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 PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Where the United States elects not to proceed with a *qui tam* action under the False Claims Act, and the relator instead conducts the action for the United States, must a notice of appeal be filed within the 60-day period provided for in Fed. R. App. P. 4(a)(1)(B), applicable when the United States is a "party," or the 30-day period provided for in Fed. R. App. P. 4(a)(1)(A)?

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INTEREST OF *AMICUS CURIAE*[1]

Taxpayers Against Fraud Education Fund ("TAF") is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act, has participated in litigation as a *qui tam* relator and as *amicus curiae*, and has provided testimony before Congress about ways to improve the Act. TAF has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAF strongly supports vigorous enforcement of the Act based on its many years of work focused on the proper interpretation and implementation of the Act.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that all parties have consented to the filing of this brief and that letters reflecting the consent of both petitioner and respondents have been filed with the Clerk.

SUMMARY OF ARGUMENT

Federal Rule of Appellate Procedure 4(a)(1) provides that the time to file a notice of appeal in a civil case is thirty days after the entry of the judgment or order appealed from, except that when the United States is a party to a case, any party to that case has sixty days to file a notice of appeal. See also 28 U.S.C. § 2107(a), (b).[2] The question presented in this case is whether for purposes of this rule the United States is a party to a *qui tam* action under the False Claims Act, 31 U.S.C. § 3729, *et seq.,* brought by a private individual on behalf of the Government and in the Government's name, when the Government initially declines to intervene and take over the case as authorized by the Act.

Regardless of whether the Government initially intervenes in a False Claims Act *qui tam* action, the Government remains the real party in interest – the United States is named in the caption of every *qui tam* action, liability is based upon harm to the United States, and any damages and penalties

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[2] Federal Rule of Appellate Procedure 4(a)(1) provides in pertinent part:

> (A) In a civil case, except as provided in Rule[] 4(a)(1)(B), . . . the notice of appeal . . . must be filed . . . within 30 days after the judgment or order appealed from is entered.
>
> (B) When the United States . . . is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

are awarded to the United States with a reward paid from that recovery to the person who initiated the case on the Government's behalf. And regardless of whether the Government joins the case at the outset, the Act provides that the Government retains a significant role, including the right to object to the settlement or dismissal of its claim, and the right to intervene, after having initially opted not to do so, upon a showing of good cause.

Given the United States' unique role in False Claims Act *qui tam* actions, the potential for confusion from giving Federal Rule of Appellate Procedure 4(a) a non-literal reading, and the goal of the modern Federal Rules of Civil Procedure to ensure that procedural rules do not become procedural traps, the Court should hold that the United States is a party to a False Claims Act *qui tam* action for purposes of Federal Rule of Appellate Procedure 4(a) such that the sixty-day time for appeal applies to all parties to such an action. That reading of the rule serves the purposes of the False Claims Act and the Federal Rules of Civil Procedure, and causes no prejudice to any party because Federal Rule of Appellate Procedure 4(a) provides that all parties to a case involving the United States have the same sixty-day time limit to appeal.

ARGUMENT

I. THE FALSE CLAIMS ACT PROVIDES A UNIQUE ROLE FOR THE GOVERNMENT IN A *QUI TAM* ACTION WHETHER OR NOT THE UNITED STATES ACTIVELY PARTICIPATES IN THE CASE

Congress enacted the False Claims Act ("FCA") in 1863 to combat rampant procurement fraud during the Civil War.[3] The Act was modeled after informer suits that had been used in England, and early in the history of this country. *See United States ex rel. Marcus v. Hess*, 317 U.S. 547, 542, n.4 (1943). By harnessing the information and resources of private individuals to bring suit in the name of the United States and on its behalf, the Act sought to enhance the Government's ability to combat fraud against the United States Treasury. Congress has twice amended the Act, once in 1943 and again in 1986, each time refining the intertwined roles of the Government and the private persons who initiate cases on its behalf.

In its current form, the False Claims Act provides that an action may be commenced in one of two ways. First, the Attorney General may bring a civil action, 31 U.S.C. § 3730(a). Second "a person" may bring a civil action "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). When a person brings an action for the United

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[3] *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, *reenacted by* Rev. Stat. §§ 3490-3494, 5438 (1878); *see also United States v. Neifert-White Co.,* 390 U.S. 228, 232 (1968); S. Rep. No. 345, 99th Cong., 2d Sess. (1986), at 8*, reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

States, the statute provides that the action "shall be brought in the name of the Government." *Id.* Such an action is known as a "*qui tam*" action.[4]

The False Claims Act provides that when a person initiates a case on behalf of the United States, the complaint must be filed under seal and served on the Government, but not the defendant. The statute also provides the Government sixty days to investigate the complaint's allegations before making an election whether to proceed with the case. 31 U.S.C. § 3730(b)(2). The Government may request that a court extend the period that the case remains under seal to provide the Government additional time to investigate. 31 U.S.C. § 3730(b)(3). Upon expiration of the sixty-day period or any extension, the Government must make an election whether to proceed with the action. If the United States elects to proceed, it has primary responsibility for the conduct of the litigation. 31 U.S.C. § 3730(b)(4)(A). If the Government elects not to proceed, the person initiating the action shall have the right to conduct the action. 31 U.S.C. § 3730(b)(4)(B).[5]

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[4] "*Qui tam*" is short for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur,*" which means he who sues for himself as well as for the king. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768, n.1 (2000).

[5] When the FCA was first enacted, the Government had no right to participate in an action brought by a relator, Act of March 2, 1863, ch. 67, 12 Stat. 296, although the case could not be settled without the Government's consent. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 n.11 (1943). When Congress amended the statute in 1943, Congress provided for the first time that the Government could take over a case initiated by a relator. Act of December 23, 1943, ch. 377, 57 Stat. 608. Under the Act as amended in 1943, if the Government took over the suit, the relator had no continuing role in the litigation. *Id.* If the Government declined to

Section 3730(c) sets forth "the rights of the parties to qui tam actions." 31 U.S.C. § 3730(c). If the Government proceeds with the action, it has primary responsibility for conducting the action and shall not be bound by an act of the person bringing the action, although the person has a right to continue as a party to the action, subject to specified limitations. 31 U.S.C. § 3730(c)(1). The Government may dismiss the action, 31 U.S.C. § 3730(c)(2)(A), settle the action, 31 U.S.C. § 3730(c)(2)(B), or seek to restrict the relator's participation under certain circumstances. 31 U.S.C. § 3730(c)(2)(C).

If the Government declines to proceed with the action, the person initiating the action has the right to conduct the action. 31 U.S.C. § 3730(c)(3). At its request, the Government may be served with the copies of all pleadings and deposition transcripts for the purpose of monitoring the case. *Id.* The court, without limiting the rights of the person who initiated the action, may permit the Government to intervene at a later date upon a showing of good cause. *Id.* The right to join at a subsequent tine was intended to ensure that the initial decision did not prevent the Government from asserting its interests in the litigation at a later time. "Conceivably, new evidence discovered after the first sixty days of the litigation could escalate the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment or making it difficult for the qui tam relator to litigate alone." S. Rep. No. 99-345, at 26, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

Whether or not the Government proceeds with the action, the Government may seek restrictions on

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intervene, it had no opportunity to join again at a later date. The 1986 amendments further expanded the Government's role.

discovery by the relator upon a showing that the relator's actions would interfere with the Government's investigation or prosecution of a matter arising out of the same facts. 31 U.S.C. § 3730(c)(4).

Finally, the Government may elect to pursue its claim through any alternate remedy available to it. 31 U.S.C. § 3730(c)(5). If the Government makes such an election, the person initiating the action has the same rights in that proceeding as the person would have had if the *qui tam* action had proceeded. *Id.* In any such alternate proceeding, "[a]ny findings of fact or conclusions of law . . . shall be conclusive on all parties to an action." *Id.*

II. THE GOVERNMENT IS THE REAL PARTY IN INTEREST IN A *QUI TAM* ACTION REGARDLESS OF WHETHER IT JOINS THE CASE INITIALLY

Prior to the decision of the Second Circuit below, several appellate courts had concluded that the United States is a party for purposes of Federal Rule of Appellate Procedure 4(a) and that the sixty-day time period for appeals in cases in which the United States is a party applies. The Fifth, Seventh, and Ninth Circuits had concluded that the sixty-day rule applied to all *qui tam* actions.[6] The Tenth Circuit, in a decision prior to the 1986 amendments to the False Claims Act, concluded that the general thirty-day rule applied, and a later panel considered

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[6] *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304 (5th Cir. 1999); *United States ex rel. Haycock v. Hughes Aircraft Company*, 98 F.3d 1100 (9th Cir. 1996).

itself bound by that decision.[7] After the Second Circuit's decision below, the Third Circuit joined the majority in concluding that the sixty-day rule applies to all *qui tam* actions.[8] The reasoning of the appellate courts that have concluded that the sixty-day time period applies to *qui tam* actions comports with a literal reading of the rule and serves both the purposes of the False Claims Act and the Federal Rules of Civil Procedure. The decision below erred in discounting the ever present interest of the United States in a *qui tam* action and the Government's ongoing role regardless of its active participation in conducting the case.

A. The Claim in a False Claims Act *Qui Tam* Action Belongs to the United States

While the United States clearly is a nominal party to a *qui tam* action, in the sense that its name appears in the caption, it is much more than that. The gravamen of a cause of action under the False Claims Act, regardless of whether the case is initiated by the United States or a private individual, is that the United States Treasury has been harmed or threatened with harm because of the conduct of the defendant. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 774 (2000).[9] By statute, the private person

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[7] *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy,* 588 F.2d 1327 (10th Cir. 1978); *United States ex rel. Shaw v. AAA Engineering & Drafting, Inc.*, 138 Fed. Appx. 62 (10th Cir. 2005).

[8] *United States ex rel. Rodriguez v. Our Lady of Lourdes Medical Center,* 552 F.3d 297, 302 (3rd Cir 2008).

[9] *United States ex rel. Marcus v. Hess*, 317 U.S. at 551 ("We think the chief purpose of [the False Claims Act] was to provide for restitution to the government of money taken from it by

who brings a *qui tam* action is given a partial assignment of the Government's claim, but there is no question that the claim itself belongs to the Government. *Stevens,* 529 U.S. at 774. Any recovery under the statute is based upon harm to the United States, and any recovery belongs to the United States, with a statutory bounty being paid from that recovery to the private individual who prosecuted the case on the United States' behalf. 31 U.S.C. § 3730(d)(providing that award shall be paid from the "proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action"). The False Claims Act protects the United States' interest by expressly providing that no *qui tam* action may be settled or dismissed without its consent. 31 U.S.C. §§ 3730(b)(1); 3730(c)(2)(B).

Thus, the United States' role as a real party in interest is far more significant than its role in Miller Act cases, where the United States has been considered a party for purposes of Rule 4(a), as well as for other jurisdictional purposes. Under the Miller Act, suppliers to government contractors may bring an action in the name of the United States to recover payments due them. 40 U.S.C. § 1331 (formerly 40 U.S.C. § 270(a)). In such a case, as in a False Claims Act *qui tam* action, the United States' name appears in the caption and the Government could bring its own action to recover the funds. Yet unlike a False Claims Act *qui tam* action, the Government has no role in a Miller Act case and no

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fraud, and that the device of [a civil penalty plus multiple damages] was chosen to make sure that the government would be made completely whole.").

stake in the recovery pursued by the private person. Nevertheless, courts have concluded that the United States is both a nominal party and a real party in interest in such a case, and have concluded that Federal Rule of Appellate Procedure 4(a)'s sixty-day time limit applies to all parties to such a case. *See United States ex rel. Custom Fabricators, Inc. v. Dick Olson Constructors, Inc.,* 823 F.2d 370, 371 (9th Cir. 1987); *Barnard-Curtiss Co. v. United States of America, for the Use and Benefit of D.W. Falls Construction Co.*, 252 F.2d 94 (10th Cir.1958). This Court also has concluded that the United States is a real party in interest in such cases. *See United States Fidelity and Guaranty Company v. United States for the Benefit of Kenyon*, 204 U.S. 349 (1907); *see also Davison Bros. Marble Co. v. United States ex rel. Gibson*, 213 U.S. 10 (1976). Based on the treatment of Miller Act cases, the Ninth Circuit concluded in *United States ex rel. Haycock v. Hughes Aircraft Company*, 98 F.3d 1100 (9th Cir. 1996), that the United States is a party for purposes of Federal Rule of Appellate Procedure 4, given the far greater stake and role in the case that the United States has in a False Claims Act *qui tam* action than in a Miller Act case. *Id.* at 1102.

Although the Tenth Circuit in *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy,* 588 F.2d 1327 (10th Cir. 1978) rejected the analogy to the Miller Act cases, it misconstrued both the nature of the Miller Act cases and the False Claims Act *qui tam* actions. The Court viewed the United States as a real party in interest in a Miller Act case*, id.* at 1328, but the United States has no stake and no role in such cases. And while the Tenth Circuit concluded that the United States was merely a nominal party in False Claims Act *qui tam* actions,

id. (observing that proceeding in the government's name was a "mere statutory formality") the court did not acknowledge that the claim in such a case belongs to the United States, which receives most of the recovery and which retains some control over disposition of the case. But *Petrofsky* was decided before 1986, when Congress substantially amended the Act and expanded the Government's control over declined cases by expressly authorizing the Government to intervene in a *qui tam* action after having initially declined to do so. *See* 31 U.S.C. § 3730(c)(3).[10] *Compare Petrofsky,* 588 F.2d at 1328 (observing there is no support for "a continuing governmental interest in these suits after the United States has opted out.")

The paramount interest of the United States in a *qui tam* action was central to the Seventh Circuit's conclusion that a *qui tam* action is a case in which the United States is a party for purposes of Federal Rule of Appellate Procedure 4(a). In an opinion by Judge Posner, the Seventh Circuit observed that "even if the government decides not to annex the lawsuit," it has a substantial ongoing interest, including receiving copies of all pleadings and depositions, freedom to pursue alternate remedies and receives the lion's share of any recovery regardless of who conducts the litigation.." *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir.

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[10] When the Tenth Circuit in *Shaw* found no relevant change warranting reexamination of *Petrofsky* it did not evaluate the 1986 amendments' expansion of the Government's control over declined cases. *See Searcy v. Philips Electronics N.A. Corp.*, 117 F.3d 154, 159 (5th Cir. 1997) (observing that since the original Act "Congress has both created and expanded the government's power to assume control of the litigation").

2004). The Seventh Circuit also observed that the United States must be considered a party because the relator's standing was dependent upon the United States' status. Although that observation was made before this Court's decision in *Stevens*, it is fully consistent with it, as this Court also concluded that the relator's standing is derivative of the United States' claim. *See Stevens,* 529 U.S. at 774 (relators have standing as partial assignees of the United States' claim to recovery).[11]

The Court below discounted the Government's stake in a *qui tam* action, *see United States ex rel. Eisenstein v. City for New York*, 540 F.3d 94, 101 (2d Cir. 2008) (observing that it is a "'merely a statutory formality' that the relator brought the suit in the name of the United States"), focusing instead on far more variable factors such as the level of participation exercised in a particular case. *Id.* at 100 ("What is of import is that the United States played no role in this matter before the district court."). But as the Seventh Circuit recognized in rejecting a similar argument, rules of timing for taking an appeal should not turn on variable questions like the government's participation in a particular case. *See Ou*, 368 F.3d at 775 (rejecting suggestion in *Petrofsky* that a court could take into

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[11] "'Although the partial assignment allows the relator asserting the government's injury to satisfy the requirements of Article III standing, it does not transform a qui tam action into the relator's "own case" . . . . The FCA makes clear that notwithstanding the relator's statutory right to the government's share of the recovery, the underlying claim of fraud always belongs to the government.'" *United States ex rel. Lemmon v. Envirocare of Utah*, 2008 U.S. Dist. LEXIS 29619 (D. Utah Apr. 9, 2008) (holding that the United States' claim survives the death of the relator) (citations omitted).

account the circumstances of an individual case as "a very curious qualification… to graft on to a jurisdictional statute."); s*ee also Petrofsky, 5*88 F.2d at 1329 (Logan, J., dissenting).

B. The United States' Stake and Role in a *Qui Tam* Action Does Not End When it Initially Declines to Intervene

While the court below viewed the United States' participation in a *qui tam* action as an either/or proposition, and dismissed the Government's ultimate control over the disposition of the case as merely "a sensible requirement," *Eisenstein*, 540 F.3d at 98, the Government's ongoing oversight over *qui tam* cases and ability to settle or dismiss the case demonstrate that it is far more than a nominal party. The Government's role in a *qui tam* action is a fluid one. The initial decision to decline to join is not dispositive of the Government's future role in the case, or its view of the merits. *See United States ex rel. Williams v. Bell Helicopter Textron Inc.,* 417 F.3d 450, 455 (5th Cir. 2005) ("The statute… does not require the government to proceed if its investigation yields a meritorious claim."); *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 974 (7th Cir. 2002)*, aff'd on other grounds*, 538 U.S. 119 (2003); S. Rep. No. 99-345, at 26, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

III. APPLYING THE SIXTY-DAY RULE TO FALSE CLAIMS ACT *QUI TAM* ACTIONS SERVES THE PURPOSES OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FALSE CLAIMS ACT

While the United States is both a nominal party and a real party in interest, applying the sixty-day rule to all parties to a *qui tam* action also serves both the purposes of the False Claims Act and the Federal Rules of Civil Procedure.[12] The reading adopted by most appellate courts ensures that there is adequate time for the United States to consult the relevant decision-makers concerning its interests in the appeal of a judgment or order affecting its claim in appropriate cases, and it avoids the confusion that flows from the fact that the case is brought in the name of the United States and the United States' name appears in the caption.

A. The Purposes of the Sixty-Day Rule are Fully Applicable to *Qui Tam* Actions

The report of the Advisory Committee on Rule 73(a), the predecessor to Federal Rule of Civil Procedure 4(a), explains that the purpose of providing a longer time to file a notice of appeal in a case in which the United States is a party is to

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[12] There is no need to treat the United States as a party for all purposes under the Rules of Civil Procedure. When the United States does not conduct the litigation and allows the relator to prosecute the case without it, the United States should not be treated as a party for purposes of discovery. For purposes of appeal, a different question is presented – namely whose rights are being compromised.

account for the slower decision-making process of the United States:

> In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration, and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it.

Report of Proposed Amendments To Rules Of Civil Procedure For The District Courts Of The United States, *reprinted in* 5 F.R.D. 433 (1945). And in order to prevent unfairness to the other parties to a

case in which the United States was a party, the sixty-day rule applies to all parties to such a case.[13]

Those purposes are served by applying the sixty-day rule to *qui tam* actions, regardless of whether the United States has already joined the case. While the Court below dismissed this purpose as "obviously inapplicable," there are many circumstances in which it is in the United States' interest for relators to consult with the United States before filing a notice of appeal from a judgment or order affecting the United States' claim to enable the United States itself to determine whether to appeal or intervene. Because the United States has a broader perspective than a *qui tam* relator in an individual case, it may have a stake in challenging an order or judgment that the relator does not, or because it was not involved in conducting a case, may subsequently determine that an order or judgment has more far-reaching implications than it initially thought. *See, e.g., United States ex rel. McGough v. Covington Technologies Co.,* 967 F.2d 1391 (9th Cir. 1992); *Searcy v. Philips Electronics N.A. Corp*., 117 F.3d 154 (5th Cir. 1997); S. Rep. No. 99-345, at 26, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291. The United States may also need to protect its interests when a relator is unexpectedly dismissed from a case. *See, e.g., United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp*., 486 F. Supp. 2d 1233 (D. Colo. 2007) (dismissing *qui tam* action for lack of

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[13] *See id*. ("Since it would be unjust to allow the United States, its officers or agencies extra time and yet deny it to other parties in the case, the rule gives all parties in the case 60 days. The Judicial Conference of Senior Circuit Judges in 1945 recorded itself as in favor of extending the additional time of 60 days to all parties in any case where the United States or its officers or agencies were parties.").

jurisdiction after jury award of damages and declining to permit the United States to intervene), *reversed,* 540 F.3d 1180 (10th Cir. 2008). As the Third Circuit observed, the United States retains the right to intervene even on appeal and can appeal an adverse decision without formally intervening. Thus, the government's decision-making process "continues to be relevant to determining how long the right to appeal should remain available." *Lourdes*, 552 F.3d at 302.

B. Applying the Sixty-Day Rule Avoids Confusion

As most of the appellate courts that have considered this issue have concluded, applying the sixty-day rule avoids confusion that can arise from litigants applying a literal reading of the rule, given that the United States appears in the caption to the case and that the United States' omnipresent role in *qui tam* actions. *See United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304 (5th Cir. 1999) (observing that the language of the False Claims Act is likely to lead relators to conclude that the United States is a party and "the government is ever present in *qui tam* suits in ways that promote confusion."); *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (2004) (avoids confusion that would be created by giving the rule "a nonliteral interpretation"). The Federal Rules of Civil Procedure are generally to be construed to "secure the just, speedy, and inexpensive determination of every action and proceeding." Federal Rule of Civil Procedure 1. To the extent there is any ambiguity in whether the United States, which is both a nominal party and a real party in interest, is a "party" for purposes of the timing of an appeal, the rule should

be construed to avoid confusion. Applying the sixty-day rule, as most appellate courts have done, accomplishes this, and causes no harm to other parties because all parties receive the benefit of the sixty-day rule. While the court below observed that "counsel of minimal competence" would question whether the United States was a party and ensure that an appeal was filed within thirty days, not only *pro se* relators, but also defendants and several appellate courts have readily concluded that the United States is a party in the literal sense for purposes of Rule 4. *See Ou, 368 F.3d at 775; Russell,* 193 F.3d at 307-08; *Haycock,* 98 F.3d at 1002*; United States ex rel. Rodriguez v. Our Lady of Lourdes Medical Center,* 552 F.3d 297, 302 (3rd Cir 2008); *see also United States ex rel. Shaw v. AAA Engineering & Drafting Inc*., 138 Fed. Appx. 62 (5th Cir. 2005) (rejecting claim that defendant's cross-appeal was timely).[14] And although the Court found little evidence of confusion, given the few number of times this has arisen "in the many decades" in which Rule 4(a) and the False Claims Act coexisted, *see Eisenstein*, 540 F.3d at 101, that observation ignores that only in the last two decades has the False Claims Act been revitalized, resulting in a significant increase in *qui tam* actions, and even that increase did not occur immediately. Prior to 1986, statutory barriers enacted in 1943 substantially decreased the number of *qui tam* actions. *United States ex rel. Springfield Terminal Railway v. Quinn*, 14 F.3d 645,

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[14] The court in *Shaw* concluded that it was compelled to follow the Tenth Circuit's previous holding in *Petrofsky*, although it noted that "there are valid arguments in favor of applying the sixty-day rule in *qui tam* cases such as this one." 138 Fed. Appx. 62.

650 (D.C. Cir. 1994). Since 1986, the question of how to apply Rule 4(a) to declined *qui tam* actions has arisen and been resolved in several circuits, eliminating any confusion in those circuits. There could be many explanations for why the issue has not been joined in other circuits, including that even where parties conclude that they have sixty days to appeal, they do not necessarily need the full amount of time.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and hold that the United States is a party for purposes of Federal Rule of Appellate Procedure 4(a).

Respectfully submitted,

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