

1 IN THE SUPREME COURT OF THE UNITED STATES
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4 COCHISE CONSULTANCY, INC.,)
5 ET AL. ,)
6 Petitioners,)
7 v.) No. 18-315
8 UNITED STATES,)
9 EX REL. BILLY JOE HUNT,)
10 Respondent.)

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12
13 Washington, D.C.
14 Tuesday, March 19, 2019

15
16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 10:31 a.m.

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8 of the United States, as amicus curiae, in support
9 of the Respondent.

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1 P R O C E E D I N G S

2 (10:31 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 18-315, Cochise
5 Consultancy versus the United States, ex rel.
6 Billy Joe Hunt.

7 Mr. Boutrous.

8 ORAL ARGUMENT OF THEODORE J. BOUTROUS, JR.

9 ON BEHALF OF THE PETITIONERS

10 MR. BOUTROUS: Mr. Chief Justice, and
11 may it please the Court:

12 The Eleventh Circuit held that a
13 relator who waited seven years to file suit
14 after witnessing an alleged fraud against the
15 United States Government was entitled to rely
16 on the equitable tolling principle, the
17 discovery rule, that is established by
18 Section 3731(b)(2) of the False Claims Act,
19 even though the government declined to
20 intervene in the suit.

21 Under this approach, a relator could
22 conceal from the United States and could wait
23 to sue for a decade and still take advantage of
24 the principle of equitable tolling. This
25 reading of Section 3731(b)(2) contradicts this

1 Court's interpretive approach in the Graham
2 case, it defies default tolling rules, and it
3 would produce counterintuitive results that
4 Congress cannot possibly have intended.

5 Let me begin with the text. In this
6 Court's decision in Graham, interpreting the
7 False Claims Act, it held that these provisions
8 must be interpreted in context, not in
9 isolation. And, in particular, it -- it
10 focused on the language under -- under Section
11 3730, which is contained in Section 3731(b)(2).
12 And, here, the statutory context confirms that
13 that language, "action under Section 3730," as
14 incorporated into subsection (b)(2), is limited
15 to those actions where the United States is a
16 party, either because it's intervened or it
17 filed a complaint.

18 And Graham said --

19 JUSTICE GINSBURG: Isn't the United
20 States in some sense a party even if it hasn't
21 intervened? After all, it's going to get the
22 lion's share of the recovery, and, if I
23 understand correctly, it -- the suit can't be
24 dismissed without notice and -- and approval by
25 the United States.

1 MR. BOUTROUS: The government does
2 have certain rights, Your Honor, when it does
3 not intervene, but it is not a party. This
4 Court held that in Eisen -- the Eisenstadt
5 case. And -- and the -- the key here, Your
6 Honor, is, if we look at the text of the
7 statute, it -- there are multiple textual cues.

8 The first are that the provision,
9 Section 3731(b)(2), only refers to the United
10 States. And the statute refers to relators and
11 the United States separately throughout. But
12 it only refers to the United States.

13 And as Judge Wilkinson in the Sanders
14 case from the Fourth Circuit noted, it makes no
15 sense to apply this tolling provision to a
16 relator where the United States is not
17 involved. The language is that the knowledge
18 of the official of the United States charged
19 with responsibility to act in the circumstances
20 triggers the statute of limitations.

21 So knowledge of a third party that's
22 not a party to the case would somehow put the
23 plaintiff who's -- who's the -- the relator,
24 who's not an injured party, on notice that
25 there's a claim, it could start the clock

1 ticking without the relator even knowing it.

2 JUSTICE GORSUCH: Mr. Boutrous, I
3 understand your argument that a
4 non-intervention case is not a civil action
5 under Section 3730 for purposes of (b)(2). And
6 the arguments you've just given us, I -- I -- I
7 -- I acknowledge those and -- and your response
8 to Justice Ginsburg.

9 But I believe you still take the
10 position that the very same case is a civil
11 action under 3730 for purposes of (b)(1). And
12 so you'd have us interpret that introductory
13 language to (b) in two different ways, one for
14 (b)(1) and the other for (b)(2). How do we
15 manage that? That's quite a feat, don't you
16 think?

17 MR. BOUTROUS: Yeah, I don't think
18 it's -- it's difficult at all, Your Honor, and
19 in -- in Graham, the Court said that --

20 JUSTICE GORSUCH: But Graham -- let --
21 let -- sorry to interrupt you there.

22 MR. BOUTROUS: Yes.

23 JUSTICE GORSUCH: But I just put my
24 cards on the table so you can -- you can play
25 them as you wish. In Graham, we held that

1 retaliation claims just simply aren't covered
2 by this provision at all, and they don't
3 qualify under that introductory language for
4 either purposes of (b)(1) or (b)(2).

5 Here, you're asking us to split the
6 baby, as it were. And we normally don't read
7 the same language to mean two different things.
8 And I believe that's the problem you face that
9 we did not face in Graham.

10 MR. BOUTROUS: Well, actually, Your
11 Honor, in Graham, that exact issue was
12 presented. The Court said, in discussing
13 Section 3731(d), which at the time was
14 subsection (c), that the language "action
15 brought under Section 3730" meant only actions
16 brought under the United States in that
17 provision.

18 And the Court said it was the --
19 basically the exact same language in Section
20 3731(b)(1), which is what the Court was talking
21 about. The Court said that Congress spoke
22 imprecisely, used the term "actions under
23 Section 3730" imprecisely, and it sometimes
24 used that phrase to refer to only a subset of
25 actions under Section 3730.

1 And in interpreting Section --
2 subsection (d), it said that subset were
3 actions only involving the United States.
4 That's exactly what we're arguing here.

5 So -- and the Court has, Your Honor,
6 in many instances interpreted the same phrase
7 in a statute to mean different things. In the
8 Utility Regulatory Air case, for example, the
9 Court said you have to look at what is the
10 language doing in a particular provision. How
11 is it interacting with the other provisions?

12 Here, section -- subsections (b)(1)
13 and (b)(2) are very different provisions. It's
14 not like just a word following a defined term;
15 (b)(1) is triggered by a violation of Section
16 3729.

17 JUSTICE GORSUCH: But just so I
18 understand your argument, and we can -- we can
19 put it in a nutshell and then you can move on,
20 you read that language, a civil action under
21 3730, to mean cases where there's no
22 intervention when we come to (b)(1) but not
23 (b)(2), is that right?

24 MR. BOUTROUS: In -- in (b)(2), we
25 read it to mean there -- yes, that's correct,

1 Your Honor.

2 JUSTICE GORSUCH: Yeah.

3 MR. BOUTROUS: That there must be
4 intervention under (b)(2). In Section
5 (b)(1) --

6 JUSTICE GORSUCH: So -- so the United
7 States is a party for purposes of (b)(1) but
8 not (b)(2) --

9 MR. BOUTROUS: It -- (b) --

10 JUSTICE GORSUCH: -- put differently?

11 MR. BOUTROUS: -- (b) -- (b)(1) does
12 not refer -- does not distinguish between the
13 United States and the relator.

14 JUSTICE GORSUCH: Right.

15 MR. BOUTROUS: (b)(2) does. It
16 specifically calls out the United States. And
17 -- and the statute of limitations is triggered
18 based on the knowledge of the official of the
19 United States charged with responsibility to
20 act under the circumstances.

21 JUSTICE KAGAN: Does -- does that
22 mean, Mr. Boutrous, that the statute of
23 limitations can change in the middle of the
24 lawsuit if the government decides to intervene?

25 MR. BOUTROUS: It doesn't change, Your

1 Honor. For a relator, the statute of
2 limitations would be six years after the
3 violation occurred, and -- and that would end
4 it. For the United States, if the relator, for
5 example, sued and -- on -- on its own and the
6 government didn't intervene and it was more
7 than six years, the claim would be barred.

8 But that doesn't mean the statute of
9 limitations is changing. The United States
10 would still have the opportunity to intervene
11 and, if it -- if the official charged with
12 responsibility to act had learned less than
13 three years after -- before the filing of the
14 suit, the claim would be timely. So the
15 statute of limitations stays the same. I don't
16 think it's at all complicated.

17 But think of the reverse. Here,
18 equitable tolling -- and this goes to the
19 default rules. Equitable tolling is meant to
20 protect the injured party who's seeking
21 recompense. That's what the Court said in
22 Gabelli, where it's talking about civil
23 enforcement penalties brought -- sought by the
24 SEC. And -- and this Court said it had never
25 applied equitable tolling or the discovery rule

1 where the government is seeking penalties and
2 not seeking compensation for itself.

3 That's what the relator is doing here.

4 JUSTICE SOTOMAYOR: But you see, the
5 problem I have is that I know that it appears
6 to give the relator more of a statute of
7 limitations than the government, but, if you
8 look at this statute more broadly, which is
9 that its purpose is to ensure that when some
10 fraud has occurred against the U.S., that there
11 is recovery for the United States, and the qui
12 tam actions, whether it's the relator or the
13 U.S. prosecuting it, the recovery in bulk, as
14 Justice Ginsburg mentioned, goes to the
15 government.

16 So there is a purpose to this and one
17 that makes logical sense, which is why should
18 it matter that it's the government's knowledge
19 that is at issue when it's the government who
20 stands to benefit from a longer statute of
21 limitations?

22 MR. BOUTROUS: Well, the -- Your
23 Honor, the government would benefit from the
24 longer statute of limitations. It would have
25 the opportunity to --

1 JUSTICE SOTOMAYOR: No, but you're
2 forcing it to do something that the statute
3 clearly doesn't want to force the government to
4 do, which is you're forcing it to step into the
5 shoes of the relator, but the statute clearly
6 gives the government the option not to.

7 And you're saying read this in a way
8 that forces the government to do it.

9 MR. BOUTROUS: Well, it wouldn't be
10 forced, Your Honor. It would consider the fact
11 that the claim would be rendered untimely as
12 part of the suite of factors it normally would
13 consider.

14 Here, the government was not forced
15 into filing -- intervening. It decided that
16 based on its evaluation of the merits and of
17 cost and other factors it wouldn't do that.

18 But it -- Your Honor, there's -- it's
19 not just the recovery for the government. It's
20 rapid exposure of fraud.

21 Congress and this Court said it way
22 back when in the Marcus versus Hess case, the
23 False Claims Act was meant to spur rapid
24 ferreting out of fraud by privateers or bounty
25 hunters or people who were on the scene. This

1 would do the opposite.

2 So it's inconsistent with the purposes
3 of the False Claims Act and with the purpose of
4 statutes of limitations, which are meant --

5 JUSTICE SOTOMAYOR: Well, no longer,
6 because, in 1996, Congress made one of the
7 factors relevant to how much a relator recovers
8 whether they were dilatory in bringing the
9 action.

10 I know that has little to do with the
11 original interpretation, but that's not a
12 consequence today.

13 MR. BOUTROUS: But --

14 JUSTICE SOTOMAYOR: There's still a
15 direct incentive.

16 MR. BOUTROUS: -- it can have an
17 effect. And I think one of the cases that was
18 cited by the other side showed that there was a
19 modest reduction.

20 But the -- the principle here that a
21 relator, for example, Mr. Hunt waited seven
22 years, and one of the cases that creates the
23 conflict that brings us here was eight or nine
24 years. It is so contrary to the very essence
25 of equitable tolling to allow someone to lie in

1 the weeds and conceal from the United States --

2 CHIEF JUSTICE ROBERTS: Well, that's
3 -- that's really more of an academic concern.
4 The relators, for example, they know if they
5 don't move promptly, another relator might
6 preempt them. They know that if they don't
7 move promptly, the government itself might find
8 out before they have a chance to file, and that
9 would preempt their action as well.

10 The -- the theory of a relator just
11 sort of, as you say, waiting in the weeds I
12 think is not a realistic one.

13 MR. BOUTROUS: Well, Your Honor, that
14 -- this case proves the opposite. It's not
15 academic. Here, the relator waited seven
16 years. In other cases, in the Sanders case, I
17 think it was seven or eight years.

18 But think of it this way: If a
19 relator's case is baseless, if it's a concocted
20 claim, if it can -- if it's a meritless claim,
21 those incentives about moving quickly don't
22 spark the relator to do anything.

23 They're better off just waiting,
24 letting damages that they're going to claim
25 pile up, treble damages, and there they -- they

1 can amass whatever evidence they have while the
2 defendant has no idea that someone is going to
3 bring this claim.

4 JUSTICE GINSBURG: But you just -- you
5 just -- you prefaced this by saying if the
6 claim is baseless. So none of that is going to
7 happen if the claim is baseless.

8 MR. BOUTROUS: Well, but -- but, Your
9 Honor, these False Claims Act, I think the
10 amicus briefs demonstrate, they do present a
11 problem potentially of abuse, and -- and
12 throughout history, qui tam actions have
13 created such problems. I'm not saying they all
14 are.

15 But what I am saying is that the
16 incentives don't necessarily cause people to
17 file quickly, as this case and many others
18 demonstrate.

19 JUSTICE KAVANAUGH: You're --

20 MR. BOUTROUS: But the point is, even
21 if the incentives are -- there are incentives
22 there, this is another thing that a relator
23 could consider. They can wait.

24 That's flatly contrary to equitable
25 tolling, and that's the background rule that

1 Congress was thinking of.

2 JUSTICE KAVANAUGH: You're not arguing
3 that it would be absurd to read it as
4 Respondent and the Solicitor General read it?

5 MR. BOUTROUS: We are not. We are
6 arguing that it's counterintuitive, just like
7 the rule in Graham that was rejected.

8 JUSTICE KAVANAUGH: Counterintuitive,
9 Congress likely did not mean what it said, it
10 seems to be what you're suggesting?

11 MR. BOUTROUS: No, Your Honor. We
12 mean that Congress did mean what it said, that
13 where the United States official who's charged
14 with responsibility for filing a timely action,
15 when the government --

16 JUSTICE GINSBURG: Except it didn't
17 say that. It has a statute. It says civil
18 action. And then it says, one, or two,
19 whichever is later, and makes no distinction in
20 the text between the United States stepping in
21 as intervenor or the qui tam plaintiff going it
22 alone.

23 MR. BOUTROUS: Justice Ginsburg, I
24 think we crossed that bridge in Graham, the
25 fact that -- that that language --

1 JUSTICE GINSBURG: But Graham was --
2 Graham was a retaliation claim. And there it
3 was a case where, to bring a retaliation claim,
4 you don't have to prove there was any fraud at
5 all, just that you were retaliated against, and
6 the retaliation could occur after the statute
7 of limitations ran.

8 So that, if there are absurd results,
9 it seems to me that would -- would fit, that
10 you don't even have a claim that you can sue on
11 until the statute of limitations has already
12 run.

13 MR. BOUTROUS: That was one aspect of
14 Graham. But the way the Court got there -- and
15 the dissent in Graham did not think it was an
16 absurd position. That it was counterintuitive
17 is what the majority said.

18 But, Your Honor, it -- Graham didn't
19 just talk about the retaliation provision,
20 subsection (h). It talked about 3731(d) that
21 provides in an action under Section 30 --
22 brought under Section 3730, the United States
23 must prove the elements by a preponderance of
24 the evidence.

25 And the Court held that that provision

1 only applied to actions brought by the United
2 States or where they intervened, even though it
3 was even broader. It said any action under
4 Section 3730.

5 And the Court held that Congress was
6 imprecise. It's not that they didn't mean what
7 they said. They were imprecise when they --

8 JUSTICE KAVANAUGH: Why is this
9 imprecise? It seems very clear. Now you then
10 argue it doesn't make a ton of sense in terms
11 of the policy objectives, tolling principles, I
12 -- I get all that, but it -- it seems very
13 clear as written.

14 MR. BOUTROUS: Well, Your Honor, I
15 think that, one, we have to -- it's -- it's --
16 it's -- you can only interpret the statute by
17 understanding or viewing the language "action
18 under Section 3730" as appearing in both
19 provisions.

20 It really does. It can't be that the
21 decision turns on the fact that, as a drafting
22 technique, Congress said it once and it goes
23 into two very different provisions.

24 So, when we get to Section 3731(b)(2),
25 the question is, which actions is Congress

1 talking about? And the fact -- it's not that
2 it didn't mean what it said. But it was
3 imprecise in the sense that it didn't button
4 down absolutely clearly that a relator couldn't
5 take advantage of that provision.

6 But everything else -- common sense,
7 logic, the structure of the provision, the --
8 the -- the derivation of the --

9 JUSTICE GORSUCH: Let's talk about
10 common sense.

11 JUSTICE KAVANAUGH: What do you do --

12 JUSTICE GORSUCH: Oh, I'm sorry.

13 JUSTICE KAVANAUGH: Go ahead.

14 JUSTICE GORSUCH: No, please.

15 JUSTICE KAVANAUGH: Go ahead.

16 (Laughter.)

17 JUSTICE GORSUCH: All right. All
18 right. Your question is probably better than
19 mine.

20 (Laughter.)

21 JUSTICE GORSUCH: This common sense we
22 keep coming back to, I -- I guess I'm
23 struggling to get my head around it.

24 Congress, you suggest, wants to
25 encourage relators to act quickly, but it has a

1 number of other tools for ensuring that, as the
2 Chief Justice pointed out.

3 And, in any event, it really boils
4 down to these last three years, seven through
5 ten, and whether Congress would have thought
6 that we want relators to -- we want to
7 outsource work to relators years one through
8 six, but not seven through ten, for the reasons
9 that we want to encourage relators to act
10 quickly.

11 But couldn't a rational Congress
12 think, well, we want to outsource the work to
13 relators seven through ten as well, and why is
14 that absurd or unlikely or why does that defy
15 common sense? I guess I'm just struggling to
16 understand that argument.

17 MR. BOUTROUS: Because, Your Honor,
18 first, six years is a long time for a statute
19 of limitations for fraud, number one.

20 Number two, we're talking about
21 equitable tolling that is pegged on diligence
22 and that the -- that the party who is bringing
23 the case acted diligently.

24 As the Court said in Credit Suisse,
25 it's inequitable to continue to toll a statute

1 of limitations once the plaintiff knows there's
2 been an injury and they have a claim. It's
3 inequitable.

4 So Congress would never have thought
5 that if it was -- in putting an equitable
6 principle -- tolling principle into the
7 statute, that it would allow the plaintiff to
8 just lay back and wait for years and years and
9 years to file the lawsuit. It's contrary to
10 the very essence of what equitable tolling is.

11 JUSTICE ALITO: Well, Congress --
12 Congress certainly could have wanted to give
13 relators ten years to file suit, but that's not
14 really the question.

15 The question is did they want relators
16 to file suit between years seven and ten in
17 those cases where, A, the government didn't
18 know about the fraud until year seven and the
19 government chooses not to bring the case on its
20 own.

21 MR. BOUTROUS: Correct. And -- and
22 that's exactly right, Your Honor. When we're
23 getting to seven and ten years, the -- the
24 memories are fading, the government that has --
25 which has this, you know, a special

1 responsibility to ensure justice is done,
2 statutes of limitations serve important
3 purposes.

4 In Gabelli, the Court repeated that
5 this -- they're vital to the welfare of
6 society. They're important for justice.

7 JUSTICE ALITO: I mean, this is a --
8 this is an interesting case because it really
9 does create a statutory interpretation dilemma.

10 This is a -- a terribly-drafted
11 statute. It may serve wonderful purposes, but
12 if -- if -- if I were to grade whoever drafted
13 it -- anyway, I'll pass that.

14 (Laughter.)

15 JUSTICE ALITO: But you have a real --
16 you have a real problem in trying to fit this
17 into the statutory text.

18 The other side I think has a real
19 problem if they want to argue that this --
20 their argument makes that Congress really --
21 anybody in Congress really intended the result
22 that they -- that they're advocating.

23 So what's your best shot at fitting
24 this into the statutory text?

25 MR. BOUTROUS: My best shot, Your

1 Honor, is that the -- the -- the language
2 "action under Section 3730" is incorporated
3 into Section 3731(b)(2), and that provision is
4 triggered when -- when the official who is
5 charged with responsibility to file a timely
6 action had knowledge and they must do so within
7 three years.

8 And that's what the Fourth Circuit
9 said in Sanders. The -- the -- the -- it can
10 only mean that we're talking about a case where
11 -- it cannot only mean. I agree with you this
12 statute's a mess, but -- but a totally
13 reasonable meaning is that it means that that's
14 the official who was charged with getting a
15 timely claim on file, timely action under
16 Section 3730.

17 And to say that it's the relator when,
18 in the history of this -- this country, we've
19 never had a statute of limitations discovery
20 rule triggered by the knowledge of a third
21 party or we -- and we've never had this Court
22 apply the discovery rule to someone seeking
23 penalties on behalf of an uninjured -- an
24 injured third party. That was Gabelli. Here,
25 the relator is in that role.

1 CHIEF JUSTICE ROBERTS: Well, but, I
2 mean, this --

3 MR. BOUTROUS: We think our --

4 CHIEF JUSTICE ROBERTS: These types of
5 actions are exceptional in many -- many ways,
6 but the -- the concerns you raise about delay
7 and all that, aren't -- aren't they at least
8 significantly addressed with the ten-year
9 statute of repose?

10 MR. BOUTROUS: No, Your Honor. Ten
11 years is -- is a lifetime when we're talking
12 about litigation. Six years is a long time.
13 And in these cases, the -- the Washington Legal
14 Foundation brief documents how the government
15 will sometimes intervene -- will come in when
16 they get the complaint. The complaint will
17 remain under seal. And it will seek extension,
18 extension, extension.

19 Here, it was over a year. So it can
20 be ten years; it could be twelve years. So ten
21 years in civil litigation, memories fade,
22 people -- witnesses die. They disappear. And
23 so that is -- the difference between six years
24 and ten years is a -- is a very long time.

25 And in going back to --

1 CHIEF JUSTICE ROBERTS: Well, we have
2 quite a few cases that started, you know, ten
3 years ago.

4 MR. BOUTROUS: But they weren't filed
5 at the ten-year mark. They were filed and they
6 -- they go through all sorts of processes and
7 you can take discovery and you can find out the
8 information and the litigation has commenced.

9 And -- and -- and back to Justice
10 Alito's question about my best argument, the
11 other piece of it is we know that Congress
12 adopted this tolling provision directly from
13 Section 2416, which is the -- the tolling
14 provision that only applies to actions brought
15 by the United States in tort and contract
16 actions.

17 So that's another, I think, flashing
18 red light that, at a bare minimum, this
19 language is not clear. It's as ambiguous as
20 the language was viewed to be in Graham. And
21 then the question is, what is it most likely
22 that Congress intended? What did it --

23 JUSTICE KAVANAUGH: Well, the state --
24 the states have an amicus brief that says no --
25 no state has a statute of limitations that

1 explicitly adopts the rules reflected in -- the
2 rule reflected in Petitioners' tortured
3 interpretation of the FCA; it is Petitioners'
4 proposed rule, not the FCA's plain meaning,
5 that is absurd.

6 So that is from 20 states. Your
7 response to their assessment?

8 MR. BOUTROUS: Their assessment really
9 has no bearing on what Congress intended in
10 1986. And some of the --

11 JUSTICE KAVANAUGH: But their
12 assessment does have some bearing on how we
13 think about how it fits into the overall
14 context of these kinds of cases, and that's
15 been really the thrust of your argument, I
16 think.

17 MR. BOUTROUS: Well, I -- I -- I think
18 that the -- that it does not have any bearing.
19 I think it's incorrect because, again, I go
20 back to the point that it's -- it's not
21 equitable, it's not fair, it's -- it's contrary
22 to the purposes of the False Claims Act, which
23 are meant to incentivize in all ways relators
24 coming forward. So I -- we simply disagree
25 with that assessment.

1 There's -- there's -- and I didn't see
2 any real clear examples in -- in -- in that
3 brief or from the government that our rule
4 would cause any problems whatsoever. Our rule
5 is consistent with history. It's consistent
6 with Gabelli, Credit Suisse, with Graham, and
7 -- and basic principles governing statutes of
8 limitations. The --

9 JUSTICE KAGAN: It seems to me that,
10 you know, this statute reflects a Congress that
11 just decided that it did not want the
12 government's decision whether to intervene to
13 affect the statute of limitations. And that
14 might be a bad policy choice, but -- but it's
15 -- it's -- you can imagine reasons why Congress
16 would have made that choice, just to say:
17 Look, we actually think that this is a very
18 special kind of case, and we want to, you know,
19 have a statute of limitations that, it's true,
20 it's not -- it's not ordinary for a rule like
21 this to be triggered by a third party, but this
22 is a special kind of third party, which is
23 going to get most of the money from the suit.
24 And we actually think it's just easier,
25 simpler, better for any number of reasons, that

1 nothing turn on whether the government
2 intervenes or not.

3 MR. BOUTROUS: Theoretically, Congress
4 could have thought through that carefully, Your
5 Honor, and gone through that analysis, but
6 there's no indication that it did.

7 JUSTICE KAGAN: Well, the indication
8 is that they wrote a provision where nothing
9 turns on intervention.

10 MR. BOUTROUS: Well, Your Honor, I
11 would respectfully submit that it's ambiguous.
12 It's not clear, because the Congress used the
13 language "action under Section 3730"
14 imprecisely --

15 JUSTICE KAVANAUGH: What --

16 MR. BOUTROUS: -- to sometimes refer
17 to subsets of -- of those claims. And, here,
18 it's the actions by the only party mentioned in
19 the provision.

20 JUSTICE ALITO: Well, why do you --
21 why do you argue that (b)(2) applies when the
22 government intervenes? Why don't you just
23 argue that (b)(2) applies only when the
24 government itself brings suit?

25 MR. BOUTROUS: That -- that would be

1 another way to look at it, Your Honor. I think
2 that the government ultimately files a
3 complaint in intervention, if it intervenes,
4 and then that relate back -- relates back. So
5 I think it -- it -- it gets us, you know, to
6 the same place, but I -- I do think that it's
7 -- it's really over-reading Graham to suggest
8 that this has been decided, that actions under
9 Section 3730 necessarily covers (b)(2).

10 The Court -- the government repeatedly
11 cites and quotes Graham, suggesting that the
12 Court held that, but it leaves out the fact
13 that the Court very carefully said the text of
14 Section 3731(b)(1) means all actions.

15 JUSTICE KAVANAUGH: Where -- where is
16 the ambiguity? I'm not seeing ambiguity.
17 Where exactly is the phrase that you think is
18 ambiguous?

19 MR. BOUTROUS: Well, it's -- it's a
20 combination of things, Your Honor. It's, as
21 Graham said, Congress used that language,
22 "action under Section 3730," imprecisely to
23 refer to different groupings of cases.

24 And when we -- when we look at that
25 language as incorporated into (b)(2), and the

1 only party referenced there is the United
2 States, and it's triggered off the official of
3 the United States charged with responsibility
4 to act, we say the better reading is that that
5 means it's an action where the United States
6 brought the action or intervened in the action.

7 The government is reading in the
8 notion that the -- that the decision to act or
9 responsibility to act includes the -- the
10 decision not to act, which we think is not
11 clear from the text. So it's ambiguous.

12 JUSTICE KAVANAUGH: If it's -- if it's
13 not ambiguous, then I don't think there is a
14 statutory interpretation canon any longer that
15 says we can conclude that Congress didn't mean
16 what it said. The only avenues are the
17 absurdity canon or maybe scrivener's error, but
18 you're not arguing any of those.

19 So, if we conclude that it's not
20 ambiguous, is there anything left?

21 MR. BOUTROUS: There is, Your Honor.
22 The Court's decision in Barnhart, which
23 Respondents cite in their brief at page 20,
24 says that if the text is -- if the -- the
25 inquiry ceases if the statutory language is

1 unambiguous and the statutory scheme is
2 coherent and consistent. This statutory scheme
3 is neither of those.

4 And I'll reserve the rest of my time.
5 Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Mayfield.

9 ORAL ARGUMENT OF EARL N. MAYFIELD III
10 ON BEHALF OF THE RESPONDENT

11 MR. MAYFIELD: Mr. Chief Justice, may
12 it please the Court:

13 Section 31 -- 3731(b) is an
14 event-based statute of limitations that makes
15 no distinction as to the party to whom it
16 applies. It applies equally to both the United
17 States and to relators who bring suits on
18 behalf of the United States.

19 In keeping with this Court's decision
20 in Vermont Agency, in every case, the real
21 party in interest is the United States. And as
22 many justices have just recognized, at all
23 times, the United States maintains ultimate
24 control over the suit and it is the ultimate
25 beneficiary of the suit.

1 Approximately 70 percent of qui tam
2 suits are initiated by private relators. The
3 Department of Justice intervenes in only about
4 a fifth of those. But, in every case where the
5 result is successful, either by settlement or
6 by judgment, the United States is the ultimate
7 beneficiary. In every case, the United States
8 gets at least 70 percent of the proceeds.

9 And this is in keeping with the entire
10 rational purpose of the statute, which, as a
11 number of the Court members have noted, is the
12 only reason to deviate from the plain language
13 of the statute.

14 JUSTICE GORSUCH: Well, counsel, your
15 argument would have a lot more appeal if we
16 didn't have Graham County knocking around out
17 there. So what do we do about that? You --
18 you're encouraging us to read that introductory
19 language to the statute to mean what it seems
20 to mean.

21 MR. MAYFIELD: Yes, Your Honor.

22 JUSTICE GORSUCH: But, in Graham
23 County, we held it didn't mean what it seems to
24 mean. It wasn't as plain as we -- as you
25 argue.

1 So what's your best argument for
2 addressing -- how would you have us best
3 distinguish Graham County?

4 MR. MAYFIELD: Yes, Justice Gorsuch.
5 In Graham County, we had the anomalous
6 situation where Congress simply forgot to
7 provide an applicable statute of limitations to
8 the retaliation provision that it had added in
9 1986.

10 If one reads part (b)(1) and part
11 (b)(2), both of those refer by their terms to
12 false claims. A retaliation suit is not a
13 false claim, nor, under the 1986 amendment, is
14 the United States ever a party to a retaliation
15 suit. It is brought solely by the private
16 person retaliated against.

17 So we had an ambiguity there and the
18 Court recognized that ambiguity. It had to
19 choose between either the six years, which was
20 the only solid number that was presented in
21 terms of years at (b)(1), or, in the
22 alternative, the default statute of limitations
23 that the states had, which is the avenue the
24 Court took.

25 But, here, by contrast, we have plain

1 language that applies on its face, a civil
2 action under 3730.

3 It doesn't differentiate whether or
4 not a party is intervening, which the Congress
5 could easily have done. In point of fact, the
6 Congress did do so in the very next section.
7 In part C, it says: If the government elects
8 to intervene and proceed with an action
9 under -- brought under 3730(b), Congress could
10 have simply taken that phrase and put it at the
11 beginning of part (b)(2).

12 That is what Petitioners are asking
13 the Court to do today.

14 But, as this Court has repeatedly
15 held, that's improper because there is no
16 absurdity. The absurdity here would be if the
17 statute didn't result in the United States
18 obtaining more funds or if there was some
19 anomalous result.

20 But even Petitioner admits that their
21 reading, the literal one, results in an outcome
22 where, as they said at the very end of the
23 reply brief, the government obtains more money.

24 That was the point of the 1986
25 amendments. This Court has said in both Clark

1 and Reno that when looking at a statutory
2 provision, if that provision uses the same term
3 in the very same sentence, it means the same
4 thing every time.

5 Statutes are not ephemeral. They are
6 not shape shifters. We do not give them
7 different meanings because we would prefer a
8 different outcome.

9 CHIEF JUSTICE ROBERTS: Your friend
10 relied on the, if I'm remembering right, the
11 United Air Regulatory case.

12 MR. MAYFIELD: Yes, Your Honor.

13 CHIEF JUSTICE ROBERTS: How do you
14 distinguish that?

15 MR. MAYFIELD: Your Honor, in this
16 case, we have a mechanism by which the
17 Department always screens the cases. It's
18 somewhat unique. The relevant official of the
19 United States is always going to be a member of
20 the Department of Justice.

21 Very few other statutes act like that.
22 In Vermont Agency, the Court pointed out there
23 were four qui tam statutes. But, in this case,
24 the Department, the official charged with
25 responsibility, is a designee of the Attorney

1 General.

2 Other statutes don't function like
3 that, but there is a good reason for this, and
4 that is Congress wanted the Department to have
5 the first bite at the apple, to qualitatively
6 pick the very best cases, to have the optimal
7 use of the Department's resources.

8 And then, when the Department decides
9 not to intervene in those cases where it makes
10 that decision, we have these other cases on the
11 side, the vast majority of them, as it would
12 happen.

13 And the question which Petitioner
14 never answers is, why would Congress want those
15 cases to go fallow? Why would it want those
16 frauds to go unredeemed?

17 JUSTICE ALITO: I think Congress could
18 have done a lot of things. It could have done
19 other things so that there could -- those could
20 be actionable. It could have had a ten-year
21 statute of limitations for everybody. It could
22 have had a discovery rule for the relator.

23 Let me give you two cases, and you
24 explain to me why Congress would have wanted a
25 different result in these two cases.

1 Case A: Government does not want to
2 intervene in the case. It knows about the
3 fraud before year seven.

4 Case B: Government doesn't want to
5 intervene. It doesn't know about the fraud
6 before year seven.

7 What is the reason for allowing B to
8 go forward but not A?

9 MR. MAYFIELD: Well, Your Honor, in
10 all cases, the tolling provision would act to a
11 defendant's benefit. So, if a defendant could
12 litigate the issue at the outset of the lawsuit
13 and prevent the case from going forward, if it
14 could show the government had not acted in a
15 timely manner either based on real knowledge or
16 constructive knowledge, but within that scheme,
17 let's take year seven.

18 If the government didn't act in year
19 seven, and the relator brought the suit, at any
20 time after that, the United States would still
21 have the option of taking over the lawsuit.

22 The intervention is always available
23 to the government. It doesn't depend on when
24 the relator brings the suit.

25 JUSTICE ALITO: Well, the government

1 could always bring this within ten years, could
2 it not?

3 MR. MAYFIELD: It would depend, Your
4 Honor, on the tolling provision. If its -- if
5 its actor, the relevant government official,
6 for instance, an AUSA or someone in the Civil
7 Division, had known about the lawsuit, then no.

8 JUSTICE ALITO: Right. Okay. Okay.
9 But I still don't quite understand your reason
10 for saying Congress would have treated those
11 two cases differently.

12 MR. MAYFIELD: Well, the reason, Your
13 Honor, it's -- it's both to spur the
14 Department, the '86 amendments make clear that
15 the Department said it wanted more time because
16 these frauds were often hidden.

17 But it also put an outer limit on it.
18 Congress could have said five years or ten
19 years for the tolling provision. It thought
20 three was reasonable. But that also, Your
21 Honor, affects relators.

22 For instance, a relator might have an
23 impediment to bringing a suit, such as not
24 knowing about the False Claims Act.

25 JUSTICE ALITO: Yeah, well, then you

1 have a discovery rule for the relator.

2 MR. MAYFIELD: Which Congress elected
3 not to do, Justice Alito.

4 JUSTICE ALITO: Right. Exactly.

5 MR. MAYFIELD: And so the question is
6 why would that be rational, and the reason it
7 would be --

8 JUSTICE ALITO: Yeah. That's what I'm
9 struggling with.

10 MR. MAYFIELD: The reason it would be
11 rational, Your Honor, is because the government
12 ultimately benefits from the relator's action.
13 If there is no knowledge issue and the relator
14 is timely, he brings a suit, the government
15 gets the money.

16 JUSTICE ALITO: Yeah, I understand the
17 government benefits, but that would argue in
18 favor of a ten-year statute of limitations.

19 If the government chooses not to bring
20 suit, why does it matter whether the government
21 knew about this fraud before year seven or
22 didn't know about the year -- about it before
23 year seven? That's what I'm trying to get at.

24 MR. MAYFIELD: I think Congress
25 created a balancing to protect defendants,

1 Justice Alito. I mean, this -- this doesn't
2 allow every suit to go forward. If the
3 Department -- if the relevant government
4 official knows in year -- say, year six and
5 doesn't act, for whatever reason, the
6 Department may decide its resources are best
7 spent somewhere else, it may decide that this
8 case isn't meritorious, and let's say the
9 relator then brings the suit, the Congress --
10 rather, the Department can always change its
11 mind.

12 It could in year ten, if the case is
13 still going on, come in and take it over. And
14 that is to its benefit. But, if the three-year
15 tolling applies, because, if we want defendants
16 to get a protection against the Department
17 sitting and doing nothing, the Department was
18 the institutional actor that testified before
19 Congress, and Congress said, okay, we're going
20 to give you more time than you had before, but
21 you've got to do something. You can't just not
22 do anything once you know about it.

23 But the Department wouldn't have that
24 option if it didn't know. And as the -- a
25 number of Justices have pointed out, a relator

1 has every incentive to bring it to the
2 Department's attention quickly, although the
3 relator may not be the only person who provides
4 that information. It could well be a witness.
5 It could be the audit by the government.

6 JUSTICE ALITO: Why didn't your client
7 bring it to the government's attention sooner?

8 MR. MAYFIELD: It's not in the record,
9 Your Honor, but my client was -- first, he was
10 serving in Iraq. Second, when he got back to
11 the United States, he was not aware of the
12 False Claims Act. But then he was arrested.

13 And at the time of his arrest, he told
14 the FBI about facts regarding this fraud, which
15 was different from the matter that then
16 resulted in him going to jail.

17 JUSTICE SOTOMAYOR: So what inducement
18 is there -- I'm taking that you're agreeing
19 with the United States that officials of the
20 United States, you believe, also are just the
21 Department of Justice official.

22 MR. MAYFIELD: That is correct, Your
23 Honor.

24 JUSTICE SOTOMAYOR: It's sort of
25 interesting that this statute doesn't define

1 who officials are. I don't know where you get
2 it other than pointing to other statutes. But
3 we could -- that wasn't dealt with below.

4 What inducement is there for the FBI
5 to pass the information to the right officials?
6 And how do we know in this case it wasn't done,
7 that there wasn't a U.S. Attorney that this was
8 discussed with in some way?

9 MR. MAYFIELD: Well, ultimately, it
10 was, Your Honor. That happened after the
11 initial meeting with the FBI. It's not in the
12 record, again, because that was not developed,
13 and the court below did not consider it to be
14 particularly relevant.

15 But it's for that reason, Your Honor,
16 that it's -- the official charged is cabined to
17 the Department of Justice.

18 If it could just be any government
19 official, then that screening process that
20 Congress designed wouldn't -- wouldn't act.
21 There isn't anyone in the FBI or the OIG or the
22 contracting agency who's responsible for
23 protecting the government's rights.

24 The Attorney General, however, in
25 Section 3730(a), is the individual specifically

1 charged with the statute to investigate every
2 case. It's a non-discretionary duty.

3 JUSTICE SOTOMAYOR: So why didn't
4 Congress reference that? Why didn't they,
5 instead of just saying official of the United
6 States, say official designated under the
7 subsection you just mentioned?

8 MR. MAYFIELD: We don't know, Your
9 Honor. We don't know why they did that, except
10 that they did borrow --

11 JUSTICE SOTOMAYOR: Other than Justice
12 Alito's point that it's poorly written.

13 MR. MAYFIELD: I think that -- I think
14 that's fair, Your Honor, it is poorly written,
15 which is why there are the plenary -- or,
16 rather, plethora of these cases coming to the
17 court.

18 But they did borrow that. I think
19 there was some shorthand from 2416, as my
20 colleague pointed out.

21 But they borrowed only the tolling
22 provision under 2416. They did not borrow the
23 party limitation under 2415.

24 So, if, as Petitioners would have it,
25 Congress had meant this provision to somehow

1 apply only to the United States, it would have
2 borrowed from 2415 and said in actions brought
3 by the United States.

4 But they didn't do that. The plain
5 language says it's a civil action under Section
6 3730.

7 So having written it that way, the
8 question is, why would we deviate from that?
9 Is -- is the outcome absurd? It is not, in the
10 sense there is a rational basis, even if any of
11 us in here might have taken a different path in
12 designing the statute, that is the outcome that
13 prevails.

14 JUSTICE ALITO: And what happens if a
15 relator brings a suit, the government chooses
16 not to intervene, but then, as the suit goes
17 on, the -- the -- it -- it appears that the
18 relator is not fulfilling -- is not litigating
19 the case in a -- in a diligent way? What can
20 the government do at that point?

21 MR. MAYFIELD: Justice Alito, the
22 statute specifically provides for that because,
23 at any time, the Department of Justice can
24 dismiss the False Claims Act suit or, in the
25 alternative, which also happens, it can take it

1 over.

2 It can do a -- there are -- although
3 it does not happen frequently, there are
4 occasions where the Department looks at a suit
5 that's been in the system for some years and
6 says: You know what, we will -- we will take
7 that over after all.

8 JUSTICE ALITO: So the -- the relator
9 does have some responsibilities with respect to
10 the prosecution of the suit in the name of the
11 United States?

12 MR. MAYFIELD: Only with respect to
13 his relationship to the Department. For
14 instance, if the Department requests that he be
15 forwarded pleadings or if the Department asks
16 that discovery be truncated in some way, those
17 are his responsibilities.

18 JUSTICE ALITO: No, no, that's not my
19 point. This is an action in the name of the
20 United States, correct?

21 MR. MAYFIELD: That's correct.

22 JUSTICE ALITO: The relator is, in
23 effect, representing the United States. And
24 the relator has responsibilities in that case?
25 Otherwise, the government can intervene and

1 take over the case?

2 MR. MAYFIELD: The government always
3 has the ultimate ability to take over the case,
4 Justice Alito. The relator is basically a free
5 agent within those statutory constraints.

6 JUSTICE ALITO: Yeah. Well, what I'm
7 getting at -- I'm sure you realize this -- is
8 why doesn't that suggest that the relator has
9 -- is charged with responsibilities to act in
10 the circumstances?

11 MR. MAYFIELD: Because under no
12 circumstances could the relator, who has taken
13 no oath to the Constitution, is not employed in
14 any way by the government, and is not
15 answerable to the government during the course
16 of the litigation in terms of if he decides to
17 take witness A or to ask for specific
18 documents, he's not carrying out a government
19 policy, to differentiate from Dixson, which the
20 Petitioners relied on.

21 In that case, you had individuals who,
22 by contract, were dispensing federal housing
23 funds.

24 JUSTICE ALITO: Yeah. Well, are --
25 are you arguing that Vermont Agency was

1 incorrectly decided?

2 MR. MAYFIELD: Not at all, Your Honor.
3 It's just simply the degree to which the
4 assignment gives the -- the government's agent
5 in this case free reign.

6 The ultimate outcome of the case,
7 whether or not it's dismissed, intervened, or
8 settled, is always up to the government. The
9 government always gets to make that decision,
10 and over the relator's objections if it so
11 chooses.

12 But, in terms of if it doesn't
13 intervene, the relator can act like a normal
14 litigant and make his own tactical decisions,
15 but he's not an officer in any meaningful sense
16 because he -- he cannot obligate the United
17 States.

18 If he signs a contract, he's not doing
19 so on behalf of the United States. No one
20 would believe he was. He's carrying out no
21 statutory duties. And he is not answerable,
22 ultimately, to anyone in the Department of
23 Justice.

24 If my client decided today that he
25 wanted to walk away from this case, he could.

1 There's no one to make him do it. And the only
2 thing that could save it is if the Department
3 took it over.

4 JUSTICE KAGAN: Mr. Mayfield, am -- am
5 I right that in certain circumstances this
6 statute actually gives the relator a longer
7 statute of limitations than the government has?

8 In other words, take a case where the
9 government finds out on day one about a fraud.
10 The government, as I read the statute, then has
11 six years.

12 But, if the relator finds out on day
13 one about a fraud and thinks it's the kind of
14 fraud that the government or any -- nobody else
15 will ever find out about, then that relator can
16 sit on his rights for ten years, so the relator
17 actually gets four more years than the
18 government itself does.

19 Is that right? And if it's right, why
20 on earth does it make any sense?

21 MR. MAYFIELD: It's a -- it's a
22 hypothetical that's not likely to happen in the
23 real world, Justice Kagan, but it is
24 hypothetically right. But at all times the
25 government could still take over the case.

1 Let's say the relator in that case
2 waits until year ten, files. At that very
3 moment, the government can intervene. If the
4 relator takes another five years to litigate
5 that case, and we're in year 15, the government
6 can intervene.

7 It's always the government's case. At
8 no point does a relator have greater rights
9 than the government. And that makes sense.

10 CHIEF JUSTICE ROBERTS: Well, I
11 suppose the -- I suppose the government can
12 also find a relator, right?

13 MR. MAYFIELD: It could if it were
14 that diligent, Your Honor.

15 CHIEF JUSTICE ROBERTS: I mean, short
16 -- just short of year ten?

17 MR. MAYFIELD: If it -- if it were so
18 inclined, it could, Your Honor. And if --
19 let's assume that the United States had a
20 maligned motive. It could also sit on its
21 rights for ten years and pretend it didn't
22 know, which is really the fallacy of
23 Petitioners' position, which is the assumption
24 that relators are sometimes -- are always
25 acting based on maligned interests, but the

1 government is always noble.

2 But let's assume they're both revenue
3 maximizers. The government could sit on its
4 rights.

5 Every harm that Petitioners point to
6 exists in a scheme in which the relators play
7 no role. The same discovery occurs in terms of
8 what the government knew and when it knew it.
9 And the government always --

10 CHIEF JUSTICE ROBERTS: Well, that's
11 -- I don't know if that's more or less academic
12 than your friend's hypothetical, but it
13 certainly is academic that the United States
14 would allow fraud to be continued to practice
15 for, you know, nine years and 300 days or
16 whatever.

17 MR. MAYFIELD: Well, Mr. Chief
18 Justice, it's actually probably more likely,
19 but the reason would be different. It might
20 not necessarily be maligned. It might be a
21 lack of resources.

22 But we know, indeed, that was what
23 instigated the 1986 amendment, that the
24 Department frequently finds itself unable to
25 timely respond to these kinds of frauds and

1 often doesn't know. Again, 70 percent of these
2 cases are brought by private relators.

3 The Department and its associate
4 agencies simply lack the investigative power to
5 discover all these frauds. So it's in the
6 government's interest for the relator to do it.

7 If you have that bad actor who waits
8 until year ten and assumes all along the way
9 that the government doesn't otherwise know,
10 which is a foolhardy assumption on the part of
11 a relator, because the relator doesn't know
12 what investigation the government's doing on
13 its own, he doesn't know if another
14 whistleblower is coming forward, he doesn't
15 know if another witness who doesn't want to be
16 a relator is going to come forward.

17 He controls none of these things. He
18 does not control the government's internal
19 knowledge or decision -- decision-making power.
20 The only thing he controls is whether or not he
21 comes forward.

22 And if someone else beats him to it,
23 he's out of luck. So it would be foolhardy for
24 him to do it and it would be malpractice for
25 any attorney to recommend that he do it.

1 But even if -- even if someone decided
2 to take that insane gamble, at the end of ten
3 years, whenever that suit gets filed, and let's
4 assume the suit is successful, he can walk into
5 court and the United States can say, when they
6 try to settle the case, that relator sat on his
7 rights. We don't think he deserves the full
8 30 percent. And the court can knock it down.

9 So, on both ends, Congress has built a
10 statutory scheme that confines the very harms
11 that Petitioner has raised here, harms that
12 they can't really point to exist in the real
13 world because virtually all relators bring
14 their suits as quick -- as soon as they get a
15 lawyer who is able to identify the fraud and
16 bring it forward, because, otherwise, they may
17 lose. They'll lose everything.

18 It would be like taking a lottery
19 ticket and dropping it in the toilet. No one
20 does that. And at the end of the day, every
21 time a relator acts, no matter when he does it,
22 whether it be year one, year five, or year ten,
23 it is the government that ultimately benefits.

24 Thank you. We urge the affirmance of
25 the decision below.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Guarnieri.

4 ORAL ARGUMENT OF MATTHEW GUARNIERI
5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
6 IN SUPPORT OF THE RESPONDENT

7 MR. GUARNIERI: Mr. Chief Justice, and
8 may it please the Court:

9 I'd like to begin by addressing a
10 question that Justice Kagan posed to Mr.
11 Mayfield. In our view, the correct
12 interpretation of the statute mandates that the
13 relator and the United States always have the
14 same deadlines for filing suit.

15 The six-year limitations period in
16 (b)(1) and the three-year tolling rule in
17 (b)(2) will expire on precisely the same date
18 for both a potential relator and for the United
19 States.

20 So, under the correct interpretation
21 of the statute, a relator could never bring a
22 timely action, unless the United States could
23 also bring an action on the same day alleging
24 the same fraud.

25 The second point I'd like to address,

1 Mr. Boutrous alluded repeatedly earlier to
2 principles of equitable tolling.

3 JUSTICE ALITO: What's the textual
4 basis for that?

5 MR. GUARNIERI: Both paragraphs 2 --
6 paragraph (b)(2) and paragraph (b)(1) both
7 apply to a civil action under Section 3730.
8 So, in any case, a court -- the tolling rules
9 will be identical, whether or not the United
10 States initiates the suit, the United States
11 intervenes in a suit initiated by a relator, or
12 the United States elects not to intervene in a
13 suit initiated by a relator.

14 The statute itself draws no
15 distinction between those three categories of
16 cases, and, therefore, we think the tolling
17 rule and the six-year limitations period in
18 (b)(1) will operate in the same way in all of
19 those suits.

20 JUSTICE KAGAN: Yeah, I guess my
21 hypothetical was a slightly different one. It
22 was supposing that the federal government knows
23 on day one of the fraud, it gets six years to
24 bring the fraud, right?

25 MR. GUARNIERI: That's correct.

1 JUSTICE KAGAN: But then I changed the
2 case, essentially, and said, well, now we're
3 dealing with a different case. And in this
4 case, the federal government doesn't know of
5 the fraud. Instead, the relator knows of the
6 fraud on day one. And assuming that the
7 government remains in blissful ignorance, and
8 everybody else does too, he gets ten years.
9 Isn't that right?

10 MR. GUARNIERI: That's correct. We
11 think that that's how the the statute would
12 operate.

13 Now the relator in that sense would
14 also have more of the six-year period to bring
15 the suit. If the relator learns of the fraud
16 on day one, the relator will have more of those
17 six years in which to file suit than the United
18 States will have. And we think that's of no
19 consequence.

20 It's -- Congress adopted a different
21 form of parallel treatment, and the form of
22 parallel treatment that Congress adopted
23 ensures that the -- the deadlines expire for
24 both the United States and the relator at
25 exactly the same point in time.

1 As I began to say earlier, Mr.
2 Boutrous alluded repeatedly to principles of
3 equitable tolling, the kinds of principles this
4 Court encountered in -- in the Gabelli decision
5 and in Credit -- in Credit Suisse. There is no
6 occasion here to resort to principles of
7 equitable tolling because there is a statute on
8 point that dictates the tolling rule that
9 applies in cases like this one.

10 And for all the reasons that have
11 already been discussed this morning, the
12 statutory text makes that tolling rule
13 applicable even in a non-intervened suit.

14 There's also been significant
15 discussion this morning of this Court's
16 decision in Graham County. Graham County
17 interpreted the exact same language that is --
18 is at issue here, that is, the phrase "a civil
19 action under Section 3730 as used in 3731(b),"
20 to refer to a subset of civil actions under the
21 False Claims Act.

22 But the subset that the Court
23 identified in Graham County includes a
24 non-intervened suit just like this one. The
25 Court interpreted that language to refer to

1 suits under 3730(a) or (b) alleging a violation
2 of 3729. This is such a suit. This suit falls
3 into that category regardless of whether or not
4 the United States elects to intervene in the
5 action.

6 There's also been -- been some
7 discussion about why this was a sensible policy
8 result. We think the key thing to keep in mind
9 in that respect is that a relator is permitted
10 to sue to vindicate an interest of the United
11 States.

12 The United States is the injured party
13 in all of these cases. The United States is a
14 real party in interest regardless of whether or
15 not it elects to intervene in the action, the
16 majority of any recovery would go to the United
17 States. And in that context, it made good
18 sense that Congress chose to -- to make the
19 tolling rule in (b)(1) applicable based on the
20 knowledge of the injured party, that is, the
21 United States.

22 JUSTICE ALITO: Now, if the government
23 decides it doesn't want to intervene, what
24 difference does it make whether it knew about
25 this fraud or not? That's what I just can't

1 understand.

2 MR. GUARNIERI: Congress chose to make
3 the tolling rule applicable based on the
4 knowledge of the United States. And we think a
5 -- another way to pose a similar question,
6 Justice Alito, would be: Why should the United
7 States be deprived of the assistance of a
8 private relator during that three-year tolling
9 period?

10 Petitioners have yet to identify a
11 sensible reason Congress would have wanted to
12 deprive the United States of the assistance of
13 the relator during those years. The logic --

14 JUSTICE ALITO: Well, it --

15 MR. GUARNIERI: -- and the structure
16 --

17 JUSTICE ALITO: -- deprives them of
18 the assistance of a relator during those years
19 if the government knew about this on day one.
20 That really doesn't answer my question.

21 MR. GUARNIERI: If the government
22 knows about the fraud on day one --

23 JUSTICE ALITO: Right.

24 MR. GUARNIERI: -- Congress made a
25 reasonable decision that the tolling period

1 would extend only three years from that point
2 in time. But the same is true for a relator.
3 A relator could not rely on the tolling
4 provision to bring a suit after those three
5 years have expired. It's a reasonable policy
6 choice that's reflected in clear statutory text
7 here.

8 All the Court needs to do here is --
9 is follow the statute as written and apply the
10 -- the language of (b), using the same
11 construction it applied in Graham County.

12 If there are no further questions, I'd
13 be happy to yield the balance of my time.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Three minutes, Mr. Boutrous.

17 REBUTTAL ARGUMENT OF THEODORE J. BOUTROUS, JR.

18 ON BEHALF OF THE PETITIONERS

19 MR. BOUTROUS: Thank you, Your Honor.

20 I will -- I will begin with the last
21 point that the United States has made. They
22 made it in their brief repeatedly, and it's
23 just incorrect.

24 The Court did not in Graham hold that
25 the -- the language "action under Section 3730"

1 meant the same thing in (b)(1) and (b)(2). On
2 page 421 and 422, which is what the government
3 keeps citing, the Court began its sentence with
4 "Section 3731(b)(1)'s text," is talking about
5 the text of that particular provision.

6 And if you look at the analysis on
7 page 418, where the Court was specifically
8 talking about the virtually identical language
9 to what we have here in subsection (d), which
10 was then (c), the Court made exactly the point
11 we are making: That provision only referenced
12 the United States, and the -- the Court said
13 that Congress used that phrase "action under
14 Section 37" imprecisely, sometimes to only
15 refer to sub -- to subsets of those actions.
16 And that's what it did here.

17 The United States is ignoring -- I
18 didn't hear one word about the purposes of
19 statutes of limitations from anyone on the
20 other side.

21 Statutes of limitations serve valuable
22 purposes. They -- they spark action quickly
23 and more quickly, and they're meant to protect
24 defendants, allowing a rule that allows tolling
25 after -- basically, this is self-tolling. The

1 relator can just decide to press the button and
2 toll the statute of limitations and then let it
3 loose and it -- and it goes. That's --
4 Congress would not have intended -- it's
5 implausible that it would have intended that.

6 I'd like to briefly address the point,
7 Justice Sotomayor, you were making, and it's
8 really our alternative argument, about the
9 official of the United States. I don't see why
10 the United States should and the Respondent
11 should have it both ways. They say the relator
12 stands in the shoes of the United States. The
13 relator should -- everything should be the same
14 between the relator and the United States.

15 If that's the case, then I think our
16 alternative argument is very appealing, that
17 where the government doesn't involve -- doesn't
18 intervene, and the inter -- the relator is
19 acting under this Court's decision in Stevens
20 as the designated agent of the United States,
21 and it's not an assignee when it's pursuing
22 penalties on behalf of the United States and
23 damages for the United States, it's the agent,
24 it's --

25 JUSTICE SOTOMAYOR: The use of the

1 word --

2 MR. BOUTROUS: -- the prosecutor.

3 JUSTICE SOTOMAYOR: -- "officer" is
4 very different than a "representative."

5 MR. BOUTROUS: It -- it actually --

6 JUSTICE SOTOMAYOR: Or even "agent."
7 Those are substantially different concepts.
8 And so I do think the word "official" sounds --
9 means what it sounds like, an official and not
10 a representative.

11 MR. BOUTROUS: Well, Your Honor, I
12 would point to this Court's decision two years
13 before the 1986 amendments in -- in United
14 States versus Dixson, a criminal case where the
15 Court held that the -- the words "public
16 officials" under the federal bribery statute
17 encompassed private corporate officers who were
18 performing public responsibilities.

19 And, here, it's -- it's not fair to
20 say that the government -- that the relator is
21 just on his own, the government does -- doesn't
22 intervene, and then argue that our rule is
23 wrong because the relator is doing this
24 important work for the government. It's acting
25 as the agent for the government.

1 JUSTICE GINSBURG: "Agent" is a
2 different word than "official."

3 MR. BOUTROUS: But -- it -- it is,
4 Your Honor. But an agent who is performing
5 official responsibilities, I think their --
6 their knowledge should be imputed to the
7 government.

8 Thank you very much.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 The case is submitted.

12 (Whereupon, at 11:27 a.m., the case
13 was submitted.)

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1	acknowledge ^[1] 7:7 Act ^[26] 4:18 5:7 6:19 10:20 11:12 13:23 14:3 16:9 20:25 21:9 27:22 31:4,8,9,10 36:21 38:10,18 39:24 41:5 42:12 43:20 45:24 47:9 48:13 57:21 acted ^[2] 21:23 38:14 acting ^[3] 50:25 62:19 63:24 action ^[34] 5:13 7:4,11 8:14 9:20 14:9 15:9 17:14,18 18:21 19:3,17 24:2,6,15 29:13 30:22 31:5,6,6 35:2,8 40:12 45:5 46:19 54:22,23 55:7 57:19 58:5,15 60:25 61:13,22 actionable ^[1] 37:20 actions ^[18] 5:15 8:15,22,25 9:3 12:12 16:12 19:1,25 25:5 26:14,16 29:18 30:8,14 45:2 57:20 61:15 actor ^[3] 39:5 41:18 52:7 acts ^[1] 53:21 actually ^[7] 8:10 28:17,24 49:6,17 51:18 63:5 added ^[1] 34:8 address ^[2] 54:25 62:6 addressed ^[1] 25:8 addressing ^[2] 34:2 54:9 admits ^[1] 35:20 adopted ^[3] 26:12 56:20,22 adopts ^[1] 27:1 advantage ^[2] 4:23 20:5 advocating ^[1] 23:22 affect ^[1] 28:13 affects ^[1] 39:21 affirmance ^[1] 53:24 agencies ^[1] 52:4 Agency ^[4] 32:20 36:22 43:22 47:25 agent ^[8] 47:5 48:4 62:20,23 63:6,25 64:1,4 ago ^[1] 26:3 agree ^[1] 24:11 agreeing ^[1] 42:18 ahead ^[2] 20:13,15 Air ^[2] 9:8 36:11 AL ^[1] 1:5 ALITO ^[28] 22:11 23:7,15 29:20 37:17 38:25 39:8,25 40:3,4,8,16 41:1 42:6 45:14,21 46:8,18,22 47:4,6,24 55:3 58:22 59:6,14,17,23 Alito's ^[2] 26:10 44:12 alleged ^[1] 4:14 alleging ^[2] 54:23 58:1 allow ^[4] 14:25 22:7 41:2 51:14 allowing ^[2] 38:7 61:24 allows ^[1] 61:24 alluded ^[2] 55:1 57:2 alone ^[1] 17:22 already ^[2] 18:11 57:11 alternative ^[4] 34:22 45:25 62:8,16 although ^[2] 42:2 46:2 amass ^[1] 16:1 ambiguity ^[4] 30:16,16 34:17,18 ambiguous ^[6] 26:19 29:11 30:18	31:11,13,20 amendment ^[2] 34:13 51:23 amendments ^[3] 35:25 39:14 63:13 amicus ^[5] 2:8 3:11 16:10 26:24 54:5 analysis ^[2] 29:5 61:6 Angeles ^[1] 2:2 anomalous ^[2] 34:5 35:19 another ^[8] 15:5 16:22 26:17 30:1 50:4 52:13,15 59:5 answer ^[1] 59:20 answerable ^[2] 47:15 48:21 answers ^[1] 37:14 anybody ^[1] 23:21 anyway ^[1] 23:13 appeal ^[1] 33:15 appealing ^[1] 62:16 APPEARANCES ^[1] 2:1 appearing ^[1] 19:18 appears ^[2] 12:5 45:17 apple ^[1] 37:5 applicable ^[4] 34:7 57:13 58:19 59:3 applied ^[3] 11:25 19:1 60:11 applies ^[8] 26:14 29:21,23 32:16,16 35:1 41:15 57:9 apply ^[5] 6:15 24:22 45:1 55:7 60:9 approach ^[2] 4:21 5:1 approval ^[1] 5:24 Approximately ^[1] 33:1 aren't ^[3] 8:1 25:7,7 argue ^[7] 19:10 23:19 29:21,23 33:25 40:17 63:22 arguing ^[5] 9:4 17:2,6 31:18 47:25 argument ^[20] 1:17 3:2,5,8,13 4:4,8 7:3 9:18 21:16 23:20 26:10 27:15 32:9 33:15 34:1 54:4 60:17 62:8,16 arguments ^[1] 7:6 around ^[2] 20:23 33:16 arrest ^[1] 42:13 arrested ^[1] 42:12 asks ^[1] 46:15 aspect ^[1] 18:13 assessment ^[4] 27:7,8,12,25 assignee ^[1] 62:21 assignment ^[1] 48:4 assistance ^[3] 59:7,12,18 Assistant ^[1] 2:6 associate ^[1] 52:3 assume ^[3] 50:19 51:2 53:4 assumes ^[1] 52:8 assuming ^[1] 56:6 assumption ^[2] 50:23 52:10 attention ^[2] 42:2,7 Attorney ^[4] 36:25 43:7,24 52:25 audit ^[1] 42:5 AUSA ^[1] 39:6 available ^[1] 38:22 avenue ^[1] 34:23 avenues ^[1] 31:16 aware ^[1] 42:11	away ^[1] 48:25 B b(1) ^[16] 7:11,14 8:4 9:12,15,22 10:5,7,11 34:10,21 54:16 55:6,18 58:19 61:1 b(2) ^[19] 5:14 7:5,14 8:4 9:13,23,24 10:4,8,15 29:21,23 30:9,25 34:11 35:11 54:17 55:6 61:1 baby ^[1] 8:6 back ^[9] 13:22 20:22 22:8 25:25 26:9 27:20 30:4,4 42:10 background ^[1] 16:25 bad ^[2] 28:14 52:7 balance ^[1] 60:13 balancing ^[1] 40:25 bare ^[1] 26:18 Barnhart ^[1] 31:22 barred ^[1] 11:7 based ^[6] 10:18 13:16 38:15 50:25 58:19 59:3 baseless ^[3] 15:19 16:6,7 basic ^[1] 28:7 basically ^[3] 8:19 47:4 61:25 basis ^[2] 45:10 55:4 bearing ^[3] 27:9,12,18 beats ^[1] 52:22 began ^[2] 57:1 61:3 begin ^[3] 5:5 54:9 60:20 beginning ^[1] 35:11 behalf ^[15] 2:3,5,7 3:4,7,10,15 4:9 24:23 32:10,18 48:19 54:5 60:18 62:22 believe ^[4] 7:9 8:8 42:20 48:20 below ^[3] 43:3,13 53:25 beneficiary ^[2] 32:25 33:7 benefit ^[4] 12:20,23 38:11 41:14 benefits ^[3] 40:12,17 53:23 best ^[7] 23:23,25 26:10 34:1,2 37:6 41:6 better ^[4] 15:23 20:18 28:25 31:4 between ^[7] 10:12 17:20 22:16 25:23 34:19 55:15 62:14 BILLY ^[2] 1:9 4:6 bite ^[1] 37:5 blissful ^[1] 56:7 boils ^[1] 21:3 borrow ^[3] 44:10,18,22 borrowed ^[2] 44:21 45:2 both ^[12] 19:18 32:16 34:11 35:25 39:13 51:2 53:9 54:18 55:5,6 56:24 62:11 bounty ^[1] 13:24 BOUTROUS ^[53] 2:2 3:3,14 4:7,8,10 6:1 7:2,17,22 8:10 9:24 10:3,9,11,15,22,25 12:22 13:9 14:13,16 15:13 16:8,20 17:5,11,23 18:13 19:14 21:17 22:21 23:25 25:3,10 26:4 27:8,17 29:3,10,16,25 30:19 31:21 55:1 57:2 60:16,17,19 63:2,5,11 64:3 bribery ^[1] 63:16 bridge ^[1] 17:24 brief ^[6] 25:14 26:24 28:3 31:23 35:
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