IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, EX REL. IRWIN :

EISENSTEIN, :

Petitioner :

v. : No. 08-660

CITY OF NEW YORK, NEW :

YORK, ET AL. :

- x

Washington, D.C.

Tuesday, April 21, 2009

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

APPEARANCES:

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

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

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

C O N T E N T S

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,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

will have to be undertaken unless the --

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

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

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

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

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

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

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

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

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

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

file an amicus brief?

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

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

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

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

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

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

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

MR. SCHOR: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SCHOR: Correct.

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

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

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

MR. SCHOR: Since the government is bound by

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

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

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

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

JUSTICE SCALIA: But there are some

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

MR. SCHOR: The government has to make requests.

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

MR. SCHOR: The --

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

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

JUSTICE SCALIA: Right.

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

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

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

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

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

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

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

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

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

(Laughter.)

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

JUSTICE SCALIA: Precision.

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

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

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

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

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

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

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

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

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

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

I would like to --

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

MR. SCHOR: Yes, it is.

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

MR. SCHOR: Yes.

I would like to --

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

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

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

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

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

MR. SCHOR: The declination provision, Your Honor?

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

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

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

MR. SCHOR: Oh.

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

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

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

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

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

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

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

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

MR. SCHOR: It would be --

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Rephen.

ORAL ARGUMENT OF PAUL T. REPHEN
ON BEHALF OF THE RESPONDENTS
MR. REPHEN: Mr. Chief Justice, and members of the Court:
When the government declines to intervene in a qui tam action, it should not be deemed a party for purposes of the Rules of Procedure Rule 4. The government's role is described in terms of intervention as of right in the first 60 days following the filing of the complaint and for good cause thereafter if the government decides to come in after initial declination.
CHIEF JUSTICE ROBERTS: This is certainly a trap for the unaware, right? I mean, every lawyer loves to win on a technicality, but --
MR. REPHEN: I don't think this is a trap for the unwary. It is clear --
CHIEF JUSTICE ROBERTS: It says if the United States is a party, it is -- it is 60; if it's not, it's 30. And you have got a situation where the United States -- the action is brought in the name of the United States.
MR. REPHEN: It is brought in the name of the United States. But, you know, looking at the statute, where the government has declined, it's not a party. Any conservative counsel, if there are two

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

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

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

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

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

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

MR. REPHEN: Yes.

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

file a notice of appeal is jurisdictional.

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

JUSTICE STEVENS: All of those would be terminated?

MR. REPHEN: Yes.

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

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

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

MR. REPHEN: Yes, yes.

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

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

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

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

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

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

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

MR. REPHEN: There are certain --

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

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

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

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

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

JUSTICE SCALIA: You are saying that.

MR. REPHEN: There may be --

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

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

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

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

I think --

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

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

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

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

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

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

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

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

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

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

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

MR. REPHEN: Rule 4 --

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

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

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

MR. REPHEN: That's right.

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

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

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

JUSTICE SCALIA: You rely a lot, counsel, on

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

MR. REPHEN: I think the rules --

JUSTICE SCALIA: Right?

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

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

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

JUSTICE SCALIA: I forget the different word it used?

MR. REPHEN: "Appearance," maybe.

JUSTICE SCALIA: Appearance?

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

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

statute, you would say the government --

MR. REPHEN: Our argument was --

JUSTICE SCALIA: The government would have been a party?

MR. REPHEN: I wouldn't --

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, yeah, but I

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

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

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

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

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

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

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

MR. REPHEN: I --

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

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

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

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

JUSTICE SCALIA: You're normally a party.

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Do you agree with the government?

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

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

(Laughter.)

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

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

MR. REPHEN: They were relying --

JUSTICE SCALIA: The point they are making here --

MR. REPHEN: They were addressing --

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

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

JUSTICE SCALIA: I think they were.

MR. REPHEN: -- of activity.

JUSTICE SCALIA: We disagree on that.

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

JUSTICE SCALIA: We'll hear from them.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Wall.

ORAL ARGUMENT OF JEFFREY B. WALL

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE,

SUPPORTING THE RESPONDENTS

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

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

(Laughter.)

MR. WALL: I thought you might.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WALL: Well, Justice Scalia, with all

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WALL: Right, and --

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

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

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

the -- amend the statute by changing the rule.

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

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

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

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

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

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

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

MR. WALL: It can intervene.

JUSTICE SCALIA: -- and then appeal?

MR. WALL: Yes.

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

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

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

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

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

If there are no more questions, thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Wall.

Mr. Schor, you have three minutes remaining.

REBUTTAL ARGUMENT OF GIDEON A. SCHOR

ON BEHALF OF THE PETITIONER

MR. SCHOR: Thank you.

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

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

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

JUSTICE BREYER: Under all of the rules of discovery?

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

I would also take issue with the assertion

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

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

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

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

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

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

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

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

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

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

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