No. 13-7081
ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALAN J. BAUER, DR.,

Plaintiff-Appellant,

v.

MAVI MARMARA, AUDACITY OF HOPE, RACHEL CORRIE, CHALLENGER I, CHALLENGER II (a/k/a The Saoirse), GAZZE, TALI, ARION, SFENDONI ("Boat 8000"), TAMARA (a/k/a Eleftheri Mesoghios), SEVEN Y TWO ("Irene"), FINCH, TAHRIR, STEFANO CHIRIANI and all right, title and interest in each of them,

Defendants-Appellees, in rem

UNITED STATES OF AMERICA,

Interested Party-Appellee

On Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR THE PLAINTIFF-APPELLANT

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PERTINENT STATUTES AND REGULATIONS

18 U.S.C. § 962 provides as follows:

Sec. 962. Arming vessel against friendly nation

> Whoever, within the United States, furnishes, fits out, arms, or attempts to furnish, fit out or arm, any vessel, with intent that such vessel shall be employed in the service of any foreign prince, or state, or of any colony, district, or people, to cruise, or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace; or
>
> Whoever issues or delivers a commission within the United States for any vessel, to the intent that she may be so employed--
>
> Shall be fined under this title or imprisoned not more than three years, or both.
>
> Every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited, one half to the use of the informer and the other half to the use of the United States.

SUMMARY OF THE ARGUMENT

The government ignores numerous judicial decisions that hold Section 962 and similar informer statutes provide an implied private right of action. The government prefers to argue for a different construction of the statute based upon decisions interpreting unrelated statutes. As a result, the government's Brief is really a string of over-generalized, that therefore irrelevant assertions of black-letter law.

The trial court and the government have both acknowledged the extensive authority, including no less than two Supreme Court decisions, supporting the conclusion that Section 962 implicitly includes a private right of action. Unable to contend with the weight of authority, the government urges this Court to follow the trial court's lead, and reinterpret the Statute according to "prevailing [modern] legal principles." Gov. Br. 22[1]. However, the Supreme Court has instructed courts against changing the meaning of a statute. "Our role is to say what the law, as hitherto enacted, is; not to forecast what the law, as amended, will be." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 n. 7.

The government attempts to justify the deviation from the traditional construction of the Statute by speculating that it is "unlikely" that Congress would have intended to create an implied right of action in a criminal statute or in one that touches on foreign relations. Gov. Br. at 15, 19. However, the Court need not engage in such speculation where authoritative precedents demonstrate that Congress intended to create such a private right of action. The interpretive principles the government cites are designed to assist courts in construing statutes, the meanings of which are subject to doubt. The extensive history of Section 962

[1] The government's brief will be cited as "Gov. Br." followed by a page number; Dr. Bauer's Initial Brief will be cited as "Bauer Br." followed by a page number; and references to the trial court record not included in Dr. Bauer's Appendix will be cited by docket entry, "D.E." followed by a docket number and page number.

and similar contemporary informer statutes leaves no doubt as to whether they include private causes of action. Accordingly, it is irrelevant whether as a general matter, criminal statutes or those that relate in some way to foreign relations are construed to include private rights of action is irrelevant. Section 962 provides such a right, regardless of those considerations.

The government is wrong when it argues that its non-participation precludes an informer like Dr. Bauer from proceeding with a civil *in rem* action. The very existence of a private right of action demonstrates that government participation is not necessary. Indeed, as the trial court recognized, traditional informer statutes were prevalent at a time when the federal government was relatively small and had fewer resources than it now possesses. Informer statutes were necessary for the enforcement of the law, and these actions were often necessarily brought without government participation.

The government attempts to blur the line between government non-participation and government opposition. While the question was never expressly raised in the trial court or in the government's Brief, under Section 962, Dr. Bauer would be permitted to maintain his action regardless of whether the government merely declines to participate or if it would affirmatively oppose the action on the merits. So held the court in *United States v. Skinner*, 27 F. Cas. 1123 (C.C.D.N.Y. 1818). But the Court need not reach this issue that was not raised in the trial court.

The Court need only address the question of whether Section 962 includes a private right of action for informers. The Supreme Court and other lower federal courts have held that it does, and this Court should not deviate from those precedents.

ARGUMENT

Standard of Review

A matter requiring statutory interpretation is a question of law, which is subject to *de novo* review. *United States v. Merrill*, 685 F.3d 1002 (11th Cir. 2012).

A. The government ignores numerous judicial decisions that demonstrate Section 962 provides a private right of action, and as a result the government argues for a novel interpretation of the Statute at odds with authoritative precedent.

The government argues that "no implied right of action should be read into Section 962." The government analyzes Section 962 as if against a clean slate, and attempts to explain why a court should not *create* an implied private cause of action in the Statute. Observing that "court's are loathe to infer rights of action where one is not expressly provided by Congress," the government argues that this Court should not *create* such a right. Gov. Br. 12-13. These observations are followed by a string of arguments suggesting how the Court ought to construe a statute like Section 962 that does not explicitly state that a private citizen may sue.

The basic flaw in the government's argument is that Section 962 has already been found to provide a private right of action.

The government argues that Section 962 cannot provide a private cause of action because if it did, the Statute would contain all of the same provisions as those found in the modern-era False Claims Act. Gov. Br. 14-15. The government asserts that private rights are "extremely unlikely" to be found in criminal statutes. Gov. Br. at 15. And again, the government speculates that "it is highly unlikely that Congress would have given a private individual the right to assert an action under a statute whose purpose is to prevent the United States from being compromised in its relations with friendly powers.[2]" Gov. Br. at 19.

1. The Supreme Court and others have already ruled that Section 962 should be construed to provide a private right of action.

The government's arguments are all very misplaced because several courts, including the United States Supreme Court, have already interpreted this informer statute and other similar bounty statutes to include an implied private right of action. *See e.g., United States v. Skinner*, 27 F. Cas. 1123 (C.C.D.N.Y. 1818) (holding "any individual" could initiate an action for violation of the Neutrality

[2] In this case, and in any informer action under Section 962 for that matter, the informer does not compromise American relations with friendly powers; he *prevents* others from doing so.

Act, regardless of government participation or approval)[3]. As discussed in Dr. Bauer's Initial Brief (Bauer Br. 15-20), the resolution of this appeal should begin and end with footnote 4 in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541, n. 4 (1943), which instructs that "statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue." Footnote 4 of *Marcus*, explicitly stated that Section 962[4] provided common informers like Dr. Bauer with a private right of action. *Id*. And, as discussed at length in the Initial Brief, the Supreme Court reconfirmed this principle in *Vermont Agency of Natural Resources v. United States, ex. rel. Stevens*, 529 U.S. 765, 777 n.7 (2000). Bauer Br. 18-20.

The trial court, itself, conceded that "[a]t the time the Neutrality Act was drafted, contemporaneous informer statutes were construed by some courts to allow an informer to bring suit." Appx. 27. Granted, the trial court said that only "***some*** courts" construed informer statutes allow private informers to sue. But

[3] For additional cases supporting this point, see Bauer Br. 20-23.

[4] *Marcus* cited the predecessor to Section 962, which in all material respects for purposes of this appeal, was identical to the present version. Accordingly, Dr. Bauer will refer to Section 962 when discussing both the current citation as well as those that preceded it, even if they were codified in the United States Code at different citations.

neither the trial court nor the government cites a single contemporaneous decision that construed these statutes differently[5].

On the contrary, the trial court cited decisions holding that even in the absence of statutory authorization, a private informer could enforce his or her rights with an "an action or information of debt." Appx. 27-28. The trial court also cited Blackstone for the proposition that "[f]orfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called popular actions." Appx. 27, *citing* 3 WILLIAM BLACKSTONE, COMMENTARIES 159-60 (1768).

2. After recognizing that historically, Section 962 has been construed to authorize common informers to sue, the court improperly abrogated that statutory right based upon the trial court's perception of the "common law."

After the trial court recognized the traditional meaning attributed to the Statute, it held that while a private right of action was once allowed, "the prevailing conception of the common law has changed since 1789." Appx. at 27.

[5] Even the decision of the District Court in *The Venus*, 180 F. 635 (E.D. La. 1910), upon which the government relies so heavily, held: "It may be that [the informer] had the right to institute the action, but as to this I express no opinion." In any event, and as discussed in Dr. Bauer's Initial Brief (Bauer Br. 23-25), *The Venus* is of dubious precedential value as the reasoning underpinning the court's holding directly contradicted the ruling of the Supreme Court in *The Three Friends*, 166 U.S.1 (1897), which was decided only 13 years earlier.

The trial court also observed that "an informer's power to bring suit has ***diminished*** over time." Appx. 27 (emphasis supplied). Both of these statements indicate that the trial court acknowledged that as enacted by Congress and as interpreted by contemporary judicial decisions, Section 962 included a private right of action.

Similarly, the government conceded in its Statement of Interest that in *Marcus v. Hess* the Supreme Court construed Section 962 as providing a right of action for common informers. D.E. 13 at 12, n.7. The government then raised the question of whether Section 962 "should ***still*** be construed in that manner…" *Id*. (emphasis supplied). Thus, both the trial court and the government have conceded that the enacting Congress and the numerous courts that have interpreted Section 962 and other similar informer provisions understood them to provide a private right of action. These conclusions should be determinative in this question of statutory interpretation. To the Eighteenth-Century Congress that enacted Section 962, and to the subsequent courts that interpreted it, the private right of action did not require explicit authorization.

But the trial court did not rely upon Congress's understanding of its own legislation. Neither did it rely upon authoritative judicial decisions interpreting the Statute. Instead, the trial court held, "[e]ven if historical custom may have allowed a private suit at the time it was drafted, 'the prevailing conception of the common law has changed since 1789 in a way that counsels restraint' today." Appx. 29, *quoting Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004). Thus, the trial court proceeded to ask whether (in the absence of any legislative amendment, and in the absence of any contrary authoritative judicial decision) the meaning of Section 962 has somehow changed over time. It was the wrong question to ask, and it led (and probably was intended to lead) the court to the wrong decision.

Finding that "the prevailing conception of the ***common law*** has changed since 1789," (emphasis supplied) the trial court decided that the meaning of a ***statute*** drafted at the same time has changed as well. The trial court failed to recognize that courts have less license to find evolution in the meaning of a statute than they might have when interpreting the common law. The role of a court interpreting a statute "is to say what the law, as hitherto enacted, is." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 n. 7. The meaning of a statute does not evolve. *Id*. "Otherwise, we would speak not of 'interpreting' the law but of 'intuiting' or 'predicting' it. *Id*. The trial court not only predicted the meaning of the statute; it fulfilled its own prediction by re-interpreting it. The government now asks that this Court similarly disregard the numerous precedents from which the trial court deviated and analyze Section 962 without reference to precedent.

While the trial court professed to be exercising "restraint" when it ***abrogated*** the implied private right of action from Section 962 (Appx. 29), in fact, it was rewriting the Statute. Dr. Bauer requests that this court exercise real judicial restraint, and restore the traditional meaning to Section 962.

B. The meaning of Section 962 should not be changed merely because the Statute includes criminal penalties and its enforcement may touch on foreign relations.

The government posits that "[Section 962] is part of the criminal title of the United States Code, and therefore it implicates the government's prosecutorial discretion." Gov. Br. at 15. The government's sweeping argument that any punitive statute or any statute appearing in the "criminal title" of the United States Code cannot include a private right of action is simply false. In fact, numerous provisions of the Criminal Code allow private individuals to sue for redress. See e.g., 18 U.S.C. §1964 (civil RICO); 18 U.S.C. §§ 2252A(f), 2255 (private right of action provided under child pornography laws); 18 U.S.C. § 2724 (private right of action for disclosure of personal information contained in motor vehicle records), to name but a few. The statutes identified above expressly provide a private right of action. Given the extensive history of Section 962, which the trial court agreed "is kind to [Dr. Bauer's] claim," the Statute should be viewed as the practical equivalent of a statute expressly providing a private right of action.

More to the point, the government's argument is belied by cases specifically discussing Section 962 and other informer statutes. For example, in *United States v. Skinner*, 27 F. Cas. 1123, 1124 (C.C.D.N.Y. 1818), a Neutrality Act action was initiated by a common informer. The *Skinner* court held that no government authorization was required for the informer to obtain a warrant for the violation of the Statute. Rather, "any individual might complain of the infraction of a law."

Contrary to the government's interpretation (Gov. Br. 20 n.8), the *Skinner* decision goes beyond holding that a private citizen may ***initiate*** the suit. The court held also that ***the president had no right to interfere with the proceedings that had already been commenced***. ***Id***. Despite the fact that the Statute included criminal penalties and might have touched on foreign relations, the court found that the informer enjoyed a private right of action, ***and*** that the government had no right to interfere with the proceeding.

In *Marcus v. Hess*, the Supreme Court held: "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." 317 U.S. at 541, n.4, *quoting Marvin v. Trout*, 199 U.S. 212, 225 (1905). The *Marcus* Court then listed "some such statutes." *Id*. The very first statute in the list was 18 U.S.C. § 23, the predecessor statute to Section 962. *See id*. The Court was not swayed by the fact that the Statute appeared in the criminal title of the United States Code; or by the fact that the Statute included criminal and punitive provisions; or by the fact that the Statute allowed private enforcement of the neutrality laws, which are connected to foreign relations.

Several of the statutes listed in footnote 7 of the *Stevens* decision, 529 U.S. at 777 n.7, were criminal statutes that included bounty provisions for informers but no express right of action. Nonetheless, the Supreme Court instructed that these statutes were to be construed to authorize the informers to sue[6].

In *Adams v. Woods*, 6 U.S. 200 (1805), the plaintiff brought an action of debt to enforce the bounty provision of a criminal statute outlawing slave trade from the United States to any foreign county. The defendant asserted the two-year limitations that by its terms applied to the criminal provisions of the statute. Chief Justice Marshall held that the two year limitations period barred the action of debt. In so holding, the Chief Justice observed: “Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information….” *Id*. at 203. Contrary to the government’s assertion that the Neutrality Act’s criminal penalties suggest that no private right of action was intended, *Adams v. Woods* demonstrates that precisely because the Statute contained criminal penalties, and because it provided for a bounty for informers, it was presumed to allow a private right of action.

[6] Presumably, the only reason Section 962 was not included in Stevens footnote 7 was that the Court was discussing statutes enacted by the First Congress. The predecessor of Section 962 was first enacted a handful of years later in 1794.

Similarly, the government overreaches when it argues that it is "highly unlikely" that Congress would have created a private right of action "under a statute whose purpose is to prevent the United States from being compromised in its relations with friendly powers." Gov. Br. at 18-19. In *The Laurada*, 85 F. 760, 769 (D. Del. 1898), which the government cites to support this proposition, the court merely observed that the purpose of the Neutrality Act is "that the United States shall not be compromised in its relations with friendly powers by the use of its soil or waters for the furnishing, fitting out or arming of vessels, or for the making of preparations therefore, with a hostile intent that they should cruise of commit hostilities against those powers." This statement is a classic explanation of the purpose of the Neutrality Act.

The government quotes only part of this statement – that the purpose of the Neutrality Act is to prevent the United States from being "compromised in its relations with friendly powers." Gov. Br. 19. In providing the partial quote, the government twists the meaning of the *Laurada* court's statement. The statement was meant to ***justify enforcement*** against those who violate the neutrality laws of the United States. But the government distorts it to the point where it is used to resist enforcement of the civil *in rem* provisions of the Act. See. Gov. Br. 19.[7]

[7] Surely the government is not suggesting that it seeks dismissal of Dr. Bauer's action because it perceives Hamas, the intended beneficiary of the flotilla as a

The government cites *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), in which the plaintiffs sued the President of the United States, and other officials including the CIA Director, two Secretaries of State, and the Secretary of Defense for a number of violations, including the alleged violation of 18 U.S.C. § 960, a different (and ***dissimilar***) provision of the Neutrality Act that provides ***only*** criminal penalties. The court's refusal to find an implied private right of action was not inconsistent with the other Neutrality Act cases interpreting Section 962. Section 962 includes a private remedy in the form of a bounty, and the cases finding a private right of action are consistent with the many cases finding that this type of bounty provision implies a right to sue. The refusal of the court in *Sanchez-Espinoza* to find a private right of action in Section 960, a purely criminal

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"friendly power" with which it seeks to maintain relations. The Department of State has identified Hamas as a Designated Foreign Terrorist Organization, hardly a "friendly power." See http://www.state.gov/j/ct/rls/other/des/123085.htm (last visited December 1, 2013). And, following Dr. Bauer's letter informing the government of the impending flotilla, the Department of State issued a statement warning would-be participants that their plan was "irresponsible and provocative," and more significantly, it warned "that delivering or attempting or conspiring to deliver material support or other resources to or for the benefit of a designated foreign terrorist organization, such as Hamas, could violate U.S. civil and criminal statutes and could lead to fines and incarceration." See, Press Statement of Department of State Spokesperson, Victoria Nuland, dated June 24, 2011, http://www.state.gov/r/pa/prs/ps/2011/06/166967.htm (last visited December 1, 2013). It is incomprehensible how the government now asserts that enforcement of the Neutrality Act would somehow "compromise" the United States in its relations with "friendly powers."

provision of the Act has no bearing on this case that involves a civil *in rem* provision of the Neutrality Act.

An examination of the government's Brief reveals that the government cites very few cases discussing the specific question of whether Section 962 includes a private right of action. It also discusses very few decisions discussing whether other contemporaneous informer statutes were understood implicitly to provide a private right of action. Instead, the government's brief extracts legal snippets and recitations of black letter law from various cases having only a tenuous connection to the narrow issue in this case. The reason for this is obvious, and it was recognized by both the trial court and the government in the court below – Section 962 has always been understood to include an implied private right of action.

C. The government's refusal to participate in the action does not divest Dr. Bauer of his right to sue.

The government argues that a plaintiff cannot maintain an action without the ***participation*** of the government. Gov. Br. at 23. This is precisely the argument rejected by the court in *United States v. Skinner*, when it held that the private Neutrality Act informer did not need the participation of the executive branch to obtain a warrant. 27 F. Cas. at 1124. Indeed, *Skinner* went further and held that the president had no right to interfere with the informer's action. *Id*.

The government relies on *The Venus*, 180 F. 635 (E.D. La. 1910) and *Olivier v. Hyland*, 186 F. 843 (5th cir. 1911), two iterations of the same case, for the proposition that where the government intervenes, disavows, and moves to dismiss the action must be terminated. Notably, these cases followed the seizure made on complaint of the informer, *Olivier*, at 843, which itself indicates that the informer enjoyed the right to seek the seizure[8]. And, in fact, did so without the government's participation in the action.

The trial court in *The Venus* expressed its opinion that because the action for forfeiture of the ships was "criminal in nature," it could only be brought in the name of the United States. *Id*. Both the trial court and the Fifth Circuit overlooked the then-recent decision of the United States Supreme Court in *The Three Friends*, 166 U.S. 1 (1897), where the Supreme Court held that a forfeiture action under Section 962 was ***civil*** in nature despite the fact that it arose out of a criminal violation. *See Id*. at 49-50; Bauer Br. 23-25. Because the dismissal in *The Venus* was based upon a false assumption that the informer suit was a criminal action, the court's ruling that the government's intervention and motion to dismiss terminated the action is unsound.

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[8] On this point, the trial court stated: "It may be that he had the right to institute the action, but as to this I express no opinion." 180 F. at 635. Had the trial court believed the informer enjoyed no right to sue, it would have dismissed on that basis. Instead, the trial court expressed no opinion.

The government's argument that its abstention somehow terminates Dr. Bauer's action is invalid for another reason. In *The Venus*/*Olivier*, the government affirmatively intervened and sought dismissal on the merits. In the instant case, the government filed its Statement of Interests expressing only that it believed that Dr. Bauer ***lacked standing*** to bring the informer action, and that the government itself declined to participate. Declining to participate is not the same as affirmatively seeking dismissal on the merits.

Regardless of whether the government would have some special power to move to dismiss a Section 962 informer action on the substance or merits of the case, the government has conspicuously refrained from doing so[9]. In Footnote 10 of the government's brief, it seeks dismissal based upon its nonparticipation in the action. See Gov. Br. 25, n.10. No authority supports the government's position that non-participation by the government requires dismissal. Even under the modern False Claims Act, (which provides the government with more control that traditional informer statutes like Section 962[10], and which is relevant here only by way of analogy), if the government declines to participate, the relator may continue

[9] Note in Footnote 10 of the government's brief, it seems to hint to a position it might take on the merits in the trial court. Gov. Br. 25, n.10. However, even there, the government goes no further than reiterating that it declines to participate; non-participation.

[10] The government agrees that modern qui tam statutes like the False Claims Act provide more control that does Section 962. Gov. Br. 8, 14

the action on his or her own. 31 U.S.C. § 3730(b)(4); *Stevens*, 529 U.S. at 769. And, under Section 962, where the courts have held the informer enjoys a private right of action, that right would be meaningless if it required government participation.

Moreover, based upon the holding of *United States v. Skinner*, 27 F. Cas. 1123 (C.C.D.N.Y. 1818), discussed above, it is doubtful the government would have the right to dismissal even if it sought it on the merits. The Skinner court held that the president had no right to interfere with the informer's action. Additionally, the *Stevens* Court held that at least with regard to the informer's own interest in the bounty, the informer does not act as an agent of the government, but as a partial assignee of the claim. *Stevens*, 529 U.S. at 772-73. As such the government does not possess an unfettered right to seek dismissal of the informer's action. *See id*. Even under the False Claims Act, where the government is given the power to seek dismissal, the relator enjoys a right to notice and a hearing. 31 U.S.C. § 3730(c)(2)(A). In contrast, and as held by *Skinner*, Section 962 does not empower the government to dismiss an informer's action.

Regardless of whether the government may obtain dismissal on the merits of a Section 962 informer action, the government here has not moved for such a dismissal. The government did not take a position on the merits either in the trial court or in its Brief on appeal. The question the government does address is a purely legal question – whether Section 962 provides common informers like Dr. Bauer with an implied right of action. And, as to this legal question the government enjoys no special authority and is entitled to no deference to dictate whether Congress has granted a common informer with a right to sue. The Court should not entertain dismissal based upon government opposition where the government has not expressed its opposition. The Court should restrict its review to the question of whether Section 962 provides common informers with a private right of action. As demonstrated in Dr. Bauer's Brief and above, Section 962 provides common informers with a private right of action.

Dated, December 2, 2013

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(A), (B) and (C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief uses a proportionately spaced font and contains 4837 words exclusive of those portions that are excluded under Rule 32(a)(7)(B)(iii).

/s/ Asher Perlin________
Asher Perlin

CERTIFICATE OF SERVICE

I hereby certify on December 2, 2013, I filed the foregoing using the ECF system, which automatically served a copy upon Vijay Shanker, Esq., vijay.shanker@usdoj.gov.

/s/ Asher Perlin _____________
Asher Perlin