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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

TABLE OF AUTHORITIES – Continued

REPLY BRIEF FOR PETITIONER

THE GOVERNMENT IS A "PARTY" UNDER RULE 4(a)(1)(B) EVEN WHERE IT DECLINES TO INTERVENE

1. In framing the issue here as "whether a 'real party in interest' is the same as a 'party'" under Rule[1] 4(a)(1)(B) (Opp. at 8), Respondents demonstrate a fundamental misunderstanding of this dispute. The question is not whether the phrase "real party in interest" is co-extensive with the word "party" under Rule 4(a)(1). Rather, the question is what condition(s) – independent of being a "real party in interest" – must be satisfied in order for a "real party in interest" to be or become a "party" under that rule.

Like Respondents, Petitioner seeks the answer in Rule 17(a)(1) of the Federal Rules of Civil Procedure ("Rule 17(a)(1)"). But the answer found there by Petitioner is diametrically opposed to that found by Respondents (*see* Opp. at 14). In Petitioner's reading of Rule 17(a)(1), the real party in interest is (or becomes) a party when the action is prosecuted "in the name of" the real party in interest. *See id.* ("An action must be prosecuted *in the name of* the real

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[1] All short forms and abbreviations defined in Petitioner's Petition for Writ of Certiorari are incorporated herein by reference. "Opp." hereinafter refers to Respondents' Brief in Opposition. "Pet." hereinafter refers to Petitioner's Petition for Writ of Certiorari.

party in interest." (emphasis added)).[2] This condition for party status – suit in the real party in interest's "name" – is adverted to throughout Rule 17(a). *See, e.g.*, Fed. R. Civ. P. 17(a)(1) ("The following may sue *in their own names* without joining the person for whose benefit the action is brought. . . ." (emphasis added)); *id.* at 17(a)(2) ("Action *in the Name of* the United States for Another's Use or Benefit" (emphasis added)).[3] The purpose of the naming requirement is to bind the real party in interest to any judgment entered and thus to protect the defendant against later suit by the real party in interest. *See, e.g., Gogolin & Stelter v. Karn's Auto Imports, Inc.* 886 F.2d 100, 102 (5th Cir. 1989); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1039 (9th Cir. 1986).

Tellingly, the FCA uses *precisely* the same language – suit in the real party in interest's "name" – as does Rule 17(a)(1). Referring to a *qui tam* action, the FCA states: "The action shall be brought *in the name of* the Government." 31 U.S.C. § 3730(b)(1) (emphasis added). Moreover, nothing in the FCA remotely suggests that, after the Government declines to intervene, the *qui tam* action is no longer in the name of the Government. *See id.* §§ 3730(b)(4)(B),

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[2] Indeed, under Fed. R. Civ. P. 10(a), it is by being *named* in the title of the complaint that one becomes a "party": "Every pleading must have a caption with . . . a title. . . . The title of the complaint must *name* all parties. . . ." Fed. R. Civ. P. 10(a) (emphasis added).

[3] It is undisputed that the Government is, at a minimum, a real party in interest here. (Opp. at 8.)

3730(c)(3), 3730(d)(2) & (4). Rather, as here, the action continues to be in the "name" of the Government. *See id.* This continuity, consistent with the purpose of the naming requirement under Rule 17(a)(1), ensures that the Government is bound by any judgment and that the defendant is protected from later suit by the Government alone. (*See* Pet. App. at 8a (Government is "bound by the relator's actions for purposes of *res judicata* and collateral estoppel").)

Accordingly, the identity of language in Rule 17(a)(1) and 31 U.S.C. § 3730(b)(1) demonstrates that Congress has already resolved the issue here. Because a *qui tam* action is statutorily mandated to be in the "name" of the Government regardless of whether the Government intervenes or not, the Government in a *qui tam* action is actually a party and not simply a real party in interest.

Selective reading leads Respondents to find the wrong answer in Rule 17(a)(1). Respondents ignore the significance of Rule 17(a)(1)'s requirement of suing in the "name" of the real party in interest and therefore fail to conclude that such naming turns a "real party in interest" into a "party." Instead, Respondents rely on a misguided *expressio unius* argument – that the inclusion of the phrase "real party in interest" in Rule 17(a)(1) but *not* in Rule 4(a)(1)(B) (which instead uses "party") means that a mere "real party in interest" is *not* a "party" for purposes of Rule 4(a)(1)(B). (*See* Opp. at 14 (citing Pet. App. at 10a).) That is correct as far as it goes. But it does not go far

enough because it takes no account of Rule 17(a)(1)'s naming requirement. That naming requirement determines when a real party in interest is and is not a party.

2. Nothing in Respondents' Opposition undercuts Petitioner's contention that the Second Circuit's holding is unsupported by statute or rule, and is administratively unworkable. (*See* Pet. at 9, 12.) Under the Second Circuit's holding, a real party in interest is or becomes a party when it is "the person participating in the proceedings with control over litigation." (Pet. App. at 8a.) Notably, the Second Circuit cited no authority whatsoever for this proposition. (*See id.*) Instead, observing that the Government post-declination may not participate in the *qui tam* action without moving to intervene, the Court relied on the seemingly self-evident proposition that "[t]he inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." (*Id.*) Echoing this view, Respondents contend that "intervention would not be necessary if the United States were a party." (Opp. at 8, 15.)

Both the Second Circuit and Respondents, however, incorrectly assume that the Government's intervention in a *qui tam* action post-declination, *see* 31 U.S.C. § 3730(c)(3), is the same as intervention under Rule 24 of the Federal Rules of Civil Procedure. Manifestly, it is not. Indeed, even where the Government post-declination does not move to intervene, any favorable judgment will *on its face* entitle

the Government to damages (or penalties), and the action may not be settled without Government approval, *see* 31 U.S.C. § 3730(b)(1). The Government will also be bound by the judgment. (*See* Pet. App. at 8a.) By contrast, in an ordinary action subject to Rule 24 intervention, a person or entity that does not move to intervene is a stranger to the action, and any judgment will not on its face entitle that person or entity to any award at all. Nor, as a general matter, will the non-intervenor be bound by the judgment. Thus, *qui tam* intervention, which is significantly different from Rule 24 intervention, cannot be a basis for defining when a real party in interest is or is not a party.

For these reasons, any rule purporting to make such a definition cannot workably depend on a concept as imprecise as "participation." Post-declination, the Government still may veto a settlement, be served with all pleadings (*see* 31 U.S.C. § 3730(c)(3)), obtain an express award on the face of a judgment, and be bound by any judgment. By any reasonable definition, these factors evidence "participation" in and "control over" litigation. (*See* Pet. App. at 8a.) While Respondents may well venture counter-arguments citing the ability to control discovery, these simply demonstrate that the debate is not susceptible of clear resolution. The Second Circuit's hazy rule of "participation" is therefore ill-suited to the hard reality of filing deadlines.

3. Respondents' discussion of *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (*see* Opp. at 9-11), need not long detain this Court. *Stevens* addressed the issue of whether a relator has standing to bring suit on the Government's behalf. The instant case, however, raises no issue of standing. Moreover, contrary to Respondents' argument (*see* Opp. at 10), *Stevens* involved *no* discussion of the distinction between a "party" and a "real party in interest," or of whether the Government post-declination is a "party" for purposes of Rule 4(a)(1)(B).[4] For these reasons, Respondents' contention that the holdings of the Fifth, Seventh, and Ninth Circuits on the instant issue predate *Stevens* is unavailing. (Opp. at 11-12.)[5]

4. In addressing the concern that the Second Circuit's holding will confuse relators, both the Second Circuit and Respondents assert that there is "little history of confusion." (Opp. at 7 (quoting Pet.

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[4] The *Stevens* Court did hold, however, that a relator is effectively a partial assignee of the Government's damages claim. 529 U.S. at 773. Since the assignment – effected by the FCA's *qui tam* mechanism, *id.* – is only partial, the Government retains a partial claim. Thus, it is still a real party in interest, as both the Second Circuit and Respondents acknowledge.

[5] Contrary to the Second Circuit's holding (Pet. App. at 14a) and Respondents' Opposition (Opp. at 11), the primary rationale supporting *United States ex rel. Lu v. Ou,* 368 F.3d 773, 775 (7th Cir. 2004), was unrelated to standing. Thus, *Stevens* hardly undermines the persuasive value of *Ou.*

App. at 14a).) Suffice it to say that the existing 3-2 circuit split itself evidences a "history of confusion."[6]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[6] Should this Court reverse the Second Circuit's decision, the Second Circuit, rather than affirming on the separate ground that a relator may not bring a *qui tam* action *pro se* (*see* Opp. at 4 n.2), may give the relator herein the opportunity to retain counsel for further proceedings. *See Safir v. Blackwell,* 579 F.2d 742, 745 n.4 (2d Cir. 1978).