No. 18-315

IN THE
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL*. BILLY JOE HUNT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONERS

This Court has already held that the very text respondent declares "plain" and "unambiguous," Resp. Br. 16, is in fact "imprecise[ ]" and "inexact." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418, 422 (2005). Respondent and the United States nonetheless rely on hyper-literal textual arguments that ignore the statutory context, purpose, and history that *Graham* makes clear are essential tools when interpreting Section 3731(b)(2).

Respondent's narrow focus on the "civil action under Section 3730" language disregards other language in Section 3731(b)(2) demonstrating that the provision is not available when the United States has declined to intervene, including the language that links the start of that limitations period to the knowledge of "the official of the United States charged with responsibility to act in the circumstances," 31 U.S.C. § 3731(b)(2)—language that is inapplicable where the United States has not intervened because no United States official has responsibility to act "in [those] circumstances."

The United States fares no better in essentially pinning its entire argument on a single passage from *Graham*, which the United States claims "construed the phrase 'civil action under section 3730' in Section 3731(b)" to encompass non-intervened actions. U.S. Br. 9. But the language from *Graham* expressly refers to *"§ 3731(b)(1)'s* text," not to Section 3731(b)(2). 545 U.S. at 421 (emphasis added). And where, as here, the same statutory language appears in two different provisions of a statute, there is

nothing unusual or improper about giving that language different meanings based on differing context. *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

By eschewing the holistic interpretive approach mandated by *Graham*, respondent creates a host of counterintuitive results that he then strives unsuccessfully to minimize. For example, in response to petitioners' showing that the availability of Section 3731(b)(2) in non-intervened actions could enable relators to wait ten years before filing suit without ever notifying the government of the alleged fraud, respondent declares that "[i]n no situation should (b)(2) apply when suit precedes knowledge" by the government—an invented limitation that finds no basis in the text of the statute or any prior decision from any court. Resp. Br. 32.

Respondent and the United States rely on the same flawed approach to statutory interpretation in responding to petitioners' alternative argument that, if Section 3731(b)(2) is available in non-intervened actions, it is the knowledge of the relator that triggers the three-year limitations period. If Section 3731(b)(2) is available where the United States has not intervened, this is the only reading of the statute that comports with this Court's description of a relator as a "statutorily designated agent of the United States" with respect to the portion of the recovery paid to the government, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000), and the only reading that would ameliorate the congressionally unintended consequences that would otherwise result from making Section 3731(b)(2) available in non-intervened actions, such as giving relators longer to sue than the government in some settings

where they are similarly situated. In contrast, the supposedly "bizarre result[ ]" that the United States decries (at 11)—a relator being permitted to sue where he has learned of the fraud several years after the government decided not to file suit—is not bizarre at all; it is completely consistent with the False Claims Act's goal of facilitating recovery for fraud against the government.

Ultimately, the reading of Section 3731(b)(2) advanced by respondent and the United States may have superficial appeal when "civil action under Section 3730" is "viewed in isolation." *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015) (internal quotation marks omitted). But *Graham*—and the settled principles of statutory construction on which it rests—demand more. Section 3731(b)(2) must be "read in its proper context," in light of default limitation rules, and in a manner that minimizes congressionally unintended, "counterintuitive results." *Graham*, 545 U.S. at 415, 421. Doing so demonstrates that the Eleventh Circuit's interpretation of Section 3731(b)(2) is untenable and that Congress never intended to permit respondent to pursue this claim after waiting seven years to file suit.

I. SECTION 3731(B)(2) IS INAPPLICABLE IN NON-INTERVENED ACTIONS.

Respondent and his *amici* ignore the powerful textual evidence and other interpretive indicia demonstrating that Section 3731(b)(2) is available only where the United States files suit or has intervened in a relator-initiated action.

A. When "Read In Its Proper Context," The Text Of Section 3731(b)(2) Establishes That It Applies Only When The United States Is A Party.

Section 3730 authorizes two types of litigants—the government and relators—to bring False Claims Act suits, but Section 3731(b)(2) refers to only one of them: "the official of the United States charged with responsibility to act in the circumstances." According to respondent and the United States, Section 3731(b)(2) is nevertheless broad enough to encompass non-intervened suits in which the United States is not a party because the provision applies to "civil action[s] under section 3730" and this Court supposedly determined in *Graham* that "Government and relator suits are such 'civil actions.'" Resp. Br. 17; *see also* U.S. Br. 15.

But *Graham* never *once* mentions Section 3731(b)(2). In fact, the language from *Graham* repeatedly invoked by the United States (at 9, 15)—"'civil action under section 3730' means only those civil actions under § 3730 that have as an element a 'violation of section 3729,' that is, §§ 3730(a) and (b) actions," 545 U.S. at 421–22—is expressly limited to "§ 3731(b)(1)'s text," *id.* at 421.

Although a non-intervened suit under Section 3730(b) is a "civil action under section 3730" in Section 3731(b)(1), when that language is "read in its proper context" in Section 3731(b)(2), *Graham*, 545 U.S. at 415, it is apparent that the language does not extend to non-intervened actions. "The specific language in the statute bears this out." *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008). "When the government declines to intervene," U.S. Br. 14, there is no "official of

the United States charged with responsibility to act in the circumstances" within the meaning of Section 3731(b)(2) because the United States is not a party to the case and "government officials are certainly not 'charged with responsibility' to ensure that a relator brings a timely [False Claims Act] action." *Sanders*, 546 F.3d at 294; *see also* Chamber Br. 7–8.

Without acknowledging as much, respondent and the United States are reading Section 3731(b)(2) as if it applied to the official "charged with responsibility to act [or to decline to act] in the circumstances." *See* U.S. Br. 27 ("'act[ing] in the circumstances" is "determining the appropriate governmental response to evidence of FCA violations"). But that is not the statute that Congress wrote. *See Graham*, 545 U.S. at 417 (rejecting reading of Section 3731(b)(1) that would have required reading in "'[suspected or actual]'" before "'violation'"). It instead replicated the language of 28 U.S.C. § 2416(c)—a limitations provision that indisputably applies only to suits filed by the government—which ties the limitations period to the knowledge of "an official of the United States charged with the responsibility to act in the circumstances." As in Section 2416(c), a government official "act[s] in the circumstances" addressed in Section 3731(b)(2) by filing a complaint (either a case-initiating complaint or a complaint-in-intervention). *See Sanders*, 546 F.3d at 294 ("it is doubtful that the government official 'charged with responsibility to act in the circumstances' could be charged with any responsibility other than to see that the government brings or joins an FCA action within the limitations period"). Section 3731(b)(2) is therefore inapplicable to non-intervened suits because there is no "official of the United States" who has acted and whose knowledge can serve as the trigger for the statute of limitations.

This interpretation of "civil action under section 3730" is consistent with the principle that "the 'same . . . provision' of a statute cannot 'bear[ ] two different meanings' at the same time." U.S. Br. 17 (quoting *Clark v. Martinez*, 543 U.S. 371, 380, 383 (2005)) (emphasis omitted). While "civil action under section 3730" appears only once in Section 3730(b), it is part of two different limitations provisions. As *Graham* indicates, the language effectively appears in *both* Section 3731(b)(1) and Section 3731(b)(2). In fact, *Graham* repeatedly stated that the "civil action under section 3730" language is part of Section 3731(b)(1). *See*, *e.g.*, 545 U.S. at 416 ("§ 3731(b)(1)'s language . . . assumes that well-pleaded 'action[s] under section 3730' to which it is applicable include a 'violation of section 3729'") (alterations in original). The language is likewise part of Section 3731(b)(2). There is nothing improper about giving that language different meanings in different statutory contexts. *See Envtl. Def.*, 549 U.S. at 574. This holds true whether the language appears once, or multiple times, in the statute. *See*, *e.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989) (a state officer sued in his official capacity is not a "person" under 42 U.S.C. § 1983 when the suit seeks money damages but is a "person" when the action seeks injunctive relief).

Indeed, the United States does not dispute that, as this Court explained in *Graham*, Congress used the phrase "action brought under section 3730" in Section 3731(d) to refer to "§ 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party," 545 U.S. at 418—which is precisely the definition that petitioners are advocating in Section 3731(b)(2). Thus, even the United States recognizes that this language can

have different meanings in different parts of Section 3731.[1]

These textual cues—the fact that "civil action under section 3730" is effectively incorporated into two different subsections of Section 3731 and Congress's use of the same language in another provision of Section 3731 to convey the same meaning petitioners urge here—demonstrate that Congress intended to limit Section 3731(b)(2) to suits in which the United States is a party.

B. Default Tolling Rules Support Restricting Section 3731(b)(2) To Suits In Which The United States Is A Party.

Default tolling rules confirm that petitioners' reading of Section 3731(b)(2) is "the better way to resolve th[e] ambiguity" created by Congress's "imprecise[ ]" drafting. *Graham*, 545 U.S. at 417, 418. Congress enacted Section 3731(b)(2) against the backdrop of the well-established principle that, where a limitations period is tolled based on fraudulent concealment, it begins to run when *the party entitled to file suit* learns, or should have learned, the material facts—not when a third party (such as the government in a non-intervened suit) does. *See* Pet. Br. 22–26.

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[1] Respondent takes a contrary tack, arguing—in direct contravention of the plain language of Section 3731(d) and this Court's decision in *Graham*—that, "[i]n choosing to name the 'United States' [in Section 3731(d)], Congress was *not* distinguishing between relators and the Government." Resp. Br. 29 (emphasis added). That respondent felt it necessary to resort to this atextual, illogical reading of Section 3731(d) is a powerful indication of the damage this provision does to respondent's reading of Section 3731(b)(2).

Respondent offers two equally unpersuasive rejoinders. First, he asserts that it is actually the "victim's" knowledge—not the plaintiff's knowledge—that generally matters for tolling purposes, and, here, the government is the victim of the alleged False Claims Act violation. Resp. Br. 35, 39–40. But respondent cites no case law supporting his reimagined version of this default tolling rule; in fact, settled law is to the contrary. *See*, *e.g.*, *Chao v. Va. Dep't of Transp.*, 291 F.3d 276, 283–84 (4th Cir. 2002) (holding that the government was not entitled to equitable tolling where it had failed to file suit diligently even though the employees on whose behalf the FLSA suit was filed had been diligent). Nor does he identify any common-law rule that would support allowing relators to sleep on their rights for up to ten years as long as they—along with the perpetrator of the fraud—continue to conceal the fraud from the government. That outcome is fundamentally incompatible with the principles of equitable tolling, which require would-be plaintiffs to "demonstrate that they have been diligent in pursuit of their claims," *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1808 (2018), as well as with the False Claims Act's objective of "encouraging *prompt* action on the part of relators." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006) (emphasis added). It also ignores the fact that Section 3731(b)(1) already provides relators with a "relatively long" six-year statute of limitations that is more generous than many other fraud limitations periods. *Graham*, 545 U.S. at 427–28 (Breyer, J., dissenting).[2]

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[2] *See*, *e.g.*, 15 U.S.C. § 77m ("No action [for making false statements or material omissions to investors in offering materials]

Second, respondent argues that petitioners' reading of Section 3731(b)(2) violates a different default rule requiring that statutes of limitations "be read to promote predictability and certainty" because the availability of Section 3731(b)(2) would not be known until the government makes its intervention decision. Resp. Br. 35. But the predictability and certainty provided by a statute of limitations "are primarily designed to assure fairness to defendants" by protecting them from stale claims, *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965), not to guarantee that the timeliness of a claim will be readily ascertainable when suit is filed.

To the contrary, questions about the timeliness of a claim often persist throughout a case. For example, the parties may dispute which statute of limitations applies to a particular claim, whether that limitations period is subject to tolling, and when the relevant facts became known to the plaintiff. Congress has not even supplied a limitations period for a number of federal statutes, despite the substantial uncertainty that is occasioned by courts' efforts to identify the most analogous state (or occasionally, federal) limitations period to apply. *See Graham*, 545 U.S. at 421 n.3 (listing "likely candidates for analogous state statutes of

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shall be maintained . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence," and "[i]n no event" may the action be brought "more than three years after the security was bona fide offered to the public."); 28 U.S.C. § 1658(b) ("[A] private right of action that involves a claim of fraud . . . in contravention of a regulatory requirement concerning the [federal] securities laws . . . may be brought not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.").

limitations" for a False Claims Act retaliation claim while emphasizing that the list "may well not be . . . exhaustive or authoritative").

Even after the applicable limitations period is identified, uncertainty over whether a suit is timely may persist for years until the facts are sufficiently developed to resolve the issue on summary judgment or at trial. In this case, for example, the Eleventh Circuit did not "conclude[ ]," as respondent suggests, "that [his] suit was timely," Resp. Br. 15, but held "only that at the motion to dismiss stage it was error to dismiss the complaint," Pet. App. 31a n.12. The court underscored that, "if facts developed in discovery show that the relevant government official knew or should have known the material facts about the fraud at an earlier date, [respondent's] claims could still be barred by the statute of limitations." *Id.*

Any additional uncertainty occasioned by a decision limiting the availability of Section 3731(b)(2) to suits in which the United States is a party would be minimal. If a relator files a suit that would be untimely unless Section 3731(b)(2) is available, the United States will have the opportunity to intervene at the outset of the case and thereby render the claim timely. But if the United States decides that the case is not sufficiently meritorious to warrant intervention, or declines to intervene for any other reason, then the defendant will be able to secure prompt dismissal on limitations grounds. Respondent's "specter of a springing statute of limitations" interrupting the

case after it is "well along" is thus purely apocryphal. Resp. Br. 38.[3]

C. Respondent Fails To Negate The Counterintuitive Results Of His Interpretation Of Section 3731(b)(2).

Respondent strains to counter petitioners' showing that his interpretation of Section 3731(b)(2) would lead to the same kinds of "counterintuitive results" that troubled this Court in *Graham*, 545 U.S. at 421, and simultaneously attempts to invent other counterintuitive outcomes that would supposedly result from petitioners' interpretation. Both efforts fail.

First, neither respondent nor the United States disputes that their reading of Section 3731(b)(2) would give relators a *longer* limitations period than the government in some scenarios where the two are similarly situated, *see* Pet. Br. 26–27, which is inconsistent with respondent's own view that the False Claims Act "puts relators on the *same* statute of limitations footing as the Government." Resp. Br. 27 (emphasis added). That preferential treatment for relators is also inconsistent with the fact that Congress

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[3] Accordingly, petitioners' reading of Section 3731(b)(2) would not create the kind of "'jurisprudential limbo'" that this Court has sought to avoid in other settings where a plaintiff attempted to extend the limitations period retroactively based on developments the defendant could not have foreseen. *See* Resp. Br. 37 (quoting *Wallace v. Kato*, 549 U.S. 384, 395 (2007) (rejecting a proposed rule that would have tolled the limitations period on a Section 1983 action between the date of the plaintiff's conviction and the date the conviction was overturned because "a statute that becomes retroactively extended" would deprive defendants of "notice to preserve beyond the normal limitations period evidence that will be needed for their defense")).

enacted Section 3731(b)(2) to address unique obstacles that *the government* faces when trying to investigate and prepare a False Claims Act complaint within the six-year limitations period, *see* Pet. Br. 35–36, as well as Congress's decision repeatedly to afford the government *greater* rights than relators under the False Claims Act. *See*, *e.g.*, 31 U.S.C. § 3730(c)(2)(A)–(D) (government may dismiss or settle a relator-initiated suit over the relator's objection, and court may limit relator's participation on an appropriate showing by either the government or the defendant). Giving relators longer to sue than the government makes no sense in light of the False Claims Act's purpose and history.

Second, by affording relators up to ten years to sue (as long as they keep the government in the dark about the fraud), respondent's interpretation would prolong the very fraud that the False Claims Act is designed to root out and complicate the government's ability to recover in cases where the passage of time may have resulted in the loss of evidence. Respondent goes to great lengths to avoid this inexplicable outcome by arguing that "no relator who learned about the fraud and waited ten years to file without telling the Government could use (b)(2)." Resp. Br. 31. But there is simply nothing in the plain language of Section 3731(b)(2) that supports respondent's *ipse dixit*. If a relator files suit exactly ten years after a violation that was unknown to the government and the government subsequently declines to intervene, then the suit would be timely (assuming that Section 3731(b)(2) is available in non-intervened actions and is triggered by the government's knowledge) because (1) the suit would not be filed "more than 10 years after the date on which the violation is committed," and (2) the action would not be brought "more than 3 years after the

date" when the government learned the material facts. 31 U.S.C. § 3731(b)(2).

Not surprisingly, respondent fails to cite even a single case supporting his effort to read a third requirement—"suit may not be filed by a relator before the relator informs the government of the alleged violation"—into Section 3731(b)(2). The relevant case law is to the contrary. *See*, *e.g.*, *United States ex rel. Salmeron v. Enter. Recovery Sys., Inc.*, 464 F. Supp. 2d 766, 769 (N.D. Ill. 2006). And even if the relator does inform the government of the fraud shortly before filing suit on the cusp of the ten-year limitations mark, the government will be left with little time to investigate the claim and prepare its own complaint—thereby nullifying the very purpose of the 1986 amendments to Section 3731(b), which were intended to "give [the government]" more time and "flexibility" where it learned of the fraud shortly before the expiration of the then-exclusive six-year limitations period. *Hearings Before the Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary H.R.*, 99th Cong. 159 (1986) (statement of Assistant Attorney General Richard K. Willard).

Respondent and the United States also attempt to defuse the incentives for delay created by the availability of Section 3731(b)(2) in non-intervened actions by pointing to other features of the False Claims Act that would supposedly incentivize relators to file suit promptly, such as the first-to-file and public-disclosure bars. *See* Resp. Br. 53; U.S. Br. 25. But the ineffectiveness of those measures is underscored by the facts of this case, where respondent claims that he "was the *only* witness to th[e] forgery" allegedly undertaken to effectuate a bid-rigging scheme. Resp.

Br. 11 (emphasis added). As the lone witness, respondent faced little risk that someone else would beat him to the courthouse or that the allegations would be publicly disclosed, and he therefore apparently felt sufficiently comfortable to wait a full *seven years* to file suit.

This fact pattern is hardly an outlier. Relators are often "close observers or otherwise involved in the fraudulent activity," S. Rep. No. 99-345, at 4 (1986), which means that they are well-situated to gauge whether others possess the requisite knowledge to bring a False Claims Act action and whether they will be able to preserve evidence to facilitate "carry[ing] [their] burden of proof" years after the fact, U.S. Br. 26, when the defendant's ability to identify relevant evidence and witnesses may be severely hampered. Relators are thus uniquely positioned to weigh the costs and benefits of filing suit promptly or instead seeking to maximize the treble damages recoverable from any ongoing fraud by delaying suit up to ten years—exacerbating the already-substantial litigation burdens for False Claims Act defendants. *See* Chamber Br. 15–19.[4]

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[4] In response to petitioners' showing (at 31–32) that delay was not among the factors Congress originally contemplated would reduce a relator's financial recovery—and that the possibility of a reduced recovery thus sheds no light on Congress's intent when enacting Section 3731(b)(2)—respondent counters that courts accounted for delay when determining relators' shares "[w]ell before" 1996, when the Department of Justice included this factor in its guidelines. Resp. Br. 54. But, in support, respondent cites only a district court opinion that was issued six years *after* the 1986 False Claims Act amendments and that is therefore no more probative of Congress's intent in 1986 than the 1996 De-

Third, respondent and the United States downplay the burden that would be imposed on the government when it is subjected to discovery into its knowledge of the alleged fraud in non-intervened actions. Resp. Br. 37; U.S. Br. 26. The United States' expression of willingness to shoulder these burdens in its brief does not diminish the fact that, when Congress enacted the 1986 amendments to the False Claims Act, it is very unlikely that it would have wanted to burden the government with intrusive discovery into questions about when the relevant officials knew or should have known about alleged fraud in cases that the government has determined to be unworthy of the resources necessary for intervention. After all, Congress enacted the 1986 amendments to make it easier for the government to recover where it has been the victim of fraud, not to saddle the government with new burdens in suits of questionable merit. *See*, *e.g.*, S. Rep. No. 99-345, at 1 ("The purpose of [the 1986 amendments] is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government.").

Finally, respondent also attempts to manufacture counterintuitive consequences that would supposedly result from petitioners' position, arguing that petitioners' reading of Section 3731(b)(2) would render the

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partment of Justice guidelines. *Id.* Nor did that court even attempt to divine Congress's intent when enacting the 1986 amendments. *See United States v. Gen. Elec.*, 808 F. Supp. 580 (S.D. Ohio 1992). Moreover, it only reduced the relator's share of the award from 25% to 22.5%—despite the fact that the relator "was aware of the fraud long before he filed his complaint . . . [and] his silence facilitated the continuation of the fraud"—which is hardly a strong disincentive for delay. *Id.* at 584.

relation-back provision in Section 3731(c) "superfluous." Resp. Br. 33. But respondent's own hypothetical belies that argument. If, as respondent posits, the government learns of the fraud in year five, a relator sues in year seven, and the government intervenes in year nine (after requesting multiple extensions of the 60-day intervention period, as is not uncommon, *see* WLF Br. 13; J.A. 6a–7a), then the government would be required to rely on Section 3731(c), which provides that the "Government['s] pleading shall relate back to the filing date of the [relator's] complaint," to establish that its complaint was timely under Section 3731(b)(2). The relation-back provision would thus continue to have force if Section 3731(b)(2) is unavailable in non-intervened actions because it would be implicated whenever the government files its complaint in intervention more than three years after learning of the fraud and more than six years after the violation.

D. The Legislative History Refutes Respondent's Reading Of Section 3731(b)(2).

The legislative history confirms that Congress enacted Section 3731(b)(2) "to permit the *Government*"—not relators in non-intervened actions where the United States is not a party—"to bring an action . . . within 3 years of when the Government learned of a violation." S. Rep. No. 99-345, at 15 (emphasis added).

According to respondent, "[p]etitioners provide no reason that Congress would have wanted to bar relators" from invoking Section 3731(b)(2) in non-intervened actions. Resp. Br. 47. But Congress emphasized that relators are generally well-positioned to discover fraud based on their "close" proximity to the conduct. S. Rep. No. 99-345, at 4. The considerations

that militated in favor of affording the United States additional time to discover the fraud and file suit—the government's difficulty in "piec[ing] together" the fraud, H.R. Rep. No. 99-660, at 26 (1986)—are therefore inapplicable to relators. In fact, Congress designed the False Claims Act to "achieve *rapid* exposure of fraud" by relators, *Sikkenga*, 472 F.3d at 725—a goal that would be undermined by the availability of a limitations provision that permits relators to wait up to ten years before filing suit without ever alerting the government to their allegations.[5]

Respondent also emphasizes that Congress never "actually address[ed] (b)(2)'s applicability to *relators*," Resp. Br. 48, which is precisely the point: Congress was informed by the Department of Justice that Section 3731(b)(2) was necessary to remedy a government-specific problem arising from its frequent inability to investigate fraud and prepare a complaint within the then-exclusive six-year limitations period because the government often received no notice of the fraud until that period had nearly expired. *See* Pet. Br. 36. If the Department of Justice had felt that relators were encountering the same problem—and should likewise be afforded additional time to file suit

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[5] Respondent argues that the Tenth Circuit's focus on "rapid exposure" by relators misreads the legislative history, which supposedly emphasizes "not promptness, but rather, effectiveness." Resp. Br. 51 (citing *Sikkenga*, 472 F.3d at 725). But the same excerpt of legislative history quoted by respondent (at 50 n.7) expressly refers to "Government delay in fraud cases," S. Rep. No. 99-345, at 11, and the decision from this Court that the Senate Report expressly invokes explains that, under the False Claims Act, "large rewards were offered to stimulate actions by private parties should the prosecuting officers be *tardy in bringing the suits*." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943) (emphasis added).

based on the date the fraud was discovered—it presumably would have said exactly that to Congress. But the legislative history does not offer a hint of any such concern on behalf of the Department of Justice or Congress.

Indeed, Congress did not simply overlook relators when it enacted the 1986 amendments. As respondent emphasizes (at 46), those amendments included many "[r]elator-targeted reforms." But all of the relevant interpretive tools—including Congress's decision to use language drawn directly from the government-specific statute of limitations in 28 U.S.C. § 2416(c)—make clear that Section 3731(b)(2) is a *government*-targeted reform.

II. IF SECTION 3731(B)(2) IS APPLICABLE IN NON-INTERVENED ACTIONS, THEN THE RELATOR IS THE "OFFICIAL OF THE UNITED STATES CHARGED WITH RESPONSIBILITY TO ACT."

Although Section 3731(b)(2)'s "imprecise[ ]" text does not expressly mention relators, *Graham*, 545 U.S. at 418, the context of this "idiosyncratic" and "unique" statute, U.S. Br. 31; Resp. Br. 59, demonstrates that the relator is the "official of the United States charged with responsibility to act in the circumstances" in the event that Section 3731(b)(2) can be invoked in non-intervened actions. Thus, if Section 3731(b)(2) is available here, its limitations period was triggered when respondent learned of the alleged fraud seven years before he filed suit.

Respondent and the United States ignore the broader statutory context and resort to the formalistic view that relators cannot be "official[s] of the United States" for purposes of Section 3731(b)(2) because relators are not "appointed" or "employed by the

United States." U.S. Br. 28; *see also* Resp. Br. 57.[6] But they ignore the many dictionary definitions establishing that the term "official" is sufficiently capacious to include a person "authorized to act for a government," *Webster's Third New Int'l Dictionary* 1567 (2002); *see also* Pet. Br. 41 n.8, and neither has any response to this Court's decision in *Dixson v. United States*, 465 U.S. 482 (1984), where officers of a private corporation who were not appointed or employed by the United States were nevertheless held to be "public officials" because they possessed a "degree of official responsibility for carrying out a federal program" of community-development block grants. *Id.* at 499.

When relators pursue a False Claims Act suit in a non-intervened action they have a similar "degree of official responsibility" because, as respondent acknowledges, they "'stand in the government's shoes' for suit-bringing purposes." Resp. Br. 44 (capitalization altered). A relator brings suit "in the name of the Government," 31 U.S.C. § 3730(b)(1), and, in seeking to recover damages for the government, acts as a "statutorily designated agent of the United States," *Stevens*, 529 U.S. at 772; *see also Hyatt*, 91 F.3d at 1217 n.8 ("The [False Claims Act] deputizes private individuals to act to protect the interests of the United States.").

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[6] While the United States is dismissive of petitioners' position in this case, it displayed far less certainty on this question in *Graham*, where it stated that the answer was "not clear" and cited cases on both sides of the issue, including the Ninth Circuit's decision in *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996), which it described as holding that a private "employee is an 'official of the United States' when suing as a relator because Section 3730(b) authorizes the individual to bring suit on behalf of the United States." U.S. Br. 18 n.6, *Graham*, No. 04-169.

If Congress had intended to limit the term "official" to encompass only the Attorney General and his delegates, *see* Resp. Br. 57; U.S. Br. 27–28, Congress could have done so explicitly, as it did in other sections of the False Claims Act that expressly refer to the "Attorney General," *see*, *e.g.*, 31 U.S.C. § 3730(a). In fact, Congress contemplated using the narrower phrase "an official within the Department of Justice" in Section 3731(b)(2) but ultimately opted for the broader term "official of the United States," *see* S. Rep. No. 99-345, at 30—two years *after* this Court had broadly construed the term "official" in *Dixson* to reach private parties carrying out public responsibilities. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 993 (2005) (citing "presumption that Congress is aware of settled judicial and administrative interpretations of terms when it enacts a statute") (internal quotation marks and alteration omitted).

Congress's use of "officials of the United States" elsewhere in the False Claims Act to refer only to government employees does not override these other indications that Congress used the phrase in Section 3731(b)(2) to encompass relators in non-intervened actions. As respondent and the United States emphasize, Resp. Br. 60; U.S. Br. 29, there can be no doubt that "officials of the United States responsible for investigating false claims" refers only to government employees in Section 3729(a)(2)(A)—but that is because the False Claims Act elsewhere expressly states that the *Attorney General* is responsible for "diligently . . . investigat[ing]" alleged False Claims Act violations. 31 U.S.C. § 3730(a). As used in Section 3731(b)(2), however, the meaning of "official of the United States" is informed by a different provision

of the False Claims Act, Section 3730(c)(3), which provides that, where the government does not intervene, "the person who initiated the action shall have the right to conduct the action." *Id.* § 3730(c)(3). Thus, "in th[ose] circumstances," it is the relator who is "the official of the United States charged with responsibility" to act. And while the United States is correct that "[n]othing in the" False Claims Act "*require[s]* such a person to commence a qui tam suit," U.S. Br. 28, nothing requires the government to file a False Claims Act suit, either. Indeed, there are many reasons that the government may elect not to file a False Claims Act complaint even where it believes that a violation has occurred. But, where the government does file suit or intervene in an action, the relevant government employee is "charged with responsibility to act in the circumstances," just as the relator shoulders that same "responsibility" where the government declines to intervene.

Respondent and the United States do not dispute that deeming the relator to be the relevant "official of the United States" in non-intervened actions would ameliorate many of the counterintuitive results that would otherwise be attributable to the availability of Section 3731(b)(2) in such suits—including by linking the limitations period to the knowledge of a party (the relator) rather than a nonparty (the government), eliminating relators' incentive to keep the government in the dark about the alleged fraud and wait ten years before filing suit, and ensuring that relators do not enjoy longer limitations periods than the government in some circumstances. *See* Pet. Br. 45–46; *Hyatt*, 91 F.3d at 1218. The United States instead points to its own supposedly counterintuitive scenario that could result from petitioners' position—one in which the government's suit is time-barred but the relator's

suit is not because "the government learn[ed] of a fraud *first*." U.S. Br. 29. But permitting the relator to proceed in that scenario—rather than deeming both suits to be time-barred, which is the outcome the United States advocates—promotes the False Claims Act's objective of facilitating the "Government's ability to recover losses sustained as a result of fraud." S. Rep. No. 99-345, at 1. If given the choice between no recovery at all and recovery in a relator-litigated suit, there is no doubt that the Congress that enacted the 1986 amendments would have chosen recovery.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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