underlies its order of dismissal. *See Romea v. Heiberger & Assocs.*, 163 F.3d 111, 114 (2d Cir. 1998). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotation marks and citation omitted). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

"The FCA imposes significant penalties on those who defraud the [g]overnment." *Miller v. United States ex rel. Miller*, 110 F.4th 533, 541 (2d Cir. 2024) (internal quotation marks and citation omitted). "The FCA, however, is 'not an all-purpose antifraud statute, or a vehicle for punishing garden-variety breaches of contract or regulatory violations.'" *United States ex rel. Billington v. HCL Techs. Ltd.*, 126 F.4th 799, 803 (2d Cir. 2025) (quoting *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 194, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016)). As relevant here, the statute imposes liability on any person

who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A), or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," *id.* § 3729(a)(1)(B). To establish a claim under either subsection, a relator must show that the defendant: "(1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury." *Mikes v. Straus*, 274 F.3d 687, 695 (2d Cir. 2001), *abrogated on other grounds by Universal Health Servs.*, 579 U.S. 176. The term "claim" is defined by statute as "any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—is presented to an officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2)(A)(i). The FCA's reverse false claim provision imposes liability on any person who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the [g]overnment." *Id.* § 3729(a)(1)(G). The statute also imposes liability where a defendant "conspires to commit" a violation of these provisions. *Id.* § 3729(a)(1)(C).

Relators assert that the district court erred in dismissing their property-based claims under Section 3729(a)(1)(A)-(C), as well as the reverse false claim under Section 3729(a)(1)(G). Alternatively, Relators contend that the district court abused its discretion in denying the request for leave to amend. We address each argument in turn.

Appendix A

I. Property-Based Claims Under the FCA

A false claim under the FCA "normally connotes a demand for money or for some transfer of public property." *United States v. McNinch*, 356 U.S. 595, 599, 78 S. Ct. 950, 2 L. Ed. 2d 1001 (1958) (internal quotation marks and citation omitted). Here, the amended complaint alleges that the property at issue is wild fish. *See* App'x at 78 ("As a result of their fraudulent scheme, Defendants have illegally harvested from United States waters many millions of dollars' worth of fish to which they are not entitled."). On appeal, Relators argue that the district court erred in dismissing their property-based claims under the FCA on the ground that the wild fish at issue are not "property" under the statute.[3] Assuming without deciding that the defendants' application for a fishing endorsement is tantamount to a claim for the fish they would catch pursuant to that license, we disagree that the wild fish are "property" under the statute.

Because the FCA does not define property, we look to "traditional concepts of property" law to determine whether an interest is sufficient to constitute property under the FCA. *Cleveland v. United States*, 531 U.S. 12, 24, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000); *see also United States v. Henry*, 29 F.3d 112, 115 (3d Cir. 1994) ("[T]o determine whether a particular interest is property for purposes of the fraud statutes, we look to whether the law traditionally has recognized and enforced it as

3. Relators do not challenge on appeal the district court's separate determination that the fishery endorsements also do not qualify as property under the FCA.

a property right."). As set forth below, the district court correctly determined, based upon well-settled Supreme Court precedent, that free-swimming wild fish and game are not the property of the state or federal government under traditional concepts of property law and, thus, wild fish cannot constitute "property" for purposes of an FCA claim.

As Relators note, in the late nineteenth century, the Supreme Court did suggest that a state has ownership in wildlife. In particular, in *Geer v. Connecticut*, 161 U.S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896), the Supreme Court surveyed the history of property rights in wildlife, from the Institutes of Justinian to Blackstone, and concluded that wild fish and game within a state's territory are the common property of its citizens and that the state acts as a trustee for that common property. *Id.* at 529 ("While the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions had led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.").

In dissent, Justice Field agreed that the state had authority to regulate wild fish and game. *See id.* at 541 ("I do not doubt the right of the state, by its legislation, to provide for the protection of wild game, so far as such

protection is necessary for their preservation, or for the comfort, health, or security of its citizens, and does not contravene the power of congress in the regulation of interstate commerce."). But he did not ground that authority in state *ownership* of wild fish and game; rather, he concluded that nobody has a *proprietary* interest in wild fish and game until it is caught:

> I hold that where animals within a state, whether living in its waters or in the air above, are, at the time, beyond the reach or control of man, so that they cannot be subjected to his use or that of the state in any respect, they are not the property of the state or of any one in a proper sense. I hold that, until they are brought into subjection or use by the labor or skill of man, they are not the property of any one, and that they only become the property of man according to the extent to which they are subjected by his labor or skill to his use and benefit.

Id. at 539.

Within several decades, the Supreme Court began its retreat from the view that wild fish or game are the property of the state, as suggested in the majority holding in *Geer*, and moved towards Justice Field's dissent, which classified such fish and game as property of no one. For example, in *Missouri v. Holland*, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 18 Ohio L. Rep. 61 (1920), the Supreme Court held that the 1916 treaty between the United States

and Great Britain, which regulated the killing and sale of migratory birds, was a proper exercise of the federal government's treaty power under the Constitution. *Id.* at 431-35. In doing so, the Supreme Court rejected Missouri's argument that the treaty was invalid because the state had ownership of such birds or possessed exclusive power to regulate their killing:

> No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away.

Id. at 434. Similarly, in *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948), the Supreme Court again rejected the contention that a state owns the wild fish within its waters, explaining that "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Id.* at 402.

The Supreme Court reiterated this legal principle again in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265,

97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977), which held that a Virginia statute that limited the ability of "nonresidents or aliens" to catch a certain fish, namely, menhaden, in its territorial waters was preempted by federal law. *Id.* at 286. In reaching that determination, the Court adopted the reasoning of Justice Field's dissent in *Geer*, explaining:

> A State does not stand in the same position as the owner of a private game preserve[,] and it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. . . . The "ownership" language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."

Id. at 284 (citing *Holland*, 252 U.S. 416, and *Geer*, 161 U.S. at 539-40 (Field, J., dissenting), and quoting *Toomer*, 334 U.S. at 402); *accord Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 386, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978).

Any conceivable doubt as to the continuing vitality of the "ownership" language of *Geer* was eliminated in *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979), which noted that "[t]he *Geer* analysis has . . . been eroded to the point of virtual extinction in cases

involving regulation of wild animals" and, after tracing that erosion, "expressly overrule[d] *Geer*." *Id.* at 331-35. In doing so, the Court relied upon the above-referenced quotation from *Douglas*, which it noted "explicitly embraced the analysis of the *Geer* dissenters."[4] *Id.* at 334.

4. Although Relators seek to rely upon the Supreme Court's more recent decision in *Horne v. Department of Agriculture*, 576 U.S. 351, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015), to support their position, such reliance is misplaced. In *Horne*, growers of raisins challenged a requirement by the federal government that they set aside a certain percentage of their yearly crop for a government reserve account, free of charge. *Id.* at 355. In an effort to combat the growers' argument that this reserve requirement constituted an unlawful taking under the Fifth Amendment, the government countered that the requirement was a permissible condition on raisin growing, rather than a taking, and relied upon *Leonard & Leonard v. Earle*, 279 U.S. 392, 49 S. Ct. 372, 73 L. Ed. 754 (1929), which upheld a Maryland law requiring oyster packers to obtain a license and return at least 10% of the used shells to the state. *Horne*, 576 U.S. at 365-67. In holding that the reserve requirement for raisins constituted an unlawful taking, *Horne* distinguished *Leonard* by explaining that privately grown raisins were "the fruit of the growers' labor," while "the oysters, unlike raisins, were 'feræ naturæ' that belonged to the [s]tate under state law." *Id.* at 367. Although the Supreme Court did use the language of ownership to distinguish *Leonard*, we again view such language as a shorthand reference (as in earlier Supreme Court cases) to a state's power to regulate the taking and control of wild animals, rather than as establishing the existence of a property right. *See also id.* ("Raisins are not like oysters: they are private property—the fruit of the growers' labor—not public things subject to the absolute control of the state.") (internal quotation marks and citation omitted). We therefore reject Relators' suggestion that this language in *Horne* somehow implicitly overruled the Court's analysis regarding the lack of any ownership rights in wild fish or game, as repeatedly articulated in cases such as *Holland*, *Toomer*, *Baldwin*, *Douglas*, and *Hughes*.

This Court has likewise recognized this well-settled principle of law regarding the lack of property rights in wildlife. More specifically, in *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159 (2d Cir. 1978), we explained—citing, *inter alia*, *Douglas*, *Holland*, and Justice Field's dissent in *Geer*—that, "[a]s a general rule, wild fish, birds and animals are owned by no one" and "[p]roperty rights in them are obtained by reducing them to possession." *Id.* at 163-64. Other circuits have similarly acknowledged that the government's proprietary ownership of wildlife is a fiction. *See Utah Native Plant Soc'y v. U.S. Forest Serv.*, 923 F.3d 860, 870-71 (10th Cir. 2019); *Colvin Cattle Co. v. United States*, 468 F.3d 803, 809 (Fed. Cir. 2006); *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 671 (1st Cir. 1980); *Reeves, Inc. v. Kelley*, 603 F.2d 736, 737-38 (8th Cir. 1979).[5]

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5. In support of their position that *Geer* is still good law, Relators rely on the Tenth Circuit's decision in *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc). Although the *Hodel* court noted that it read *Hughes* as overruling only "the narrow holding of *Geer* by rejecting the view that a state, without violating the Commerce Clause of the Constitution, may prohibit the export of wildlife lawfully taken within the state," *id.* at 1426 n.5, it did not endorse the view that *Geer* supported the existence of a property right in wildlife by the state. To be sure, it cited *Geer* for the proposition that "[i]t is well settled that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised 'as a trust for the benefit of the people.'" *Id.* at 1426 (quoting *Geer*, 161 U.S. at 528-29). However, the Tenth Circuit then emphasized:

> Neither state nor federal authority over wildlife is premised upon any technical "ownership" of wildlife by

Accordingly, based upon the Supreme Court's precedent regarding the lack of property rights in wild fish and game, which was confirmed by our decision in *Long Cove*, we hold that no one owns or has a property interest in wild fish within state or federal waters and, thus, the wild menhaden fish harvested in U.S. waters by Defendants are not "property" within the meaning of the FCA. In reaching this decision, we emphasize that, although federal and state governments do not have a proprietary interest in wild fish and game, they retain broad powers to regulate the taking of such wild fish and game. Those regulatory powers have been long recognized by the Supreme Court, and our holding today does nothing to disturb those powers. *See, e.g.*, *Hughes*,

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> the government. Although older decisions sometimes referred to government "ownership" of wildlife, that language has been deemed "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." [*Toomer*, 334 U.S. at 402]. As the Supreme Court declared, "[I]t is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government . . . has title to these creatures until they are reduced to possession by skillful capture." [*Douglas*, 431 U.S. at 284 (citing *Holland*, 252 U.S. at 434); *Geer*, 161 U.S. at 539-40 (Field, J., dissenting)].

Id. at 1426-27. Thus, *Hodel* provides no support for Relators' claim that a state has a property right in wildlife. Indeed, the Tenth Circuit again rejected that contention in *Utah Native Plant Society*, in which it quoted the above-referenced language from *Hodel* and held that, "[b]ecause wild animals are not the private property of those whose lands they occupy, the State of Utah, at least once it released the goats back into the wild, did not own the goats. . . ." 923 F.3d at 870-71.

441 U.S. at 338 (stating that "[t]he overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders"); *Toomer*, 334 U.S. at 402 (describing "[t]he whole ownership theory . . . as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource").

Instead, consistent with Supreme Court precedent, we conclude that this power to regulate wild fish and game is not based on ownership and does not create a property right in them and thus cannot be the subject of a cause of action for fraud in connection with a claim for property under the FCA. Although Relators attempt to distinguish this clear precedent on several grounds, we find each of those arguments unpersuasive and address each one in turn.

First, Relators argue that "the plain language of the Submerged Lands Act ["SLA"] confirms that States have 'title to and ownership of' 'fish' within State waters." Appellants' Br. at 15 (quoting 43 U.S.C. §§ 1311(a)(1), 1301(e)). The SLA, which was enacted in 1953, states:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance

> with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States.

43 U.S.C. § 1311(a). The statute defines "natural resources" to include, "without limiting the generality thereof, . . . fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life." *Id.* § 1301(e).

According to Relators, the SLA's first clause vests property rights in states over, *inter alia*, wild fish, whereas the second clause confirms the states' regulatory power over the same. We disagree. Relators' reliance on the SLA is misplaced. Although the Act confirms state title to submerged lands, its inclusion of fish within the definition of "natural resources" does not establish that states possess a *proprietary* interest in free-swimming wild fish.

The purpose of the SLA was to override the Supreme Court's decision in *United States v. California*, 332 U.S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889 (1947). *See* H.R. Rep. No. 82-695, at 5 (1951) ("Title II merely fixes as the law of the land that which, throughout our history prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely that the respective States are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters."). In that decision, the Supreme Court had held that the federal government, and not the states, has the "paramount rights in and power over" the threemile

ocean belt contiguous to a state's shoreline. *California*, 332 U.S. at 38. Nothing in the SLA suggests that it was intended to override the principle that free swimming fish in the wild are not property.

Perhaps the best evidence that the SLA did not alter Supreme Court precedent as to free-swimming fish is that many of the cases determining that state ownership of wildlife is a "fiction"—including *Douglas*, *Baldwin*, and *Hughes*—were decided *after* the SLA was enacted in 1953. *See Douglas*, 431 U.S. at 284; *Baldwin*, 436 U.S. at 386; *Hughes*, 441 U.S. at 334-35. Indeed, in *Douglas*, the Supreme Court had occasion to squarely address the argument that "the Submerged Lands Act . . . and a number of [the] Court's decisions recognize that the States have a title or ownership interest in the fish swimming in their territorial waters," and thus, "the States 'own' the fish." 431 U.S. at 283 (internal citation and footnote omitted). The Court was clear that "[this] contention is of no avail," reiterating that, as a matter of property right, "it is pure fantasy to talk of 'owning' wild fish, birds, or animals." *Id.* at 283-84. Although Relators contend that the rejection of the state-ownership theory in *Douglas* was limited to the Court's prior case authority and did not include the SLA, that narrow reading of its analysis is unwarranted as its discussion regarding ownership of wild animals was made in direct response to the contention that the SLA vested in states ownership of fish swimming in their territorial waters. *Id.*

This reading of the Court's opinion is confirmed by Justice Rehnquist's partial concurrence, which disagreed with certain reasoning in the majority opinion, but

indicated his agreement with the majority opinion that "the States do not 'own' freeswimming creatures within their territorial limits in any conventional sense of that term." *Id.* at 287 (Rehnquist, J., concurring in part) (citation omitted). More specifically, he emphasized that the "convey[ance of] 'title' and 'ownership' to such land and resources" in Section 1311(a)(1) of the SLA "could not reasonably refer to free-swimming fish which are incapable of such ownership." *Id.* at 290.

In *Long Cove*, we reached the same conclusion in interpreting the analogous language contained in a New York statute that provided that the "State of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership." 582 F.2d at 164 (quoting N.Y. Env't Conserv. Law § 11-0105). The question presented was whether we should interpret this statute literally to mean that "New York has asserted a true ownership interest in wildlife"—we concluded, "We think not." *Id.* at 165. We further explained that we viewed the language of the New York statute not as a claim of "a right of possession of wildlife," but rather as a claim "solely 'for the purpose of regulating and controlling their use and disposition.'"[6] *Id.* (quoting N.Y. Env't Conserv. Law § 11-

6. To be sure, in *Long Cove*, we noted that, "[u]nlike most wild animals, . . . clams, mussels and other sedentary or burrowing mollusks do not roam to any significant degree," and, "[h]ence, they are deemed to be in the possession of the owner, if any, of the land in which they are found." 582 F.2d at 164. However, that conclusion regarding the sedentary wild clams at issue in *Long Cove* has no application to the wild fish at issue here.

0105). Thus, our interpretation of this New York statute in *Long Cove* regarding the lack of a "true ownership" right in wildlife further supports our reading of the similar language contained in the SLA.

In short, we conclude that nothing in the SLA alters the Supreme Court's direction that nobody has a proprietary ownership interest in free-swimming fish or otherwise supports Relators' attempt to classify wild fish as property under the FCA.[7]

Second, Relators argue that the Supreme Court's holdings that a state has no property right in wildlife can be distinguished because in those cases the Court was narrowly deciding federalism questions regarding whether a state's claim of ownership in wildlife could immunize it from federal regulation. We disagree. Although federalism issues were raised in various Supreme Court cases addressing this ownership of wildlife issue, the Court's analysis has not been limited to assessing a state's claim of property right against the federal government. Instead,

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7. Relators' cursory reliance on the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act") is similarly unavailing. Congress enacted the Magnuson-Stevens Act in 1976 as part of "[a] national program for the conservation and management of the fishery resources of the United States." 16 U.S.C. § 1801(a)(6) (1976). The statute provides, in relevant part, that "the United States claims, and will exercise in the manner provided for in this chapter, sovereign rights and exclusive fishery management authority over all fish . . . within the exclusive economic zone." *Id.* § 1811(a). That statutory language confers no ownership or property rights in the wild fish but rather confers federal authority to manage and regulate the fish in federal waters.

as we recognized in *Long Cove*, the Supreme Court has made clear for over one century that, "[a]s a general rule, wild fish, birds and animals are owned *by no one*." 582 F.2d at 163 (emphasis added); *see also Douglas*, 431 U.S. at 284 ("*Neither the States nor the Federal Government*, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.") (emphasis added); *Hughes*, 441 U.S. at 334 (quoting *Douglas* with approval); *Holland*, 252 U.S. at 434 ("Wild birds are *not in the possession of anyone*; and possession is the beginning of ownership.") (emphasis added).

To the extent Relators also contend that we should disregard any of the above-referenced language from the Supreme Court cases as "obvious dicta," Appellants' Reply Br. at 2, we disagree. As a threshold matter, we are unpersuaded that the Supreme Court's analysis in each of these cases can be classified as dicta. Even in cases where federalism issues were being raised, the Supreme Court's determination that no one owns wildlife was necessary to support its holdings that a state could not claim such ownership and, thus, was not dicta. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). In any event, it is well settled that "we are obligated to accord great deference to Supreme Court *dicta*, absent a change in the legal landscape." *United States v. Harris*, 838 F.3d 98, 107 (2d Cir. 2016) (internal quotation marks and citation omitted); *see also Clemente v. Lee*, 72 F.4th

466, 474 (2d Cir. 2023). Here, there has been no change to the legal landscape on this issue subsequent to these Supreme Court decisions and, therefore, we afford great deference to that analysis across numerous cases, even if it constitutes dicta.

Finally, we reject Relators' contention that "[t]he [g]overnment's [i]nterest, [e]ven if [l]ess than [o]wnership, [i]s [s]till a [p]roperty [i]nterest" that implicates the FCA. Appellants' Br. at 42. In particular, Relators suggest that, because a state has the right to exclude, possess, and use with respect to fish in public waters, that "States' interest in fish . . . bears the hallmarks of all the sticks in the bundle of property rights." *Id.* at 45. The "bundle of sticks" metaphor is "[a] common idiom" used to describe property. *United States v. Craft*, 535 U.S. 274, 278, 122 S. Ct. 1414, 152 L. Ed. 2d 437 (2002). "But that metaphor—whatever its merits in other contexts—cannot compensate for the absence of an interest that itself has long been recognized as property." *Ciminelli v. United States*, 598 U.S. 306, 314 n.4, 143 S. Ct. 1121, 215 L. Ed. 2d 294 (2023) (internal quotation marks and citation omitted).

Here, the interest that the government retains in wild fish and game is exercised through its regulatory power, and not by virtue of the government's ownership of them, and that interest (though broad and important) does not transform the regulatory power into a property right. Relators cite no caselaw for the proposition that the FCA reaches claims for things in which the government retains some sort of bundle of interests or that are simply subject to governmental regulation. *Cf. United States v.*

Evans, 844 F.2d 36, 42 (2d Cir. 1988) ("A law prohibiting a particular use of a commodity that the government does not use or possess ordinarily does not create a property right. If it did, many government regulations would create property rights."). Thus, notwithstanding the government's broad regulatory authority over wild fish, the lack of any property interest by the government in the fish is fatal to any attempt to assert an FCA cause of action based on an alleged false claim submitted to the United States regarding those fish. Accordingly, because the federal and state governments do not have a property interest in wild fish, the district court correctly concluded that the amended complaint failed to state a claim under Sections 3729(a)(1)(A), (B), and (C) of the FCA.

II. Reverse FCA Claim

Relators also argue that the district court erred in dismissing their reverse false claim under the FCA. Here, the theory regarding the reverse false claim is that the false certifications submitted by Defendants to MARAD and the Coast Guard "covered up illegal fishing conducted the prior year" and, "[i]n doing so, Defendants 'conceal[ed]' or 'avoid[ed]' or 'decrease[d] an obligation' to pay mandatory statutory penalties under the AFA for their illegal fishing and fraudulent statements." Appellants' Br. at 45-46 (alterations in original). As set forth below, we agree with the district court's conclusion that the allegations in the amended complaint fail to state a reverse false claim.

The FCA imposes liability on any person who makes a "reverse false claim," which "covers claims of money owed

to the government, rather than payments made by the government." *United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 119 (2d Cir. 2021) (emphasis omitted); *see also* 31 U.S.C. § 3729(a)(1)(G), (b)(3). "Under any theory of a reverse false claim, . . . the relator must allege an 'obligation' to pay money or property to the government." *Miller*, 110 F.4th at 542. An "obligation" is defined as "an established duty, whether or not fixed, arising from" enumerated sources, including a contractual relationship, statute, or regulation. 31 U.S.C. § 3729(b)(3). "[A] duty to pay is established only when it triggers an immediate and self-executing duty to pay." *Billington*, 126 F.4th at 804 (emphasis, internal quotation marks and citation omitted). "In other words, . . . potential or contingent exposure to penalties does not create an 'established' duty to pay and, accordingly, an obligation does not exist by the mere fact of a violation." *Miller*, 110 F.4th at 545.

The district court held that, because the AFA's civil penalties are discretionary, Relators failed to state a reverse false claim. *Cooke*, 2025 U.S. Dist. LEXIS 867, 2025 WL 27662, at *7-9. On appeal, Relators assert that the AFA's civil penalties for violating the citizenship requirement are mandatory. In particular, Relators point to two statutory provisions: the first provides that "a person that violates [a provision of the AFA or a regulation promulgated thereunder] *is liable* to the United States [g]overnment for a civil penalty," 46 U.S.C. § 12151(a)(1) (emphasis added); and the second provides that "the owner of a documented vessel for which a fishery endorsement has been issued *is liable* to the [g]overnment for a civil penalty . . . if [they or their agent] knowingly falsified or concealed a material fact, or knowingly made a false

statement or representation, about the eligibility of the vessel under [the citizenship requirement]," *id.* § 12151(c) (emphasis added).

Determining whether a penalty is self-executing and mandatory under the FCA requires examining the statutory language and the broader context of the statute as a whole. *See Miller*, 110 F.4th at 546. "Liable" is defined, in relevant part, as "[r]esponsible or answerable in law; legally obligated," or "[s]ubject to or likely to incur a fine, penalty, etc." *Liable*, BLACK'S LAW DICTIONARY (12th ed. 2024). Relators assert that this ends the matter. However, it does not suffice to say that "is liable" means "obligation"—this tautology provides no insight. The question is whether "is liable" under the AFA constitutes an "established duty," which, for purposes of the FCA, means an "immediate and *self-executing* duty to pay." *Miller*, 110 F.4th at 545 (emphasis added). We conclude that it does not.

First, the statute does not on its face establish a self-executing obligation. The only other statutory provision concerning penalties in the AFA provides that, "[i]f the owner of a vessel fails to pay a civil penalty *imposed* by the Secretary [of Transportation], the Secretary may . . . deny . . . or revoke" the issuance of a fishery endorsement for the vessel in question. 46 U.S.C. § 12152 (emphasis added). That the Secretary of Transportation *imposes* a civil penalty suggests that the Secretary and/or MARAD must take affirmative steps to communicate, confirm, and collect the penalties, indicating that they are neither self-executing nor immediate.

Second, the statutory context indicates that the penalties are discretionary, not mandatory. For example, the AFA provides that MARAD "may conduct investigations and inspections regarding compliance." *Id.* § 12140(a). Moreover, the relevant MARAD regulation notes that certain penalties "may apply" if an entity violates the citizenship requirement. *See* 46 C.F.R. § 356.49.

We have previously noted that "[t]he repeated use of the term 'may' implies discretion" and undercuts the argument that the available penalties are mandatory. *See Miller*, 110 F.4th at 547 (citing *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 310, 140 S. Ct. 1308, 206 L. Ed. 2d 764) (2020). Indeed, as the district court noted, the allegations of the amended complaint confirm the discretionary nature of the potential penalties under the AFA. *See* App'x at 97 ("The National Vessel Documentation Center ('NVDC'), a unit within the Coast Guard, is one of the federal bodies that investigates vessel citizenship requirement violations and *recommends* appropriate penalties. . . . In February 2012, the Coast Guard approved commencement of a civil penalty assessment process against Trico to collect penalties under 46 U.S.C. § 12151(a). MARAD concurred in the Coast Guard's findings of fact.") (emphasis added).

In short, it is abundantly clear from the statutory framework that the civil penalty for violating the AFA is not self-executing, and it is in the discretion of MARAD as to whether to impose a civil penalty for any violations of the AFA and, thus, this unassessed civil penalty cannot

constitute an "obligation to pay" for purposes of a reverse false claim under the FCA. *See also United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 196 F. Supp. 3d 436, 447 (D. Del. 2016) ("[L]iability under [Section 12151 of the AFA] is contingent on the government's discretion to impose fines on defendants, as evidenced by the statutory language. As such, these potential obligations to pay unassessed fines are not within the scope of the FCA.").

Our holding is consistent with our recent decision in *Miller*, in which we held that a relator failed to sufficiently allege a reverse false claim based on civil penalties allegedly avoided by the defendant. More specifically, the relator argued that "she sufficiently alleged that [the defendant] had an obligation, or established duty, to pay because [the defendant's] conduct violated the 2015 Consent Orders, triggering 'mandatory payment provisions' or 'immediate liability' under the FDIA [(Federal Deposit Insurance Act)]." 110 F.4th at 546. The statute at issue provided that a bank that violates a final order "shall forfeit and pay a civil penalty." 12 U.S.C. § 1818(i)(2)(A)-(C). Notwithstanding the "shall" language, we rejected the relator's argument that the potential fine for violation of the FDIA constituted an "obligation to pay" under the FCA. *Miller*, 110 F. 4th at 544-47. In doing so, we explained that we agree with "our sister circuits [who] have concluded that potential or contingent exposure to penalties does not create an 'established' duty to pay and, accordingly, an obligation does not exist by the mere fact of a violation." *Id.* at 545 & n.5 (collecting cases); *see, e.g.*, *United States ex rel. Kasowitz Benson Torres LLP v. BASF Corp.*, 929 F.3d 721, 725, 442 U.S.

App. D.C. 205 (D.C. Cir. 2019) ("[A]n unassessed potential penalty for regulatory noncompliance does not constitute an obligation that gives rise to a viable FCA claim.") (alteration in original); *United States ex rel. Simoneaux v. E.I. duPont de Nemours & Co.*, 843 F.3d 1033, 1039 (5th Cir. 2016) (holding, in the context of a reverse false claim, that "[w]here . . . a regulatory penalty has not been assessed and the government has initiated no proceeding to assess it, there is no established duty to pay"). We then determined that, "[w]hile the FDIA's 'shall forfeit and pay' language, by itself, could arguably be read to require immediate and mandatory penalties, . . . the statutory context makes clear that these penalties are not mandatory, but discretionary." *Miller*, 110 F.4th at 546. In other words, "the [relevant agency] has the discretion *not* to impose a penalty that the FDIA states a bank 'shall forfeit and pay'" and, "accordingly, [that language] do[es] not trigger mandatory payment provisions or immediate liability under the FDIA." *Id.* at 547 (emphasis in original) (internal quotation marks and citation omitted).

Here, as in *Miller*, Relators put the cart before the horse, as any obligation by Defendants to pay a penalty for any violations of the AFA has not yet materialized. The Secretary of Transportation retains the discretion to determine whether to impose a civil penalty for any violation, and "an obligation does not exist by the mere fact of a violation." *Id.* at 545; *see also Simoneaux*, 843 F.3d at 1040 (emphasizing that "most regulatory statutes . . . impose only a duty to obey the law, and the duty to *pay* regulatory penalties is not 'established' until the penalties are assessed") (emphasis in original).

Relators' arguments to the contrary are unavailing. They suggest that the question of whether penalties are mandatory or discretionary can be answered only by reference to the relevant statute and that related regulations are of no moment. However, that takes our holding in *Miller* too far; nowhere did we suggest that related regulations are irrelevant to determining whether penalties are mandatory or discretionary. Rather, courts may consider related regulations in the course of exercising their independent judgment in interpreting a statute. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412-13, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024). In any event, our determination would be the same based upon the statutory language, even without consideration of the regulations.

Relators' reference to *United States v. Monsanto*, 491 U.S. 600, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989), also misses the mark. In *Monsanto*, the Supreme Court held that a statute providing that a person convicted of certain offenses "shall forfeit . . . any property" and that the sentencing court "shall order" forfeiture clearly set forth mandatory penalties. *Id.* at 607. The Supreme Court noted that "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied." *Id.* The discretionary language in the AFA is a far cry from the strong verbiage in the statute at issue in *Monsanto*. And regardless of whether the penalties under the AFA are mandatory, no self-executing obligation to pay those penalties arises automatically upon committing a violation.

Accordingly, because the potential civil penalties for violations under the AFA do not constitute an "obligation to pay" under the FCA, 31 U.S.C. § 3729(a)(1)(G), the district court correctly held that Relators had failed to state a reverse false claim.

III. Leave to Amend

Finally, Relators challenge the district court's denial of their request to further amend their complaint.

"We generally review a district court's decision to permit or deny leave to amend a complaint for abuse of discretion, keeping in mind that leave to amend should be freely granted when justice so requires." *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 164 (2d Cir. 2015) (internal quotation marks and citation omitted). "However, when denial of leave to file a revised pleading is based on a legal interpretation, such as futility, a reviewing court conducts a *de novo* review." *Id.* A request to amend is futile if "proposed amendments would fail to cure prior deficiencies or to state a claim under Rule 12(b)(6)." *Pyskaty v. Wide World of Cars, LLC*, 856 F.3d 216, 225 (2d Cir. 2017) (internal quotation marks and citation omitted).

In their opposition to Defendants' motions to dismiss, Relators requested leave to amend to add a conversion claim under 31 U.S.C. § 3729(a)(1)(D), in light of our decision in *Miller*. Section 3729(a)(1)(D) imposes liability on any person who "has possession, custody, or control of property or money used, or to be used, by

the [g]overnment and knowingly delivers, or causes to be delivered, less than all of that money or property." 31 U.S.C. § 3729(a)(1)(D). The statute does not define "use." *See id.* § 3729(b). Relators sought to add this new conversion claim under Section 3729(a)(1)(D) based upon the theory that Defendants failed to deliver unlawfully harvested fish to the government, and Relators relied upon *United States v. Bengis*, 631 F.3d 33, 38-40 (2d Cir. 2011), which they contend supports the proposition that "illegally caught fish are immediately treated as government property the moment they are caught because they are subject to seizure and sale by the government." Appellants' Br. at 51.

The district court denied Relators' request, finding that they did "not explain how or why the Second Circuit's decision in *Miller*—which construed only the FCA's reverse false claims provision—suggests that they should be permitted to bring a new claim under an entirely different provision." *Cooke*, 2025 U.S. Dist. LEXIS 867, 2025 WL 27662, at *9. The district court further noted that it had already granted Relators leave to amend in response to Defendants' initial motions to dismiss and warned that there would be no further opportunities to amend. *Id.*

We conclude that the district court did not abuse its discretion in denying Relators' request for leave to amend because of the undue delay in asserting it.[8] Although

8. The district court alternatively denied Relators' request for leave to amend based on the futility of their proposed amendment. *Cooke*, 2025 U.S. Dist. LEXIS 867, 2025 WL 27662, at *9. However,

Relators suggest this Court's decision in *Miller* effected a change in the law that required the district court to grant leave to amend, we disagree. *Miller* makes no mention whatsoever of Section 3729(a)(1)(D), and we agree with the district court that Relators failed to adequately explain below why *Miller* should permit them "to bring a new claim under an entirely different provision." *Id.* On appeal, Relators now explain that, prior to *Miller*, they "believed in good faith that the *Bengis* doctrine would state a claim under [Section] 3729(a)(1)(G)," *i.e.*, a reverse false claim, but that *Miller*'s clarification of "the meaning of 'established'" as it relates to reverse false claims has led Plaintiffs to believe "that a claim under *Bengis* would be a better fit under [Section] 3729(a)(1)(D)."[9] Appellants' Br. at 57. Thus, Relators assert that, "[a]lthough *Miller* might still permit such a claim [under Section 3729(a)(1)(G)], the *Bengis* doctrine now fits more naturally under [Section] 3729(a)(1)(D)." *Id.* at 57-58 n.10.

To be sure, our 2024 decision in *Miller* substantially undermined any argument regarding a plausible reverse false claim in the amended complaint under Section 3729(a)(1)(G), for the reasons discussed *supra*. However,

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because we affirm on the other grounds articulated by the district court, we do not reach whether the proposed amendment was futile.

9. *Bengis* concerned whether crimes of conspiring to commit smuggling under 18 U.S.C. § 371 and violations of the Lacey Act, 16 U.S.C. § 3372(a)(2)(A), were "offenses against property." We held that South Africa had a property interest in illegally harvested lobsters because the illegal harvesting "deprived South Africa of proceeds from the sale of the illegally harvested lobsters." *Bengis*, 631 F.3d at 40.

any potential conversion claim under Section 3729(a)(1)(D) based on *Bengis*, which was decided in 2011, existed long before this litigation was commenced and was unaffected by our decision in *Miller*. In other words, Relators were free, when drafting the original complaint and the amended complaint, to also assert the Section 3729(a)(1)(D) claim that they now seek to add but chose to omit from their first two complaints. In short, the district court was not required to provide Relators with another opportunity to amend when they could have brought this separate claim earlier and raised it only after the district court had stated that no further amendments would be allowed. *See Nat'l Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n*, 898 F.3d 243, 258 (2d Cir. 2018) ("[A] busy district court need not allow itself to be imposed upon by the presentation of theories seriatim.") (internal quotation marks and citation omitted).

Accordingly, it was not an abuse of discretion to deny the request to further amend the complaint given the undue delay in raising the new claim. *See Solomon v. Flipps Media, Inc.*, 136 F.4th 41, 55 (2d Cir. 2025); *Porat v. Lincoln Towers Cmty. Ass'n*, 464 F.3d 274, 276 (2d Cir. 2006).

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JANUARY 3, 2025

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21-CV-5743 (JMF)

UNITED STATES OF AMERICA, *ex rel. et al.*,

Plaintiffs,

-v-

COOKE INC. *et al.*,

Defendants.

Filed January 3, 2025

OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

In this *qui tam* proceeding, Relators W. Benson Chiles and Chris Manthey ("Relators") bring claims on behalf of the United States of America under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, against a Canadian seafood conglomerate called Cooke Inc. ("Cooke") and its subsidiaries, affiliates, officers, and employees (together, "Defendants"). *See* ECF No. 48 ("Compl."), ¶¶ 1, 15-26. Relators allege that Defendants defrauded the Government by submitting false statements

and omitting material information in order to obtain commercial fishing vessel licenses and harvest fish in U.S. waters. Defendants now move, pursuant to Rules 9(b) and 12(b) of the Federal Rules of Civil Procedure, to dismiss the operative Amended Complaint in its entirety. *See* ECF Nos. 51, 55, 59. They argue, among other things, that Relators' primary claims fail because neither fishing licenses nor fish qualify as "property" within the meaning of the FCA. The Court agrees. Accordingly, and for the reasons that follow, Defendants' motions are granted, and the Amended Complaint is dismissed.

BACKGROUND[1]

Under the American Fisheries Act of 1998 ("AFA"), a vessel is permitted to engage in commercial fishing in U.S. waters if it has a valid fishery endorsement — that is, a fishing license. 46 U.S.C. § 12113(b)(1). Of particular relevance to this case, the AFA provides that "[a] vessel owned by an entity is eligible for a fishery endorsement *only* if at least 75 percent of the interest in the entity . . . is owned and controlled by citizens of the United States." *Id.* § 12113(c)(1) (emphasis added). The AFA assigns responsibility for fishery endorsement eligibility determinations to the Maritime Administration ("MARAD") — an agency of the U.S. Department of Transportation — and to the Coast Guard. S*ee* 46 C.F.R. § 356.5; 46 U.S.C. §§ 12105(3)(a), 12113(e)(1); 49 U.S.C. § 109(a). Noncompliance with the AFA's citizenship

1. The facts set forth in this section, taken from the Amended Complaint unless otherwise noted, are assumed to be true. *See, e.g., Gonzalez v. Hasty*, 651 F.3d 318, 321 (2d Cir. 2011).

requirement can result in revocation of a fishery endorsement and the imposition of civil penalties. *See* 46 U.S.C. § 12113(h); *id.* § 12151(a).

Cooke is a Canadian seafood conglomerate that, with its subsidiaries Omega Protein Corporation and Omega Protein, Inc. (together, "Omega"), harvests and processes menhaden, a commercially valuable fish. Compl. ¶¶ 3-5. Until December 2017, Omega was an independent, publicly traded U.S. company that owned a fleet of fishing vessels that harvested menhaden from U.S. waters in the Atlantic Ocean and the Gulf of Mexico. *Id.* ¶ 4. That month, however, Cooke acquired Omega and its subsidiaries and assets — including its fishing vessels — and Omega became a foreign entity for purposes of the AFA. *Id.* ¶ 5. Relators allege that Defendants, upon realizing that the acquisition would render Omega's fishing vessels ineligible to fish in U.S. waters, concocted "a figurehead scheme to violate the AFA Citizenship Requirement, conceal the violation, and defraud the United States." *Id.* ¶ 6.

Specifically, Relators allege that Cooke "restructured the entire Acquisition to create an illusion of compliance with the AFA Citizenship Requirement" by "transferr[ing] the Omega Vessels to a new subsidiary and then [selling] that subsidiary to a new Delaware shell entity which is 20% owned by Omega and 80% owned by a U.S. citizen named Seth Dunlop." *Id.* ¶ 7. According to Relators, however, Dunlop was "just a figurehead" because, in reality, "Cooke and Omega retained control" over the fishing vessels. *Id.* Relators allege that Defendants, having restructured the acquisition in this manner, "caused the submission,

and/or conspired to submit, false and fraudulent fishery endorsement applications to MARAD and the Coast Guard, on an annual basis, for every Omega Vessel." *Id.* ¶ 8. Each application contained a sworn citizenship affidavit and supporting submissions that "expressly and falsely represent[ed] that there is no 'understanding' by which a non-citizen controls the nominal owner of the Omega Vessels" and "omit[ted] material information that undermines that false representation." *Id.* (emphasis omitted). Relators allege that Defendants submitted these applications despite each Defendant's "understanding that Cooke and Omega would continue to control the Omega Vessels and the Delaware shell, and would operate them for their own financial benefit." *Id.* ¶ 9.

Relators allege that "[i]f Defendants had not falsely represented to the Government . . . that the Delaware shell and Omega Vessels would be in fact controlled by the figurehead" — or "if Defendants had disclosed the material facts regarding the understandings and arrangements through which Cooke and Omega exercise actual control over the figurehead" — "MARAD would have determined that the Omega Vessels could not operate in the United States commercial fisheries, and Defendants would not have harvested millions of dollars' worth of fish." *Id.* ¶ 11. More specifically, in their operative Amended Complaint, Relators bring four causes of action under the FCA: (1) that Defendants knowingly presented or caused to be presented a false or fraudulent claim, *see* 31 U.S.C. § 3729(a)(1)(A); Compl. ¶¶ 151-59; (2) that Defendants knowingly made or caused to be made a false

statement material to a false claim, *see* 31 U.S.C. § 3729(a)(1)(B); Compl. ¶¶ 160-67; (3) that Defendants conspired to present a false claim, *see* 31 U.S.C. § 3729(a)(1)(C); Compl. ¶¶ 168-72; and (4) that Defendants knowingly made a false statement to avoid an obligation to pay the United States in violation of the FCA's "reverse false claim" provision, *see* 31 U.S.C. § 3729(a)(1)(G); Compl. ¶¶ 173-81.

LEGAL STANDARDS

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must "accept[] all factual allegations in the complaint and draw[] all reasonable inferences in the plaintiff's favor." *ATSI Commc'ns, Inc. v. Schaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). The Court will not dismiss any claims pursuant to Rule 12(b)(6) unless the plaintiff fails to plead sufficient facts to state a claim to relief that is facially plausible, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), that is, one that contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). More specifically, a plaintiff must allege facts showing "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Further, if a plaintiff has not "nudged [its] claims across the line from conceivable to plausible, [those claims] must be dismissed." *Id.* at 570.

Appendix B

DISCUSSION

Defendants seek dismissal of all four causes of action. The Court can and will address the first three together and then turn to Relators' reverse false claims cause of action.

A. Submission of False Claims and Conspiracy To Do the Same

Sections 3729(a)(1)(A) and (a)(1)(B) of the FCA impose liability on "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to an officer or employee of the United States, or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." To prevail under either section, a relator must allege that the "defendants (1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury." *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010), *rev'd on other grounds*, 563 U.S. 401, 131 S. Ct. 1885, 179 L. Ed. 2d 825 (2011); *see also United States ex rel. Raffington v. Bon Secours Health Sys., Inc.*, 405 F. Supp. 3d 549, 555 (S.D.N.Y. 2019) (noting that courts "generally treat" Sections 3729(a)(1)(A) and (a)(1)(B) "together, as their elements overlap significantly"). To prevail on a claim of conspiracy to violate the FCA, at least where (as here) the claim is based on the same allegations as the underlying substantive claims, a relator must allege "an underlying wrongful act." *United States*

ex rel. Taylor v. Gabelli, 345 F. Supp. 2d 313, 336 (S.D.N.Y. 2004); *accord United States ex rel. CKD Project, LLC v. Fresenius Med. Care Holdings, Inc.*, 551 F. Supp. 3d 27, 48 (E.D.N.Y. 2021), *aff'd*, 2022 U.S. App. LEXIS 35101, 2022 WL 17818587 (2d Cir. 2022).

Significantly, the FCA is not "designed to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599, 78 S. Ct. 950, 2 L. Ed. 2d 1001 (1958). Indeed, the Supreme Court has cautioned that "[t]he False Claims Act is not 'an all-purpose antifraud statute' or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 194, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016) (quoting *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672, 128 S. Ct. 2123, 170 L. Ed. 2d 1030 (2008)) (citation omitted). Most notably for present purposes, the FCA is limited to fraud in connection with a "claim," which is defined, in relevant part, as a "request or demand . . . for money or property" that is "presented to an officer, employee, or agent of the United States," "whether or not the United States has title to the money or property." 31 U.S.C. § 3729(b)(2)(A); *see McNinch*, 356 U.S. at 599 (observing that "the conception of a claim against the government normally connotes a demand for money or for some transfer of public property" (internal quotation marks omitted)). Thus, Relators' first three causes of action — for violation of Sections 3729(a)(1)(A) and (a)(1)(B) of the FCA and conspiracy to do the same — all require a showing that Defendants made a request for "money or property" within the meaning of the statute. Relators

do not contend that Defendants made any request for money. Instead, they assert that Defendants submitted false claims for two forms of "property": first, the fishery endorsements Defendants obtained for their fishing vessels; and, second, the menhaden fish that Defendants were able to harvest from U.S. waters as a result of having obtained those endorsements. ECF No. 68 ("Rels.' Opp'n"), at 3-16. Both theories, however, are foreclosed by binding precedent.

1. The Fishery Endorsements Are Not Property

The Court begins with Relators' contention that the fishery endorsements qualify as property. The FCA itself does not define the term "property." Instead, to determine whether something qualifies as "property" within the meaning of the statute, courts often look for guidance — as the parties here do as well, *see* ECF No. 52 ("Cooke Defs.' Mem."), 7-8; ECF No. 56 ("Alpha Defs.' Mem."), at 9-12; ECF No. 60 ("BMO Capital Markets Mem."), at 16; Rels.' Opp'n 3-4 — to cases interpreting the federal mail fraud statute, which, like the FCA, prohibits obtaining "money or property" through fraud. *See, e.g., United States ex rel. Kasowitz Benson Torres LLP v. BASF Corp.*, 929 F.3d 721, 727, 442 U.S. App. D.C. 205 (D.C. Cir. 2019); *United States ex rel. Billington v. HCL Techs. Ltd.*, No. 3:19-CV-1185 (SALM), 2022 U.S. Dist. LEXIS 134048, 2022 WL 2981592, at *5-6 (D. Conn. July 28, 2022) (Merriam, J.); *Franchitti v. Cognizant Tech. Solutions Corp.*, 555 F. Supp. 3d 63, 69 (D.N.J. 2021). The Supreme Court's decision in *Cleveland v. United States*, 531 U.S. 12, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000), upon which both sides

here rely, *see, e.g.*, Cooke Defs.' Mem.. 7-8; Alpha Defs.' Mem. 9-10; BMO Capital Markets Mem. 16; Rels.' Opp'n 4, looms especially large.

The defendant in *Cleveland* was charged under the mail fraud statute with fraudulently obtaining a license to operate video poker machines in Louisiana and moved to dismiss the charges on the ground that the alleged fraud did not deprive the State of "property." 531 U.S. at 15-17. The Court agreed and held that "a government regulator" does not "part[] with 'property' when it issues a license." *Id.* at 20. In reaching that determination, the Court drew a distinction between property interests and regulatory interests, concluding that "whatever interests Louisiana might be said to have in its video poker licenses, the State's core concern is *regulatory*," not proprietary. *Id.* The Court described the State's "legitimate interest in providing strict regulation . . . related to the operation of establishments licensed to offer video draw poker devices," observing further that Louisiana's statute defines civil and criminal penalties for unauthorized use of video poker devices in violation of the licensing rules. *Id.* at 20-21 (cleaned up). All of this, the Court explained, amounted to "a typical regulatory program" because "[i]t licenses, subject to certain conditions, engagement in pursuits that private actors may not undertake without official authorization." *Id.* at 21.

The Court held that Louisiana did not possess a property interest in poker licenses merely because "the State receives a substantial sum of money in exchange for each license." *Id.* "Licenses pre-issuance," the Court

observed, "do not generate an ongoing stream of revenue." *Id.* "At most, they entitle the State to collect a processing fee from applicants for new licenses. Were an entitlement of this order sufficient to establish a state property right, one could scarcely avoid the conclusion that States have property rights in any license or permit requiring an upfront fee, *including* drivers' licenses, medical licenses, and *fishing* and hunting *licenses*." *Id.* (emphases added). "Such licenses," however, "are purely regulatory." *Id.* The Court also rejected the contention that Louisiana had a property interest because it had "significant control over the issuance, renewal, suspension, and revocation of licenses." *Id.* at 22 (internal quotation marks omitted). "[F]ar from composing an interest that has long been recognized as property," the Court reasoned, "these intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate." *Id.* at 23 (cleaned up). "Even when tied to an expected stream of revenue, the State's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a sales tax on liquor. Such regulations are paradigmatic exercises of the States' traditional police power." *Id.*

Notably, relying in part on *Cleveland*, another district court has held — on facts similar to those alleged here — that fishing licenses do not qualify as "property" within the meaning of the FCA. *See United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 196 F. Supp. 3d 436 (D. Del. 2016). The court there explained that "[a]pproval for a [fishing] license requires a party to meet certain conditions in order to engage 'in pursuits

that private actors may not undertake without official authorization,' and subjects license holders to official inspections." *Id.* at 444 (quoting *Cleveland*, 531 U.S. at 21). The *Majestic Blue Fisheries* court found additional support for its conclusion in Federal Circuit decisions holding that fishing licenses do not "constitute a traditional property right" because "applicants lack[] the authority to exclude others from the fishery," and "the right to exclude" is a hallmark of property interests. *Id.* (cleaned up); *see also Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1374 (Fed. Cir. 2004) (concluding, in the Fifth Amendment takings context, that the plaintiff lacked "a property interest in its fishing permits and authorization letter" for its fishing vessels); *Conti v. United* States, 291 F.3d 1334, 1341 (Fed. Cir. 2002) (holding that a swordfishing permit did not confer a property interest for purposes of the Takings Clause). "Because a [fishing] license is not property," the *Majestic Blue Fisheries* court concluded, "there is no 'plausible claim for relief' under the FCA." *Majestic Blue Fisheries*, 196 F. Supp. 3d at 445.

The Court reaches the same conclusion here. Indeed, to summarize the Supreme Court's decision in *Cleveland* — which, as noted, explicitly included fishing licenses as an example of licenses for which the state has a "purely regulatory" interest — is effectively to reject Relators' contention that fishery endorsements qualify as "property." 531 U.S. at 22. Like the statute at issue in *Cleveland*, "the [AFA] establishes a typical regulatory program": "It licenses, subject to certain conditions, engagement in pursuits that private actors may not undertake without official authorization." *Id.* at 21. Or,

as Defendants put it, "the federal government treats certificates of documentation with fishery endorsements not as commercial transactions with an expectation to profit from the harvested fish, but rather as standard regulatory licenses." ECF No. 71 ("Defs.' Reply"), at 4. For example, "[a]pplicants pay only a nominal fee of $133 for a certificate of documentation, plus $12 for a fishery endorsement," and "licensees pay nothing at all for the fish they harvest." *Id.*; *see also* Cooke Defs.' Mem. 8 ("[T]he Government does not conduct the fishing itself, does not hold permits for that prerogative, and is not selling fishing permits in the ordinary commercial sense."). A straightforward application of *Cleveland* thus forecloses Relators' licensing theory of property here. *See also United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1205 (10th Cir. 2006) (rejecting an FCA relator's effort to locate a government property right in export certificates because "applying the statute in this fashion would stretch it far beyond its intended purpose").

Relators' two counterarguments are unpersuasive. First, citing out-of-circuit cases that predated *Cleveland*, Relators argue that "[c]ases assessing whether licenses are property distinguish between licenses that are mandatory . . . and licenses that are discretionary." Rels.' Opp'n 15. But *Cleveland* drew no such distinction, and Relators do not explain why the government would possess a property interest in "mandatory" licenses that have not yet issued. Second, Relators contend that *Pasquantino v. United States*, 544 U.S. 349, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005) — and not *Cleveland* — governs this case.

Appendix B

In *Pasquantino*, the Supreme Court held that Canada possessed a "property" right to uncollected excise taxes on liquor that was illegally imported into the country. 544 U.S. at 355. The uncollected tax, the Court reasoned, was a right to "collect money" which is a "valuable entitlement[]" considered to be "'property' as that term ordinarily is employed." *Id.* at 355-56 (citing Black Law's Dictionary 1382 (4th ed. 1951) (defining "property" as "extend[ing] to every species of valuable right and interest")); *see also id.* at 356 ("The right to be paid money has long been thought to be a species of property."). The Court distinguished *Cleveland* on that basis, explaining that whereas the "State's interest in an unissued video poker license was not 'property,' because the interest in choosing particular licensees was 'purely regulatory' and 'could not be economic,'" Canada's "entitlement to tax revenue is a straightforward 'economic' interest." *Id.* at 356-57 (alterations omitted). But the *Cleveland* Court expressly rejected the State's argument that it possessed a property interest in licenses because it received "a substantial sum of money in exchange for each license," 531 U.S. at 21, and nothing in *Pasquantino* altered that straightforward principle. Here, "[b]ecause the government does not expect any revenue from the issuance of a fishing license other than the nominal application fee (which was indisputably paid) and instead merely decides who can enter a regulated field," Defs.' Reply 8, *Pasquantino* is inapposite. Instead, *Cleveland* controls and compels the conclusion that the fishing licenses Defendants allegedly obtained through their false certifications were not property.

2. The Fish Are Not Property

Relators' alternative theory — that the wild menhaden fish harvested in U.S. waters by Defendants are themselves "property" within the meaning of the FCA, *see* Rels.' Opp'n 3-14 — is also foreclosed by Supreme Court precedent.[2] Relators' argument on that score rests primarily on the Supreme Court's 1896 decision in *Geer v. Connecticut*, 161 U.S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896), which recognized that the sovereign possesses a "property" interest in wildlife "as a trust for the benefit of the people, and not as a prerogative for the advantage of the government." *Id.* at 529; *see* Rels.' Opp'n 6. But Relators' reliance on *Geer* is misplaced because *Geer* was overruled

2. Relators assert that Defendants forfeited any response to their fish-as-property theory because the issue was mentioned only in passing in a footnote. *See* Rels.' Opp'n 9-10; *see also* Cooke Mem. 8 n.3 (arguing that "there is no property interest in wildlife or fish, such as menhaden in the Atlantic Ocean"). But Relators are arguably the ones who raised the issue belatedly, as their Amended Complaint does not make pellucid their theory that the "property" at issue was the fish that Defendants harvested. In any event, even if Defendants could have and should have raised the issue more squarely in their initial memoranda of law, the Court has discretion to consider it. *See Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 252 (2d Cir. 2005). Exercising that discretion is especially appropriate where, as here, the issue is purely one of law. Moreover, Relators "cannot claim that [they were] blindsided . . . or that [they were] prejudiced by the district court's consideration of that issue," as reflected in the fact that they thoroughly briefed the issue in their opposition memorandum of law. *Id.* That is not surprising, as Defendants' "motion was cast in terms of the broader and subsuming argument" that Relators had failed to allege any money or property underlying their FCA claims. *Id.*

by the Supreme Court's subsequent decisions in *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977), and *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979), both of which repudiated the notion that wildlife such as fish qualify as property. In *Douglas*, the Supreme Court held unlawful a Virginia law prohibiting vessels owned by nonresidents from fishing in state waters. In reaching that holding, the Court rejected the argument that "because the States 'own' the fish, they can exclude federal licensees." 431 U.S. at 283. Quoting from Justice Field's dissent in *Geer*, the Court explained that "[a] State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture." *Id.* (quoting *Geer*, 161 U.S. at 539-40 (Field, J., dissenting)). And it described "the 'ownership' language" in prior cases as "no more than a 19th-century legal fiction expressing the importance to its people that a State have power to preserve and *regulate* the exploitation of an important resource." *Id.* (internal quotation marks omitted and emphasis added).[3] Two years later, in *Hughes*, the Court confirmed *Geer*'s demise, explaining that, "[i]n

3. The Supreme Court previewed the point even earlier, when it observed that "[t]he whole ownership theory . . . is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and *regulate* the exploitation of an important resource." *Toomer v. Witsell*, 334 U.S. 385, 402, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948) (emphasis added).

rejecting the argument that Virginia's 'ownership' of fish swimming in its territorial waters empowered the State to forbid fishing by federally licensed ships owned by nonresidents while permitting residents to fish, [*Douglas*] explicitly embraced the analysis of the *Geer* dissenters." 441 U.S. at 334. Lest there be any doubt, the *Hughes* Court announced that its decision "expressly overrule[d] *Geer*." *Id.* at 335.

Relators attempt to dismiss the relevant language in *Douglas* as "colorful" and "breezy *dicta*," Rels.' Opp'n 10-11, claiming that the Supreme Court "walked back" its language a year later in *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978). But they are wrong. For one thing, *Baldwin* pre-dated *Hughes*, which, as noted, expressly overruled *Geer. See Hughes*, 441 U.S. at 335. For another, *Baldwin* itself explained that, following *Douglas, Geer*'s logic had "remaining vitality" only insofar as the antiquated concept of "ownership" was shorthand for a state's "power to preserve and regulate the exploitation of an important resource." *Baldwin*, 436 U.S. at 386. In other words, *Geer* survives only to the extent that its account of the state's control over wildlife reflects the state's regulatory, as opposed to property, interest. If anything, then, *Baldwin* cuts against Relators' argument. Finally, and in any event, the Court is equally bound by the Second Circuit's explicit adoption of *Douglas* in *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159, 163 (2d Cir. 1978), in which the Circuit opined that "[a]s a general rule, wild fish, birds and animals are owned by *no one*. Property rights in them are obtained by reducing them to possession," *id.* (emphasis

added). Other circuit courts have expressly adopted and applied *Douglas*'s binding reasoning as well. *See, e.g., Utah Native Plant Soc'y v. United States Forest Serv.*, 923 F.3d 860, 871 (10th Cir. 2019) (wild mountain goats); *Colvin Cattle Co. v. United States*, 468 F.3d 803, 808-09 (Fed. Cir. 2006) (wild horses).

Unable to marshal binding precedent, Relators cite a law review article to argue that "the state sovereign ownership of wildlife articulated in *Geer* is still alive and well," pointing to state and federal legislation that refers to state "ownership" of wildlife. Rels.' Opp'n 4-6 (citing Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 Env't L. 673 (2005)). In doing so, however, Relators ignore *Douglas* and *Hughes*. *Douglas* and its progeny make clear that talk of owning wildlife is not to be taken literally — that such ownership language is a "pure fantasy" and merely a reflection of a state's regulatory authority over natural resources. *Douglas*, 431 U.S. at 283-84. The Second Circuit's decision in *Long Cove* is to the same effect. The defendants in *Long Cove* were charged with violating the National Stolen Property Act by taking undersized clams from the Long Island Sound and selling them to area restaurants. *See Long Cove*, 582 F.2d at 161-62. The government argued that the clams were "stolen" from the State of New York because of a New York law that provided that "[t]he State of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership." *Id.* at 164. Considering "whether New York has asserted a

true ownership interest in wildlife," the Second Circuit concluded that it had not. *Id.* at 165; *see also United States v. Schultz*, 333 F.3d 393, 405 (2d Cir. 2003) (observing that "the purpose of asserting ownership" over wildlife is "only to regulate and control the use and disposition of [it], not to actually take possession of it"). New York is not, for example, liable for an attack by any wild animal, as an actual private owner of such an animal would be. *See Long Cove*, 582 F.2d at 164. In other words, the fact that a state claims ownership over wildlife does not mean that the state has a genuine property interest in wildlife.

Trying a different tack, Relators argue that, even assuming "that fish are not property in the water," that premise "does not foreclose FCA liability" because fish "transform into private property once they are caught." Rels.' Opp'n 12. The point is well taken: Menhaden fish that are lawfully harvested by commercial fisheries do indeed become private property. But the point is also immaterial. The FCA "protect[s] the funds and property of the Government from fraudulent claims," *United States v. Neifert-White Co.*, 390 U.S. 228, 233, 88 S. Ct. 959, 19 L. Ed. 2d 1061 (1968), including property over which the government holds title *and* property administered by the government on behalf of another person. In other words, the question is not whether a defendant ever obtains, through downstream commercial activity, something that can be considered property — as was the case for the video poker licensee in *Cleveland* after obtaining the licenses. Instead, the relevant question here is whether the menhaden fish at issue constituted the *government's* property *before* Defendants harvested them. For the reasons discussed above, they did not.

For similar reasons, *United States v. Bengis*, 631 F.3d 33 (2d Cir. 2011), a criminal restitution case cited in passing by Relators, *see* Rels.' Opp'n 18, is of no moment. Admittedly, *Bengis* held that South Africa had "a property interest in rock lobsters unlawfully harvested from its waters." 631 F.3d at 35. But that property interest attached "the moment a fisherman pull[ed] an illegally harvested lobster out of the sea." *Id.* at 39. Virtually all fruits of unlawful activity can be forfeited under federal law. *See, e.g.*, 18 U.S.C. § 981. That cannot be sufficient to create a property interest for purposes of the FCA, as it would mean that virtually every regulatory violation would give rise to an FCA claim, despite the Supreme Court's admonition that the statute is not a "vehicle for punishing garden-variety . . . regulatory violations." *United Health Servs.*, 579 U.S. at 194. As if to underscore the point, the *Bengis* court stressed that the harvesting of rock lobsters lawfully was "a regulatory scheme." 631 F.3d at 39. Finally, and in any event, the court in *Bengis* was construing South African, not American, law. *See id.*

Finally, Relators contend that "[e]ven if no specific American holds 'title' to [fish in U.S. waters], they are owned in common by all Americans, together, with the government administering and managing public fish stocks as a steward to 'preserve' this economically valuable and ecologically important natural resource." Rels.' Opp'n 13. It is true that, under the FCA, a false claim is actionable "whether or not the United States has title to the money or property," 31 U.S.C. § 3729(b)(2)(A), so long as the government "provides or has provided any portion of the money or property requested or demanded," *id.* § 3729(b)(2)(A)(ii)(I); *United States ex rel. Kraus v.*

Wells Fargo & Co., 943 F.3d 588, 602 (2d Cir. 2019). But the problem with Relators' contention is not merely that the government lacks a property interest in wild fish before they are caught — it is that "no one" does. *Long Cove Seafood, Inc.*, 582 F.2d at 163. What is more, Relators' argument about the government's administration of fish stocks only underscores the purely regulatory interest at play. Relators describe how "the government plays . . . an administrator role" by "monitoring and investing heavily in fish in U.S. waters; by using the AFA's citizenship rule to bolster the U.S. maritime industry; . . . and by investing substantial resources in managing, preserving, protecting, and maintaining fish in U.S. waters" — all of which are hallmarks of the government's regulatory interest. Rels.' Opp'n 14 (cleaned up); *see also id.* at 7 (noting that the government "has the right to acquire possession of fish in U.S. waters, has the right to exclude others from taking fish, and similar rights"). In other words, Relators insist that "because fish in U.S. waters are *managed* by the government . . . that is enough." *Id.* at 14. It is not. The Second Circuit has advised that "[a] law prohibiting a particular use of a commodity that the government does not use or possess ordinarily does not create a property right. If it did, many government regulations would create property rights." *United States v. Evans*, 844 F.2d 36, 42 (2d Cir. 1988). And, as the Supreme Court has cautioned, the FCA is not a "vehicle for punishing garden-variety . . . regulatory violations." *Universal Health Servs.*, 579 U.S. at 194. "Absent ample evidence of congressional intent," which the Relators have not provided, the Court "will not interpret the term property in a way that fundamentally changes the relationship between the FCA and garden-variety regulatory violations." *Kasowitz*, 929 F.3d at 728.

For these reasons, the Court concludes that neither the fishery endorsements Defendants obtained for their fishing vessels nor the menhaden fish Defendants were able to harvest from U.S. waters are "property" within the meaning of the FCA. Accordingly, Relators' first three causes of action — for submissions of false claims in violation of Sections 3729(a)(1)(A) and 3729(a)(1)(B) of the FCA and conspiracy to do the same — must be and are dismissed.[4]

B. Reverse False Claims

That leaves only Relators' cause of action under the FCA's reverse false claim provision, *see* Compl. ¶¶ 173-81, which "covers claims of money *owed* to the government, rather than payments *made* by the government," *United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 119 (2d Cir. 2021). Specifically, the provision imposes civil liability on any person who

> 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.

4. The Court need not and does not reach Defendants' alternate grounds for dismissal of these causes of action. Accordingly, there is no need for the Court to consider Relators' sur-reply. *See* ECF No. 77.

31 U.S.C. § 3729(a)(1)(G). The FCA defines an "obligation" as "an established duty, whether or not fixed, arising from" enumerated sources, including a contractual relationship, a statute, or a regulation. 31 U.S.C. § 3729(b)(3). "Accordingly, the existence of a cognizable 'obligation' turns on whether a duty is 'established' — or whether there is *any* duty to pay." *Miller v. United States ex rel. Miller*, 110 F.4th 533, 543 (2d Cir. 2024) (internal quotation marks omitted). "[A] duty to pay is 'established' only when it triggers an immediate and self-executing duty to pay." *Id.* at 545. "In contrast, a duty to pay is not established — and there is no cognizable 'obligation' under the reverse false claim provision — when the imposition of penalties depends on government discretion." *Id.* Thus, for example, "a duty is *not* established" when "a statute gives an agency the ability to decide whether to impose a civil penalty for a violation of the law." *Id.* at 544. Put simply, "[t]here is no obligation to pay unless and until the government has determined that a fine *must* be paid." *Id.* at 545-46 (emphasis added).

These principles, and the Second Circuit's decision in *Miller*, doom Relators' reverse false claims cause of action. Citing the AFA's language that anyone who violates the statute "is liable" for a civil penalty, Relators contend that Defendants had an obligation to pay the government money because their violations of the citizenship requirement triggered "mandatory" penalties. Rels.' Opp'n 17 (quoting (a)(1), (c)). But a nearly identical argument was made and rejected just months ago in *Miller*. In fact, if anything, *Miller* involved a statute with even more mandatory language than the AFA, namely a statute providing in

relevant part that an entity "*shall forfeit and pay*" a civil penalty for violations. 12 U.S.C. § 1818(i)(2)(A) (emphasis added). The court acknowledged that this language, "by itself, could arguably be read to require immediate and mandatory penalties." *Miller*, 110 F.4th at 546. Even so, the court concluded that it was not enough to create an "established duty" to pay, and thus an "obligation," because "the statutory context makes clear that these penalties are not mandatory, but discretionary." *Id.* The statute's "repeated use of the term 'may'" to describe the agency's enforcement authority, the court reasoned, "implies discretion, and undercuts [the relator's] claim that the 'shall forfeit and pay' imposes mandatory penalties." *Id.* at 547 (citation omitted).

The statutory penalties at issue here are similarly discretionary. For starters, the AFA's language is not even as stark as the language that gave the *Miller* court some initial pause, as it provides only that "a person that violates this chapter or a regulation prescribed under this chapter *is liable* to the United States Government for a civil penalty." 46 U.S.C. § 12151(a)(1) (emphasis added); *see also United States ex rel. Simoneaux v. E.I. duPont de Nemours & Co.*, 843 F.3d 1033, 1040-41 (5th Cir. 2016) (holding that "shall be liable to the United States for a civil penalty" language does not give rise to an established duty to pay under the FCA where the agency retains discretionary authority not to impose a penalty). For another, the AFA's penalty provision establishes only a ceiling "of not more than $15,000" for penalties. *Cf., e.g., United States v. Conyers*, 227 F. Supp. 3d 280, 289 (S.D.N.Y. 2016) (concluding, in the context of a statute

that provides that defendants "shall be punished" up to a maximum amount without providing a minimum sentence, that the "Court treats the authorization of a maximum penalty as providing discretion to the sentencing judge to sentence anywhere between no penalty and the maximum penalty"). By contrast, 46 U.S.C. § 12151(a)(2), which is not at issue here, provides a floor for penalties, demonstrating that Congress knows how to create — or eliminate, as the case may be — discretion to impose statutory penalties when it wishes to do so.

What is more, regulations promulgated by MARAD under the AFA make plain that the statutory penalties at issue here are discretionary. They provide that if a vessel owner submits false statements to obtain a vessel's fishery endorsement, "penalties *may* apply"; "[t]he vessel's fishery endorsement *may* be revoked"; "[a] fine . . . *may* be assessed against the vessel owner"; and "[t]he owner . . . *may* be subject to additional fines." 46 C.F.R. § 356.49 (emphases added). As in *Miller*, this "repeated use of the term 'may' implies discretion" on the agency's part. 110 F.4th at 547. The regulations further provide that if MARAD "ha[s] a concern regarding a Non-Citizen" controlling a fishing vessel, "[it] will notify the entity of the concern and work with the entity toward a satisfactory resolution, provided there is no verifiable evidence of fraud," 46 C.F.R. § 356.11(d), further undercutting Relators' claim that the "is liable" language in the statute imposes self-executing and immediate monetary penalties. And while it is true that "a regulation can[not] override [a] statute," Rels.' Opp'n 17; *see, e.g., Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 2273, 219 L.

Ed. 2d 832 (2024), the language of these regulations is no more inconsistent with the "is liable" language of the AFA than prosecutorial discretion is with the mandatory language found throughout Title 18 of the United States Code, *see, e.g., Heckler v. Chaney*, 470 U.S. 821, 835, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985) (holding that a statute "commit[ted]" to an agency "complete discretion . . . to decide how and when" to bring criminal charges even though it provided that violators "shall be imprisoned . . . or fined" and observing that such language "is commonly found in the criminal provisions of Title 18 of the United States Code").

If all this were not enough, Relators' own Amended Complaint confirms the discretionary nature of the applicable penalties under the AFA. In describing the statutory scheme, Relators note that "[t]he National Vessel Documentation Center ('NVDC') . . . is one of the federal bodies that investigates vessel citizenship requirement violations and *recommends* appropriate penalties." Compl. ¶ 53 (emphasis added). To illustrate the penalty regime in practice, the Amended Complaint then recounts a January 2011 case in which the NVDC and MARAD launched a joint investigation of Trico Marine Services, Inc. ("Trico") and concluded that "Trico had violated the citizenship requirement." *Id.* Over a year later, "the Coast Guard approved commencement of a civil penalty assessment process against Trico to collect penalties under 46 U.S.C. § 12151(a)" — a determination with which "MARAD concurred." *Id.* On Relators' own account, then, the applicable civil penalty regime is far from immediate or self-executing but rather laden with

discretion. As another district court put it in reaching the same conclusion: "[L]iability under [Section 12151 of the AFA] is contingent on the government's discretion to impose fines on defendants, as evidenced by the statutory language. As such, these potential obligations to pay unassessed fines are not within the scope of the FCA." *Majestic Blue Fisheries*, 196 F. Supp. 3d at 447.

Accordingly, Relators' fourth cause of action must be and is dismissed as well.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss must be and are GRANTED, and Relators' Amended Complaint is dismissed in its entirety.

The only remaining question is whether Relators should be granted leave to amend once again. Although leave to amend a complaint should be freely given "when justice so requires," Fed. R. Civ. P. 15(a)(2), it is "within the sound discretion of the district court to grant or deny leave to amend," *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). Contending that "Second Circuit law on reverse false claims changed after the Complaint was filed (*Miller*)," Relators seek leave to amend to add a count under Section 3729(a)(1)(D) of the FCA, which applies to any person who "has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property." 31 U.S.C. § 3729(a)(1)(D); *see* Rels.' Opp'n 18.

The Court denies Relators' request. For one thing, Relators do not explain how or why the Second Circuit's decision in *Miller* — which construed only the FCA's reverse false claims provision — suggests that they should be permitted to bring a new claim under an entirely different provision. That is especially so where, as here, the Court previously granted Relators leave to amend the Complaint to cure the deficiencies raised in Defendants' first motions to dismiss and expressly warned that they would "not be given any further opportunity" to do so. *See* ECF No. 43; *see also, e.g., Transeo S.A.R.L. v. Bessemer Venture Partners VI L.P.*, 936 F. Supp. 2d 376, 415 (S.D.N.Y. 2013) (providing that a plaintiff's "failure to fix deficiencies in its previous pleadings is alone sufficient ground to deny leave to amend *sua sponte*" (citing cases)). In any event, it is well established that a district court may deny leave to amend where amendment would be futile. *See, e.g., Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000). And that is the case here, as any claim under Section 3729(a)(1)(D) would fail for the same reason as Relators' claims under Sections 3729(a)(1)(A) and 3729(a)(1)(B) — namely, the lack of "property or money" within the meaning of the FCA.

Accordingly, the Clerk of Court is directed to terminate ECF Nos. 51, 55, and 59; to enter judgment in Defendants' favor consistent with this Opinion and Order; and to close the case.

SO ORDERED.

Dated: January 3, 2025
New York, New York

Appendix B

/s/ Jesse M. Furman
JESSE M. FURMAN
United States District Judge