

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   UNITED STATES, EX REL. IRWIN           :

4   EISENSTEIN,                           :

5                    Petitioner                   :

6                    v.                                 :   No. 08-660

7   CITY OF NEW YORK, NEW                 :

8   YORK, ET AL.                                 :

9   - - - - - x

10   Washington, D.C.

11   Tuesday, April 21, 2009

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

16 APPEARANCES:

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18       the Petitioner.

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

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

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P R O C E E D I N G S

(11:17 a.m.)

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

Mr. Schor.

ORAL ARGUMENT OF GIDEON A. SCHOR

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1           Secondly, there will be enormously difficult  
2 fact-gathering efforts for the -- that the relator and  
3 the defendant will have to undergo at the end of a case  
4 after judgment has been entered. Sometimes a docket  
5 sheet in a fully litigated qui tam action, declined or  
6 not, can be 100 or 200 pages, and the case will have  
7 gone on for 5 or 6 years.

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

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

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

1 will have to be undertaken unless the --

2 CHIEF JUSTICE ROBERTS: Well, no. And --  
3 and if the inquiry says it's hard to tell, there's a  
4 30-day limit and there's a 60 day limit, I don't know of  
5 any responsible counsel who wouldn't file within 30  
6 days.

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

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

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

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

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

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

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

24          JUSTICE GINSBURG:  How would the -- how  
25 would you know at the time of filing of the notice of

1 appeal whether the government is thereafter going to  
2 file an amicus brief?

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

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

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

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

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

1 going to be pursuing your appeal. I think it's better  
2 to wait and not file until one is certain that one will  
3 be pursuing the appeal.

4 JUSTICE SCALIA: Well, anyway, a rule's a  
5 rule, and discussing all of these consequences is beside  
6 the point. If, indeed, the government's a party, it's  
7 60 days, right, and you say the government's a party?

8 MR. SCHOR: Correct.

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

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

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

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

22 JUSTICE SCALIA: Okay.

23 MR. SCHOR: If the Court, however, wants to  
24 -- wants to rule narrowly and just decide the Rule  
25 4(a)(1)(B) issue, whether the government is a party

1 under Rule 4(a)(1)(B), our arguments are certainly  
2 consistent with that as well.

3 The government is a -- well, let me address  
4 one issue that may be in the Court's mind or that the  
5 Court may be asking. Well, Petitioner -- you know, we  
6 have the government telling us that it doesn't need the  
7 60 days when it doesn't intervene or actively  
8 participate. Doesn't that end the matter?

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

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

21 We would argue that two factors detract from  
22 the government's argument in that respect. First of  
23 all, it's unrealistic to think that the government will  
24 never need the 60-day period if it doesn't intervene or  
25 actively participate. The problem arises if the relator

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

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

1           CHIEF JUSTICE ROBERTS:  There may be --  
2   there may be a lot of reasons the relator will not  
3   pursue an appeal.  I don't think there's any reason that  
4   the relator would not file a notice of appeal within 30  
5   days or, if he doesn't like 30 days, you ask for an  
6   extension of time for another 30 days.  Then the whole  
7   issue is moot.

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

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

17           MR. SCHOR:  Correct.

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

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

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

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

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

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

17 Now, the -- it's important also to note that  
18 when the government declines to proceed with a qui tam  
19 action, it might be declining to conduct the action or  
20 take discovery or use its resources, but it's not  
21 declining to get a judgment. The judgment gets a  
22 binding judgment even when it declines.

23 And it's -- there's no dispute that the --  
24 that the claim is the government's claim and that the  
25 judgment finally disposes of it. If -- if in a declined

1 action the relator litigates and gets a \$10 million  
2 award, the government takes the money. And so the  
3 government is bound by the judgment. The judgment  
4 finally disposes of the government's claim.

5 JUSTICE SCALIA: But there -- there are some  
6 provisions that -- that seem to indicate the government  
7 isn't a party. For example, it specifically provides  
8 that even when the government hasn't intervened, the  
9 government may request copies of the pleadings. Doesn't  
10 it have to make requests for them?

11 MR. SCHOR: The government has to make  
12 requests.

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

15 MR. SCHOR: The -- the --

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

20 MR. SCHOR: No. But Congress can restrict  
21 the operation of particular Federal Rules of Civil  
22 Procedure. The argument that I think Your Honor is  
23 averting to is the Rule 5 argument that my -- that  
24 Respondents and the government make. Rule 5 doesn't  
25 define who a party is. It attaches certain consequences

1 to -- to being a party, but it doesn't define who a  
2 party is. It says you get to be served -- if you are a  
3 party, you get to be served with certain pleadings, and  
4 Congress --

5 JUSTICE SCALIA: Right.

6 MR. SCHOR: -- simply restricted that --  
7 that right in the False Claims Act. But that doesn't  
8 make it a party. What makes it a party is whether it's  
9 named and is --

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

17 MR. SCHOR: The fact that ordinarily a party  
18 might get served with certain pleadings doesn't mean  
19 that if Congress restricts that right, it's not a party.  
20 It means it's a party that Congress has -- for whom  
21 Congress has restricted the right. And that happens in  
22 --

23 JUSTICE GINSBURG: Do you think that  
24 everyone -- you are relying on the government, that the  
25 government is in the caption and it's a real party in

1 interest. Is every real party in interest a party for  
2 the -- for this purpose?

3 MR. SCHOR: No, we are not arguing that. To  
4 be a party, a real party in interest must be named in  
5 the -- the action must be brought in the name of the  
6 real party in interest. And we've cited abundant  
7 authority for the proposition that that means that the  
8 pleadings must identify that person by name. If the  
9 action is to be brought in the name of Smith, then the  
10 pleadings must identify Smith as the plaintiff. So the  
11 naming requirement must be complied with. It's not  
12 sufficient in our view just to be a real party in  
13 interest.

14 JUSTICE SCALIA: Can I come back to the Rule  
15 5 point just for a minute? You -- you say that the  
16 effect of the False Claims Act is simply to restrict  
17 what would normally be the right of the government to  
18 get copies of all the pleadings. That's really not how  
19 it reads. It doesn't say that the government shall  
20 receive copies of the pleadings only if it requests  
21 them. Rather, it says the government shall receive  
22 copies of the pleadings if it requests them, as though  
23 without that provision it wouldn't have a right to  
24 receive copies. Isn't that the way it reads?

25 MR. SCHOR: It does read that way. I think

1 the addition of "only" is logician's language, Your  
2 Honor. I'm not sure that the drafters --

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

5 (Laughter.)

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

8 JUSTICE SCALIA: Precision.

9 MR. SCHOR: -- of quality. The attachment  
10 of the condition "if it requests" I think goes a long  
11 way towards suggesting that if it doesn't so request,  
12 then it -- it won't, which means that Congress has  
13 restricted the operation of -- of Rule 5.

14 And -- and there are a number of instances  
15 where Congress will restrict the operation of Federal  
16 Rules of Civil Procedure even when someone is concededly  
17 a party to the case. I have cited a number of instances  
18 in that -- of that in our reply brief. There are a  
19 number of statutory actions, especially where the  
20 government is a party, where, even though it's  
21 concededly a party and everyone's a party, the -- the  
22 normal party discovery obligations don't apply. We have  
23 cited FOIA and EPA and tax summons and -- and habeas is  
24 a slightly different example.

25 But there are many examples where Congress

1 will step in and restrict the obligations that the  
2 Federal Rules would otherwise apply to people who are  
3 parties without depriving them of party status.

4 I'd like to address the intervention  
5 provision. We have many arguments in our briefs as to  
6 why the intervention provision doesn't determine party  
7 status. I think that the simplest way from A to B is to  
8 follow through to its conclusion an example that the  
9 government gives. The government says that if it vetoes  
10 a settlement, then it is a party.

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

21 I'd like to just go back to the definition  
22 of -- of "party" that is in our briefing. The --  
23 several provisions of the False Claims Act show that,  
24 even without ever intervening or actively participating,  
25 the government satisfies the classic elements of party

1 status. It's a real party in interest because the  
2 statute upholds the government's claim and gives the  
3 government the bulk of recovery. The -- the government  
4 is named as a plaintiff in the pleadings pursuant to the  
5 Act's naming requirements. The government is served  
6 with the complaint under Federal Rule of Civil Procedure  
7 4 pursuant to the Act's service requirement. And the  
8 government is bound by the judgment, which is not even  
9 disputed here. Those are the classic elements of party  
10 status, and the government satisfies them all in this  
11 case --

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

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

24 It is an oddity of the False Claims Act that  
25 the plaintiff is served with the complaint, but that's

1 there on the face of the statute. And once it's served,  
2 having been named and having been already a real party  
3 in interest by operation of law, then it has -- it's  
4 already a party at that point. And if it's a party at  
5 that point, then it's a party for purposes of Federal  
6 Rule of Appellate Procedure 4(a)(1)(B) and -- and may be  
7 for other purposes as well.

8 I'd like to --

9 JUSTICE SCALIA: May be for other purposes?  
10 I thought you told me before that it was --

11 MR. SCHOR: It is.

12 JUSTICE SCALIA: -- for other purposes as  
13 well.

14 MR. SCHOR: It is.

15 JUSTICE SCALIA: Okay. Let's -- let's stay  
16 on track.

17 MR. SCHOR: Yes.

18 (Laughter.)

19 MR. SCHOR: I'd like to --

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

23 MR. SCHOR: In -- in our arguments, it is a  
24 party even though it is not subject to discovery. There  
25 are two ways one can characterize the government. One

1 can either say it's not a party for purposes of  
2 discovery; or, as we say, citing authority in our reply,  
3 it is a party, but it is for other statutory reasons not  
4 subject to discovery.

5           The declination provision is key here. It  
6 -- by the declination provision, Congress said the  
7 government can decline to engage in discovery. Right?  
8 It declines to conduct the action. One aspect of  
9 conducting the action is engaging in discovery. The  
10 government can decline to engage. That means not only  
11 not serving discovery requests, but not responding to  
12 discovery requests. And that's part and parcel of the  
13 declination provision. That's the way Congress  
14 structured it. So I --

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

17           MR. SCHOR: The declination provision, Your  
18 Honor?

19           JUSTICE SCALIA: Yes. I'm sorry. I didn't  
20 mean to eat up your time with it.

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

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

24           MR. SCHOR: Oh.

25           Well, it's certainly on page 2 of our

1 opening brief. It says: "If the government elects not  
2 to proceed with the action, the person who initiated the  
3 action shall have the right to conduct the action." And  
4 there are other provisions that we cite in footnote 27.

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

10 MR. SCHOR: Well, footnote 27 of our brief  
11 also cites other provisions of the Act that -- that  
12 define what it means "to conduct the action." And  
13 discovery is one of them, and the declination provision  
14 says that if the government declines -- if the  
15 government -- if the government intervenes, then it  
16 conducts the action; if it declines, then it doesn't  
17 conduct the action. And the rest of the Act defines  
18 what "conducting the action" is, and that includes  
19 discovery.

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

24 JUSTICE SCALIA: And -- and the fact that it  
25 cannot conduct discovery also involves the fact that

1 it's immune from discovery. How do you get that? And  
2 it is; is it not --

3 MR. SCHOR: Yes, that's our position --

4 JUSTICE SCALIA: -- immune from --

5 MR. SCHOR: -- and I think that's the  
6 government's position as well.

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

9 MR. SCHOR: It would be --

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

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

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

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

1 in discovery obligations that --

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

8 MR. SCHOR: There's --

9 JUSTICE SCALIA: Specifically.

10 MR. SCHOR: It's an inference to be drawn  
11 from the statute, Your Honor.

12 In sum, we'd ask the Court to reverse the  
13 judgment of the Second Circuit. And I'd like to reserve  
14 the balance of my time for rebuttal.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
16 Mr. Rephen.

17 ORAL ARGUMENT OF PAUL T. REPHEN

18 ON BEHALF OF THE RESPONDENTS

19 MR. REPHEN: Mr. Chief Justice, and members  
20 of the Court:

21 When the government declines to intervene in  
22 a qui tam action, it should not be deemed a party for  
23 purposes of the Rules of Procedure, Rule 4. The  
24 government's role is described in terms of intervention  
25 as of right in the first 60 days following the filing of

1 the complaint and for good cause thereafter if the  
2 government decides to come in after initial declination.

3 CHIEF JUSTICE ROBERTS: This is certainly a  
4 trap for the unwary, right? I mean, every lawyer loves  
5 to win on a technicality, but --

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

8 CHIEF JUSTICE ROBERTS: It says if the  
9 United States is a party, it's -- it's 60; if it's not,  
10 it's 30. And you've got a situation where the United  
11 States -- the action is brought in the name of the  
12 United States. It's --

13 MR. REPHEN: It's brought in the name of the  
14 United States, but, you know, looking at the statute,  
15 where the government has declined, it's not a party.  
16 Any conservative counsel, if there are two periods of  
17 time, 30 days or 60 days, the intelligent thing to do is  
18 to go ahead --

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

23 MR. REPHEN: And rejected. And I think  
24 after -- it's hard to see --

25 CHIEF JUSTICE ROBERTS: Well, my point is if

1 it didn't occur to you, how can you claim that it should  
2 definitely have occurred to your friend on the other  
3 side?

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

9 JUSTICE STEVENS: May I ask this question  
10 about -- are there a number of circuits that follow the  
11 60-day rule?

12 MR. REPHEN: Yes.

13 JUSTICE STEVENS: And in those cases,  
14 suppose we decide your way in this case. What happens  
15 to the -- all the appeals that have been taken relying  
16 on the 60-day rule? Because I understand the failure to  
17 file a notice of appeal is jurisdictional.

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

20 JUSTICE STEVENS: All of those would be  
21 terminated?

22 MR. REPHEN: Yes.

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

25 MR. REPHEN: I don't know. I guess those

1 judgments would have to be vacated, the judgments --

2 JUSTICE STEVENS: So a really -- in several  
3 circuits, a really rather important decision is being  
4 called for?

5 MR. REPHEN: Yes, yes.

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

10 MR. REPHEN: That may be true, Your Honor.  
11 Correct, yes.

12 JUSTICE GINSBURG: So, I mean, even the  
13 holiest jurisdictional base can be precluded and not  
14 raised on collateral attack.

15 MR. REPHEN: You may be correct on that,  
16 Your Honor.

17 Again, as I said, the -- what the Congress  
18 has done -- it's very important in this case to look at  
19 the legislative history. Congress has given the  
20 government 60 days to weigh the risks and benefits of  
21 getting involved in the case. If it chooses to do so,  
22 it has full responsibility for the conduct of the  
23 litigation.

24 If it declines to do that, the statute  
25 provides that the relator shall have full responsibility

1 for the conduct of the litigation, and requires the  
2 government, if it subsequently wants to get involved, to  
3 make a motion for intervention, during which time it has  
4 to show good cause.

5 And it's our position that "intervention"  
6 should be given its ordinary and common meaning, which  
7 is the method by which a person who is not a party  
8 becomes a party.

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

15 MR. REPHEN: There are certain --

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

18 MR. REPHEN: There is certainly a limited  
19 role here, but it is a very limited role. The  
20 government can do that. This Court has recognized that  
21 it can be a party for this limited purpose. For  
22 example, if the government moved to dismiss -- and they  
23 have -- there has to be a hearing following that -- and  
24 that motion were denied, the government could not then  
25 participate on the merits of the case. It would have to

1 move to intervene for good cause if the 60 days had  
2 passed.

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

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

11 JUSTICE SCALIA: You are saying that --

12 MR. REPHEN: There may be --

13 JUSTICE SCALIA: -- but you're also saying  
14 as for the rest, sometimes it is, sometimes it isn't.

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

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

22 MR. REPHEN: We're not taking a formal  
23 position on that. I think --

24 CHIEF JUSTICE ROBERTS: Well, counsel, how  
25 does it work -- presumably, I guess the government can

1 decide that it wants to appeal a case in which it has  
2 not participated below, right?

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

5 CHIEF JUSTICE ROBERTS: It has to move to  
6 intervene. So let's say there's a judgment and the  
7 government looks at it and says, well, we didn't know we  
8 would get a decision like this; we've got to appeal  
9 this. The relator doesn't want to appeal it. Thirty  
10 days goes by. The government moves to intervene because  
11 it has 60 days.

12 MR. REPHEN: I think we would take the  
13 position there's no longer a case, Your Honor. It has  
14 30 days; the relator has not appealed. The government  
15 was not a party during that 30-day period. Thirty-one,  
16 32, 33 days -- the case is over. I guess there's a  
17 possibility for the government to move to extend its  
18 time under the rules, but generally there would be no  
19 opportunity for the government to intervene. As soon as  
20 the case is over. It had not been a party, it had not  
21 chosen to be a party, and the time has expired.

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

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

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

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

15           MR. REPHEN: Yes, but having not intervened  
16 in the case, they had not been a party.

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

19           MR. REPHEN: Rule 4 --

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

22           MR. REPHEN: Well, the government -- the  
23 government is given that opportunity to monitor the  
24 case.

25           JUSTICE BREYER: Yes.

1           MR. REPHEN: They can come in, but the  
2 government having --

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

11           MR. REPHEN: That's right.

12           JUSTICE BREYER: And -- all right. The  
13 Rules Committee would look into it if it's a problem.

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

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

20           JUSTICE SCALIA: You rely a lot, counsel, on  
21 -- on intervention, as that's what makes the government  
22 a party.

23           MR. REPHEN: I think the rules --

24           JUSTICE SCALIA: Right?

25           MR. REPHEN: Well, we rely on it because

1 that was what Congress said. Congress has made it clear  
2 using intervention --

3 JUSTICE SCALIA: The original statute -- the  
4 earlier statute did not use the word "intervention."

5 MR. REPHEN: But it used it in --

6 JUSTICE SCALIA: I forget the different word  
7 it used?

8 MR. REPHEN: "Appearance," maybe.

9 JUSTICE SCALIA: "Appearance"?

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

18 JUSTICE SCALIA: Well, I really wondered  
19 whether they didn't intend the same -- the same result.  
20 You think they consciously -- under the prior statute,  
21 you would say the government --

22 MR. REPHEN: I wouldn't --

23 JUSTICE SCALIA: The government would have  
24 been a party?

25 MR. REPHEN: I wouldn't --

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

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

12 CHIEF JUSTICE ROBERTS: Counsel, I -- I  
13 pressed your friend about what's the big deal, why don't  
14 you just file within 30? It only seems fair to press  
15 you on what's the big deal with letting them have -- for  
16 60?

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

18 CHIEF JUSTICE ROBERTS: Which also solves  
19 the problem of the potential trap for the unwary.

20 MR. REPHEN: I think the big deal is that it  
21 can open more questions than it resolves if you give the  
22 government party status for this purpose.

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

25 MR. REPHEN: And I think, Your Honor -- I

1 think, Chief Justice --

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

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

13 CHIEF JUSTICE ROBERTS: Well, it should be  
14 construed narrowly. I don't think saying whether it's  
15 30 or 60 days at all implicates that principle.

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

20 CHIEF JUSTICE ROBERTS: Well, yes, I mean,  
21 if we assume you're right, then that's construing it  
22 narrowly. But -- but the whole question is that  
23 there's some confusion in the rule about who's right,  
24 and all I'm saying is it seems to me that it would be  
25 the easiest thing to avoid any trap for the unwary, with

1 no consequences on the other side, to say 60 days.

2 MR. REPHEN: But I think it wouldn't be  
3 consistent with the intent of Congress or the intent of  
4 the rule, which is to move appeals along really within  
5 30 days. The exception is given to the government when  
6 it is a party, when it has to --

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

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

19 Again, turning to the question of the real  
20 party in interest, as I think it was discussed, real  
21 party in interest is simply one who can bring the  
22 lawsuit. Mr. Eisenstein is a real party in interest. A  
23 real party in interest is not synonymous with party  
24 status. Rule 17 describes real party in interest.  
25 Obviously Rule 4 describes a party.

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

4 MR. REPHEN: I --

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

7 MR. REPHEN: Your Honor, I don't think it's  
8 an accumulation of all of these bits of -- of real party  
9 in interest. Well, it doesn't really count how the  
10 party is named because --

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

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

16 JUSTICE SCALIA: -- you're normally a party.

17 MR. REPHEN: The naming is nominal. I think  
18 the real question is to look at the intent of Congress  
19 in terms of the right of the government to participate,  
20 and I would point out, I think during the first 80 years  
21 of experience under the qui tam action, the United  
22 States was named but had absolutely no right to play a  
23 role in the litigation.

24 I don't know that we should elevate form  
25 over substance here, and I must come back again to what

1 we think is the critical role, which was the intent of  
2 Congress in requiring intervention on the part of the  
3 United States Government if it decides that it wants to  
4 assume the burdens of party status.

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

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

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

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

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

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

24 JUSTICE SCALIA: Except the United States  
25 has a lot of power. Unlike the -- the government's

1 presentation here, you would not allow any degree of  
2 activity on the part of the government to cause it to be  
3 a party, even if it exercises all of these other powers  
4 short of intervening? It must intervene, in your --

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

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

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

12 JUSTICE SCALIA: Do you agree with the  
13 government?

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

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

20 MR. REPHEN: I don't know if it's ineffable.  
21 I think the government was relying on the Devlin  
22 decision, where there was some indication that there  
23 could be status of being a party where there is limited  
24 participation for collateral purposes. But again in  
25 Devlin, the government had argued that intervention was

1 the preferable method of getting into a case. The Court  
2 rejected that because they thought intervention  
3 essentially would be pro forma, but in this -- in this  
4 --

5 JUSTICE SCALIA: I don't think they were  
6 relying on Devlin. They -- they --

7 MR. REPHEN: Well, they were relying --

8 JUSTICE SCALIA: The point they are making  
9 here is --

10 MR. REPHEN: They were addressing --

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

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

17 JUSTICE SCALIA: I think they were.

18 MR. REPHEN: -- of activity.

19 JUSTICE SCALIA: We disagree on that.

20 MR. REPHEN: I guess we will hear from them  
21 shortly.

22 JUSTICE SCALIA: We'll hear from them.

23 (Laughter.)

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

1 government.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Wall.

4 ORAL ARGUMENT OF JEFFREY B. WALL

5 ON BEHALF OF THE UNITED STATES,

6 AS AMICUS CURIAE,

7 SUPPORTING THE RESPONDENTS

8 MR. WALL: Mr. Chief Justice, and may it

9 please the Court --

10 JUSTICE SCALIA: I have a question for you,

11 Mr. Wall.

12 (Laughter.)

13 MR. WALL: I thought you might.

14 JUSTICE SCALIA: What is the government's

15 position on that point?

16 MR. WALL: I actually wanted to start

17 exactly where you and Justice Ginsburg began because I

18 think we've gotten off a little bit on the wrong track.

19 If this Court wants a bright-line rule, the

20 right rule is intervention. Now, that would solve 98 or

21 99 percent of qui tam suits under the False Claims Act.

22 The government urged intervention as a prerequisite in

23 Devlin, and this Court disagreed. So the government

24 left open the possibility in its brief that in a very

25 small number of qui tam suits, on the order of 1 percent

1 or less, it might participate, absent intervention, in a  
2 way that would justify treatment as a party under  
3 Devlin.

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

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

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

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

16 MR. WALL: -- that the government could have  
17 appealed the judgment here as of right, and that is why  
18 we think the purposes of the 60-day period were not  
19 implicated. Because the government couldn't appeal, it  
20 was not a potential appellant that required the  
21 authorization of the Solicitor General, and it didn't  
22 need the 60 days. And that's an important point, I  
23 think, about why it couldn't just be solved by the --

24 JUSTICE SCALIA: Doesn't it need the 60 days  
25 to figure out whether it would want to intervene in

1 order to be able to appeal?

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

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

20 MR. WALL: Well, Justice Scalia, with all  
21 respect, the False Claims Act itself doesn't say  
22 anything about intervention. It doesn't say anything  
23 about 60 days. It just says the government has a right  
24 to come in and take over the action and run it and allow  
25 the relator to continue as a party. And that's why it

1 uses the word "intervene" -- because Congress understood  
2 that, in its accepted legal meaning, as a process by  
3 which a nonparty becomes a party, and the idea was to  
4 give the executive branch a choice. In each qui tam  
5 suit, the executive is able to determine whether to  
6 assume the greater benefits and burdens of party status.

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

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

18           MR. WALL: I think there are two distinct  
19 harms, Mr. Chief Justice. The first is to the  
20 government, and the second is to Congress and the system  
21 it set up in the statute. The harm to the government is  
22 that, if it can be made a party under FRAP 4, despite  
23 the fact that it has actively attempted to decline party  
24 status, it could also be made a party under the other  
25 rules.

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

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

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

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

20 First, if this Court announces a 30-day  
21 rule, that's clear going forward. Relators and their  
22 counsel will treat declined qui tam suits like civil  
23 actions generally to which the United States is a party.

24 Second, if the rules are better read for a  
25 30-day period, because the United States was not a party

1 here entitled to appeal the judgment, then Petitioner  
2 was not entitled to assume that he would get 60 days --

3 JUSTICE ALITO: What about the lawyers and  
4 the parties in the four circuits that have adopted the  
5 60-day rule. They had a court of appeals opinion in  
6 front of them that said you had 60 days. They're just  
7 out of luck now?

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

16 CHIEF JUSTICE ROBERTS: I'm sure that the  
17 Appellate Rules Advisory Committee, when they hear this  
18 decision, if they haven't already, will put something in  
19 the rules about whether it's 30 days or 60 days. So I'm  
20 not terribly concerned about clarity going forward.  
21 It's going to be made clear by the Advisory Committee  
22 and the submission of new rules, and I see no reason  
23 that they wouldn't make it clear. I don't know whether  
24 they'll think 30 or 60 is the best idea.

25 MR. WALL: Right, and --

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

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

17 The Judicial Conference raised some question  
18 about its power to do that. Two years later Congress  
19 enacted the statute putting in the 30-day and 60-day  
20 rules. I think then that's a baseline. And I'm not  
21 sure that the Advisory Committee could come back and  
22 effectively amend the -- amend the statute by changing  
23 the rule.

24 What Congress had in mind when it passed  
25 2107 was if the -- if the -- the United States is a  
26 potential appellant and requires more time to conduct

1 its internal decision-making processes, it gets 60 days.  
2 Otherwise, that 30-day baseline governs.

3 And I respectfully disagree, Mr. Chief  
4 Justice, that Congress was not concerned about moving  
5 appeals forward expeditiously. It shortened the period  
6 from 3 months to 30 days precisely because it wanted  
7 judgments to become final.

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

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

19 JUSTICE SCALIA: I understand, but this --  
20 this goes to your argument about congressional intent:  
21 That they were concerned about preserving to the  
22 government time, as a potential appellant, to think the  
23 matter over. It seems to me that argument is -- is a  
24 wash.

25 MR. WALL: But I think it goes back to what

1 Justice Ginsburg asked much earlier, which is: At the  
2 time the judgment is entered, who is a party entitled to  
3 take the appeal? If the United States has done nothing,  
4 it's not a potential appellant. When the 30-day period  
5 runs, the case is over, and the United States, if it  
6 wants to --

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

9 MR. WALL: It can intervene.

10 JUSTICE SCALIA: -- and then appeal?

11 MR. WALL: Yes.

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

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

21 When it does so very rarely -- we're talking  
22 about -- I mean that is the exceptionally rare case  
23 under the False Claims Act, and the government is  
24 saying, we can make that decision within the 30 days  
25 because we are not a party to the judgment at the time

1 it's entered. And, again, I think what Petitioner  
2 strains to do when he says at page 25 of his reply brief  
3 that when you decline as the government, you avoid the  
4 burdens of party status. What Petitioner can't explain  
5 is why that is any different for the burden of appealing  
6 an adverse judgment and the burdens of discovery. All  
7 of those rules speak in terms of party status.

8 If Petitioner is able to foist on the  
9 government a status that it actively attempted to  
10 decline, as was its right afforded it by Congress, then  
11 it seems to me Petitioner can equally try to foist on  
12 the government, though it doesn't here, in future cases  
13 party status.

14 And this Court will have to decide case by  
15 case, is the United States a party for purposes of each  
16 rule of civil and appellate procedure? And I think that  
17 approach threatens much more uncertainty than the  
18 approach the government is outlining where intervention  
19 is a simple, workable, administrable test to determine  
20 whether the United States is a party to a qui tam suit.

21 If there are no more questions, thank you.

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

23 Mr. Schor, you have 3 minutes remaining.

24 REBUTTAL ARGUMENT OF GIDEON A. SCHOR

25 ON BEHALF OF THE PETITIONER

1 MR. SCHOR: Thank you.

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

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

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

15 JUSTICE BREYER: Under all the rules?  
16 Discovery --

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

22 I'd also take issue with the assertion of  
23 Respondent's counsel that it's -- that it's their rule  
24 that will be the bright-line test. Clearly, it's  
25 Petitioner's rule. Petitioner says that the government

1 is a party in all qui tam actions for purposes of  
2 Federal Rule of Appellate Procedure 4(a)(1)(B). That  
3 forecloses all of the jurisdictional inquiries.

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

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

21 MR. SCHOR: I don't think it does. I think  
22 -- I think the -- an active participation standard would  
23 create far more trouble, far more complexity. It would  
24 be almost impossible for relators and defense to -- to  
25 know in advance what's -- what's required of them.

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

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

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

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 The case is submitted.

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

21

22

23

24

25

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