No. 08-660

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
IRWIN EISENSTEIN,

Petitioner,

v.

CITY OF NEW YORK,
MICHAEL BLOOMBERG,
JOHN DOE, JANE DOE,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

Petitioner argues that the Government is a party in declined *qui tam* actions because the Government is the real party in interest, is named as a party in all filings, and is served under Federal Rule of Civil Procedure 4. (*See* Brief for Petitioner ("Pet. Br.") 16-26, 33; Point I.B., *infra*.) In so arguing, Petitioner relies on four circuit decisions (Pet. Br. 4, 20) and proposes a rule that is clear and easy to apply (Pet. Br. 28).

In response, Respondents and the Government essentially ignore the four circuit decisions and, in continuing to press for a participation-based definition of the term "party," commit themselves to a test far too uncertain for a workable jurisdictional deadline. (*See* Pet. Br. 28-30.) While the Government claims to limit the circumstances constituting the "active participation" that would render it a party, the claim is belied by the capacious language used by the Government to describe such participation and by the Government's long list of examples. In particular, the Government asserts that it is a party if it intervenes, or moves to dismiss, or vetoes a settlement, or objects to a voluntary dismissal, or otherwise exercises "its more substantive prerogatives," or "otherwise actively participates." (Govt. Br. 9, 14-16.) This can hardly be

[1] This reply brief responds only to the most fundamental defects in the brief filed by Respondents ("Resp. Br.") and in the *amicus* brief filed by the Government ("Govt. Br.").

called a rule. The Government's effort to have it all ways should be rejected.

Respondents and the Government unavailingly argue that the FCA would not have provided for "interven[tion]" if the Government were already a party to the *qui tam* action. (*See* Resp. Br. 13, 31; Govt. Br. 6, 9-11, 24.) This argument's mistaken premise is that the FCA's term "interven[tion]" means intervention under Federal Rule of Civil Procedure 24, by which a non-party to an action becomes a party. Several FCA provisions, by according the Government the rights and powers of a party, demonstrate Congress's understanding that the Government is a party even in the absence of "interven[tion]," and thus that the FCA's term "interven[tion]" cannot mean Rule 24 intervention.

Moreover, legislative history establishes that the Government is a party prior to and regardless of its decision whether to "intervene" under the FCA. From 1943 until the 1986 amendments to the FCA, the Government, after being served with the *qui tam* complaint under Federal Rule of Civil Procedure 4, had to decide whether to enter an "appearance" (rather than whether to "intervene") in the action. But only after becoming a party to an action must one decide whether to appear. Thus, immediately prior to the 1986 amendments, the FCA demonstrated that the Government was already a party by the time it decided whether to appear. While the 1986 amendments revised "appearance" to "interven[tion]," Congress did not intend thereby to import Rule 24

intervention into the FCA. If Congress had so intended, it would have been undertaking a remarkable alteration – transforming the Government from a party to a non-party – and would have been needlessly inserting into the FCA a series of glaring anomalies, such as allowing the Government to be and to remain a *non-party* despite being identified in the complaint as a party, receiving service under Federal Rule of Civil Procedure 4, moving to dismiss, and obtaining a binding judgment in its own name. Nothing in the 1986 amendments or the legislative history indicates that Congress understood itself to be making such a significant change with such bizarre consequences.

ARGUMENT

I. Even Absent Intervention, the Government Is a "Party" to a *Qui Tam* Action

A. The Arguments of Respondents and the Government Fail to Establish That the Government Is Not a Party and Fail to Rebut Petitioner's Definition of "Party"

Why Respondents and the Government rely on *Devlin v. Scardelletti,* 536 U.S. 1 (2002), is mystifying. (Resp. Br. 13; Govt. Br. 8, 15-16.) In *Devlin,* the Court held that nonnamed class members who object to a settlement but who do not properly intervene are

"parties" for purposes of appealing the approval of the settlement. 536 U.S. at 14. The Court held that such approval bound the nonnamed class member and therefore was a "final decision of [his] right or claim." *Id.* at 9 (internal quotation marks and citation omitted). The key factor, the Court concluded, was that "nonnamed class members are parties to the proceedings in the sense of being *bound* by the settlement." *Id.* at 10 (emphasis added). The dissent opined that only the *named* class representatives are parties for purposes of appealing the approval, and that "the parties to a judgment are those *named as such* . . . ." *Id.* at 15 (Scalia, J., dissenting).

Devlin is particularly supportive of Petitioner because the requirement held critical by the majority – being bound – and the requirement held critical by the dissent – being named – are *both* satisfied here. Respondents and the Government concede that the Government is bound by the judgment in a declined *qui tam* action. (Resp. Br. 27; Govt. Br. 27.) Nor do Respondents or the Government meaningfully rebut any of Petitioner's extensive authority for the proposition that, under the FCA's naming requirement, the complaint must name the Government *as a plaintiff*. (*See* Pet. Br. 9 n.5, 20-21, 24 n.15; *see also* Pet. Br. 22-23 & n.13.)

In a breathtaking assertion, the Government contends that "the caption of Petitioner's complaint does not identify the Government as a party-plaintiff" but rather identifies Petitioner as "the" party-plaintiff and the United States "as an entity for

whose benefit the action is brought . . . ." (Govt. Br. 24.) The Government does not, because it cannot, cite any authority for the proposition that the caption does not name the Government as a plaintiff, let alone *the* plaintiff. In fact, in the case title, the United States comes first, unintroduced by subordinating language like "*ex rel.*," which is short for "*ex relatione*," meaning "[o]n the relation or information of," *Black's Law Dictionary* 621 (8th ed. 2004). Thus, as far as the *title* is concerned, the United States is the plaintiff, and the relator is the source of the allegations.[2] (The 1986 amendments to the FCA established that the relator is *also* a party. *See* 31 U.S.C. § 3730(c)(1).) Moreover, the Government's logic is awry: Regardless of whether the *qui tam* action is brought "for the benefit of" the Government (as well as the relator, *see* 31 U.S.C. § 3730(b)(1)), it is still true that the Government must be identified as a plaintiff (per the naming requirements of the FCA and Rule 17(a)), and such identification has long been effectuated by the convention "United States *ex rel.* ___."[3] In any event, because the Government cannot

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[2] Whether or not the action is "for the benefit of" the United States (*see* Govt. Br. 24), the issue is what the title "United States ex rel. Smith v. Jones" actually says. In fact, this title says that the Government is the plaintiff and that Smith is the source of the information upon which the Government's complaint is based. *See Black's Law Dictionary* 621 (8th ed. 2004) ("A suit *ex rel.* is typically brought *by the Government* upon the application of a private party (called a relator) who is interested in the matter." (emphasis added)).

[3] The Government's assertion that Rule 17(a) does not "add anything to the analysis" (Govt. Br. 26) is unfathomable. While

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credibly assert that, had it intervened herein, the caption would be any different, the Government's contention implies, astonishingly, that the caption post-intervention still would not identify the Government as a plaintiff. To state the Government's position is to defeat it.[4]

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the relator is undisputedly a real party in interest (Resp. Br. 26; Govt. Br. 26), this is so only with respect to the relator's own claim (*i.e.,* the portion of the Government's claim assigned to the relator, *see Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 & n.4 (2000)). Thus, while the relator, as a real party in interest, can and should be named under Rule 17(a), that Rule separately requires the Government, which is a real party in interest by virtue of the unassigned portion of its claim (Pet. Br. 18), to be named as well. *See* 6A Charles Alan Wright *et al., Federal Practice and Procedure* ("*Wright*") § 1545, at 352-53 (2d ed. 1990). Moreover, as far as the unassigned portion of the Government's claim is concerned, the relator acts – that is, files the complaint and, after the Government's declination, conducts the action – as the Government's "statutorily designated agent." *Stevens,* 529 U.S. at 772. Where, as here, the principal never parts with the right as to which the agent represents it for purposes of litigation, the principal and not the agent is the real party in interest. 6A *Wright* § 1548, at 376-77 (2d ed. 1990). Therefore, the *qui tam* action must be brought in the name of the Government (as statutory principal) and not simply in the name of the relator (as statutory agent).

[4] Cases holding that the caption is not "determinative" of the identity of the parties (*see* Govt. Br. 24) involve the odd complaint whose caption names an entity as a party but whose allegations do not, or *vice versa*. *See* 5A *Wright* § 1321, at 388 n.12 (3d ed. 2004). Barring such exceptional circumstances, the caption "is entitled to *considerable weight* when determining who the plaintiffs to the suit are . . . ." *Williams v. Bradshaw*, 459 F.3d 846, 849 (8th Cir. 2006) (cited at Govt. Br. 24-25). Nor does *Williams* support the Government's assertion that the

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Contrary to the Government's argument (Govt. Br. 8, 15-16), *Devlin* does not remotely stand for the proposition that participation in district court proceedings determines whether one is a party for purposes of appeal. The relevant factor in *Devlin* was not that the nonnamed class member "actively participate[d]" (Govt. Br. 9) – by objecting to the settlement or otherwise – but rather that the class member was bound by the settlement: "What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement." 536 U.S. at 10. In a declined *qui tam* action, the judgment binds the Government by operation of statutory requirements – *i.e.,* those making the Government a real party in interest, a named plaintiff, and a recipient of service under Rule 4 – rather than by any "active participation." Because the Government is so bound, the degree of its participation in district court proceedings is irrelevant to whether it is a party under *Devlin.*[5]

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caption in this case did not identify the Government as a party plaintiff (Govt. Br. 24-25): While the caption in *Williams* named "Lateca Williams . . . on Behalf of the Heirs at Law" when it should have named the heirs themselves, *see* 459 F.3d at 848, the caption in the instant case named the "United States" itself (in the phrase "United States, upon the relation of Irwin Eisenstein," *see supra* at 4-5 and n.2) rather than "Irwin Eisenstein, on behalf of the United States."

[5] Though the Government also cites a *Rooker-Feldman* case, *Lance v. Dennis,* 546 U.S. 459, 465 (2006), for the proposition that participation determines party status, the *Lance* Court made clear that the determining factor is whether a party in a

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Contrary to Respondents' assertion, *Stevens* never distinguished between a "'party'" and a "'real party in interest,'" and never even mentioned the phrase "real party in interest." (*See* Resp. Br. 15.) Respondents also mistakenly argue that, "[had] the Government been a party plaintiff to the litigation in *Stevens,* then there clearly would have been standing because the alleged injury in fact was indisputably sustained by the Government." (*Id.*) By failing to state for whom "there clearly would have been standing," Respondents conflate the standing analysis of the relator's claim with the standing analysis of the Government's claim. Given the *Stevens* Court's holding that the relator has his *own* claim, the Court would still have needed to perform an independent analysis of the relator's standing even if the Government had intervened. The fact of the *Stevens* Court's standing analysis does not at all establish that the Government was not a party there.

From the *Stevens* Court's statement that the judicial power exists to redress injury "'*to the complaining party*,'" *Stevens,* 529 U.S. at 771-72 (quoting *Warth v. Seldin,* 422 U.S. 490, 499 (1975)), Respondents somehow conclude that *Stevens* held the Government a non-party. (Resp. Br. 15-16.) The conclusion does not follow. In *Stevens,* the Government's injury was not in doubt; the *relator's* injury

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later proceeding was "named" in an earlier proceeding, *id.* at 466 n.2.

was the issue, to which the Court addressed itself. The Court focused on the relator as "the complaining party" because, as the one who files the *qui tam* complaint and who has an interest distinct from the Government's, the relator must have standing separate and apart from the Government's standing. But nothing in *Stevens* suggests that the Government was not a party. Though Respondents apparently read the phrase "the complaining party" to mean that the relator is the *only* plaintiff, any such reading is baseless: The *Warth* Court used the singular ("complaining party") because it was generalizing in the singular, and the *Stevens* Court simply took the quotation as it found it.

Attacking straw men, both Respondents and the Government contend that, under Federal Rule of Appellate Procedure 4(a)(1)(B), being a real party in interest does not *by itself* render one a party (Resp. Br. 17, 25; Govt. Br. 23-24), and that the FCA's naming requirement does not *by itself* render one a party (Resp. Br. 27; Govt. Br. 24-27).[6] But Petitioner does not argue that either of these is sufficient on its own to render the Government a party.[7] (Pet. Br. 5, 20.)

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[6] Hence, the Government's citation to the titles of habeas cases (Govt. Br. 25) is unavailing: In such cases, the Government is not a real party in interest, and thus the naming of the Government in the titles of those cases is insufficient to render it a party.

[7] Similarly, Respondents are incorrect in asserting – without the benefit of citation – that the Fifth, Seventh, and

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Insofar as the Government argues that its active participation (*e.g.,* its veto of a settlement) renders it a party even absent intervention, the Fifth Circuit's decision in *Searcy v. Philips Electronics N. Am. Corp.,* 117 F.3d 154 (5th Cir. 1997), actually undercuts the Government's position. (*See* Govt. Br. 18-19 (citing *Searcy* with approval in argument that veto of settlement gives Government "party status").) In *Searcy,* the Fifth Circuit held that, absent intervention, the Government is *not* a party for purposes of the right to appeal and that, to appeal, the Government must satisfy the prerequisites applied to appeals by non-parties. *Searcy,* 117 F.3d at 156, 157. To the extent that the Government's participation – its veto – was relevant, it was so only to support the Government's effort to satisfy those prerequisites. *Id.* at 157. In any event, it is not clear that *Searcy* survives *Devlin*. *Devlin* held that one who is bound, though not a named party, is a party for purposes of the right to appeal. Thus, in a declined *qui tam* action, the Government – which is bound *and* a named party, *see supra* at 4-5 – is *a fortiori* a party for purposes of the right to appeal.[8]

Ninth Circuits held "real party in interest" status to be sufficient for party status. (Resp. Br. 17.) In fact, those courts all based their holdings as well on the identification of the Government as a party in the case filings. (Pet. Br. 20 (citing cases).)

[8] This conclusion disposes of Respondents' numerous contentions that the Government absent intervention has no right of appeal. (*See, e.g.,* Resp. Br. 17, 20, 22, 26.) In *United States v. Brumfield,* 188 F.3d 303 (5th Cir. 1999), and *United*

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B. The Statutory Text and Legislative History Demonstrate That the Government Is a Party to a *Qui Tam* Action Before It Even Decides Whether to Intervene

Respondents and the Government assert, as did the Second Circuit below, that the FCA would not have provided for "interven[tion]" by the Government, 31 U.S.C. § 3730(b)(2), if the Government were already a party to the *qui tam* action. (Resp. Br. 13, 31; Govt. Br. 6, 9-11, 24; Pet. App. 8a.) This argument is based on the mistaken premise that the FCA's term "interven[tion]" means intervention under Federal Rule of Civil Procedure 24. FCA intervention, pursuant to which the Government "proceeds with the [*qui tam*] action" and "[has] the primary responsibility for prosecuting the [*qui tam*] action," 31 U.S.C. § 3730(b)(2) & (c)(1), is materially different from Rule 24 intervention, pursuant to which a non-party to an action becomes a party. FCA intervention is not the means by which the Government becomes a party to a *qui tam* action. Indeed, the Government becomes a party when the relator files a *qui tam* complaint naming the Government as a party and serves the Government under Federal Rule of Civil Procedure 4 – long before the point at which the Government must

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States v. Hallahan, 768 F.2d 754 (6th Cir. 1985) (*see* Resp. Br. 22), the facts are so sparely described and the holdings are so conclusory that it is impossible to determine what the court meant by "participation" or by "the 'traditional' posture" required for application of the 60-day appellate deadline.

decide whether to intervene under the FCA. Rather, FCA intervention is the means by which the Government appears in a *qui tam* action alongside the pre-existing party plaintiff – the relator.

Several other FCA provisions accord the Government the rights and powers of a party – and hence regard the Government as a party – even in the absence of "interven[tion]." These provisions entitle the Government to move to dismiss, to veto any settlement or voluntary dismissal, to obtain the bulk of any recovery, to obtain a binding judgment in its own name, and to be served under Federal Rule of Civil Procedure 4.[9] (By contrast, Rule 24 intervention never accords an intervenor "primary responsibility for prosecuting the action.") The foregoing FCA provisions, which presuppose that the Government is a party even absent intervention, demonstrate that the FCA's term "interven[tion]" cannot mean Rule 24 intervention.[10]

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[9] Even the authority cited by the Government demonstrates that FCA intervention is not the equivalent of Rule 24 intervention: "'[Intervention under Rule 24 is] a procedure by which an outsider with an interest in a lawsuit may come in as a party though the outsider has *not been named as a party by the existing litigants*.'" (Govt. Br. 9-10 (emphasis added) (citation omitted).) Here, by virtue of the FCA's naming requirement, an existing litigant – namely, the relator, *see* 31 U.S.C. § 3730(c)(1) – has indeed named the Government as a party.

[10] Contrary to the Government's assertion (Govt. Br. 14), the reason for Petitioner's contention that intervention is not a proper test of party status is not that the Government's presence

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The Government's primary support for the premise of equivalence between FCA intervention and Rule 24 intervention is the question-begging contention that the word "intervention" is a "legal term of art with an established legal meaning." (Govt. Br. 11.) Only by reading "intervention" in isolation from the FCA's other provisions, which regard the Government as a party and guarantee the Government a uniquely dominant role, can the Government make this contention. Yet such isolation violates the very principle on which the Government purports to rely, namely, that "'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (Govt. Br. 13 (quoting *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)).) Read in the context of the FCA's provisions according the Government the above-described rights and powers absent intervention, the FCA's term "interven[tion]" cannot be the term of art that the Government claims: The statutory context of the FCA's intervention provision both contemplates that the Government is already a party prior to FCA intervention and accords the Government a prosecutorial primacy unknown to Rule 24.

In a self-defeating argument, the Government quotes authority stating that Congress, when using legal terms of art, "*presumably* knows and adopts the

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in a *qui tam* action is pervasive, but rather that, even absent intervention, the FCA accords the Government party powers and thus regards the Government as a party.

cluster of ideas that were attached" to each such term "in the body of learning from which it was taken." (Govt. Br. 11 (quoting, *inter alia*, *Morissette v. United States*, 342 U.S. 246, 263 (1952) (emphasis added)).) The emphasized language makes clear that Congress's adoption of the "cluster of ideas attached" to the term of art is merely a presumption. Here, even assuming *arguendo* that the bare word "intervention" is a term of art,[11] any such presumption of adoption is rebutted by the above-described FCA provisions that regard the Government as a party even absent intervention.

The above-described FCA provisions are sufficient on their own to demonstrate that the FCA's term "interven[tion]" does not mean Rule 24 intervention and that Congress understood the Government to be a party prior to and regardless of its

[11] The Government's brief does not convey a clear understanding of the phrase "term of art." While the Government argues, in the same breath, that "intervention" should receive its "ordinary meaning" *and* is a "term of art" (Govt. Br. 11), this Court uses the phrase "ordinary meaning" *in contradistinction to* the phrase "term of art." *See, e.g., S.D. Warren Co. v. Maine Bd. of Envtl. Prot.,* 547 U.S. 370, 376 (2006) ("But 'discharge' presumably is broader, else superfluous, and since it is neither defined in the statute *nor a term of art*, we are left to construe it 'in accordance with its *ordinary or natural meaning*.'" (emphases added) (citation omitted)); *Gonzales v. Oregon,* 546 U.S. 243, 282-83 (2006) ("We do not force *term-of-art definitions* into contexts where they plainly do not fit and produce nonsense. What is obviously intended in § 821 is the *ordinary meaning* of 'control' . . . . (emphases added) (quoting Webster's dictionary) (Scalia, J., dissenting)).

decision whether to intervene in a *qui tam* action. Nonetheless, legislative history confirms this conclusion. In 1943, Congress created a mechanism by which the Government could take over and conduct the relator's *qui tam* action. Specifically, Congress provided that, after commencing the *qui tam* action, the relator must effect service on the United States Attorney and the Attorney General, and that "[t]he United States shall have sixty days, after service as above provided, within which to *enter an appearance* in such suit." 31 U.S.C. § 232(C) (Supp. III 1943) (emphasis added). If the United States declines, then the relator "may carry on such suit," but if the United States "shall *enter appearance* in such suit the same shall be carried on solely by the United States." *Id.* (emphasis added). Although Federal Rule of Civil Procedure 24, entitled "Intervention," was already long in existence by the time of the 1943 amendments to the FCA, *see, e.g., United States v. C.M. Lane Lifeboat Co.*, 25 F. Supp. 410, 411 (E.D.N.Y. 1938), Congress in 1943 used the term "appearance" rather than the term "intervention."

The use of "appearance" is telling: One is not obligated to enter an appearance in an action until one is already a party to the action, by virtue of having been identified in the complaint as a party and having been served with process. In this context, an appearance is a voluntary, overt act by which one who has been served and thus is *already* a party submits to the jurisdiction of the court, enabling that party to avoid default and to invoke the court's power

in the party's favor. *See Roell v. Withrow*, 538 U.S. 580, 586 n.3 (2003); *Cutting v. Town of Allenstown*, 936 F.2d 18, 21 n.1 (1st Cir. 1991); *Anderson v. Taylorcraft, Inc.*, 197 F. Supp. 872, 873-74 (W.D. Pa. 1961). An appearance, moreover, is not necessary for party status. If, for example, a person is identified in the complaint as a defendant and is served with process, such person is a party but may nonetheless default for lack of appearance. *See* Fed. R. Civ. P. 5(a)(2) (providing in subsection entitled "If a *Party* Fails to *Appear*": "[A] *party* who is in default for failing to *appear*" need not be served with post-complaint pleadings, motions, and similar documents (emphases added)). Moreover, a binding default judgment may be entered against a party despite – indeed, because of – the lack of appearance. *See* Fed. R. Civ. P. 55(a) ("When a *party* against whom a judgment for affirmative relief is sought has *failed to plead or otherwise defend*, . . . the clerk must enter the *party's* default . . . ." (emphases added)); *id.* 55(b) ("If the plaintiff's claim is for a sum certain . . . , the clerk . . . must enter judgment for that amount and costs against a *defendant* who has been *defaulted for not appearing* . . . ." (emphases added)). Thus, one may be a party to an action without ever appearing.

By using the term "appearance" in the 1943 amendments, Congress regarded the Government, upon being served with the *qui tam* complaint, as one who had become a party by having been named in and served with a complaint and who was deciding

whether to appear. In Congress's view, the Government, after service with the *qui tam* complaint, would have to decide whether to appear – and, following a decision not to appear, would be waiving its rights to conduct the action and would instead be subject to whatever judgment was obtained by the relator.[12] In short, the term "appearance" in the 1943 amendments reveals Congress's understanding that the Government was already a party to the *qui tam* action before it decided whether to appear.

The term "appearance" remained in the FCA until 1986, when Congress revised the statutory language from "appearance" to "intervene."[13] The Senate Report on the 1986 amendments included a telling characterization of this revision.[14] According to

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[12] For this reason, Respondents draw the wrong inference from the observation that "[t]he *Stevens* case would have been over if the Court had dismissed the relator." (Resp. Br. 15.) The case would have been over not because the Government was not a party, but rather because it was a party who had decided not to appear. The Government recognized this conclusion in asserting that, when the Government does not intervene in a *qui tam* action, "the usual inference is that the government has chosen to forgo the benefits and to avoid the burdens that party status would entail." (Govt. Br. 15.)

[13] Compare 31 U.S.C. § 3730(b)(2) (1982) ("The Government may proceed with the action by entering an appearance . . . .") *with id.* (1986) ("The Government may elect to intervene and proceed with the action . . . .").

[14] The Senate Report is particularly instructive because Congress in 1986 enacted the Senate bill, S. 1562, in lieu of the House bill, H.R. 4827. *See* 1986 U.S.C.C.A.N. 5266, 5266. Moreover, resort to legislative reports is appropriate here, and

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that Report, "*current law*" – meaning pre-1986 law – "provides that within the initial 60-day period . . . , the Government must indicate whether it will *intervene* and proceed with the action or decline to enter." S. Rep. No. 99-345, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288 (emphases added).[15] Pre-1986 law, however, used the term "appearance," not the term "interven[tion]." Thus, Congress did not understand itself to be making a substantive change by the revision. In other words, whatever label one attaches to the statutory procedure by which the Government begins to conduct a *qui tam* action, that procedure after the 1986 amendments was understood to be the same as it had been previously.[16] Consequently,

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not only to rebut Respondents' own use of such material (*see* Resp. Br. 18). The FCA provisions according the Government the rights and powers of a party even absent "interven[tion]," *see supra* at 11-14, raise a substantial question as to whether the FCA's term "interven[tion]" means something other than Rule 24 intervention. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language *and then to legislative history if the statutory language is unclear*." (emphasis added)); *United States v. Gayle*, 342 F.3d 89, 94 (2d Cir. 2003) (committee reports are "[t]he most enlightening source of legislative history").

[15] The portion of the Senate Report quoted by Respondents contains a similar remark (*see* Resp. Br. 18): "Under *current law*, the Government is barred from reentering the litigation once it has declined to *intervene* during this initial period." S. Rep. No. 99-345, at 26, 1986 U.S.C.C.A.N. at 5291 (emphases added).

[16] As the Government itself suggests (Govt. Br. 13), the word "interven[tion]" was more consonant with another provision of the 1986 amendments clarifying that the relator is a

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Congress has always understood that the Government becomes a party to a *qui tam* action well before deciding whether to "appear[ ]" or (in the revised language) "intervene."

Another portion of the legislative history demonstrates that Congress in 1986 understood the Government's intervention to be something other than Rule 24 intervention. The House bill, H.R. 4827, provided that, if the Government elected to intervene and proceed with the action, the relator "shall have a right to continue in the action with the same rights as provided by *Rule 24(a) of the Federal Rules of Civil Procedure*." H.R. 4827, 99th Cong. § 3, A&P H.R. 4827 (Westlaw FALSECLM-LH 16), at *8 (1986) (amending 31 U.S.C. § 3730(c)(1)) (emphasis added). The House Report described this provision as requiring that, when the Government "enters an action filed by a relator, the relator remains a party to the suit with the same rights as if he had been an *intervenor as of right under Rule 24(a), Federal Rules of Civil Procedure*." H. Rep. No. 99-660, A&P H.R. Rep. 99-660 (Westlaw FALSECLM-LH 3), at *24 (1986) (emphasis added). The Government's intervention under the FCA, by contrast, was provided for and described without any reference to Rule 24. These selective references to Rule 24, too, are telling: They demonstrate that Congress was aware of the distinction

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party before, during, and after the Government's intervention decision. *See* 31 U.S.C. § 3730(c)(1) (1986) (relator has right to "continue" as party to action if Government intervenes).

between Rule 24 intervention and the Government's own distinct intervention under the FCA, and that, when Congress wanted to specify Rule 24 intervention in the FCA context, it knew how to do so.

Respondents' and the Government's argument under Federal Rule of Civil Procedure 5 is unavailing. (*See* Resp. Br. 28; Govt. Br. 13-14.) Rule 5 does not determine who is a party; rather, it provides for consequences flowing from the determination, made independently of Rule 5 (*see* Pet. Br. 16-25, 33; *supra* at 1), of who is a party. Moreover, by requiring that the Government be served *upon request,* section 3730(c)(3) restricts, rather than repeats, the service obligations otherwise applicable under the procedural rules. By restricting such obligations, section 3730(c)(3) is the opposite of superfluous.[17]

For several reasons, Petitioner's reading of the FCA's term "interven[tion]" is preferable to that of Respondents and the Government. First, far from reading the term in isolation, Petitioner's reading harmonizes the term with the statutory context, which repeatedly regards the Government as a party even absent intervention. Second, it relies on actual provisions of the FCA – *i.e.,* those according the Government party powers – rather than on a canon of

[17] In statutory actions, it is not unusual for courts to restrict obligations that arise under the Federal Rules of Civil Procedure and that otherwise bind parties. *See* Point III.A., *infra*.

construction (*i.e.,* that regarding interpretation of a "term of art"). Third, it demonstrates that the canon of construction does not even apply because the statutory context rebuts the presumption underlying the canon. Fourth, it is confirmed by the Senate Report, which is a more reliable, because statute- and case-specific, source of authority than a canon of construction. Fifth, it avoids the fractured, principle-less reading advanced by Respondents and Government, namely, that the Government is a party if it intervenes, or moves to dismiss, or vetoes a settlement, or objects to a voluntary dismissal, or "takes some other affirmative steps," or otherwise exercises "its more substantive prerogatives," or "otherwise actively participates."[18] (Resp. Br. 6, 17, 20, 25; Govt. Br. 6, 9, 14-16.)

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[18] The Government does not clearly state whether, besides intervention, the *only* other acts that can render the Government a party are moving to dismiss, vetoing a settlement, or objecting to a voluntary dismissal. *Compare* Govt. Br. 14-15 (indicating that seeking stay of relator's discovery is included among "significant prerogatives" and, by extension, "more substantive prerogatives") *with* Govt. Br. 18 (referring to treatment of Government as party "in those two narrow circumstances"). Certainly, the Government's effort to couch its position in capacious language – such as "otherwise actively participates," "has significant prerogatives," and "exercises its more substantive prerogatives" (Govt. Br. 9, 14-16) – suggests that the Government is not prepared to confine the circumstances under which it is a party absent intervention. The Government expressly so admits. (Govt. Br. 16.) The Government thereby belies its claim that its position "would create no meaningful uncertainty" concerning the application of

(Continued on following page)

Finally, if Congress in 1986 had truly intended to change "appearance" to mean Rule 24 intervention, then (by Respondents' and the Government's logic) it was undertaking the quite significant change of converting the Government from a party to a non-party – and thereby placing in the FCA's text a series of severe internal contradictions, such as allowing a non-party to move to dismiss, to veto a settlement, to obtain a judgment in its own name for the bulk of any recovery, and to remain a non-party despite being named in the complaint as a party and being served under Federal Rule of Civil Procedure 4. Nothing in the 1986 amendments or the legislative history indicates that Congress understood itself to be making such a momentous change with such bizarre consequences. Nor do Respondents or the Government offer any reason why Congress would want to alter the FCA so radically. In short, if the FCA's term "interven[tion]" contemplates not Rule 24 intervention but rather an appearance alongside a pre-existing plaintiff, then internal contradictions disappear, and all of the FCA's above-described provisions are harmonized. If, by contrast, the term is understood to mean Rule 24 intervention, then the FCA will be laden with numerous and unnecessary anomalies that Congress could not have intended.

Federal Rule Appellate Procedure 4(a)(1)(B) to declined *qui tam* actions. (Govt. Br. 18; *cf.* Pet. Br. 28-30 (arguing that participation-based rule for determining party status would be too uncertain to be workable).)

II. Respondents and the Government Mischaracterize Petitioner's Argument Concerning the Need for Clarity in Rule Interpretation

Contrary to the suggestion of Respondents and the Government, Petitioner does not argue that, in cases of doubt, the courts should apply the longer deadline or the most generous interpretation. (Resp. Br. 23-24; Govt. Br. 28.) Rather, Petitioner argues that, if the Government is not held to be a party under Federal Rule of Appellate Procedure 4(a)(1)(B), there will always be a trap for the unwary because of the ongoing requirement that the Government be identified as a plaintiff in the case caption and filings. (Pet. Br. 25-27.) If Rule 4(a)(1)(B) is read to render the Government a party consistent with that requirement, then the trap will be avoided. The length of the applicable appellate deadline is irrelevant to the basis for Petitioner's argument.

Respondents and the Government would read Rule 4(a)(1)(B) to apply the 60-day deadline where the Government is not a "party" to, but rather an "active participant" in, the action. Whatever may be said about Petitioner's reading of the word "party" in Rule 4(a)(1)(B), Petitioner's reading is vastly more literal than that proposed by Respondents and the Government. (*Cf.* Resp. Br. 4; Govt. Br. 27-28.)

The Government argues that relator's *counsel* will not likely be confused following a holding in favor of the 30-day deadline. (Govt. Br. 29-30.) But that

argument ignores the fact that in *Rodriguez* (*see* Pet. Br. 4) the relator's *counsel* was indeed confused. (*See* Pet. Br. 26-27 & n.16.)

Contrary to the Government's intimation (Govt. Br. 28-29), Petitioner's argument that there will be a likelihood of confusion even following a holding by this Court in favor of the 30-day deadline is supported by the *Rodriguez*, *Lu*, *Haycock*, and *Russell* decisions (*see* Pet. Br. 4, 25-27). Absent a controlling decision by this Court, each of the courts of appeals is supreme in its own jurisdiction, yet this supremacy did not prevent the Third, Fifth, Seventh, and Ninth Circuits from acknowledging the risk of confusion and applying the 60-day deadline.

III. Respondents' and the Government's Other Arguments Are Meritless

A. That the Government Is Not Subject to Party Discovery in Declined *Qui Tam* Actions Is Due to Its Declination and Does Not Demonstrate That It Is a Non-Party

Although the Government embraces Petitioner's contention that the Government, after declination, is not subject to party discovery under Federal Rules of Civil Procedure 26-37 (Govt. Br. 20), the Government embraces it for the wrong reason. The reason that the Government after declination is not subject to party discovery is not that the Government is not a party. (*See* Govt. Br. 10.) Rather, the reason is that its

declination frees it from assuming the burdens of party status. (*See* Govt. Br. 9.) As the Government argued in *Searcy,* because the Government after declination has little control over the relator's discovery, it makes sense to protect the Government from ordinary party discovery. *See* Reply Brief for the Appellant United States of America, *Searcy v. Philips Electronics N. Am. Corp.* (5th Cir. 1997) (No. 96-410515), 1997 WL 33562499, at *18 (Jan. 2, 1997). Indeed, when a party fails to appear, *see supra* at 15-17, it is ordinarily not subject to party discovery. *See Blazek v. Capital Recovery Assocs.,* 222 F.R.D. 360, 360-61 (E.D. Wis. 2004) (where defendant "did not answer or otherwise appear," defendant "elected, in essence, to give up party status [and] should not have to bear the burdens that the discovery rules impose on parties"); *see also Cartier v. Geneve Collections, Inc.,* No. CV 2007-0201 (DLI) (MDG), 2008 WL 1924921, at *1 (E.D.N.Y. Apr. 29, 2008) (citing cases).

It is not unusual for courts to hold that a party to a statutory civil action – especially the Government – is not subject to ordinary party discovery. *See, e.g., Wolf v. C.I.A.,* 569 F. Supp. 2d 1, 9-10 (D.D.C. 2008) ("Discovery is generally unavailable in FOIA actions." (internal quotation marks and citation omitted)); *NVE, Inc. v. Department of Health and Human Servs.,* 436 F.3d 182, 195 (3d Cir. 2006) ("There are no grounds in the APA to permit discovery in this case."); *United States v. Southern Tanks, Inc.,* 619 F.2d 54, 56 (10th Cir. 1980) ("As a general rule, discovery is available in summons enforcement proceedings only

in extraordinary situations."); *Harris v. Nelson,* 394 U.S. 286, 290 (1969) ("We agree with the Ninth Circuit that Rule 33 of the Federal Rules of Civil Procedure is not applicable to habeas corpus proceedings and that 28 U.S.C. § 2246 does not authorize interrogatories except in limited circumstances not applicable to this case . . . .").

B. The Purpose of the 60-Day Deadline Would Still Be Served by Treating the Government as a Party Regardless of Intervention or Participation

According to Respondents and the Government, the purpose of the 60-day deadline would not be served by applying that deadline here. The Government asserts that, where the Government neither intervenes nor actively participates in the district court, it does not conduct the "formal" review process for determining whether to appeal and thus does not require the longer period. (Govt. Br. 20-22.) As a preliminary matter, Petitioner has no way of testing that assertion or of determining whether there is nonetheless an *informal* review process and, if so, how long it takes. In any event, reasonable minds may differ about whether the Government's participation is sufficiently active in a particular case. The Government may well end up needing but not getting the 60 days because a court of appeals decides, after the fact and over the Government's objection, that the Government's participation was not sufficiently

active. This problem would be solved – and the purpose of the 60-day deadline would be served – by treating the Government as a party regardless of intervention or participation.

Respondents argue under *Searcy* that, if the Government appeals without intervening, then it has no right to appeal, must pursue a non-party appeal, and thus has no need for the 60-day period. (Resp. Br. 22, 25-26.) This argument incorrectly assumes that the Government would not be entitled to the 60-day deadline if it pursues a non-party appeal. Nothing in *Searcy* supports that assumption. Indeed, the Fifth Circuit in *Searcy*, notwithstanding its holding that the Government is not a party for purposes of the appeal-as-of-right issue, explicitly allowed that the 60-day deadline might nonetheless apply in a declined *qui tam* action, *see Searcy,* 117 F.3d at 156 (citing *Haycock*), and, two years later, the Fifth Circuit so held in *Russell*. In any event, *Searcy* itself contained no holding as to whether the 30- or 60-day deadline applies where the Government appeals without intervening. Finally, if *Searcy* does not survive *Devlin, see supra* at 10, then the premise of Respondents' argument fails.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Brief for Petitioner, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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