

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, EX REL. IRWIN :

4 EISENSTEIN, :

5 Petitioner :

6 v. : No. 08-660

7 CITY OF NEW YORK, NEW :

8 YORK, ET AL. :

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10 Washington, D.C.

11 Tuesday, April 21, 2009

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:17 a.m.

16 APPEARANCES:

17 GIDEON A. SCHOR, ESQ., New York, N.Y.; on behalf of
18 the Petitioner.

19 PAUL T. REPHEN, ESQ., New York, N.Y.; on behalf of the
20 Respondents.

21 JEFFREY B. WALL, ESQ., Assistant to the Solicitor
22 General, Department of Justice, Washington, D.C.; on
23 behalf of the United States, as amicus curiae,
24 supporting the Respondents.

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P R O C E E D I N G S

(11:17 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-660, United States, ex rel. Eisenstein v. the City of New York.

Mr. Schor.

ORAL ARGUMENT OF GIDEON A. SCHOR

ON BEHALF OF THE PETITIONER

MR. SCHOR: Mr. Chief Justice, and may it please the Court:

For two main reasons, the Second Circuit's judgment should be reversed. First, under Appellate Rule 4(a)(1)(B) the government is a party in qui tam actions because it is named, served, and bound and a real party in interest, all without ever intervening or actively participating.

And second, any participation-based test party status will create a burdensome fact-specific jurisdictional inquiry at the start of every appealed and declined qui tam --

JUSTICE GINSBURG: Why at the start? Why isn't the time the end, when we can -- the notice of appeal is to be filed after there is a judgment. Why isn't the proper time to determine number of days to appeal when the judgment is entered? And at that point,

1 one can see that the government has done nothing,
2 absolutely nothing in the case.

3 At the inception, I agree with you, we don't
4 know what, if anything, the government is going to do.
5 But by the time judgment is entered, we surely know.

6 MR. SCHOR: It will be quite difficult and
7 burdensome, even upon entry of judgment, for a relator
8 or a defendant to determine whether the government's
9 participation was sufficiently active to make the
10 government a party for purpose --

11 JUSTICE GINSBURG: But we hear the
12 government did nothing, not one thing.

13 MR. SCHOR: Well, under the -- under the
14 active participation test, that may be. But the
15 question is -- is, will this Court be adopting the
16 active participation test.

17 JUSTICE GINSBURG: The test is -- I don't
18 know what you mean by "active participation" as opposed
19 to just plain participation. If the rule is at the time
20 judgment is entered to determine how much time you have
21 to file your notice of appeal, the question is, has the
22 government done anything? And if the government has
23 done nothing at all, then you have 30 days.

24 MR. SCHOR: In -- well, to address Your
25 Honor's first point, the Second Circuit's test was

1 participation. The test proposed by Respondents and the
2 government is active participation, which narrows --
3 narrows it somewhat. We point out in our opening brief
4 that it's hard to conclude that the government did
5 nothing here. It did request to receive orders and --

6 JUSTICE SCALIA: So that's the question,
7 whether that's enough or whether the government's power
8 to prevent discovery, which it can do, is that alone
9 enough?

10 MR. SCHOR: Well, our position is that the
11 test is the wrong test. Our position is that --

12 JUSTICE SCALIA: I understand that. But --
13 but I'm saying there are various steps the
14 governments -- the government can take, and I -- I think
15 you have a point, that even though this case may be an
16 easy one, we're going to have to decide in future cases
17 how much -- how much activity by the government is
18 enough activity to make the government a party.

19 MR. SCHOR: And I think it will be a very
20 difficult determination for the relator or the defendant
21 for several reasons. First of all, the government
22 expressly declines to limit or define the circumstances
23 constituting active participation. So there will be a
24 whole series of legal determinations and possibly trips
25 to this Court to determine the content of the standard.

1 Secondly, there will be enormously difficult
2 fact-gathering efforts for the -- that the relator and
3 the defendant will have to undergo at the end of a case
4 after judgment has been entered. Sometimes a docket
5 sheet in a fully litigated qui tam action, declined or
6 not, can be a hundred or 200 pages, and the case will
7 have gone on for 5 or 5 years.

8 The standard would require -- the active
9 participation standard would require the relator or the
10 defendant to comb through the docket sheet to find every
11 instance of government participation to see whether, if
12 the docket sheet will review it, the participation was
13 sufficiently active.

14 CHIEF JUSTICE ROBERTS: You wouldn't have to
15 -- you wouldn't have to do anything like that at all.
16 He would just file before 30 days just to be on the safe
17 side. It's not like he's going to say, I'm going to
18 analyze this 100-page document to see whether I get an
19 extra 30 days to do something as simple as filing a
20 notice of appeal.

21 MR. SCHOR: Respectfully, I think that might
22 read out of the rules the 60-day period. But also, I
23 think it's a reflex among trained counsel always to see
24 first, as soon as judgment is entered, how much time do
25 I have to file the notice of appeal. So the inquiry

1 will have to be undertaken unless the --

2 CHIEF JUSTICE ROBERTS: And -- and if the
3 inquiry says it's hard to tell, there's a 30-day limit
4 and there's a 60 day limit, I don't know of any
5 responsible counsel who wouldn't file within 30 days.

6 MR. SCHOR: If that's the position, then
7 that will read out of the rules the 60-day period. The
8 rules do contain a 60-day period.

9 CHIEF JUSTICE ROBERTS: Why would that --
10 why would it -- I mean, it would still apply to the
11 government or any case in which the government is a
12 party, where it's not an issue whether is the government
13 a party or not.

14 MR. SCHOR: If it becomes too difficult to
15 determine whether the government is a party, then it --
16 then it would be very hard to imagine the relator or the
17 defendant who will feel able to invoke the 60-day
18 provision, and that would effectively make it a dead
19 letter --

20 CHIEF JUSTICE ROBERTS: Oh, no, no, no, I
21 agree with you that it -- I'm just saying why in a world
22 would the relator want to invoke the 60-day provision if
23 there's at all -- at all a question about whether it's
24 30 days or 60 days?

25 MR. SCHOR: It's -- it's the case that

1 people read the rules and see there's a -- there are 30
2 days if the government's not a party and 60 days if the
3 government is a party. It's -- it's a function of the
4 rules themselves. If the rules say there's a 60-day
5 period --

6 JUSTICE GINSBURG: Is there any advantage?
7 I mean, a notice of appeal is the easiest document, so
8 it's not a question that there's any labor involved in
9 doing this. But is there any advantage to filing -- to
10 taking the 60 days instead of the 30 days? Why would
11 counsel want to take advantage of the extra 30 days? It
12 isn't a question of a labor, having to write, like
13 having to write a brief. What advantage would there be
14 to taking the additional 30 days?

15 MR. SCHOR: If we're talking about relator's
16 counsel, sometimes in a declined qui tam action the
17 relator's counsel may wait to determine, may want to
18 know whether the government will be filing any sort of
19 amicus brief on appeal before determining whether we'll
20 go ahead with the appeal. And rather than filing what's
21 known as a protective notice of appeal, which isn't --
22 which isn't an optimal procedure --

23 JUSTICE GINSBURG: How would the -- how
24 would you know at the time of filing of the notice of
25 appeal whether the government is thereafter going to

1 file an amicus brief?

2 MR. SCHOR: Relator's counsel is frequently
3 in touch with government counsel. And an important
4 factor in whether relator's counsel will pursue an
5 appeal and spend the money on the appeal is whether they
6 will have support in any respect from the government.
7 So sometimes it is the case that relator's counsel will
8 very much want to know if government -- if the
9 government will be making any sort of supportive filing
10 on the appeal, and that may take longer to determine
11 than the 30 days. Sometimes it's 60 days.

12 CHIEF JUSTICE ROBERTS: So -- yes, but --
13 you don't have to know that before you file the one-page
14 notice of appeal. I mean, if you need more time, you
15 can get more time, but you don't have to know all of
16 that. It's not going to cost you a lot of money to file
17 the notice of appeal.

18 MR. SCHOR: That's -- that's true.

19 JUSTICE SCALIA: And if it turns out the
20 government is not going to come in, you can always
21 dismiss the appeal.

22 MR. SCHOR: That is true. I think it's a
23 suboptimal procedure to file something, to file a notice
24 with the court if -- if you're not certain that it's
25 going to be pursuing your appeal. I think it's better

1 to wait and not file until one is certain that one will
2 be pursuing the appeal.

3 JUSTICE SCALIA: Well, anyway, a rule's a
4 rule and discussing all of these consequences is beside
5 the point. If, indeed, the government's a party, it's
6 60 days, right, and you say the government's a party?

7 MR. SCHOR: Correct.

8 JUSTICE SCALIA: And is -- is it your
9 position that the government is a party to this case for
10 all purposes, for all purposes of all the rules, or is
11 it just some of them?

12 MR. SCHOR: No, we are not arguing that the
13 government is a party only for some purposes and not
14 others. Our arguments are consistent with the view that
15 the government is a party for the case.

16 JUSTICE SCALIA: As opposed to the
17 government's view, which does sort of pick and choose
18 between --

19 MR. SCHOR: Correct, and Respondents' as
20 well.

21 If the Court, however, wants to rule
22 narrowly and just decide the Rule 4(a)(1)(B) issue,
23 whether the government is a party under Rule 4(a)(1)(B),
24 our arguments are certainly consistent with that as
25 well.

1 The government is -- well let me address one
2 issue that may be in the Court's mind or that the Court
3 may be asking. Well, Petitioner, you know, we have the
4 government telling us that it doesn't need the 60 days
5 when it doesn't intervene or actively participate;
6 doesn't that end the matter.

7 JUSTICE GINSBURG: The government is not
8 saying it doesn't need the 60 days. It's saying you
9 don't qualify for the 60 days, you are not the
10 government. I don't think the government is arguing
11 that its own time can be shortened.

12 MR. SCHOR: Well, the rule is that if the
13 government gets 60 days everybody gets 60 days, even
14 private parties like the relator. But I believe the
15 government's position is that if the rationale for
16 giving 60 days doesn't apply, then everyone else
17 shouldn't get the benefit of the 60 days, either. I
18 believe that's the government's position.

19 We would argue that two factors detract from
20 the government's argument in that respect. First of
21 all, it's unrealistic to think that the government will
22 never need the 60-day period if it doesn't intervene or
23 actively participate. The problem arises if the relator
24 does not appeal. If the relator litigates and tries a
25 case with sufficient skill that the government doesn't

1 need to take over and the district court nonetheless
2 enters judgment for the defendant, the problem arises if
3 the relator doesn't appeal or doesn't appeal the
4 particular issue or order that the government would like
5 before the court of appeals. In that case, an amicus
6 filing won't protect the government's interests and the
7 government will have to appeal. And once it's conceded
8 that the government has to appeal, then it has to be
9 conceded that the government will need 60 days. That
10 is, that the rationale for the 60-day period is fully
11 applicable.

12 It's also true sometimes --it's not at all
13 fanciful that the relator might not appeal. The relator
14 might have spent a lot of money, time and money pursuing
15 the trial, and, having lost, may have called it quits
16 for purposes of the appeal. Or the defendant might say
17 to the relator: Look, if you don't pursue your appeal,
18 we won't file a bill of costs against you. There could
19 be all kinds of reasons why the relator might not
20 appeal. If the relator doesn't appeal, there will be no
21 appeal in which the government can make an amicus
22 filing.

23 CHIEF JUSTICE ROBERTS: So there may be --
24 there may be a lot of reasons the relator will not
25 pursue an appeal. I don't think there's any reason that

1 the relator would not file a notice of appeal within 30
2 days or, if he doesn't like 30 days, you ask for an
3 extension of time for another 30 days. Then the whole
4 issue is moot.

5 MR. SCHOR: It -- it may be, but I believe
6 that if Rule 4(a)(1)(B) creates a 60-day period, then
7 the litigants have an entitlement to invoke it.

8 JUSTICE SCALIA: Well, your argument goes --
9 is replying to the government the Respondent's argument
10 that there is no sense in giving 60 days to the
11 government, and what you're saying is, yes, sometimes
12 there is.

13 MR. SCHOR: Correct.

14 JUSTICE SCALIA: Even when the government
15 has not actively participated. So it really negates,
16 you know, you're doing something that has no point. It
17 could have a point, to give the government 60 days, even
18 in a case where it has not actively participated. It
19 may need that long to consult with other agencies as to
20 whether to accept a defeat in this case or -- or on its
21 own to conduct an appeal if the relator doesn't want to.

22 MR. SCHOR: That's correct, and --

23 JUSTICE GINSBURG: Can the government appeal
24 without having intervened in the district court?

25 MR. SCHOR: Since the government is bound by

1 the judgment, I believe that the government does have
2 that right. I don't have authority in the False Claims
3 Act context for that position, but I think it follows
4 from the conclusion, which is undisputed here, that the
5 government is bound by the judgment in a declined qui
6 tam action even where the government doesn't actively --

7 JUSTICE SCALIA: I'm sure the government
8 will agree with that. I'm sure that's one of the
9 contexts in which they agree that the government is a
10 party.

11 MR. SCHOR: Yes, I think that's right,
12 although they can speak for themselves.

13 Now, the -- it's important also to note that
14 when the government declines to proceed with a qui tam
15 action, it might be declining to conduct the action or
16 take discovery or use its resources, but it's not
17 declining to get a judgment. The judgment gets a
18 binding judgment even when it declines. There's no
19 dispute that the claim is the government's claim and
20 that the judgment finally disposes of it. If in a
21 declined action the relator litigates and gets a \$10
22 million award, the government takes the money. And so
23 the government is bound by the judgment. The judgment,
24 finally disposes of the government's claim.

25 JUSTICE SCALIA: But there are some

1 provisions that -- that seem to indicate the government
2 isn't a party. For example, it specifically provides
3 that even when the government hasn't intervened, the
4 government may request copies of the pleadings. Doesn't
5 it have to make requests for them?

6 MR. SCHOR: The government has to make
7 requests.

8 JUSTICE SCALIA: Well, why would it have to
9 do that if it's a party?

10 MR. SCHOR: The --

11 JUSTICE SCALIA: So you're -- I mean, you're
12 saying they are not a party for that rule at least, that
13 requires the pleadings to be served upon the other
14 party.

15 MR. SCHOR: No. But Congress can restrict
16 the operation of particular Federal Rules of Civil
17 Procedure. The argument that I think Your Honor is
18 averting to is the Rule 5 argument that my -- that
19 Respondents and the government make. Rule 5 doesn't
20 define who the party is. It attaches certain
21 consequences to being a party, but it doesn't define who
22 a party is. It says you get to be served if you are a
23 party. You get to be served with certain pleadings and
24 Congress --

25 JUSTICE SCALIA: Right.

1 MR. SCHOR: Congress restricted that right
2 in the False Claims Act. But that doesn't make it a
3 party. What makes it a party is whether it's named --

4 JUSTICE SCALIA: I'm not following you. I'm
5 saying if -- if the government is a party, Rule 5 would
6 apply and the government would automatically get copies
7 of the pleading whether or not it requested them. So
8 the provision in the False Claims Act that the
9 government will only get copies if it requests them
10 seems to indicate that the government is not a party.

11 MR. SCHOR: The fact that ordinarily a party
12 might get served with certain pleadings doesn't mean
13 that if Congress restricts that right, it's not a party.
14 It means it's a party that Congress has -- for whom
15 Congress has restricted the right. And that --

16 JUSTICE GINSBURG: Do you think that
17 everyone -- you are relying on the government, that the
18 government is in the caption and it's a real party in
19 interest. Is every real party in interest a party for
20 this purpose?

21 MR. SCHOR: No, we are not arguing that. To
22 be a party, a real party in interest must be named in
23 the -- the actions needs to be brought in the name of
24 the real party in interest. And we've cited abundant
25 authority for the proposition that that means that the

1 pleadings must identify that person by name. If the
2 action is to be brought in the name of Smith, then the
3 pleadings must identify Smith as the plaintiff. So the
4 naming requirement must be complied with. It's not
5 sufficient in our view just to be a real party.

6 JUSTICE SCALIA: Can I come back to the Rule
7 5 point just for a minute? You say that the effect of
8 the False Claims Act is simply to restrict what would
9 normally be the right of the government to get copies of
10 all the pleadings. That's really not how it reads. It
11 doesn't say that the government shall receive copies of
12 the pleadings only if it requests them. It says the
13 government shall receive copies of the pleadings if it
14 requests them, as though without that provision it
15 wouldn't have a right to receive copies. Isn't that the
16 way it reads?

17 MR. SCHOR: It does read that way. I think
18 the addition of "only" is logician's language, Your
19 Honor. I'm not sure that the drafters --

20 JUSTICE SCALIA: Well, that's what we are
21 down here, you know.

22 (Laughter.)

23 MR. SCHOR: It may be, but not every
24 drafting of a statute rises to that level of --

25 JUSTICE SCALIA: Precision.

1 MR. SCHOR: -- of quality. The attachment
2 of the condition "if it requests" I think goes a long
3 way towards suggesting that if it doesn't so request,
4 then it -- it won't, which means that Congress has
5 restricted the operation of -- of Rule 5. And -- and
6 there are a number of instances where Congress will
7 restrict the operation of Federal Rules of Civil
8 Procedure even when someone is concededly a party to the
9 case.

10 I have cited a number of instances in that
11 -- of that in our reply brief. There are a number of
12 statutory actions, especially where the government is a
13 party, where, even though it is concededly a party and
14 everyone's a party, the -- the normal party discovery
15 obligations don't apply. We have cited FOIA and EPA and
16 tax summons and -- and habeas is a slightly different
17 example. But there are many examples where Congress
18 will step in and restrict the obligations that the
19 Federal Rules would otherwise apply to people who are
20 parties without depriving them of party status.

21 I would like to address the intervention
22 provision. We have many arguments in our briefs as to
23 why the intervention provision doesn't determine party
24 status. I think that the simplest way from A to B is to
25 follow through to its conclusion an example that the

1 government gives. The government says that if it vetoes
2 a settlement, then it is a party.

3 Well, if it vetoes a settlement -- - that
4 is, without having intervened. If it vetoes a
5 settlement without having intervened, the case goes
6 forward because there is no settlement. But then if the
7 government wants to conduct the action, the only way it
8 can conduct the action under the statute is if it then
9 intervenes. So you have a case where the government is
10 already a party when it intervenes; and, therefore, even
11 under the government's example the intervention
12 provision cannot determine party status.

13 I would like to just go back to the
14 definition of -- of "party" that is in our briefing.
15 The -- several provisions of the False Claims Act show
16 that, even without ever intervening or actively
17 participating, the government satisfies the classic
18 elements of party status. It's a real party interest
19 because the statute upholds the government's claim and
20 gives the government the bulk of recovery. The -- the
21 government is named as a plaintiff in the pleadings
22 pursuant to the act's naming requirements. The
23 government is served with the complaint under Federal
24 Rule of Civil Procedure 4 pursuant to the act's service
25 requirement. And the government is bound by the

1 judgment, which is not even disputed here. Those are
2 the classic elements of party status, and the government
3 satisfies them all in this case.

4 JUSTICE GINSBURG: There is something odd
5 about -- plaintiffs come to the court seeking something.
6 Defendants are -- are stuck. They're being sued. And
7 here the United States is an involuntary plaintiff. It
8 didn't commence this lawsuit, and I think there must be
9 many cases where the government will say, we don't want
10 anything to do with this.

11 MR. SCHOR: I -- I don't think it's accurate
12 to say that the government is an involuntary plaintiff,
13 because Congress has said the United States will be a
14 plaintiff under these circumstances and -- and in that
15 respect Congress has spoken for the United States.

16 It is an oddity of the False Claims Act that
17 the plaintiff is served with the complaint, but that's
18 there on the face of the statute. And once it's served,
19 having been named and having been already a real party
20 in interest by operation of law, then it has -- it's
21 already a party at that point. And if it's a party at
22 that point, then it's a party for purposes of Federal
23 Rules of Appellate Procedure 4(a)(1)(B) and -- and may
24 be for other purposes as well.

25 I would like to --

1 JUSTICE SCALIA: May be for other purposes?
2 I thought you told me before that it was for other
3 purposes as well.

4 MR. SCHOR: Yes, it is.

5 JUSTICE SCALIA: Okay. Let's stay on track.

6 MR. SCHOR: Yes.

7 I would like to --

8 JUSTICE ALITO: It's not really a party for
9 all purposes in your submission. It's not a party for
10 discovery purposes, is it?

11 MR. SCHOR: In -- in our argument it is a
12 party even though it is not subject to discovery. There
13 are two ways one could characterize the government. One
14 can either say it's not a party for purposes of
15 discovery; or, as we say, citing authority in our reply,
16 it is a party, but it is for other statutory reasons not
17 subject to discovery.

18 The declination provision is key here. By
19 the declination provision Congress said the government
20 can decline to engage in discovery. All right. It
21 declines to conduct the action. One aspect of
22 conducting the action is engaging in discovery. The
23 government can decline to engage. That means not only
24 not serving discovery requests, but not responding to
25 discovery requests. And that's part and parcel of the

1 declination provision. That's the way Congress
2 structured it.

3 JUSTICE SCALIA: Where is that? What
4 provision is that? I didn't focus on that.

5 MR. SCHOR: The declination provision, Your
6 Honor?

7 JUSTICE SCALIA: Yes. I am sorry. I didn't
8 mean to eat up your time with this.

9 MR. SCHOR: No, that's all right.

10 JUSTICE SCALIA: I mean, where is it in the
11 stuff that I have?

12 MR. SCHOR: Oh.

13 Well, it's certainly on page 2 of our
14 opening brief. It says: "If the government elects not
15 to proceed with the action, the person who initiated the
16 action shall have the right to conduct the action." And
17 there are other provisions that we cite in footnote 27.

18 JUSTICE SCALIA: Yes, but that doesn't say
19 anything about discovery in particular. I thought you
20 were talking about some declination provision that --
21 that said the government is -- is not subject to
22 discovery.

23 MR. SCHOR: Well, footnote 27 of our brief
24 also cites other provisions of the act that -- that
25 define what it means "to conduct the action." And

1 discovery is one of them, and the declination provision
2 says that if the government declines -- if the
3 government -- if the government intervenes, then it
4 conducts the action; if it declines, then it doesn't
5 conduct the action. And the rest of the act defines
6 what "conducting the action" is, and that includes
7 discovery.

8 so our -- our conclusion from that is that
9 when the government declines to conduct the action, it's
10 going to decline to engage in discovery. That's --
11 that's the argument.

12 JUSTICE SCALIA: And -- and the fact that it
13 cannot conduct discovery also involves the fact that
14 it's immune from discovery, how do you get that? And it
15 is; is it not?

16 MR. SCHOR: Yes, that's our position, and I
17 think that's the government's position as well.

18 JUSTICE SCALIA: Oh, I'm sure it's the
19 government's position.

20 MR. SCHOR: It would be --

21 JUSTICE SCALIA: But how can that -- how can
22 that be if it's a party?

23 MR. SCHOR: If -- it's a party who is
24 because of the declination provision not subject to
25 discovery.

1 JUSTICE SCALIA: The declination provision
2 doesn't say that. The declination provision just says
3 that it is not actively conducting the case. But how do
4 you get its exemption from discovery?

5 MR. SCHOR: Because the declination
6 provision says that if the government declines, then it
7 will not conduct the action; The relator will conduct
8 the action. And "conducting the action" is defined
9 elsewhere in the statute as including conducting
10 discovery, engaging in discovery. And it would be hard
11 to imagine Congress contemplating such asymmetry in --
12 in discovery obligations that --

13 JUSTICE SCALIA: I agree with that, but --
14 but it's -- it's for me a problem with your assertion
15 that for all purposes the government is a party. It
16 seems to me it is not a party for purposes of discovery,
17 and there is no provision in -- in the -- in the False
18 Claims Act that exempts it from discovery.

19 MR. SCHOR: There is -- it's an inference
20 drawn from the statute, Your Honor.

21 In sum, we would ask the Court to reverse
22 the judgment of the Second Circuit, and I would like to
23 reserve the balance of my time for rebuttal.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Rephen.

1 ORAL ARGUMENT OF PAUL T. REPHEN
2 ON BEHALF OF THE RESPONDENTS

3 MR. REPHEN: Mr. Chief Justice, and members
4 of the Court:

5 When the government declines to intervene in
6 a qui tam action, it should not be deemed a party for
7 purposes of the Rules of Procedure Rule 4. The
8 government's role is described in terms of intervention
9 as of right in the first 60 days following the filing of
10 the complaint and for good cause thereafter if the
11 government decides to come in after initial declination.

12 CHIEF JUSTICE ROBERTS: This is certainly a
13 trap for the unaware, right? I mean, every lawyer loves
14 to win on a technicality, but --

15 MR. REPHEN: I don't think this is a trap
16 for the unwary. It is clear --

17 CHIEF JUSTICE ROBERTS: It says if the
18 United States is a party, it is -- it is 60; if it's
19 not, it's 30. And you have got a situation where the
20 United States -- the action is brought in the name of
21 the United States.

22 MR. REPHEN: It is brought in the name of
23 the United States. But, you know, looking at the
24 statute, where the government has declined, it's not a
25 party. Any conservative counsel, if there are two

1 periods of time, 30 days or 60 days, the intelligent
2 thing to do is to go ahead --

3 CHIEF JUSTICE ROBERTS: I know, but this is
4 such a -- such a trap for the unwary that you never even
5 raise this point. It was raised sua sponte by the court
6 of appeals.

7 MR. REPHEN: And rejected. And I think
8 after -- it is hard to see --

9 CHIEF JUSTICE ROBERTS: Well, my point is if
10 it didn't occur to you, how can you claim that it should
11 definitely have occurred to your friend on the other
12 side?

13 MR. REPHEN: I don't know that it didn't
14 occur to us. I think we were trying to reject it, and
15 certainly after this Court decides the issue it would no
16 longer be a trap for the unwary. The decision will be
17 out there, either 30 days or 60 days.

18 JUSTICE STEVENS: May I ask this question
19 about: Are there a number of circuits that follow the
20 60-day rule?

21 MR. REPHEN: Yes.

22 JUSTICE STEVENS: And in those cases,
23 suppose we decide your way in this case. What happens
24 to the -- all the appeals that have been taken relying
25 on the 60-day rule? Because I understand the failure to

1 file a notice of appeal is jurisdictional.

2 MR. REPHEN: I think those appeals will be
3 terminated.

4 JUSTICE STEVENS: All of those would be
5 terminated?

6 MR. REPHEN: Yes.

7 JUSTICE STEVENS: And what about judgments
8 that have been entered based on appeals that were --

9 MR. REPHEN: I don't know. I guess those
10 judgments would have to be vacated, the judgments --

11 JUSTICE STEVENS: So we are really -- in
12 several circuits, a really rather important decision is
13 being called for?

14 MR. REPHEN: Yes, yes.

15 JUSTICE GINSBURG: Why would the judgment
16 have to be vacated? Even a jurisdictional issue becomes
17 subject to preclusion once you have gone the appeal
18 route --

19 MR. REPHEN: That is true, Your Honor,
20 correct, yes.

21 JUSTICE GINSBURG: So even the
22 jurisdictional base can be precluded and not raised on
23 collateral attack.

24 MR. REPHEN: You are correct, Your Honor.
25 Again, as I said, the -- what the Congress has done --

1 it is very important in this case to look at the
2 legislative history. Congress has given the government
3 60 days to weigh the risks and benefits of getting
4 involved in the case. If it chooses to do so, it has
5 full responsibility for the conduct of the litigation.

6 If it declines to do that, the
7 statute provides that the relator shall have full
8 responsibility for the conduct of the litigation and
9 requires the government, if it subsequently wants to get
10 involved, to make a motion for intervention, during
11 which time it has to show good cause. And it's our
12 position that intervention should be given its ordinary
13 and common meaning, which is the method by which a
14 person who is not a party becomes a party.

15 JUSTICE SCALIA: Except that the government
16 here has considerable powers even without intervening,
17 and they include its ability to move to stay discovery,
18 which normally a party would only be able to do. It can
19 object to any voluntary dismissal or settlement, which
20 normally would be a party's right.

21 MR. REPHEN: There are certain --

22 JUSTICE SCALIA: And some courts have
23 allowed the government to move to dismiss.

24 MR. REPHEN: There is certainly a limited
25 role here, but it is a very limited role. The

1 government can do that. This Court has recognized that
2 it can be a party for this limited purpose. For
3 example, if the government moved to dismiss and they
4 have -- there has to be a hearing following that, and
5 that motion were denied, the government could not then
6 participate on the merits of the case. It would have to
7 move to intervene for good cause if the 60 days had
8 passed.

9 JUSTICE SCALIA: So unlike -- unlike your
10 adversary here, you -- your adversary says the
11 government is a party for all purposes; you are not
12 saying the government is not a party for all purposes.
13 You're saying it's not a party for some purposes?

14 MR. REPHEN: What we're saying is certainly
15 it is not a party in this case, where it has quite
16 absolutely no role.

17 JUSTICE SCALIA: You are saying that.

18 MR. REPHEN: There may be --

19 JUSTICE SCALIA: But you're also saying as
20 for the rest, sometimes it is, sometimes it isn't.

21 MR. REPHEN: There may -- there may be
22 circumstances. If the Court were to hold that
23 intervention is required even in those limited
24 circumstances, that would be okay with us. We're not
25 taking --

1 CHIEF JUSTICE ROBERTS: How about -- I'm
2 sorry. Why don't you finish, counselor?

3 MR. REPHEN: We're not taking a formal
4 position on that.

5 I think --

6 CHIEF JUSTICE ROBERTS: Counsel, how does it
7 work in -- presumably, I guess the government can decide
8 that it wants to appeal the case in which it has not
9 participated below, right?

10 MR. REPHEN: It would have to move to
11 intervene.

12 CHIEF JUSTICE ROBERTS: It has to move to
13 intervene. So let's say there's a judgment and the
14 government looks at it and says: Well, we didn't know
15 we would get a decision like this; We've got to appeal
16 this. The relator doesn't want to appeal it. 30 days
17 goes by. The Government moves to intervene because it
18 has 60 days.

19 MR. REPHEN: I think we would take the
20 position there is no longer a case, Your Honor. It has
21 30 days; the relator has not appealed. The government
22 was not a party during that 30-day period. 31, 32, 33
23 days, the case is over. I guess there is a possibility
24 for the government to move to extend its time under the
25 rules, but generally there would be an opportunity for

1 the government to intervene. As soon as the case is
2 over, it had not been a party, it had not chosen to be a
3 party, and the time has expired.

4 CHIEF JUSTICE ROBERTS: So for all the
5 reasons in the legislative history that you discussed
6 about why the government gets more time, those reasons
7 don't apply in that situation?

8 MR. REPHEN: It doesn't apply if there is no
9 longer a case, and if 30 days has gone by, there would
10 be no longer a case.

11 JUSTICE BREYER: What's -- what about the
12 case that they were talking about, so the relator's
13 pursuing a case, that case is over, and they're not
14 going to appeal because they don't have any money left,
15 whatever it is; but the government looks at that
16 judgment and thinks, oh, God, there's something wrong
17 with this one, I better appeal it. That's the
18 government lawyer speaking.

19 Now, they're supposed to have 60 days to
20 figure that one out, and you'll take that 60 away from
21 them because they'll have to do this whole thing in 30.

22 MR. REPHEN: Yes. Having not intervened in
23 the case, they had not been a party.

24 JUSTICE BREYER: No, because they didn't
25 expect --

1 MR. REPHEN: Rule 4 --

2 JUSTICE BREYER: The judge did -- the judge
3 did a surprising thing, which judges sometimes do.

4 MR. REPHEN: Well, the government -- the
5 government is given that opportunity to monitor the
6 case. They can come in. The government having chose --

7 JUSTICE BREYER: Would this be a solution
8 which wouldn't help you? You would say, well, there's
9 some factors here cut one way, and there's some that cut
10 the other way, and some circuits have said the
11 government should have the 60 days, and those cases are
12 already proceeding. So it's best to keep it where it
13 is, which is 60 days, and then suggest the Rules
14 Committee look into this, since we don't actually --

15 MR. REPHEN: That's right.

16 JUSTICE BREYER: And it -- all right. And
17 the Rules Committee would looked into it if it's a
18 problem.

19 MR. REPHEN: The rules give 60 days to the
20 government when it's a party. If it's not a party --

21 JUSTICE BREYER: Well, I know. That's
22 repeating your argument. And I'm suggesting what would
23 be wrong with the view that you lose because of the
24 reasons I said.

25 JUSTICE SCALIA: You rely a lot, counsel, on

1 -- on intervention, as that's what makes the government
2 a party.

3 MR. REPHEN: I think the rules --

4 JUSTICE SCALIA: Right?

5 MR. REPHEN: Well, we rely on it because
6 that was what Congress said. Congress has made it clear
7 using intervention --

8 JUSTICE SCALIA: The original statute or the
9 earlier statute did not use the word "intervention."

10 MR. REPHEN: But we used it in a number --

11 JUSTICE SCALIA: I forget the different word
12 it used?

13 MR. REPHEN: "Appearance," maybe.

14 JUSTICE SCALIA: Appearance?

15 MR. REPHEN: Is appearance. But Congress --
16 Congress clearly means that now in 1986. I think
17 Congress knew what it was intending. Absent any
18 legislative history that Congress intended to not give
19 the term "intervention" its commonly understood term --
20 and it's such a commonly understood term -- by which a
21 nonparty becomes a party, I think one should give it
22 that normal intention.

23 JUSTICE SCALIA: Well, I really wonder
24 whether they didn't intend the same -- the same result.
25 If you think they consciously -- under the prior

1 statute, you would say the government --

2 MR. REPHEN: Our argument was --

3 JUSTICE SCALIA: The government would have
4 been a party?

5 MR. REPHEN: I wouldn't --

6 JUSTICE SCALIA: Because you can be a party
7 and not appear.

8 MR. REPHEN: I wouldn't say that, Your
9 Honor. But I know in 1986 what they were attempting to
10 do is strengthen the right of private persons to bring
11 qui tam actions. For the first time, the government was
12 given a limited right to come in for good cause after 60
13 days. But if you look at the legislative history of
14 that, I think Congress intended that the right of the
15 government to intervene after 60 days was somewhat
16 limited, and they had to show good cause.

17 CHIEF JUSTICE ROBERTS: Counsel, I -- I
18 pressed your friend about what's the big deal, why don't
19 you just file within 30. It only seems fair to press
20 you on what's the big deal with letting them have for
21 60 --

22 MR. REPHEN: The big -- I think --

23 CHIEF JUSTICE ROBERTS: -- which also solves
24 the problem of the potential trap for the unwary.

25 MR. REPHEN: I think the big deal is that it

1 can open more questions that it resolves if you give the
2 government party status for this purpose.

3 CHIEF JUSTICE ROBERTS: Well, I agree with
4 that. I agree with that. But what if we say --

5 MR. REPHEN: And I think Your Honor, I think
6 that, Chief Justice --

7 CHIEF JUSTICE ROBERTS: I'm sorry. What if
8 I say, or whoever is writing the opinion says, this is
9 only for purposes of filing the appeal? We don't decide
10 whether the government is a party in all these other
11 characteristics, but whether it comes to Rule 4(a) --

12 MR. REPHEN: I think the purpose of Rule 4
13 was to give the government time to make a decision when
14 it's actually a party and it has a right to appeal. It
15 should -- it is jurisdictional. It should be construed
16 narrowly. The purpose of the rule is to expedite the
17 process of appeals --

18 CHIEF JUSTICE ROBERTS: Well, it should be
19 construed narrowly. I don't think saying whether it's
20 30 or 60 days at all implicates that principle.

21 MR. REPHEN: Well, if -- if the rule
22 provides that the government should have 60 days when it
23 is a party and it's not a party, then it seems to me
24 it's a bit more --

25 CHIEF JUSTICE ROBERTS: Well, yeah, but I

1 mean, if we assume you're right, then that's construing
2 it narrowly. But the whole question is that there's
3 some confusion in the rule about who's right, and all
4 I'm saying is it seems to me that it would be the
5 easiest thing to avoid any trap for the unwary with no
6 consequences on the other side, to say 60 days.

7 MR. REPHEN: But I think it wouldn't be
8 consistent with the intent of Congress or the intent of
9 the rule, which is to move appeals along really within
10 30 days. The exception is given to the government when
11 it is a party, when it has to --

12 CHIEF JUSTICE ROBERTS: Oh, this isn't going
13 to delay appeals, for heaven's sakes. I mean, there's
14 all sorts of scheduling rules about the timing of the
15 briefs and everybody gets an extension on their briefs.
16 This is going to have no effect whatever on how quickly
17 appeals move along.

18 MR. REPHEN: Then I would tell Your Honor,
19 you know, whether or not you want to give somebody a
20 break on that, it is simply inconsistent with the rule,
21 which requires the United States to be a party when they
22 have, as in this case, played absolutely no role; and
23 they are clearly not a party.

24 Again, turning to the question of the real
25 party in interest, as I think was discussed, real party

1 in interest is simply one who can bring the lawsuit.
2 Mr. Eisenstein is a real party in interest. A real
3 party in interest is not synonymous with party status.
4 Rule 17 describes real party in interest. Obviously
5 Rule 4 describes a party --

6 JUSTICE SCALIA: The other side acknowledges
7 that. They say, however, it's different when you have
8 real party in interest plus the party named --

9 MR. REPHEN: I --

10 JUSTICE SCALIA: -- and these things are
11 styled "United States."

12 MR. REPHEN: Your Honor, I don't think it's
13 an accumulation of all of these bits of real party in
14 interest. Well, it doesn't really count, now the
15 parties named --

16 JUSTICE SCALIA: No, no, no. No, no, that's
17 -- that's unfair. If you are a real party in interest
18 and you are the named party --

19 MR. REPHEN: I think the naming -- the
20 naming --

21 JUSTICE SCALIA: You're normally a party.

22 MR. REPHEN: The naming is nominal. I think
23 the real question is to look at the intent of Congress
24 in terms of the right of the government to participate,
25 and I would point out, I think during the first 80 years

1 of experience under the qui tam action, the United
2 States was named but had absolutely no right to play a
3 role in the litigation.

4 I don't know that we should elevate form
5 over substance here, and I must come back again to what
6 we think is the critical role, which was the intent of
7 Congress in requiring intervention on the part of the
8 United States Government if it decides that it wants to
9 assume the burdens of party status.

10 JUSTICE GINSBURG: But there are certain
11 things the government can do, you concede, without
12 intervening?

13 MR. REPHEN: Yes, there are certain limited
14 roles. I don't know that that makes them a party for
15 purposes of the Eisenstein case.

16 JUSTICE GINSBURG: If the government did
17 decide to take over, the qui tam plaintiff would remain
18 a party --

19 MR. REPHEN: But the government would have
20 primary responsibility under the statute.

21 JUSTICE GINSBURG: So why shouldn't it work
22 the other way? When the government stays out, it's a
23 party -- when the government isn't conducting the
24 litigation, it's a party just as a qui tam plaintiff
25 would be a party.

1 MR. REPHEN: Yes, I think the standard is
2 intervention, and absent intervention by the United
3 States, it should not be a party.

4 JUSTICE SCALIA: Except the United States
5 has a lot of power. Unlike the -- the government's
6 presentation here, you would not allow any degree of
7 activity on the part of the government to cause it to be
8 a party, even if it exercises all these other powers
9 short of intervening? It must intervene in your --

10 MR. REPHEN: No, we would accept -- if it
11 has to be a bright line, we would accept intervention.
12 We recognize, though, the standard that you can be a
13 party for limited purpose as --

14 JUSTICE SCALIA: Well, do you want a bright
15 line or not a bright line?

16 MR. REPHEN: I would -- we would --

17 JUSTICE SCALIA: Do you agree with the
18 government?

19 MR. REPHEN: We would live with a bright
20 line certainly.

21 JUSTICE SCALIA: Do you agree with the
22 government's presentation that it becomes a party when
23 it reaches a certain ineffable degree of activity in the
24 case?

25 (Laughter.)

1 MR. REPHEN: I don't know if it's ineffable.
2 I think the government was relying on the Devlin
3 decision, where there was some indication that there
4 could be status of being a party where there is limited
5 for participation for collateral purposes. But again in
6 Devlin, the government had argued that intervention was
7 the preferable method of getting into a case. The Court
8 rejected that because they thought intervention
9 essentially would be pro forma, but in this -- in this
10 --

11 JUSTICE SCALIA: I don't think they were
12 relying on Devlin. The --

13 MR. REPHEN: They were relying --

14 JUSTICE SCALIA: The point they are making
15 here --

16 MR. REPHEN: They were addressing --

17 JUSTICE SCALIA: --- is not that we're a
18 party for some purposes and not for others. The point
19 they're making is we're a party for all purposes, once
20 we reach a certain degree of activity in the case.

21 MR. REPHEN: I don't think the government is
22 saying they're a party for all purposes which is a --

23 JUSTICE SCALIA: I think they were.

24 MR. REPHEN: -- of activity.

25 JUSTICE SCALIA: We disagree on that.

1 MR. REPHEN: I guess we'll hear from them
2 shortly.

3 JUSTICE SCALIA: We'll hear from them.

4 MR. REPHEN: If there are no further
5 questions, then we can -- we can hear from the
6 government.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Wall.

9 ORAL ARGUMENT OF JEFFREY B. WALL
10 ON BEHALF OF THE UNITED STATES,
11 AS AMICUS CURIAE,
12 SUPPORTING THE RESPONDENTS

13 MR. WALL: Mr. Chief Justice, and may it
14 please the Court --

15 JUSTICE SCALIA: I have a question for you,
16 Mr. Wall.

17 (Laughter.)

18 MR. WALL: I thought you might.

19 JUSTICE SCALIA: What is the government's
20 position on that point?

21 MR. WALL: I actually wanted to start
22 exactly where you and Justice Ginsburg began because I
23 think we've gotten off a little bit on the wrong track.

24 If this Court wants a bright-line rule, the
25 right rule is intervention. Now, that would solve 98 or

1 99 percent of qui tam suits under the False Claims Act.
2 The government urged intervention as a prerequisite in
3 Devlin, and this Court disagreed. So the government
4 left open the possibility in its brief that in a very
5 small number of qui tam suits, on the order of 1 percent
6 or less, it might participate, absent intervention, in a
7 way that would justify treatment as a party under
8 Devlin.

9 But whether or not the Court agrees with us
10 on that -- a question not presented here where the
11 government hasn't participated in any way -- the right
12 rule is intervention, and it's just a question of
13 whether this Court wants to make it cover 98 percent of
14 the suits or 100 percent of the suits.

15 JUSTICE SOUTER: Do you take the position
16 that without intervention though, nonetheless the
17 government could appeal at the -- at the tail end?

18 MR. WALL: No, we do not think --

19 JUSTICE SOUTER: You don't think that --
20 okay.

21 MR. WALL: -- that the government could have
22 appealed the judgment here as of right, and that is why
23 we think the purposes of the 60-day period were not
24 implicated. Because the government couldn't appeal, it
25 was not a potential appellant that required the

1 authorization of the Solicitor General, and it didn't
2 need the 60 days. And that's an important point, I
3 think, about why it couldn't just be solved by the --

4 JUSTICE SCALIA: Doesn't it need the 60 days
5 to figure out whether it would want to intervene in
6 order to be able to appeal?

7 MR. WALL: Justice Scalia, I think that
8 would be equally true in a number of contexts -- for
9 instance, class action settlements where the government
10 is entitled to notice, presumably so that it can
11 intervene; government contractor suits. There are any
12 number of Federal cases where the government might find
13 the decision shocking and want to come in, but until it
14 does, it's a non-party.

15 JUSTICE SCALIA: But they are not statutes
16 which give the government an extended period of time in
17 order to allow the consultation. This is a statute that
18 does that. And why would they -- why would they not
19 envision the need for that consultation in the situation
20 where the government has had no participation but comes
21 up with a -- with a decision contrary to what it thinks
22 the good law is, and it has to decide whether it wants
23 to intervene in order to appeal. Why shouldn't they be
24 given 60 days?

25 MR. WALL: Well, Justice Scalia, with all

1 respect, the False Claims Act itself doesn't say
2 anything about intervention. It doesn't say anything
3 about 60 days. It just says the government has a right
4 to come in and take over the action and run it and allow
5 the relator to continue as a party. And that's why it
6 uses the word "intervene" -- because Congress understood
7 that, in its accepted legal meaning, as a process by
8 which a nonparty becomes a party, and the idea was to
9 give the executive branch a choice. In each qui tam
10 suit, the executive is able to determine whether to
11 assume the greater benefits and burdens of party status.

12 Petitioner is caught in the awkward position
13 of saying that he thinks that the government is a party
14 at the time the case is filed, not then a party for
15 purposes of discovery, but even though it hasn't done
16 anything, it's somehow a party again when the notice of
17 appeal is filed. And the government's position is that
18 just where it does not come into the case and doesn't
19 intervene, it's not a party for any of those purposes.

20 CHIEF JUSTICE ROBERTS: What -- why do you
21 care? I mean, you're just giving people who might well
22 be confused by this provision another 30 days.

23 MR. WALL: I think there are two distinct
24 harms, Mr. Chief Justice. The first is to the
25 government, and the second is to Congress and the system

1 it set up in the statute. The harm to the government is
2 that, if it can be made a party under FRAP 4, despite
3 the fact that it has actively attempted to decline party
4 status, it could also be made a party under the other
5 rule.

6 CHIEF JUSTICE ROBERTS: Okay, but, again, we
7 would limit any decision to Federal Rule of Appeal 4
8 because of the dramatically adverse consequences for the
9 unwary. They lose their right to pursue their case.

10 MR. WALL: I don't think the government has
11 any objection in theory to a period of 60 days for only
12 FRAP 4. I think the difficulty is that any number of
13 rules speak in terms of parties. And Petitioners
14 advance no persuasive between FRAP 4 and other rules.

15 CHIEF JUSTICE ROBERTS: Well, I just does
16 did. Under FRAP 4, you're out the door without any
17 hearing on the merits. It's a technicality. The spirit
18 of the rules is that we don't throw people out because
19 of mere technicalities. Now, failure to file a timely
20 notice of appeal is not a technicality in terms of the
21 consequences.

22 MR. WALL: That's right. Three brief
23 points, I think.

24 First, if this Court announces a 30-day
25 rule, that's clear going forward. Relators and their

1 counsel will treat declined qui tam suits like civil
2 actions generally to which the United States is a party.

3 Second, if the rules are better read for a
4 30-day period, because the United States was not a
5 party, you're entitled to appeal the judgment, then
6 Petitioner was not entitled to assume that he would get
7 60 days --

8 JUSTICE ALITO: What about the relators and
9 the parties in the four circuits that have adopted the
10 60-day rule. They had a court of appeals opinion in
11 front of them that said you had 60 days. They're just
12 out of luck now?

13 MR. WALL: Well, I think they also were on
14 notice that there's a long-standing circuit split on
15 this question which the court has never answered. Given
16 the fact that what you're talking about is a ministerial
17 task, filing a one-page notice, there are actually
18 Federal court manuals that instruct in this circumstance
19 relator's counsel to file within the 30 days.

20 CHIEF JUSTICE ROBERTS: I'm sure that the
21 Appellate Rules Advisory Committee, when they hear this
22 decision, if they haven't already, will put something in
23 the rules about whether it's 30 days or 60 days. So I'm
24 not terribly concerned about clarity going forward.
25 It's going to be made clear by the Advisory Committee

1 and the submission of new rules, and I see no reason
2 that they wouldn't make it clear. I don't know whether
3 they'll think 30 or 60 is the best idea.

4 MR. WALL: Right, and --

5 CHIEF JUSTICE ROBERTS: So it's just a
6 question of -- in this case and, as Justice Stevens
7 pointed out, what the effect is going to be on other
8 cases. And it seems to me that in that situation, 60
9 days makes the most sense because otherwise you're
10 disrupting the system solely based on a trap for the
11 unwary.

12 MR. WALL: Well, and that goes to a question
13 that Justice Breyer asked earlier. The statute, 2107,
14 was enacted after what is now FRAP 4. The rule and the
15 statute shortened the period to appeal from 3 months to
16 30 days. And then the Judicial Conference, in the -- in
17 the -- what is now FRAP 4, drew the exception of 60 days
18 for cases in which the United States was a party because
19 of an express need for more time for the Solicitor
20 General to make a decision.

21 The Judicial Conference raised some question
22 about how we do that. Two years later Congress enacted
23 the statute putting in the 30-day and 60-day rules. I
24 think then that's a baseline. And I'm not sure that the
25 advisory committee could come back and effectively amend

1 the -- amend the statute by changing the rule.

2 What Congress had in mind when it passed
3 2107 was if the -- if the -- the United States is a
4 potential appellant and requires more time to conduct
5 its internal decisionmaking processes, it gets 60 days.
6 Otherwise, that 30-day baseline governs, and I
7 respectfully disagree, Mr. Chief Justice, that Congress
8 was not concerned about moving appeals forward
9 expeditiously. It shortened the period from three
10 months to 30 days precisely because of wanting judgments
11 to become final.

12 JUSTICE SCALIA: But it is -- it is a
13 potential appellant. I mean if you say Congress is
14 concerned about situations in which the government is a
15 potential appellant. It is a potential appellant in
16 these cases until the 30 days have elapsed, at least.
17 It -- it can intervene, and why shouldn't it have the 60
18 days to decide whether to appeal or not?

19 MR. WALL: I guess -- and I -- the same
20 answer I gave earlier, Justice Scalia: That's equally
21 true virtually in any Federal case that might affect the
22 United States's interests --

23 JUSTICE SCALIA: I understand, but this --
24 this goes to your argument about congressional intent:
25 That they were concerned about preserving to the

1 government time as a potential appellant to think the
2 matter over. It seems to me that argument is -- is a
3 wash.

4 MR. WALL: But I think it goes back to what
5 Justice Ginsburg asked much earlier, which is: At the
6 time the judgment is entered, who is a party entitled to
7 take the appeal? If the United States has done nothing,
8 it's not a potential appellant. When the 30-day period
9 runs, the case is over, and the United States, if it
10 wants to --

11 JUSTICE SCALIA: Can the United States
12 intervene within those 30 days --

13 MR. WALL: It can intervene.

14 JUSTICE SCALIA: -- and then appeal?

15 MR. WALL: Yes.

16 JUSTICE SCALIA: I think it's a potential
17 appellant.

18 MR. WALL: Well, it is -- yes, and it is --
19 it is equally true that it is a potential appellant then
20 in any case that might affect its interests. But we do
21 not commonly consider the United States a party to every
22 class action settlement or in every government
23 contractor suit simply based on the possibility that it
24 may want to intervene.

25 When it does so very rarely -- we're talking

1 about -- I mean that is the exceptionally rare case in
2 the False Claims Act, and the government is saying, we
3 can make that decision within the 30 days because we are
4 not a party to the judgment at the time it's entered.
5 And, again, I think what Petitioner strains to do when
6 he says at page 25 of his reply brief that when you
7 decline as the government, you avoid the burdens of
8 party status. What Petitioner can't explain is why that
9 is any different for the burden of appealing an adverse
10 judgment and the burdens of discovery. All of those
11 rules speak in terms of party status.

12 If Petitioner is able to foist on the
13 government a status that it actively attempted to
14 decline, as was its right afforded it by Congress, then
15 it seems to me Petitioner can equally try to foist on
16 the government, though it doesn't here, in future cases
17 party status. And this Court will have to decide case
18 by case: Is the United States a party for purposes of
19 each rule of civil and appellate procedure? And I think
20 that approach threatens much more uncertainty than the
21 approach the government is outlining where intervention
22 is a simple, workable, administrable test to determine
23 whether the United States is a party to a qui tam suit.

24 If there are no more questions, thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr. Wall.

1 Mr. Schor, you have three minutes remaining.

2 REBUTTAL ARGUMENT OF GIDEON A. SCHOR

3 ON BEHALF OF THE PETITIONER

4 MR. SCHOR: Thank you.

5 I think it begs the question to say that by
6 its declination the government is declining party
7 status. It is declining to conduct the action. That's
8 a much more limited category than the category of party
9 status. The government is a party because it is named,
10 served, and bound, and a real party in interest. And I
11 didn't hear any arguments addressing why the
12 intervention provision is not determinative of -- of
13 party status in response to --

14 JUSTICE BREYER: Why isn't it also a party
15 under all these other rules?

16 MR. SCHOR: We -- we -- our position is that
17 it -- that it is a party.

18 JUSTICE BREYER: Under all of the rules of
19 discovery?

20 MR. SCHOR: Well, again, we think it's a
21 party although for other reasons in the statute that
22 it's not subject to full party discovery because of the
23 declination provision, which I discussed in -- in the
24 opening.

25 I would also take issue with the assertion

1 of Respondent's counsel that it's -- that it's their
2 rule that will be the bright-line test. Clearly, it's
3 Petitioner's rule. Petitioner says that the government
4 is a party in all qui tam actions for purposes of
5 Federal Rule of Appellate Procedure 4(a)(1)(B). That
6 forecloses all of the jurisdictional inquiries.

7 It forecloses the -- the pending case issue.
8 It forecloses the -- the complicated question of when --
9 if the government gets a surprisingly bad -- if a
10 district court issues a surprisingly adverse judgment
11 when the government doesn't intervene, the government --
12 the government wants to intervene for purposes of
13 appeal. Certainly, first of all, the government -- that
14 -- that question of whether to intervene is essentially
15 the question of whether to appeal, and so it should have
16 60 days, given the rationale for the rule.

17 JUSTICE SOUTER: What do you -- what do you
18 say to the government's argument that they -- it -- it
19 may close these doors that -- that you're saying, but it
20 opens a lot of others under other rules? The government
21 says you're just asking for trouble under the -- under
22 the -- a -- an undifferentiated number of other rules if
23 we go your way. What's your response to that?

24 MR. SCHOR: I don't think it does. I think
25 -- I think the -- an active participation standard would

1 create far more trouble, far more complexity. It would
2 be almost impossible for relators and defense to -- to
3 know in advance what's -- what's required of them.

4 JUSTICE SCALIA: That's -- that's true, but
5 that's not the point that Justice Souter was making.
6 This is a self-denying position on the part of the
7 government. You would expect the government to come in
8 and say, yeah, give us 60 days to think this over.

9 They're saying, no, we'll only take 30,
10 because they're worried if we come out your way on that
11 issue, there are other issues on which they're also
12 going to be considered a party, and it's not worth the
13 risk.

14 MR. SCHOR: Well, I think their concern is
15 that -- is discovery primarily, and we have certainly
16 put plenty of arguments in our brief as to why that
17 concern is -- is less and there is certainly plenty of
18 authority for -- for thinking that the government won't
19 be subject to discovery.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

22 (Whereupon, at 12:14 p.m., the case in the
23 above-entitled matter was submitted.)

24
25

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