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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the 30-day time limit in Federal Rule of Appellate Procedure 4(a)(1)(A) for filing a notice of appeal, or the 60-day time limit in Rule 4(a)(1)(B), applies to a *qui tam* action under the False Claims Act, where the United States has declined to intervene in that action.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit:

Irwin Eisenstein is the Petitioner here and was the appellant below.

The City of New York, Michael Bloomberg, John Doe, and Jane Doe are the Respondents here and were the appellees below.

The United States of America, through the United States Attorney for the Southern District of New York, filed an *amicus curiae* brief in support of appellees below.

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The opinion of the United States Court of Appeals for the Second Circuit, dismissing the appeal as untimely, is reported at 540 F.3d 94 (2d Cir. 2008) and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-15a. The District Court's opinion is unreported, but can be found at No. 03 Civ. 413, 2006 WL 846376 (S.D.N.Y. Mar. 31, 2006), and is reprinted in the Pet. App. at 16a-43a.

JURISDICTION

The Court of Appeals entered judgment on August 19, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

1. Fed. R. App. P. 4(a)(1)(A):

   "In a civil case . . . , the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."

2. Fed. R. App. P. 4(a)(1)(B):

   "When the United States or its officer or agency 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."

3. 31 U.S.C. § 3730(c)(3):

> "If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. . . . When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause."

STATEMENT OF THE CASE

This case presents the Court with an important jurisdictional question that has created a split among five circuit courts. The Second Circuit dismissed as untimely the appeal from the judgment dismissing Petitioner's *qui tam* complaint despite the fact that the notice of appeal was filed within the time limit set forth in Federal Rule of Appellate Procedure ("Rule") 4(a)(1)(B). The Second Circuit held that although the United States (the "Government") was a named party and the "real party in interest" in the suit, the 30-day rather than the 60-day time limit set forth in Rule 4 governed the timeliness of the appeal. This holding not only contravenes the plain meaning of Rule 4, but also places the Second Circuit in direct conflict with three of the other four circuit courts that have addressed this issue.

Rule 4 provides two different time limits for the filing of an appeal in a civil case • 30 days from the

entry of the judgment or order being appealed in a suit involving only private parties, and 60 days from the entry of the judgment or order being appealed in a suit where the Government is a party. *See* Fed. R. App. P. 4(a)(1)(A) and 4(a)(1)(B). The question presented in this petition is which time limit for the filing of a notice of appeal applies where the Government is a named party to the action – here a *qui tam* action – and is clearly the real party in interest, but exercises its statutory right not to intervene in the action in the district court.

To date, three of the five circuits to consider *this exact* issue – the Fifth, Seventh and Ninth – have held that, under Rule 4(a)(1)(B), a private plaintiff has 60 days to file a notice of appeal from the entry of judgment dismissing a *qui tam* action where the Government declined to intervene in the action. *See 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, 308 (5th Cir. 1999); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996). In two of these cases – *Lu* and *Haycock* – the circuit courts held that the Government is a party for purposes of Rule 4, whether it intervenes or not. *See Lu*, 368 F.3d at 775 ("The United States is a party, and that ought to be the end of the inquiry."); *Haycock*, 98 F.3d at 1102 ("the government's nominal party status combined with the majority financial interest in the outcome suffices to make it a party for purposes of the sixty day notice of appeal rule.").

Prior to the Second Circuit's decision at issue here, the only other decision to the contrary was the Tenth Circuit's majority opinion in *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327, 1329 (10th Cir. 1978), which applied the 30-day rule because the Government declined to intervene. But even the Tenth Circuit in *Petrofsky* was divided. The dissent in *Petrofsky*, opining that a jurisdictional rule such as Rule 4 should be applied literally, concluded that the 60-day rule applies to all *qui tam* cases, whether the Government has intervened in the lawsuit or not. *See Petrofsky*, 588 F.2d at 1329 (Logan, J., dissenting). Relying on certain assertions in *Petrofksy*'s majority opinion (while ignoring the holdings in three other circuits and the conclusions of *Petrofsky*'s dissenting opinion), the Second Circuit concluded that the Government is not a party to a *qui tam* action where it declines to intervene in the district court, and that therefore the rule permitting 60 days to file a notice of appeal did not apply.

The Court should grant this petition not only to resolve the circuit conflict noted above, but also to clarify the meaning of the word "party" as it is used in Rule 4. While the Second Circuit's decision acknowledged that the Government is a named party and the "real party in interest" in any *qui tam* lawsuit, it held that the word "party," as used in Rule 4, means something more than that. (Pet. App. at 9a-10a.) Specifically, the Court held that a "party," for purposes of the rule, means "the person . . . with

control over the litigation." (Pet. App. at 8a.) Nothing on the face of Rule 4, however, suggests that the word "party" means anything other than the named party in a lawsuit. To hold that the word "party" in Rule 4 has any other meaning would contravene the plain meaning of the Rule and would be at odds with this Court's previous holdings that federal rules of procedure be given their plain meaning. *See Business Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540-41 (1991). Moreover, failing to adhere to the plain meaning of Rule 4 could lead to unnecessary confusion in the lower federal courts.

A. Proceedings in the District Court

On or about January 25, 2003, the Petitioner filed a complaint *pro se* in the United States District Court for the Southern District of New York against the Respondents alleging claims on behalf of the Government and himself under the *qui tam* provisions of the False Claims Act. *See* 31 U.S.C. § 3730(b)(1). The Government thereafter exercised its statutory right not to intervene in the action. Respondents moved to dismiss the complaint for failure to state a claim. In a Memorandum and Order dated March 30, 2006, the District Court granted the motion and dismissed the complaint. (Pet. App. at 42a.) Judgment was entered on April 12, 2006. (Pet. App. at 4a.) The Petitioner filed a Notice of Appeal *pro se* in the District Court on June 5, 2006 (Pet. App. at 4a) – 54 days after entry of judgment.

B. Proceedings in the Second Circuit

On December 26, 2006, the Second Circuit directed that the parties brief, among other things, the issue of whether the 30-day or the 60-day time limit for filing a notice of appeal under Rule 4 applies in a *qui tam* action where the United States has declined to intervene. On or about January 25, 2007, Respondents filed a motion to dismiss the appeal for lack of jurisdiction on the ground that the notice of appeal was not timely filed. Respondents argued that, because the Government declined to intervene in the action, the 30-day time limit under Rule 4(a) applied.

On or about March 5, 2007, the Second Circuit, recognizing that Respondents' motion presented an issue of first impression within the Circuit, entered an order *sua sponte* appointing *pro bono* counsel to file an opposition to Respondents' motion to dismiss the appeal. Specifically, the Second Circuit ordered that *pro bono* counsel address "whether th[e] 30-day time limit in Federal Rule of Appellate Procedure 4(a)(1)(A) for filing a notice of appeal, or the 60-day time limit in Rule 4(a)(1)(B), applies to a *qui tam* action in which the United States declines to intervene. . . ." (Second Circuit Order dated March 5, 2007.) On or about May 30, 2007, the Second Circuit appointed *pro bono* counsel for the limited purpose of opposing Respondents' motion to dismiss. (Second Circuit Order dated May 30, 2007.)

On or about October 1, 2007, *pro bono* counsel filed an opposition memorandum arguing that the

Government is a party in all *qui tam* actions under the False Claims Act and that the plain meaning of Rule 4(a)(1)(B) mandates that the 60-day time limit apply to the filing of any notice of appeal from a judgment dismissing a *qui tam* action. On or about November 9, 2007, the Government filed an *amicus curiae* brief in support of Respondents' motion to dismiss. In its brief, the Government argued that it is not a party to a *qui tam* action where it has declined to intervene in the lower court, and that the instant notice of appeal, which was filed beyond the 30-day time limit set forth in Rule 4(a)(1)(A), was therefore untimely.

On or about August 19, 2008, the Second Circuit granted Respondents' motion and dismissed the appeal as untimely. The Second Circuit held that, because the Government did not intervene in the district court, it was not a party to the action within the meaning of Rule 4(a)(1)(B), and that the instant notice of appeal should have been filed within the 30-day limit under Rule 4(a)(1)(A). (Pet. App. at 7a.) In concluding that the 30-day time limit applied, the Second Circuit explicitly acknowledged that "our holding in this matter puts us in conflict with three of the four courts of appeals that have considered this issue." (Pet. App. at 13a.)

REASONS FOR GRANTING THE PETITION

This case presents an important jurisdictional question • unresolved by this Court • that has divided the circuit courts: Is the Government a party within the meaning of Rule 4(a)(1)(B) when it declines to intervene in a *qui tam* action in the district court? A negative answer to this question will undermine this Court's long-standing principle that a statute or rule be given its plain meaning.

I. The Plain Meaning of Rule 4(a)(1)(B) Mandates That All Parties to an Appeal in a *Qui Tam* Action Be Given Sixty Days to File a Notice of Appeal.

Rule 4(a)(1)(B) states: "When the United States or its officer or agency 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." Fed. R. App. P. 4(a)(1)(B) (emphasis added). The Second Circuit, declining to apply the plain meaning of this provision, concluded that the Government in a *qui tam* action is not a "party" within the meaning of Rule 4(a)(1)(B) where it declines to intervene in the action in the district court. There is no justifiable reason for deviating from the plain meaning of this rule, where, as here, the Government is a named party to the lawsuit. Whether the Government has declined to intervene or has exercised its statutory right to conduct the action has no impact on the Government's status as a named party to the action.

While the Second Circuit's decision acknowledged that the Government is a named party and the "real party in interest" in any *qui tam* lawsuit, it held that this status "is by itself insufficient to trigger the 60-day filing period." (Pet. App. at 10a.) The Second Circuit determined that the failure of Rule 4(a) to address situations where the Government is the "real party in interest" was not "simply an oversight" but was rather a meaningful omission. (Pet. App. at 10a.) The Second Circuit concluded that the word "party," as used in Rule 4, means "the person participating in the proceedings with control over litigation" and that the Government does not fit within this definition when it has not intervened in the district court. (Pet. App. at 8a.)

Simply put, there is no statutory or rule authority for the Second Circuit's definition of "party," and the weight of circuit authority is to the contrary. The word "party" for purposes of Rule 4 means a named party to the lawsuit. This definition easily comports with the plain meaning of the rule and has been embraced by the other circuit courts. Unlike the Second Circuit's definition, it requires no determination of whether the named party in the suit actively participated in the litigation • a determination that the Second Circuit has engrafted onto the law. Moreover, because the Government is a named party in every *qui tam* action, and remains such regardless of its decision to intervene, Petitioner's definition would result in a clear rule that the 60-day time limit applies in all *qui tam* lawsuits.

A holding that the Government is not a party for purposes of Rule 4 where it declines to intervene is not only contrary to the plain meaning of Rule; it is also at odds with the plain language of the False Claims Act. Section 3730(c) of Title 31 of the United States Code is entitled, "Rights of the *Parties* to Qui Tam Actions." 31 U.S.C. § 3730(c) (emphasis added). This provision describes the statutory rights and protections accorded to the Government in instances where it declines to intervene in the lawsuit. *See* 31 U.S.C. § 3730(c)(3). Notably, this section does not include the term "real party in interest" and does not draw any distinction between the Government as "party" and the Government as "real party in interest" – let alone base any legal rights on such a distinction.

Tellingly, while the Government is entitled to at least 75% of any award when it intervenes, the Government is entitled to at least *70%* of any award when it *does not* intervene. 31 U.S.C. § 3730(d)(1), (2). The 70% entitlement, and the trivial difference between governmental awards in cases of intervention and non-intervention, demonstrates that intervention in the *qui tam* context determines only issues of litigation management, not party status. Moreover, it is difficult to imagine the non-party that is entitled to any damages in a lawsuit, let alone to an award that is almost indistinguishable in size from an award to a party. The substantiality of the Government's award, and the substantial similarity of its entitlement regardless of intervention, shows that the

Government is indeed a party to any *qui tam* suit, even where it does not intervene.

II. The Second Circuit's Decision Reflects Disagreement Among the Circuit Courts Regarding Whether the 30-Day or 60-Day Rule Applies, Which Disagreement This Court Alone Can Resolve.

A. Conflict Among the Circuits

The circuit courts are clearly divided as to whether to apply the 30-day or 60-day time limit set forth in Rule 4 under the circumstances presented here. The Fifth, Seventh and Ninth Circuits apply the 60-day rule, and now the Second Circuit has joined the Tenth Circuit in applying the 30-day rule. The Second Circuit's decision here, almost inviting the filing of this petition, acknowledged that application of the 30-day rule put it "in conflict with three of the four courts of appeals that have considered this issue." (Pet. App. at 13a.)

B. Uncertainty Concerning the Law

The Second Circuit's decision also acknowledged that circuits that have addressed the issue here have expressed concern about the potential confusion that would result from not applying the 60-day rule uniformly to all *qui tam* suits. (Pet. App. at 14a ("Nor do we share the fear of the other courts that confusion may result from applying Rule 4(a)(1)(B) in the manner we do today.").) Although the Second Circuit

was not persuaded that its rule would cause confusion, the potential confusion caused by declining to apply the plain meaning of Rule 4 in *qui tam* suits warrants granting the instant petition.

The Second Circuit determined that Rule 4(a)(1)(B) is implicated only where the Government has actively participated in the district court litigation. (Pet. App. at 11a.)[1] Cases will arise however, where the Government's so-called participation in the lawsuit is not readily determinable. For example, the Government may decline to intervene in a *qui tam* suit initially, but then may attempt to exercise its statutory right to intervene "upon a showing of good cause" under 31 U.S.C. § 3730(c)(3). If the Government litigates the "good cause" issue in the district court, but ultimately loses and is prevented from intervening in the action, it is open to debate whether the Government "participated" in the litigation for purposes of applying the Second Circuit's holding here. Under the Second Circuit's test, resolution of this question would be difficult for both the parties and the circuit court charged with determining

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[1] The Second Circuit's decision distinguished Judge Friendly's decision in *United States v. American Society of Composers, Authors & Publishers*, 331 F.2d 117 (2d Cir. 1964), an antitrust suit brought under the Expediting Act, from the case where the Government declines to intervene in a *qui tam* suit. According to the Second Circuit's decision here, the "government [in *American Society*] actively participated in the ensuing litigation." (Pet. App. at 11a.)

whether the Government is in fact a party under Rule 4.

Another point of confusion could result from the Second Circuit's analysis of the 1946 Advisory Committee Note to Rule 4's predecessor rule (the "Note"). (Pet. App. at 10a-11a.) According to the Note, the rationale for permitting the Government 60 rather than 30 days to file an appeal is that "the government's institutional decision-making practices require more time to decide whether to appeal." (Pet. App. at 10a.) The Note further states that, in the interests of fairness, "the same time should be extended to other parties in a case in which the government is a party." (Pet. App. at 10a.) The Second Circuit determined that the rationale underlying the Note is clearly not applicable in cases, such as this one, where the Government declines to intervene. (Pet. App. at 11a.) The Second Circuit stated that there is simply no basis for applying the 60-day rule when the parties "are aware the government has disclaimed any participation in the suit." (Pet. App. at 15a.)

The Second Circuit's analysis, however, fails to address situations where the Government had been a defendant in a lawsuit involving private co-defendants and a private plaintiff but then was dismissed or removed from the action, and the plaintiff appeals only as against the private defendants. The Government's institutional decision-making process, as described in the Note, is clearly not implicated in such a situation insofar as the Government will not participate in any appeal. Yet the private parties

remaining in the action have 60, not 30, days in which to appeal. *See Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1011-12 (8th Cir. 1984) (applying 60-day rule where claims against Government in district court were transferred to United States Court of Claims and only private parties remained in suit at time judgment being appealed was entered). The Second Circuit's rationale, to the extent that it is based on the Government's decision-making process, is accordingly unpersuasive.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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