No. 21-1052

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel.
JESS POLANSKY, M.D., M.P.H.,

Petitioner,

v.

EXECUTIVE HEALTH RESOURCES, INC., et al.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* BRUTUS TRADING, LLC IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Brutus Trading, LLC, is the relator in a False Claims Act ("FCA") case pending in the Second Circuit Court of Appeals. *See Brutus Trading, LLC. v. Standard Chartered Bank, et al.*, Case No. 20-2578 (2d Cir.). The government declined to intervene in the case, and its subsequent motion to dismiss was granted by the district court without any hearing, notwithstanding a sharply conflicting evidentiary record challenging the government's purported justifications for the dismissal. The Second Circuit proceedings adjudicating the lawfulness of that dismissal will be directly and significantly affected by the Court's resolution of this case.

STATEMENT

A. Background

1. In *Brutus Trading*, *Amicus* alleges that Standard Chartered Bank ("SCB"), a major global trade finance bank, concealed its violations of U.S. sanctions

[1] Petitioner has lodged a blanket letter of consent to the filing of *amicus curiae* briefs. Respondent Executive Health Resources, Inc. has consented to the filing of this brief by electronic mail from counsel dated August 24, 2022. Respondent United States has consented to the filing of this brief by letter from the Solicitor General dated August 24, 2022. Pursuant to Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part and no person other than *Amicus* or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

against Iran by continuing to convert Iranian rials into U.S. dollars. JA 58-81.[2] SCB made billions in profits in a sophisticated scheme that provided an essential avenue by which Iran funded its bloody terrorism around the globe. JA 451-52. American and Allied troops were the direct victims of this barbarism facilitated by SCB's maneuvers. *Id.* The callousness of SCB cannot be overstated. As the New York Department of Financial Services ("NYDFS") put it: "Motivated by greed, [Standard Chartered Bank] acted . . . without any regard for the legal, reputational, and national security consequences of its flagrantly deceptive action. Led by its senior management, SCB designed and implemented an elaborate scheme by which to use its New York branch as a front for prohibited dealings with Iran – dealings that indisputably helped sustain a global threat to peace and stability." JA 61-62, quoting from JA 693 (NYDFS Order *In re Standard Chartered Bank* at 22, 8/6/2012).

A key penalty for the violation of the Iran sanctions is forfeiture of its proceeds. 18 U.S.C. §981(a)(1)(C). And, to the chagrin of SCB and its ilk, Congress was not fooling around, providing that "[a]ll right, title, and interest in [those proceeds] shall vest in the United States upon commission of the act giving rise to forfeiture." 18 U.S.C. §981(f). Thus, the money SCB thought it was making serving as the banker for

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[2] There are five volumes of the joint appendix. Citation to the first three is by "JA." Citation to the final two, which were filed after a motion for indicative ruling was dismissed by the district court and the appeal was resumed, is by "SA."

terrorists became the property of the United States at the very moment SCB violated the law, and, under the FCA, was converted into an "obligation to pay" the United States. 31 U.S.C. §3729(b)(3). Concealment of that obligation to pay is actionable under the FCA as a "reverse false claim." 31 U.S.C. §3729(a)(1)(G). *Brutus Trading* is a reverse false claims action against SCB, alleging that the bank owes the United States $56.75 billion. JA 75, 473-74.

2. The conversion of a foreign currency into U.S. dollars, called "dollar clearing," involves global network messaging systems linking foreign exchanges to transmit, reconcile, and confirm transactions that are to be processed using the U.S. dollar. JA 506. Settling an obligation denominated in dollars requires clearing by the Federal Reserve Bank in New York through the Fedwire clearing system, which allows federal regulators to monitor these transactions worldwide. JA 485-86; JA 506. It is this system of electronic currency exchange that became the chokepoint by which transactions involving persons connected to Iranian interests could be blocked. JA 479. Those who wished to evade those sanctions, such as SCB, created a variety of methods to defeat the ability of these electronic systems to recognize the true identity of parties to any currency exchange. JA 487-88, 492.

The U.S. Department of Justice and the U.S. Department of the Treasury initiated an investigation of SCB in 2003, ultimately joined by the Federal Reserve Board, the Office of the Attorney General of New York, the NYDFS, and New York City agencies, to determine

whether SCB had violated the Iran sanctions. JA 117. In September 2012, NYDFS entered a Consent Order with SCB concerning sanctions valued at approximately $250 billion during the period 2001-2007, for which SCB agreed to pay a $340 million penalty. JA 693. In December 2012, SCB entered into a deferred prosecution agreement with federal authorities under which it paid $132 million for the same violations. JA 101.

The problem with these 2012 settlements was that SCB had buffaloed the government regulators and had concealed its far broader scheme to violate the Iran sanctions. JA 480-81.

3. The NYDFS 2012 settlement with SCB spurred the principals of *Amicus* to action. Both are sophisticated professionals in international currency exchange and finance – Julian Knight, having served as SCB's Global Head of Transaction Banking Exchange Sales from October 2009 to October 2011, JA 63, 478, and Robert Marcellus, an experienced currency trader, including direct dealings with SCB. JA 63-64, 446-47. Knight and Marcellus recognized that the NYDFS settlement was based only on the crudest of the techniques SCB used to evade the sanctions – wire stripping, by which the identity of an Iran-linked counterparty was simply removed from a wire payment message. JA 490.

Knight and Marcellus knew that top SCB executives, through "Project Green," had devised various strategies to defeat the sanctions regime that never

saw the light of day in the NYDFS settlement. For example, Project Green spawned the OLT3 system, which allowed Iranian clients to enter SCB's computer system on their own, conduct illegal foreign exchange transactions, and leave no record of the transaction. JA 480, 487-88. Under another stratagem, SCB personnel would change some small part of the client's name, such as dropping a word or changing a letter, and the executed transaction would go into a "sundry account," which was used to book a transaction in which the counterparty had not been properly identified. JA 454-55. The transaction would then be reconciled with the true counterparty's account, but that transaction could never be discovered during a computer search by the New York Federal Reserve Bank using a sundry account rather than the real name of that counterparty. SCB also employed hidden cells in its electronic records to conceal the true parties to illegal transactions. JA 482, 682. SCB introduced deliberate "flaws" to defeat its own systems purportedly intended to detect illegal transactions. JA 466-67. And Knight and Marcellus knew that all this had continued after 2007, the end date for the NYDFS settlement. The amount of U.S. dollars involved in trades that employed the Project Green scheme is alleged to be approximately $56.75 billion. JA 75, 473-74.

Marcellus approached both the U.S. Treasury Department and NYDFS with this information in September 2012. JA 453-59. The federal authorities were not interested in pursuing the matter and in December 2012 proceeded with their deferred prosecution

agreement with SCB. JA 101. However, the NYDFS, especially then-General Counsel Daniel Alter, reopened their investigation to investigate the broader scheme of Project Green. JA 467, 483; SA 84.

Upon learning of the reopening of the NYDFS investigation, the Justice Department arranged a meeting with Marcellus and Knight in New York City on January 16, 2013, with representatives of the other federal, state, and local agencies that had been participating in the SCB investigation. JA 464-65. Hostility from some participants toward Marcellus and Knight, generated by embarrassment for missing so much information, was evident. One interrupted Knight, stating, "We have been investigating this bank heavily for the past three years and you are telling us that we have missed millions of dollars of Iran trades and the bank is still trading with Iran? You know you're under oath." Later, he said: "I don't believe this. You must be wrong." JA 466; SA 83.

4. Notwithstanding that hostility, federal investigators, led by the FBI, asked Marcellus and Knight to cooperate with their reopened investigation. JA 467. A whistleblower, Anshuman Chandra, then employed by SCB in its Dubai branch, contacted Knight and offered to assist in the investigation. JA 483; SA 29. The FBI encouraged Marcellus and Knight, assisted by Chandra, to secure more SCB records. JA 469, 471. In September 2013 alone, they provided 20,000 records of SCB transactions, identified sanctioned counterparties, and supplied the names of witnesses to interview. JA 460-62, 483-85. Brutus's counsel gave the

government step-by-step instructions on how to open the hidden cells in SCB's spreadsheets. JA 466-67. Unfortunately, the FBI did not tell Brutus Trading that it had "wrapped up" the investigation in August 2013. JA 95. Chandra continued to provide the FBI with information about SCB's dealings with Iranian customers through December 2016. JA 500.

In September 2013 also, Marcellus, Knight and Chandra told both the federal and state authorities that SCB's consultant, Promontory Financial Group, LLC, had been observed deleting and altering records in the Dubai branch. JA 484. NYDFS pursued the matter, resulting in a report regarding Promontory's illicit activities. JA 423-38. NYDFS also fined SCB $300 million in August 2014 for its failure to comply with the terms of the 2012 agreement and to block U.S. dollar transactions by its Iran-linked customers. JA 701-12. Federal authorities accepted Promontory's report to SCB concluding that SCB had not violated sanctions without questioning the report's credibility. JA 546-93.

B. Procedural History

Marcellus and Knight formed Brutus Trading, LLC to be the relator in a False Claims Act case against SCB they filed on December 17, 2012. Over the course of the following years, the case went through various procedural twists not relevant here.

The government declined to intervene in the case in March 2019. On April 8, 2019, the government

entered into another deferred prosecution agreement with SCB concerning approximately 9,500 illegal clearing transactions, including companies owned by Mahmoud Reza Elyassi, about which Brutus had informed the government in 2012. JA 76. Among other remedies, SCB forfeited $240 million to the government. *Id.* The government refused to share the recovery with Brutus. JA 76-78.

On November 21, 2019, the government moved to dismiss *Brutus Trading* on various legal and factual grounds, relying on eight supporting declarations. Brutus responded with its own detailed declarations, but the district court denied its request to offer the testimony of former NYDFS General Counsel Alter, either at a deposition or a hearing, in order to rebut the claims of the government's declarants. JA 388. Notwithstanding the express requirement of 31 U.S.C. §3730(c)(2)(A) for a hearing, and the clear factual disputes between the parties, the district court held no hearing, and on July 2, 2020 dismissed the case. JA 772.

Just as the district court refused to hear testimony from Mr. Alter or allow cross examination of the government's declarants, so too in its opinion the district court utterly ignored the competing factual claims of Brutus's declarants. The district court concluded that the government had proffered a "valid government purpose" for dismissal because the government's declarations established that the information presented by Brutus was worthless. JA 777. The court unquestioningly credited the government's portrayal of its investigation without even adverting to the contrary

testimony of Brutus's witnesses that show that government could not have performed the examination of the mass of documents supplied by Brutus that it claims it did. *Id.* Worse, the court ignored the government's admission that it never looked at the SCB information in the hidden cells, notwithstanding Brutus's directions on how to access them. Without the slightest examination of the facts and evidence adduced by Brutus's declarants, the court dismissed the competing factual claims advanced by Brutus as nothing more than a "subjective disagreement." JA 779. In an exercise of circular reasoning, the district court went on to endorse the government's contention that it would be a waste of resources to pursue the "meritless" allegations of Brutus. JA 778.

While the case was on appeal to the Second Circuit, BUZZFEED NEWS, an online publication, posted a series of articles in September 2020 based on more than 2,000 suspicious activity reports ("SARs") that had been submitted to the Department of the Treasury, claiming that SCB, among other international financial institutions, had evaded U.S. sanctions, and that SCB had processed hundreds of millions of dollars for customers that SCB suspected were evading U.S. sanctions until 2017, if not beyond that year. SA 107. At least 31 illegal transactions reported in those SARs had previously been identified in documents provided to the authorities by Brutus Trading. *Id.* As BUZZFEED explained:

> The bank itself, confidential records show, later reported to the U.S. Treasury that it had

> suspicions about at least 31 companies contained in the data the whistleblowers had handed over. . . . [T]he whistleblowers' accounts and the banks' Treasury reports show the depth of the money laundering problems at Standard Chartered and the extent to which the US government gives big banks a pass when they break the rules. . . . Some of the 35 SARs mentioning customers in the whistleblowers' documents discussed possible links to Iran.

Standard Chartered's Iran Problems Didn't Go Away, BUZZFEED NEWS (September 25, 2020), https://www.buzzfeednews.com/article/richholmes/standard-chartered-bank-money-iran-fbi. *See also* Jason Leopold *et al.*, *The FinCEN Files: Dirty Money Pours into the World's Most Powerful Banks; Thousands of secret suspicious activity reports offer a never-before-seen picture of corruption and complicity – and how the government lets it flourish*, BUZZFEED NEWS (September 20, 2020), https://www.buzzfeed.com/article/jasonleopold/fincen-files-financial-scandal-criminal-networks ("The FinCEN files documents show Standard Chartered processed hundreds of millions of dollars for companies it suspected were circumventing sanctions against Iran until at least 2017."); Scheiber & Flitter, *Banks Suspected Illegal Activity, But Processed $2 Trillion Anyway*, N.Y. TIMES (September 21, 2020) at B8; Yang, Surane & Onaran, *Banks Slide With $2 Trillion of Suspect Flows Under Scrutiny*, BLOOMBERG NEWS (September 21, 2020).

Since the BuzzFeed articles and the SARs contradicted the notion that Brutus's information was meritless, Brutus secured a stay of the Second Circuit proceedings and, pursuant to FED.R.CIV.P. 62.1, moved in the district court for an indicative ruling that the district court would withdraw its dismissal and reconsider the case if the Second Circuit remanded the case. On October 31, 2021 the district court denied the Rule 62.1 motion on the ground that the BuzzFeed articles and the SARs were inadmissible hearsay, JA 111-12, a position at odds with its opinion dismissing the case which wholly relied on the government's hearsay declarations. JA 777.

Proceedings in the Second Circuit have resumed. Briefing is completed and the parties await oral argument.

SUMMARY OF ARGUMENT

Lower courts have failed to comply with the clear text of the FCA governing the government's authority to dismiss a *qui tam* case in two ways: (1) they have allowed the government to move to dismiss a relator's case after the government has declined to prosecute the case; and (2) they have failed to give the government's effort to dismiss a relator's case the threshold scrutiny normally required in a judicial hearing – even where the record contains evidence disputing the government's purported justification for the dismissal – to

ensure the government is not acting arbitrarily or irrationally.

By failing to adhere to Congress's design for the FCA, courts below have created a regime that fails to provide reasonable accountability for the government's move to dismiss a *qui tam* case. In practice, this means that the government can use dismissal to cover up bureaucratic incompetence or laziness, or even corruption. It also means that the self-interest of government institutions can pre-empt the taxpayers' interest in recovering massive sums from fraudsters – in *Brutus Trading* alleged to amount to over $56 *billion* – due to the supposed "burdens" of FCA litigation. And the contrivance that allows this to take place is a warped procedure which brushes aside the traditional contours of a judicial hearing, or even the hearing itself, even when critical facts are in dispute, to breezily accept the government's justifications to terminate an FCA case.

The experience of *Amicus*, perhaps even more acutely than that of Dr. Polansky, illustrates these corruptions which so commonly arise when courts fail to conform to the statutory regime for the FCA as written by Congress, crippling the effectiveness of that regime for taxpayers and impairing basic notions of due process for relators.

ARGUMENT

Petitioner has ably made the case that in 31 U.S.C. §3730(c) Congress set out a straightforward textual

scheme governing the "rights of the parties" in *qui tam* actions that does not contain any authority for the government to dismiss a *qui tam* case after the government has declined to intervene. Once the lower courts' interpretations of the FCA disengaged from that text and opened the Pandora's Box of post-declination government dismissals, they entered a landscape not charted by the statute or the intentions of Congress. As the briefing on the petition for *certiorari* illustrated, lower courts have struggled to fashion meaningful standards to cabin the dismissal authority Congress had not provided but they had unleashed. Though the lower courts came up with formulations ranging from unfettered government discretion to dismiss, *see*, *e.g.*, *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), to discretion that simply could not be fraudulent, arbitrary or capricious, or illegal, *see*, *e.g.*, *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Co.*, 151 F.3d 1139 (9th Cir. 1998), all have been animated in some sense of deference to the government's view of whether a *qui tam* case should proceed.

That deference is nowhere to be found in the FCA. Once the government has declined to intervene and proceed with or dismiss a *qui tam* case as the FCA provides, deference to the government's wishes concerning the future of a *qui tam* case is not just logically out of place, it is in conflict with the statute, which at that point gives the relator the exclusive right to conduct the action. 31 U.S.C. §3730(b)(4); *Vermont Agency of Nat. Res. v. United States*, 529 U.S. 765, 769 (2000).

Judicial deference to the government's desire to dismiss a *qui tam* case reflects an instinct that all FCA litigation is somehow the government's preserve. That is not the law. As Petitioner explains, a *qui tam* relator has been assigned part of an FCA claim and has a distinct property interest in that claim. Brief of Petitioner, 37-38. Indeed, a relator "act[s] as a check that the Government does not neglect evidence, cause unduly [sic] delay, or drop the false claims case without legitimate reason." S.Rep. 99-345, 26, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291. The government does not inherently occupy a position superior to that of the relator concerning the relator's claim, much less after the government has declined to intervene.

To the contrary, the FCA imposes on the government the duty to investigate violations *diligently*, 31 U.S.C. §3729(a), which suggests a heightened government duty to faithfully and fully explore a relator's allegations of FCA violations. The government is held accountable for this duty via the hearing required by 31 U.S.C. §3730(c)(2)(A). That provision, and the requirements of due process, leave no doubt that a court must carefully scrutinize the justifications for a government motion to dismiss, including giving a relator a hearing, governed by traditional rules of procedure and evidence, to challenge the government's evidence supporting those justifications.

Brutus Trading illustrates how far removed from the essential elements of the FCA's textual scheme adjudication of government motions to dismiss *qui tam* cases truly are.

I. In *Brutus Trading*, the District Court Gave No Scrutiny to the Government's Justification for Dismissal, Utterly Ignoring the Relator's Competing Evidence.

A relator is entitled to have its evidence submitted to the government considered by a district court and to an evidentiary hearing when the relator has presented evidence that contradicts the government's justification for dismissal. In dismissing the *Brutus Trading* complaint, the district court relied exclusively on declarations submitted by the government, while utterly ignoring the declarations and other evidence submitted by the relator that contradicted the government's declarants. The district court's brushing aside of the facts offered by the relator as merely a "subjective disagreement" is shocking in the face of even a cursory review of the record that was before the court.

1. For example, FBI Special Agent Matthew Komar and OFAC's Alexandre Manfull alleged:

> Komar: "Relator never claimed that SCB had Dubai-based clients that were fronts for Iranian businesses, which is what the Government uncovered in its investigation that led to the 2019 settlements." JA 659.
>
> Manfull: "Relator never identified these (or any other non-Iranian) entities to the U.S. government." SA 22.

These statements are directly contradicted by information provided by relator to the government from relator's earliest contacts with the government. JA

452-60. Relator made an offer of proof that NYDFS's former General Counsel, as Mr. Alter, would confirm this fact. SA 58-59. *See also* JA 753. Relator's complaint explicitly alleged the involvement of Dubai-based entities in sanctions violations:

> OLT3, by design, did not possess end counterparties to trades, leaving counterparties in Iran Group transactions and Dubai-based Iranian backed SME's labeled simply as SCB Dubai. JA 17-18, ¶ 17.
>
> [D]efendants knowingly engaged in U.S. dollar clearing and other transactions with and for the benefit [of] Iranian government entities and Iranian SDNs in at least 2008 and 2009 and as late as 2012 through the client franchise based in SCB Dubai, conducting transactions for Dubai-based, Iranian backed SME [small and medium sized entity] clients. JA 22, ¶ 27.

Relator provided the identities of numerous entities that were front companies for Iranian entities, JA 681-82; SA 44, including particularly those highlighted by relator's principal, Julian Knight. JA 480. Those front companies included Mapna International FZE, Amesco FZE, Bright Crescent FZE, and Al Zarooni Exchange FZE. JA 482, 485; SA 81-82. Mr. Chandra, an SCB Dubai employee at the time, who assisted relator and agreed to provide SCB records to the FBI, submitted a declaration stating that in those records were "many SCB Dubai customers located outside of Iran [that] were involved in U.S. dollar transactions and

were either Iranian or closely linked to Iran." JA 496. A listing of some of those entities with descriptions of connection to Iran is in a document that Mr. Chandra produced to the FBI in September 2013. JA 757-67. Relator's counsel specifically reminded the government in a January 9, 2019 letter that relator had submitted evidence of the involvement of SCB's Dubai-based entities in sanctions violations. JA 753.

2. The government dismissed relator's criticism of its investigation as merely griping at steps not taken that relator preferred. But relator offered a detailed and substantial analysis to show the government's investigation was inadequate and arbitrary. Relator pointed out that: (1) the government's conclusions are based on not more than a fraction of the evidence provided by relator, JA 75, 446-501, 510-42, 594-607, 731-71; (2) it relied on a report by SCB's consultant without considering whether the report was fundamentally unreliable because of the consultant's deletion of information at SCB Dubai, JA 469, 492; SA 58; (3) it had already decided to "wrap up" the investigation before receiving and considering SCB records that it had requested Mr. Chandra to produce, JA 95; (4) it never investigated relator's claims of sanctions violations by SCB's Dubai-based customers because it claimed that relator never alleged such violations, SA 22; (5) it made no genuine effort to corroborate relator's claims, JA 482, 488-91, 548; (6) it proffered erroneous interpretations of sanctions rules to justify its conclusions, JA 94, 677; (7) it falsely asserted that relator had not identified a company called Tanootas Taban as a target or

alerted it to "hidden cells" in SCB spreadsheets, JA 718, 753; and (8) it misrepresented Project Green, which was designed by SCB to enable its customers to evade sanctions, JA 480, as "the internal name that SCB had given to the matter that ultimately led to the 2012 DPA and related settlements," JA 95, despite the fact that there was evidence that SCB continued to implement Project Green after 2012. JA 485, 492; SA 43, 84.

3. The government's declarations were replete with conclusory and inaccurate statements of law and fact. Relator established that some of the government's legal propositions and interpretations of regulations were at odds with previous interpretations of officials of the Treasury Department. *Compare* JA 718-19 *with* JA 677. The governments' declarants were in disagreement about the appropriate construction of regulations. JA 94.

4. The government contended that it could not corroborate relator's allegations. JA 94. That was not because it was unable to do so but because it failed to attempt corroboration. For example, relator requested that the government obtain records from SCB that would confirm SCB's representations and the government's conclusions about transactions in currencies other than the U.S. dollar, JA 489-90, but the government declined to do so. The government misrepresented to the district court that relator never advised the government about sanctions violations involving Tanootas Taban despite that information having been provided by relator and Mr. Chandra, as well as a

pointed reminder of relator's earlier production in a January 9, 2019, letter from relator's counsel to the government. JA 753.

5. Not only did the district court fail to acknowledge and apparently evaluate the evidence submitted to the government by relator, but it also denied the relator an opportunity to submit other evidence from former NYDFS General Counsel Alter, a key participant in the joint investigation of the *Brutus Trading* allegations against SCB. Nevertheless, the court relied on the declaration of Elizabeth Nochlin, an employee of NYDFS who, unlike Mr. Alter, had no active role in the joint investigation. JA 686.

The district court's refusal to hold an evidentiary hearing in the face of such a record shows what a travesty judicial review of government efforts to dismiss a *qui tam* case has become. As a practical matter, the government does have unfettered discretion to dismiss a *qui tam* case. That, however, is not what the FCA provides, and this Court must restore the integrity of the statute.

II. In *Brutus Trading*, the District Court Abandoned Basic Procedural and Evidentiary Norms.

The *Brutus Trading* litigation illustrates the abuses that can occur in adjudication under the FCA when a district court operates in a jurisprudence unconstrained by the text of the statute. The experience of *Brutus Trading* demonstrates the need for the Court

to correct that jurisprudence and construe 31 U.S.C. §3730(c)(2)(A) to require an evidentiary hearing when a court is confronted by a conflicting evidentiary record in adjudicating a government motion to dismiss a *qui tam* case. The requirements of the Due Process Clause dictate such a construction. The language, history and purpose of the statute also mandate that construction.

The district court based its decision to dismiss the *Brutus Trading* complaint on nothing more than the untested declarations of the government's declarants. JA 777. Those declarations constitute hearsay in its most obvious form. Such self-serving testimony must be subjected to cross-examination to satisfy due process requirements. A hearing at which the relator has an opportunity to offer evidence that challenges the government's justification and to examine the credibility of the government's declarants is a mandate that is compelled by 31 U.S.C. §3730(c)(2)(A). Any other construction of that statutory language that does not require those minimal opportunities would render the term "hearing" hollow and virtually meaningless. "Hearing" has traditionally been understood to describe a meaningful adversarial testing of an opposing party's evidence. Such testing entails "notice of the factual basis" for the opponent's position and "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); *see also Greene v. McElroy*, 360 U.S. 474, 496 (1959) (A party must have an "opportunity to show that the [opponent's] evidence is untrue.").

In dismissing the Brutus motion for an indicative ruling pursuant to FED.R.CIV.P.62.1, the district court again apparently relied on hearsay, this time in the form of statements of FBI agents in Form 302. SA 103. Indeed, FBI 302s and similar memoranda of law enforcement interviews with witnesses are not just hearsay, they are double hearsay, or hearsay within hearsay. *United States v. Benson*, 961 F.2d 707, 709 (8th Cir. 1992). Such reports consist of out-of-court statements made by government investigators who conducted the interviews (hearsay #1) about statements purportedly made by the persons being interviewed (hearsay #2). The government itself has recognized that "because such reports of a meeting or an interview with a witness are not verbatim transcripts and suffer from other shortcomings that may impact reliability, including the agent's subjective decision to include certain information over other information, these reports 'are therefore classic hearsay without – in and of themselves – requisite indicia of reliability.'" Memorandum of Law in Support of the Government's Motions in Limine, *United States v. Bynum*, 19-cr-255, Dkt. No. 24, at 10 (E.D.N.Y. Feb. 10, 2020) (internal citation omitted). *See also United States v. Shulaya*, 17-cr-350, Dkt. No. 819, at 5 (S.D.N.Y. June 11, 2018) ("Issues that may impact reliability include the fact that different agents have different practices regarding how much detail they choose to include in a 302, and whether to include facts learned elsewhere as part of the investigation or editorial content that were not actually stated during the interview. . . . [A]gents with less background in an

investigation may also make errors in their note taking."). That the Justice Department itself would so cavalierly introduce 302s into the *Brutus Trading* proceedings underscores how corroded basic norms of evidence and due process have become in adjudication of government motions to dismiss *qui tam* cases.

Even more striking is the posture of the district court exclusively relying on untested government declarations in the face of credible evidence contradicting them, allowing the record to be padded with FBI 302s, but rejecting the SARs disclosed by BuzzFeed as improper hearsay. SA 111-12.

All of what has gone on in *Brutus Trading*, actions by the government approved by the district court, illustrate abuses that ultimately spring from the failure of the courts to take the text of the FCA governing the rights of parties to *qui tam* actions seriously and apply it as written. With the ill-considered dismissal of *qui tam* cases we have seen, billions of dollars owed to the taxpayers have been lost and the norms of our judicial procedures corrupted. This Court can now step in and return the FCA to the fraud-fighting engine Congress designed.

CONCLUSION

The Court should reverse the judgment of the Third Circuit and hold that the government does not have the authority to dismiss an FCA suit under 31 U.S.C. §3730(c)(2)(A) after initially declining to proceed

with the action. If the Court concludes that the government does have that authority, the Court should hold that the hearing provided in Section 3730(c)(2)(A) requires a thorough examination of the government's justification for dismissal to determine if the government is acting rationally and in good faith, including evidentiary proceedings to resolve a conflicting evidentiary record.

Respectfully submitted,

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