

**DOJ'S QUID PRO QUO WITH ST. PAUL: A
WHISTLEBLOWER'S PERSPECTIVE**

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON ECONOMIC GROWTH,
JOB CREATION AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM

AND THE

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL
JUSTICE

OF THE

COMMITTEE ON JUDICIARY
HOUSE OF REPRESENTATIVES

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DOJ'S QUID PRO QUO WITH ST. PAUL: A WHISTLEBLOWER'S PERSPECTIVE

Tuesday, May 7, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ECONOMIC GROWTH, JOB CREATION,
AND REGULATORY AFFAIRS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, JOINT
WITH SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL
JUSTICE, COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittees met, pursuant to call, at 10:06 a.m., in Room 2154, Rayburn House Office Building, Hon. Jim Jordan [chairman of the Subcommittee on Economic Growth] presiding.

Present: Committee on Oversight and Government Reform: Representatives Jordan, DeSantis, Duncan, McHenry, Collins, Meadows, Issa, Cartwright, Connolly, Pocan, Kelly, Horsford, and Cummings.

Committee on the Judiciary: Representatives Franks, Goodlatte, Chabot, King, Gohmert, Nadler, Conyers, Scott, and Jackson Lee.

Staff Present, Committee on Oversight and Government Reform: Ali Ahmad, Communications Advisor; Alexia Ardolina, Assistant Clerk; Molly Boyd, Parliamentarian; Lawrence J. Brady, Staff Director; David Brewer, Senior Counsel; Ashley H. Callen, Senior Counsel; Steve Castor, General Counsel; John Cuaderes, Deputy Staff Director; Adam P. Fromm, Director of Member Services and Committee Operations; Linda Good, Chief Clerk; Tyler Grimm, Senior Professional Staff Member; Christopher Hixon, Deputy Chief Counsel, Oversight; Michael R. Kiko, Staff Assistant; Justin LoFranco, Digital Director; Mark D. Marin, Director of Oversight; Laura L. Rush, Deputy Chief Clerk; Jaron Bourke, Minority Director of Administration; Jennifer Hoffman, Minority Press Secretary; Carla Hultberg, Minority Chief Clerk; Adam Koshkin, Minority Research Assistant; Jason Powell, Minority Senior Counsel; Brian Quinn, Minority Counsel; Dave Rapallo, Minority Staff Director; and Rory Sheehan, Minority New Media Press Secretary.

Staff Present, Committee on the Judiciary: Dan Huff; Counsel; John Coleman, Counsel; Zach Somers, Counsel; Sarah Vance, Clerk; Heather Sawyer, Minority Counsel; and Veronica Eligan, Minority Clerk.

Mr. JORDAN. The joint committee will come to order. I want to thank our witnesses for being here today.

Senator Grassley, Senator Isakson, we will get to you as quickly as we can. You know the routine. You have got to listen to us first.

We have got some brief opening statements and then we will get right to your testimony.

We have convened this joint hearing to examine the importance of whistleblowers to good government. These brave individuals shed light on waste, fraud and abuse, often at great personal or professional risk and make what we do in Congress a whole lot easier. We should always be grateful for the sacrifice these individuals make and proud of their contributions to the Nation.

Perhaps the most important tools that whistleblowers have are the qui tam provisions of the False Claims Act. Senator Grassley, who we will hear from shortly, was instrumental in amending the False Claims Act in 1986 to ensure whistleblowers are protected. This year, of the \$4.9 billion of False Claims Act recoveries, \$3.3 billion came from whistleblower suits, a record amount.

It is within this setting that I am so troubled by the quid pro quo between the Department of Justice and the City of St. Paul. In 2009, Fredrick Newell filed a whistleblower complaint alleging that the City of St. Paul, Minnesota, had fraudulently received millions in Federal dollars. Career DOJ and HUD attorneys investigated his case for almost 3 years. And by November 2011, the United States Government was poised to join the case on Mr. Newell's behalf. These career attorneys told Mr. Newell that the United States strongly supports his case and would intervene on his behalf.

Documents support this impression that the case was strong. In a memo from November 2011, the career attorneys wrote, the city repeatedly and falsely told HUD and others it was in compliance. The city knowingly submitted false claims in order to obtain Federal funds. The career attorneys also wrote, We believe this is a particularly egregious example of false certifications given by a city that was repeatedly shown what it had to do but repeatedly failed to do it. These attorneys recommended the United States intervene in the case.

Then, Assistant Attorney General Thomas Perez stepped in and executed a quid pro quo with St. Paul to ensure that the United States Supreme Court did not consider an unrelated appeal concerning a controversial theory under the Fair Housing Act.

To prevent the appeal from getting before the court, Perez leveraged Mr. Newell's whistleblower case. He promised St. Paul that the United States would not intervene in the case in exchange for St. Paul withdrawing the Supreme Court appeal. Unfortunately, Mr. Perez was successful.

In a closed-door meeting in the St. Paul city hall, he convinced the city to agree to the deal. The next week, the Department of Justice declined to intervene in Mr. Newell's case. The following day, the city withdrew its Supreme Court appeal. The quid pro quo was complete.

This effectively killed Mr. Newell's case, as St. Paul was able to dismiss the case on grounds that would not have been available if the Department of Justice had joined the case. As a result, Federal taxpayers lost the chance to recover up to \$200 million. In addition, residents of St. Paul lost the chance to better their community and improve their economic opportunities, the goal Mr. Newell had all along.

More alarming about this quid pro quo is the precedent that this case sets for future whistleblowers who bring claims of waste, fraud and abuse, only to be thrown under the bus for political purposes.

I want to applaud Mr. Newell for his courage in appearing here today to tell his story and for his work in identifying misspent Federal funds. And I look forward to hearing from all of our witnesses in just a few minutes. And with that, I would yield to the ranking member, the gentleman from Pennsylvania, Mr. Cartwright.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

I would like to welcome our witnesses here today, including attorney Shelley Slade, a nationally recognized expert on government fraud lawsuits and, in fact, a board member of Taxpayers Against Fraud in this country. Ms. Slade will be able to clarify some significant misunderstandings that the majority seems to have about these Federal fraud lawsuits, called qui tam lawsuits.

And I would like to welcome Mr. Newell, who by all accounts is an active citizen, committed to advocating for economic opportunities for low-income individuals and businesses.

The majority has staged today's hearing to discredit the President's nominee for Secretary of Labor with baseless accusations of fabricated, dubious—

Mr. ISSA. Mr. Chairman, Mr. Chairman.

Mr. JORDAN. The gentleman from California.

Mr. ISSA. I regret to ask the gentleman to either rephrase or take down his words. To disparage the reason for this hearing is to disparage the chair. It is well-known that to claim that the intent is somehow nefarious and not what the hearing is about is, in fact, to disparage the chairman.

Would the gentleman take down his words.

Mr. NADLER. Mr. Chairman.

Mr. JORDAN. The gentleman from New York is recognized.

Mr. NADLER. Mr. Chairman, to comment on the motivation or the purpose of the hearing is well within fair comment and this attempt by the gentleman from California to stop free and fair debate is wrong. And the words should not be taken down. They are well within fair comment, and the purpose of the hearing is open to anyone's comments, as is anything else about the hearing.

Mr. ISSA. Does the gentleman insist that our reason for this hearing is the nefarious purpose other than, in fact, righting a wrong that is perceived by the chair and by many experts?

Mr. JORDAN. The gentleman can respond.

Mr. CARTWRIGHT. Mr. Chairman, the word "nefarious" was not used, and the only word that was used was that the attempt is being made to discredit the President's nominee for Secretary of Labor, and I feel that is an appropriate comment.

Mr. ISSA. Mr. Chairman.

Mr. JORDAN. The gentleman from California.

Mr. ISSA. I would raise the point of order that this investigation began 10 months ago and has been endlessly delayed by documents requested, not granted, and that ultimately, we reach this point only because of a long delay from the time of the action. So, again, I would ask that the gentleman recognize the full length of the investigation, the attempts to right this wrong for many months, long

before a rather obscure member of the Attorney General's staff, by comparison to being a Cabinet appointee, was ever announced.

Mr. NADLER. Mr. Chairman.

Mr. JORDAN. The gentleman from New York is recognize.

Mr. NADLER. What the gentleman from California just said is his view. It is subject to debate. It is subject to other people's views and has nothing to do with taking down words and stifling legitimate debate. He is entitled to his view.

Mr. ISSA. Does the gentleman stand by his words accusing the chair of doing this for that purpose?

Mr. CARTWRIGHT. I absolutely do stand by my words, and in fact, the timing that the gentleman from California raises is important as well because we expect to hear these unsubstantiated allegations repeated tomorrow by Republican Senators at the Senate Health, Education, Labor, and Pensions Committee hearing on the nomination of Tom Perez as Secretary of Labor. It is unlikely, however, that these Senators will repeat the only true facts that today's hearing will uncover, that experts say that Mr. Perez acted completely appropriately, within ethical boundaries, and in the best interest of this country.

Mr. Newell and his attorney were invited to give a whistleblower's perspective on DOJ's decision not to intervene in his False Claims Act lawsuit. However, neither Mr. Newell, nor his attorney is—

Mr. ISSA. Mr. Chairman, since the gentleman has returned to his opening statement, I would ask that my motion be withdrawn at this time. I will sit through this dialogue, but only under protest.

Mr. JORDAN. The gentleman's complaint has been recognized. The gentleman may proceed.

Mr. CARTWRIGHT. Neither Mr. Newell nor his attorney is an expert in the Federal law in which Mr. Newell's lawsuit is based, and more importantly in this case, Mr. Newell is not technically a qualifying whistleblower for the lawsuit. Experts we have consulted, including Ms. Shelley Slade, who is one of the preeminent False Claims Act litigators in our Nation, has concluded that Mr. Newell's lawsuit brought through the advice of his attorney was weak, failed to fulfill statutory requirements, and was susceptible from the moment it was filed to dismissal. These are the facts.

DOJ intervenes in about 25 percent of all false claims lawsuits. Mr. Newell's lawsuit was therefore treated in the same manner as a majority of similar lawsuits brought to DOJ. The committee's investigation has turned up no evidence whatsoever of unethical or improper actions by the department. In fact, the majority cannot point to a single ethics rule or standard of professional conduct that was violated. The department's decision not to intervene did not end the case; rather Mr. Newell was free to pursue his lawsuit without the Federal Government, as all qui tam relators are in these cases. However, the case was dismissed by a Federal Court judge because Mr. Newell failed to meet that statutory requirement of a qualifying whistleblower, as I mentioned before. He did not have any original independent knowledge of the false claims by the City of St. Paul.

So DOJ's decision not to intervene was the correct one and was supported by senior career officials regarded as the government's

preeminent experts in their field and based on the facts of the particular case. The majority takes issue with efforts by DOJ and Tom Perez, then Assistant Attorney General for Civil Rights and today President Obama's nominee for Secretary of Labor, to preserve the concept of disparate impact, an important civil rights enforcement tool that helps prevent housing and lending discrimination from a potentially adverse Supreme Court ruling in an unrelated legal matter.

Mr. Perez told the committee staff that disparate impact was used by DOJ in settling a case involving Countrywide Financial that was the largest residential fair lending settlement in the history of the Fair Housing Act. This settlement helped hundreds of thousands of victims harmed by widespread practices or patterns of discrimination in lending. But this valuable enforcement tool faced potential problems in the context of a case, called *Magner v. Gallagher*, which was scheduled to be heard by the U.S. Supreme Court. As every lawyer knows, bad facts make bad law, and *Magner* was a strange case with bad facts. That case, landlords of low-income housing units, sued the City of St. Paul for alleged aggressive enforcement of housing safety codes to address: "rodent infestation, missing dead bolt locks, inoperative smoke detectors, poor sanitization, and inadequate heat." They claimed that if they were forced to fix these very basic problems, they would have to close the buildings, causing people to lose housing options.

I find it hard to believe that anybody intended the Fair Housing Act to be used as a shield to prevent landlords from correcting housing code violations in their buildings. And I believe it was prudent of the Department of Justice and Tom Perez to be concerned that a majority of the Supreme Court might take advantage of the irony to deliver a setback to the enforcement of these antidiscrimination laws.

Working with St. Paul to withdraw the appeal was in the best interest of protecting civil rights law and in the best interest of DOJ. Thank you, Mr. Chairman.

Mr. JORDAN. Thank the gentleman.

The chairman of the Constitution Subcommittee of Judiciary, Mr. Franks, is recognized.

Mr. FRANKS. Well, let me begin by thanking the Chairman for allowing the Constitution Subcommittee members to join in today's hearing. We appreciate that very much and I also want to express my appreciation for Senator Grassley's and Senator Isakson's presence.

We have called this hearing to examine the quid pro quo between the City of St. Paul and Assistant Attorney General Tom Perez; a quid pro quo that cost U.S. taxpayers the opportunity to recover over \$200 million along with being an injustice and a disservice to this Nation. This secret deal consisted of the Justice Department's agreeing to decline intervention in Mr. Newell's false claims case against the City of St. Paul in exchange for the City withdrawing an appeal from the Supreme Court.

To paraphrase the maxim that is inscribed on the wall outside the Office of the Attorney General of the United States: the government prevails not when it wins its case in court but when justice is done.

Over the years, attorneys within the Justice Department had consistently taken the steps necessary to ensure that they live up to this maxim. Unfortunately, Assistant Attorney General Tom Perez has failed to meet these expectations. Instead, Mr. Perez manipulated the rule of law and pushed the limits of justice to strike a deal with the City of St. Paul to block the Supreme Court from hearing an appeal that would have placed in jeopardy his division's use of an unjust legal theory.

This theory, known as disparate impact, has allowed the Civil Rights Division to target banks and others for policies that are neutral and nondiscriminatory in their intent but may, nonetheless, have a disproportionate impact on certain groups. It was the use of this theory that in many ways precipitated the Nation's foreclosure crisis, as lenders lowered their borrowing criteria to avoid disparate impact claims.

Mr. Perez went out of his way to find leverage to use against the City to get it to drop its case before the high court. And after he found that leverage, he began personally directing and advising officials at the Department of Housing and Urban Development and career attorneys within the DOJ's Civil Division, and at the U.S. Attorneys' Office in Minnesota to get them to switch their position on Mr. Newell's False Claims Act case.

Once Mr. Perez achieved this goal, he tried to cover up his secret deal by instructing career attorneys to omit any discussion of the Supreme Court appeal from their official memo on Mr. Newell's case. He further attempted to cover the deal up by insisting that the final deal with the City not be reduced to writing; instead insisting that your "word was your bond." How sadly ironic that in the same breath, Mr. Perez was breaking both his word and his bond to uphold justice.

Assistant Attorney General Perez' deal, his secret deal will have lasting consequences for the Department of Justice, the City of St. Paul, and the American taxpayers. In overruling career attorneys and ignoring its own internal procedures, the Department weakened the False Claims Act and created a large disincentive for citizens to expose fraud. The City of St. Paul missed a tremendous chance to improve the economic opportunities available to the low- and very low-income residents that Mr. Newell championed. American taxpayers lost a strong opportunity to recover over \$2 million of fraudulently spent funds and justice was ultimately and deliberately denied.

Mr. Perez' actions in facilitating and executing this quid pro quo with the City of St. Paul represented a fundamental disregard for the rule of law. Rather than allowing the Supreme Court to freely and impartially adjudicate an appeal that the court had affirmatively chosen to hear, Mr. Perez deliberately worked to get the appeal off the Court's docket.

Instead of permitting the normal decisionmaking process to occur within the Civil Division, Mr. Perez usurped the process to ensure his preferred course of action occurred. That others within the Justice Department and HUD went along with Mr. Perez' departure from the rule of law is also a disgrace. I look forward to the witnesses' testimony. I hope that it can shed further light on this disturbing chapter.

Again, I want to thank Senators Grassley and Isakson for taking time out of their busy schedules to be with us here today, and I would also like to thank our whistleblower witness Fredrick Newell for his courage and for taking the time to travel for the second time from Minnesota to be part of this investigation.

Mr. Chairman, I thank you and yield back.

Mr. ISSA. Mr. Chairman.

Mr. JORDAN. I thank the gentleman.

Mr. ISSA. Mr. Chairman.

Mr. JORDAN. The chairman of the full committee is recognized.

Mr. ISSA. In support of my earlier motion, I would ask unanimous consent that the letter the committee sent, the Subcommittee Chairman Patrick McHenry, sent on February 27, 2012, to Christopher Coleman, the mayor of St. Paul, less than 30 days after dismissal of the case.

I would also ask unanimous consent that the April 10th 2012 letter, to the Attorney General Eric Holder, again questioning this action in 2012, more than a year ago, be placed in the record.

Additionally, I would ask that the September 24, 2012, letter to the Attorney General, again, questioning this dismissal on legal grounds be placed in the record.

Additionally, I would ask that the letter of March 27th, 2013 to Thomas Perez be placed in the record.

And last, the April 4, 2013, letter jointly signed by myself, and Mr. Goodlatte be placed in the record in support of the time and effort we have put into this investigation.

Mr. NADLER. Mr. Chairman, reserving the right to object. Can I—

Mr. JORDAN. Certainly.

Mr. NADLER. I have no objection to placing anything the gentleman wants in the record. I was a little confused. You said you wanted to place it in support of—I am sorry, you said you wanted to place these documents in the record in support of something. In support of what?

Mr. ISSA. The gentleman, the ranking member of the subcommittee has chosen to claim motives related to an impending appointment. These documents clearly show a pattern from almost the moment that we became aware of them.

Mr. NADLER. So, going to the majority's motive for this hearing, in effect.

Mr. ISSA. Going to the ranking member's assertion of a motive—

Mr. NADLER. Supporting your opposition, supporting the beneficial interpretation of the majority's motive for this hearing. Right?

Mr. ISSA. Does the gentleman continue to reserve?

Mr. NADLER. I am just asking you that.

Mr. ISSA. The gentleman cast a question for some unknown reason as to the motives for this hearing. These documents clearly show that long before anyone could have imagined, first of all, President Obama perhaps having a second term, but certainly, the fact that he would elevate this individual with this kind of a record to be a full Cabinet officer, thus making it very clear that our investigation began in earnest after this quid pro quo, long before that time.

Mr. NADLER. I will—since—since I believe anybody can put anything in the record, I withdraw the objection.

Mr. JORDAN. Without objection—

Mr. ISSA. Thank you.

Mr. JORDAN. —the documents will be made a part of the record.

Mr. JORDAN. We now recognize the distinguished Senator from the State of Iowa.

Mr. NADLER. Excuse me.

Mr. JORDAN. I am sorry, Mr. Nadler. You talked so much, I thought you gave your statement. We will let you go now.

The gentleman from New York is recognized.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Chairman, today's hearing is not about Mr. Newell, or about protecting legitimate whistleblowers. It is about Tom Perez, the current Assistant Attorney General of the Justice Department Civil Rights Division and President Obama's nominee to be the next Secretary of Labor.

Tomorrow is the Senate's markup of Attorney General Perez' nomination. The entire purpose of this hearing is to attack the leadership and reputation of one of this Nation's best public servants, Tom Perez. Of course, the Constitution grants the Senate, not the House, the role of providing advice and consent to the President on nominees. Whatever input into that process we might wish to have, it should not devolve into the type of partisan attack that this hearing represents.

My Republican colleagues have declared that Assistant Attorney General Perez, "manipulated justice and ignored the rule of law," by successfully negotiating an agreement with City of St. Paul, Minnesota, to withdraw its appeal to the Supreme Court in *Magner v. Gallagher*.

But Assistant AG Perez did nothing wrong. On the contrary, he acted professionally and appropriately and in full accord with ethical and professional responsibility requirements to advance the best interest of the United States.

The *Magner* case challenged the use of disparate impact theory to enforce the housing laws. Disparate impact theory allows the government to challenge policies or practices that are seemingly neutral on their face but in practice result in discrimination against a protected class. It is a critical tool for weeding out all forms of discrimination, whether intentional or not, and ensuring equality of opportunity for all. It has long been used by Republican and Democratic administrations to attack discriminatory lending, employment, and housing practices.

An adverse ruling from the court in *Magner* could have eliminated use of this critical civil rights enforcement tool. Assistant AG Perez viewed *Magner*, where landlords of low-income housing were making the novel argument that disparate impact theory prevented St. Paul from enforcing its housing codes, as an extremely poor factual vehicle for presenting this critical theory to the Supreme Court.

Rightly concerned that bad facts make for bad law, he seized the chance to reach an agreement with the city to withdraw *Magner* and avoid the risk of an adverse ruling. There was nothing wrong with that. It is what any good lawyer would do and certainly what

the steward of the Justice Department Civil Rights Division should do to safeguard the best interest of the United States.

My Republican colleagues are unhappy that the court did not get the opportunity to eliminate the disparate impact theory. After all, they dispute the use of disparate impact, and dislike the robust enforcement of civil rights laws. And they are unquestionably angry at Mr. Perez for his role in convincing St. Paul to withdraw its Magner appeal. But their complaints and the accusations that they have leveled against Assistant AG Perez have no legitimate, legal, ethical, or professional responsibility basis.

In fact, when the City of St. Paul suggested that it would withdraw its Magner appeal if the Civil Division declined to intervene in Mr. Newell's False Claims Act case, Assistant AG Perez sought and received guidance from ethics and professional responsibility experts who approved such an agreement and his role in negotiating it. This alone debunks any claim of improper conduct.

Even accepting the Republicans' characterization of the agreement as a quid pro quo, whereby the city withdrew its appeal "in exchange," for the decision against intervention in Mr. Newell's case, there is nothing unethical or improper with reaching or brokering such an agreement; nor did Assistant AG Perez pressure career DOJ lawyers into recommending against intervention in Mr. Newell's case or somehow manipulate the Civil Division's decision-making process.

As the documents and testimony reviewed over the course of the committee's 18-month investigation in this matter confirm, the decision not to intervene in Mr. Newell's case was made by the Civil Division, not Mr. Perez' division, based on its independent evaluation of the evidence, witnesses, litigation risks, lack of HUD support for intervention, burden on the St. Paul taxpayers, and anticipated withdrawal of the city's Magner appeal.

At the end of the day, the Justice Department's top career lawyers disagreed with earlier recommendations of more junior colleagues because they concluded that Mr. Newell did not have a strong False Claims Act case on its merits.

My colleagues are free to disagree with the Civil Division's final decision in Mr. Newell's case, just as they are free to disagree with Assistant AG Perez' and the Civil Rights Division's desire to protect the disparate impact theory. But let's not pretend that these disagreements have any legitimate ethical or professional responsibility basis. This is, at best, a policy disagreement; at worst, simply partisan politics.

Senator Harkin recognized this when he canceled the hearing on Occupational Health and Safety to which Mr. Newell had been invited to testify. Mr. Newell's complaints have nothing to do with that subject. And Senator Harkin appropriately dismissed that effort as a transparent, "attack on the President's nominee for Secretary of Labor," Tom Perez, and refused to allow what he deemed as an abuse of process to go forward.

It is unfortunate that our committee's majority did not follow Senator Harkin's lead. It is also unfortunate that Mr. Newell has been dragged into this partisan fight. His disappointment that the United States declined to intervene in his False Claims Act case is

understandable. But that decision was never Tom Perez' to make, and he did not make it.

The decision against intervention in the Newell case by the Civil Division's top False Claims Act lawyers was the right choice, as is confirmed by the testimony that we will hear from Shelley Slade today, as well as by the letters that we have received from other career False Claims Act lawyers, who similarly view Mr. Newell's case as a weak candidate for government intervention.

I would ask unanimous consent to have the letters that we received made a part of record of this hearing.

Mr. JORDAN. Without objection.

Mr. NADLER. Thank you.

Assistant Attorney General Perez has done a tremendous job leading the Civil Rights Division and it is long past time to end this smear campaign against him. We should all be thankful for his services and look forward to his stewardship as Secretary of Labor.

We do not serve the public interest by holding this hearing as part of a shameful smear campaign against Mr. Perez.

With that, I yield back the balance of my time.

Mr. JORDAN. Thank the gentleman for his statement.

Distinguished Senator from Iowa is recognized for 5 minutes.

STATEMENT OF THE HON. CHARLES E. GRASSLEY, A UNITED STATES SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you for inviting me to testify. It is important to examine the impact of the deal between the Justice Department—

Mr. JORDAN. Senator, just pull that real close so that we can all hear you. There you go. Great. Thank you.

Senator GRASSLEY. —to examine the issue between the Justice Department and the City of St. Paul and the impact that that has had on the whistleblower Fredrick Newell. I come to hearings like this not just to testify on the issue, but I want to encourage whistleblowing. I want to encourage the protection of whistleblowers. And I want to encourage use of qui tam-type lawsuits building upon the success of that act that we got passed and updated in 1986.

The qui tam action that we included in the updated law allows individual whistleblowers to represent the Federal Government in certain cases and recover a share of the proceeds. When courts across the country narrowed the False Claims Act, I worked with Chairman Leahy to author legislation that overturned years of court decisions that watered down the False Claims Act of 1986.

One of our fixes has an important relevance to today's hearing. Before 2010, the Supreme Court said that private citizens do not get rewarded unless the original source information is the basis of the settlement or verdict. Our provision to fix the public disclosure bar made it clear that Congress disapproved of this broad interpretation made by the courts. Instead of allowing organizations and individuals to string along whistleblowers, only to kick them off the case at the very end, the provision required the Justice Department file a timely motion to dismiss claims that violate the public disclosure bar.

Tom Perez committed the Justice Department to assist the city in getting Fredrick Newell's qui tam action dismissed on public disclosure barred grounds in exchange for dismissing a nonrelated Supreme Court case to further his own favored legal theory.

In doing so, Mr. Perez circumvented Congress' legislative intent in reforming the law to help whistleblowers like Mr. Newell. In the process, Mr. Perez made it impossible that Mr. Newell would succeed in his suit to recover money for the United States. We are talking about not just a few million but hundreds of millions of dollars.

The result is that the department has demonstrated to future qui tam whistleblowers that they might be helped, but only if a defendant doesn't have something else the department wants in exchange.

Senate-confirmed appointees testified before the Judiciary Committee that they support False Claims Act and that they would work with whistleblowers to make sure that cases received consideration and assistance from the Justice Department. It seems clear that the department did the exact opposite in Mr. Newell's case. Consequently, the False Claims Act and whistleblowers everywhere might suffer.

In this case, the department took the authority granted to them under the law and rather than using it to secure those millions of dollars for taxpayers, they used it for leverage. They took the leverage and struck a deal to throw out the case that the career lawyers, and I want to mention, career lawyers in the department considered very strong. And along with it, they threw out the ability to recover a potential hundreds of millions of dollars of taxpayers' money. And in the process, the sad thing is, they left Mr. Newell, the whistleblower, twisting in the wind.

There are a couple of points about this deal to emphasize. First, even though the department traded away Mr. Newell's case, Mr. Perez has defended his actions, in part, by claiming that Mr. Newell still had his, "day in court."

What Mr. Perez omits from his story is that Mr. Newell's case was dismissed precisely because the United States was not a party. After the United States declined to join the case, the judge dismissed Mr. Newell's case based upon the public disclosure bar, finding he was not, "the original source of information to the government."

I will remind you, preventing an outcome like this, is exactly why we amended the law as Chairman Leahy and I did. Specifically, those amendments made clear that the original source defense is not available when the United States joins the action. That is the whole point. That is why it was so important for the City of St. Paul to make sure that the United States did not join the case. That is why the city was willing to trade away a strong case before the Supreme Court. The city knew that if the United States joined the action, the case would go forward. Conversely, the city knew if the United States did not join the case, it would likely get dismissed.

Now, think about that a while. The department trades away a case worth millions of taxpayers' dollars. They did it precisely because of the impact the decision would have on the litigation. They knew, as a result of their decision, the whistleblower would get dis-

missed based upon original source grounds. And yet, when Congress starts asking questions, they have the guts to say, "We didn't do anything improper because Mr. Newell still had his day in court."

The second point has to do with the strength of the case. Throughout the investigation the department has tried to defend Mr. Perez' actions by claiming the case was marginal, or weak. The documents, however, tell an entirely different story. Before Mr. Perez got involved, the career attorneys at the department wrote a memo recommending intervention in the case. In that memo, they described St. Paul's actions as, "A particularly egregious example of false certification." In fact, the career lawyers in Minnesota felt so strongly about the case that they took the unusual step of flying to Washington, D.C., to meet with HUD officials. And HUD, of course, agreed that the United States should intervene. Of course, that was before Mr. Perez got involved.

The documents made clear that career lawyers considered it a strong case, but the department has claimed that Mike Hertz, the department's expert on False Claims Act, considered it a weak case.

In fact, 2 weeks ago, Mr. Perez testified before my colleagues on the Senate Health Committee that Mr. Hertz, "Had a very immediate and visceral reaction that it was a weak case."

The documents now tell a far different story. Mr. Hertz knew about the case in November 2011. Two months later, a department official took notes of the meeting where the quid pro quo was discussed. That official wrote down Mr. Hertz' reaction. She wrote, "Mike, odd. Looks like buying off St. Paul. Should be whether there are legit reasons to decline as in past practice." Sounds like a very devoted lawyer working for the taxpayers. That is my editorial.

The next day the same official emailed the Associate Attorney General and said, "Mike Hertz brought up the St. Paul disparate impact case in which the Solicitor General just filed an amicus brief in the Supreme Court. He is concerned about the recommendations that we declined to intervene in two qui tam cases against St. Paul," end of email to the Associate Attorney General.

Now, these documents appear to show that Mr. Hertz' primary concern was not the strength of the case, as Mr. Perez led my Senate colleagues to believe. Mr. Hertz was concerned that the quid pro quo Mr. Perez ultimately arranged was improper. Again, in his words, it, "Looks like buying off St. Paul."

And we have a document that just came to our attention last night. The Justice Department sent my staff a critical 33-page slide show about the department's case against St. Paul. In this document, the career lawyers make their case for intervention. The department failed to provide this document to the committee, and we all warned about it in recent interviews with HUD employees, getting such critical documents so late in this investigation could be construed as a coverup. I expect any remaining documents will be immediately forthcoming.

The department's actions and specifically those of Mr. Perez in orchestrating this deal are to the detriment of the American taxpayers, the whistleblowers, and the department. Ironically, the Justice Department and the Obama administration are currently

engaged in waging the war on whistleblowers in the Federal courts across the country, most notably a case pending before the Federal courts titled *Berry v. Conyers*.

While unrelated to this matter, we all need to keep an eye on this case as it could effectively end protecting whistleblowers in the Federal Government. I thank Mr. Newell for having the fortitude to come forward as a whistleblower and to keep fighting after the Justice Department hung him out to dry. He should be praised for being here today, and if we do anything short of that, we are going to discourage further whistleblowers from coming forth. And we can do the best job of oversight we can in the Congress of the United States, every one of us. If all 535 of us are involved, there is no way we can know where the bones are buried. We have got to rely upon people that are there where the fraud is being done. And we have got to encourage them. If we don't, we are never going to stop all of this fraudulent activity.

I yield the floor.

[The prepared statement of Senator Grassley follows:]

Prepared Statement of Senator Chuck Grassley

Ranking Member, United States Senate Committee on the Judiciary

Hearing Before the House Committee on Oversight and Government Reform
Subcommittee on Economic Growth, Job Creation & Regulatory Affairs and the Committee on
the Judiciary Subcommittee on the Constitution and Civil Justice

“DOJ’s Quid Pro Quo with St. Paul: A Whistleblower’s Perspective”

Tuesday, May 7, 2013

Thank you for inviting me here today to testify. It’s important to examine the impact the deal between the Justice Department and City of St. Paul, Minnesota has had on the whistleblower in that case, Fredrick Newell.

One of the most important lessons I have learned is that an individual member of Congress can make a huge difference through oversight.

I realized early on that uncovering and eliminating fraud in government programs could save the federal government billions of dollars. One of my early investigations revealed how the Department of Defense was spending \$700 on toilet seats.

Of course, while individual members can make a difference, the federal government is simply too big to oversee without help.

In order to find reinforcements, I turned to a simple and well-tested law: the False Claims Act. Also known as “Lincoln’s Law,” the False Claims Act was adopted during the Civil War as a way to leverage private citizens in the fight against fraud.

Unfortunately, the False Claims Act was weakened by Congress following World War II. In an effort to give the law real teeth again, I joined Congressman Howard Berman and introduced the False Claims Amendments Act of 1986.

One of the key provisions included allowing “qui tam” lawsuits. Qui tam actions allow individual whistleblowers to represent the federal government in certain cases and recover a share of the proceeds.

These changes were adopted by Congress and quickly signed into law by President Reagan.

Since my amendments were signed into law, the federal government has recovered more than \$40 billion.

Taxpayers owe whistleblowers a debt of gratitude for sticking their necks out. They stand up and speak out when things are wrong.

When courts across the country narrowed the False Claims Act I worked with Senator Leahy, to author legislation that overturned years of court decisions that watered down the False Claims Act.

I also worked with Chairman Leahy to craft a provision that fixed a problem with a part of the False Claims Act known as the “public disclosure bar.”

Under the public disclosure bar, private citizens can’t file a qui tam action if it is based only on facts that the federal government has publicly disclosed, such as in an official government report.

However, if the qui tam suit is based at least in part on the private citizen’s independent information, then he can proceed as an “original source.”

Before 2010, the Supreme Court said that private citizens do not get rewarded unless the original source information is the basis of the settlement or court verdict. But oftentimes the Justice Department begins a case using original source information and in the end uses only publicly available information to settle or try the case. Thus, the Court created a disincentive for whistleblowers to come forward with new information. They would get none of the reward, but still face the probability of retaliation.

My provision made it clear that Congress disapproved of this broad interpretation. Instead of allowing organizations and individuals to string along whistleblowers only to kick them off the case at the very end, the provision required that the Justice Department file a timely motion to dismiss claims that violate the public disclosure bar.

This amendment was designed to have the Justice Department help whistleblowers in their suits, not hurt them. In fact, I included input from the Department when we drafted it.

That’s what the FCA is truly about: protecting the whistleblower. It’s not about protecting certain defendants. Nowhere does the False Claims Act distinguish between public defendants, such as city governments, and private defendants, such as companies.

It cannot be correct that cities get a pass on ripping off federal taxpayers simply because they are funded by municipal taxpayers.

Yet, our investigation into the quid pro quo found that Department officials apparently set a different standard for the City than for a private company. If this new standard becomes precedent, it seems likely that more and more cities will find it easier to defraud the federal government.

And that is not the only reason this quid pro quo is harmful to the goals of the False Claims Act. Tom Perez committed the Justice Department to assist the City in getting Fredrick Newell’s qui tam action dismissed on public disclosure bar grounds—in exchange for dismissing an unrelated Supreme Court case to further his own favored legal theory.

In doing so, Mr. Perez circumvented Congress’s legislative intent in reforming the law to help whistleblowers like Mr. Newell. In the process, Mr. Perez made it nearly impossible that Mr. Newell would succeed in his suit to recover money for the United States. The result is that the Department has demonstrated to future qui tam whistleblowers that they might be helped, but only if a defendant doesn’t have something else the Department wants in exchange.

The actions of the Justice Department in throwing Mr. Newell aside are particularly upsetting in light of questions I asked high level Department employees at their confirmation.

Senate-confirmed appointees testified before the Judiciary Committee that they supported the False Claims Act and that they would work with whistleblowers to make sure their cases received consideration and assistance from the Justice Department. It seems clear that the Department did the exact opposite in Mr. Newell's case, and the False Claims Act and whistleblowers everywhere will suffer.

In this case, the Department took the authority granted to them under the law, and rather than using it to secure millions of dollars for the taxpayer, they used it as leverage.

They took that leverage and struck a deal to throw out a case that the career lawyers in the Department considered very strong. And along with it, they threw out the ability to recover potentially hundreds of millions of taxpayer dollars.

And in the process, they left Mr. Newell, the whistleblower, twisting in the wind.

There are a couple of points about this deal to emphasize.

First, even though the Department traded away Mr. Newell's case, Mr. Perez has defended his actions, in part, by claiming that Mr. Newell still had his "day in court."

What Mr. Perez omits from his story is that Mr. Newell's case was dismissed **precisely because** the United States was not a party.

After the U.S. declined to join the case, the judge dismissed Mr. Newell's case based on the "public disclosure bar," finding he was not the "original source" of information to the government.

I'll remind you, preventing an outcome like this is exactly why we amended the law. Specifically, those amendments made clear that the Justice Department can contest the "original source" dismissal, even if it fails to intervene. So, the Department **chose** to leave Mr. Newell all alone in his case.

That was the whole point.

That is why it was so important for the City of St. Paul to make sure that the United States did not join the case.

That is why the City was willing to trade away a strong case before the Supreme Court.

The City knew that if the United States joined the action, the case would almost certainly go forward. Conversely, the City knew if the United States **did not** join the case, and chose not to contest the original source, it would likely get dismissed.

Now think about that.

The Department trades away a case worth millions of taxpayer dollars. They did it **precisely because** of the impact the decision would have on the litigation.

They knew that as a result of their decision, the whistleblower would get dismissed based on “original source” grounds, since they didn’t contest it.

And yet, when Congress starts asking questions, they have the guts to say: ‘we didn’t do anything improper because Mr. Newell still had his day in court.’

The second point has to do with the strength of the case. Throughout our investigation, the Department has tried to defend Mr. Perez’s actions by claiming the case was “marginal” or “weak.”

The documents, however, tell a far different story.

Before Mr. Perez got involved, the career lawyers at the Department wrote a Memo recommending intervention in the case. In that memo, they described St. Paul’s actions as, “a **particularly egregious** example of false certifications.”

In fact, the career lawyers in Minnesota felt so strongly about the case that they took the unusual step of flying to Washington, D.C. to meet with HUD officials.

And HUD, of course, agreed that the United States should intervene.

That was before Mr. Perez got involved.

The documents make clear that career lawyers considered it a strong case. But, the Department has claimed that Mike Hertz – the Department’s expert on the False Claims Act – considered it a weak case.

In fact, two weeks ago Mr. Perez testified before my colleagues on the Senate HELP Committee that Mr. Hertz “had a very immediate and visceral reaction that it was a weak case.”

The documents tell a far different story. Mr. Hertz knew about the case in November of 2011. Two months later, a Department official took notes of a meeting where the quid pro quo was discussed. That official wrote down Mr. Hertz’s reaction: She wrote:

“Mike – Odd – Looks like buying off St. Paul. Should be whether there are legit reasons to decline as to past practice.”

The next day, that same official emailed the Associate Attorney General, and said:

“Mike Hertz brought up the St. Paul “disparate impact” case in which the SG just filed an amicus brief in the Supreme Court. He’s concerned about the recommendation that we decline to intervene in two qui tam cases against St. Paul.”

These documents appear to show that Mr. Hertz’s primary concern was **NOT** the strength of the case, as Mr. Perez led my Senate colleagues to believe. Mr. Hertz was concerned that the quid pro quo Mr. Perez ultimately arranged was improper. Again, in his words, it “looks like buying off St. Paul.”

And, just last night the Justice Department sent my staff a critical 33 page slide show about the Department's case against St. Paul. In this document, the career lawyers make their case for intervention. The Department failed to provide this document to the committees, and we only learned about it in a recent interview with a HUD employee. Getting such a critical document so late in this investigation could be construed as a cover up. I expect any remaining documents will be immediately forthcoming.

The Department's actions—and specifically those of Mr. Perez in orchestrating this deal—are to the detriment of the American taxpayers, whistleblowers, and the Department.

Ironically, the Justice Department and the Obama administration are currently engaged in waging the war on whistleblowers in federal courts across the country—most notably in a case pending before the Federal Circuit titled *Berry v. Conyers*.

While unrelated to this matter, we all need to keep an eye on that case as it could effectively end protected whistleblowing in the federal government.

I thank Mr. Newell for having the fortitude to come forward as a whistleblower, and to keep fighting after the Justice Department hung him out to dry.

He should be praised for being here today.

Thank you.

Mr. JORDAN. I want to thank the Senator for his testimony. And I understand that Senator Grassley has to leave. And Senator Isakson, you are recognized for your 5 minutes more or less.

STATEMENT OF THE HON. JOHNNY ISAKSON, A UNITED STATES SENATOR FROM THE STATE OF GEORGIA

Senator ISAKSON. Chairman Jordan, Chairman Franks, Ranking Member Cartwright, Ranking Member Nadler, thank you for the invitation to introduce Fredrick Newell today, and thank you for letting me return to my roots in the U.S. House, and thank you for giving me the opportunity to publicly acknowledge the great work of my cohort, Senator Grassley, who is an outstanding Senator in many ways, but particularly on the whistleblower statute and enforcement of the standards of the United States of America.

This is a very serious situation which we are about to discuss, and it is very important that both sides of the story be told. Two weeks ago, the Senate Subcommittee on Employment and Workplace Safety, of which I am the ranking member, was to hold a hearing on OSHA's whistleblower protection statute.

Following on the heels of Thomas Perez' hearing before the committee, I solicited Fredrick Newell to be my witness at that hearing, since we were discussing the 22 whistleblower statutes within the Department of Occupational Safety and Health Administration, of obviously germane testimony. I felt it was important that we know what involvement Mr. Perez may have had in the St. Paul case, but more importantly, that we heard both sides of the story.

I appreciate the willingness of both of these committees to reach out to Mr. Newell and provide him the opportunity, which was taken away from him by the chairman of the committee in the Senate when they pulled our ability to have that hearing and Mr. Newell's testimony.

Mr. Newell courageously comes before the committee hearing today as a vital community leader and a blessed family man. Mr. Newell was born in Hazlehurst, Mississippi, the ninth of 16 children. After high school graduation, he joined the United States Navy and served as an intelligence specialist and a photographer.

Mr. Newell wears many hats. He is currently the pastor of True Spirit Ministries in St. Paul, Minnesota. Mr. Newell, he served in the ministry since 1986, at which time he has occupied positions which included deacon, Bible teacher, and assistant pastor. In addition to his pastoral work, Mr. Newell is also a part owner of three construction companies in St. Paul, Minnesota.

One of these companies, Newell Abatement Services, was awarded honors as runner-up in the Twin Cities Small Business of the Year and also the Frogtown Small Business of the Year in 1998.

Mr. Newell has provided the construction training for over 50 individuals from low-income backgrounds, through his communities and became a catalyst for the U.S. Department of Housing and Urban Development to force St. Paul to implement its first ever Section 3 program. As if he is not busy enough, Mr. Newell is also the President of Access Group, a nonprofit organization created to empower low-income individuals through awareness of community engagement.

Mr. Newell is a nationally recognized Section 3 advocate and has participated in various national forums on the issue. As I said, he has been married for 28 years and has raised 5 children. I thank him for making the journey to Washington today to give his testimony. I thank him for having the courage to blow the whistle. As Senator Grassley said, we will never be able to get to the bottom of many issues as a Congress if our citizens are not willing to tell us what they know. It takes a certain sense of civic responsibility and moral courage to do what he did.

Mr. Newell, I again thank you for your willingness to testify. I look forward to the hearing and hearing what you have to say. And again, I want to thank Chairman Jordan and Chairman Franks for having the courage to call this hearing today so that all of the facts can come out.

Mr. JORDAN. I want to thank you, Senator, for your testimony and for your hard work on this issue and for pointing out the important fact that the hearing last week was canceled solely because Mr. Newell was invited to give testimony. We appreciate that.

And I will now get ready for our second panel.

Mr. CONYERS. Mr. Chairman.

Mr. JORDAN. The gentleman from Michigan is recognized.

Mr. CONYERS. Thank you very much. Could I put my statement in the record? I am honored to have been invited here to be in the hearing room, and—

Mr. JORDAN. The former chairman of the Judiciary Committee is more than welcome to have his statement entered into the record.

So, without objection, the statement is entered.

Mr. CONYERS. Thank you.

Mr. CONNOLLY. Mr. Chairman, I would also ask unanimous consent to insert in the record my statement.

Mr. JORDAN. Without objection.

Mr. CONNOLLY. I thank the chair.

Mr. JORDAN. I will now recognize the second panel.

Mr. NADLER. Mr. Chairman.

Mr. JORDAN. Yes. The gentleman from New York.

Mr. NADLER. A point of order, a point of inquiry, I am not sure which. I thought the next panel was supposed to have Mr. Newell and Ms. Slade together.

Mr. JORDAN. It is my understanding there are three panels, and Ms. Slade is on the third panel.

Mr. NADLER. Is there a Memorandum of Understanding among the committees on this subject?

Mr. JORDAN. My understanding is that staff—

Mr. NADLER. What?

Mr. JORDAN. My understanding is that the staff had worked that out. We have done this several times in this committee, may not be the practice in Judiciary Committee, but we have done this several times where we have had the—

Mr. NADLER. The rules require that there be such a Memorandum of Understanding. Is there one?

The House Judiciary Committee rules require that there be a Memorandum of Understanding when there is a joint committee hearing precisely to work out questions like this.

And it was our understanding that this panel would have both Mr. Newell and Ms. Slade. I really think they should be together.

Mr. JORDAN. Well, obviously, we think different.

And I will just let the gentleman know that this committee, the Oversight Subcommittee, has set several hearings, frankly, in the last few weeks. Mr. Cartwright can attest to this—where we have had several panels, not all witnesses, minority witnesses, were on the first panel; sometimes they were only on the second panel. This is not unprecedented at all for this committee. My understanding is you have had 10 days notice of how this hearing was going to be conducted.

Mr. NADLER. I will simply say that I am glad to hear that the Oversight Committee operates that way. This is a joint hearing of two committees. The rules of one of them, the Judiciary Committee, require that there be a Memorandum of Understanding, and that this kind of question be in that memorandum. My understanding is that—my understanding as of this moment is that, in effect, the rules of the Judiciary Committee are being violated by the absence of such a Memorandum of Understanding.

Second, we had understood, it had been our information that there be one panel. I just think in the interest of efficiency. I have no particular reason beyond that.

Mr. JORDAN. If you have no particular reason beyond that, you are making an awful big deal about it.

Mr. NADLER. Well, I do think the rules should be followed, but I am willing to withdraw any objection at this time.

Mr. JORDAN. I think the rules should be followed, too, and this is the precedent of this committee.

The second panel is about the whistleblower. It is about Mr. Newell, and that is why he is on the second panel.

There will be a third panel. Ms. Slade will be recognized at that time, and I will stay as long as we have to stay. We will take as many questions as Mr. Nadler may have.

With that, we will—I will swear in our second panel. Mr. Fredrick Newell is a small business owner and minister from St. Paul, Minnesota and is a whistleblower in the False Claims Act against the City of St. Paul. Pursuant to committee rules, all witnesses will be sworn in before they testify. Please raise, if you would, Mr. Newell stand and raise your right hand.

[Witness sworn.]

Mr. JORDAN. Let the record show that the witness answered in the affirmative.

Mr. Newell, we are going to take your testimony, and then we will swear in Mr. DeVinke here in a second.

So you are recognized for 5 minutes more or less, and we have been pretty generous as you saw from the Senators' statements. But you have got approximately 5 minutes. There is a lighting system there. Just pull that microphone close and the floor is yours.

**STATEMENTS OF FREDRICK NEWELL, ST. PAUL, MINNESOTA,
ACCOMPANIED BY THOMAS DEVINCKE, MALKERSON GUNN
MARTIN LLP**

Mr. NEWELL. Thank you, Mr. Chairman.

I do have a prepared statement. I do want to first and foremost thank God for this opportunity, and I do count it as an opportunity.

And then, as it is proper and customary, I want to thank the congressional committee for this opportunity to present before you as Representatives of our great Nation facts and concerns that have brought each of us to this occasion.

I also want to thank my attorney here, Mr. Thomas DeVincke, who is to my left, though has yet to be introduced. He has been with me for over 8 years in this matter. But yet, in other words, since 2005, but if the truth be told, he is yet to even receive any compensation for his actions.

I am here today to bring light to my actions and intent to work for over 13 years to create opportunities for the minority and low-income community in St. Paul and count this once again as an opportunity to that end.

I will be making constant reference in my testimony to a HUD program called Section 3. Section 3 is a Federally mandated HUD program that was created to address the national ills facing this Nation in 1968. The facts of that day were highlighted by the Kerner Commission, formed by President Lyndon Johnson. The Kerner Report concluded that this Nation was moving toward two societies, one black, one white, separate and unequal. His finding was that the riots of 1968 resulted from the black community's frustration at a lack of economic opportunities. The report urged legislation to promote racial integration and to enrich slums, primarily through the creation of jobs, job training programs, and decent housing.

To mark the 13th anniversary of the Kerner Report, the Eisenhower Foundation sponsored two complementary reports, "The Millennium Breach" and "Locked in the Poor House." "The Millennium Breach," co-opted by former Senator and Commissioner member Fred Harris, Fred R. Harris, found the racial divide had grown in the subsequent years within the city, unemployment at crisis level.

"The Millennium Breach" found that most of the decade that followed the Kerner Report America made progress on the principal fronts the report dealt with, race, poverty and inner cities. Then progress stopped and in some ways reversed by a series of economic shocks, and trends, and the government's actions—and the government's actions and inactions.

Harris reported to date, 30 years after the Kerner Report, there is more poverty in America. It is deeper, blacker, and browner than before. And there is more concentrated in the cities, which have become America's poor houses. From the Kerner Report, the Section 3 legislation, 24 CFR part 135 was passed by Congress in 1968. The result in Section 3 program was established to ensure that contracting, training, and employment opportunities were provided to low- and very low-income individuals and communities where HUD funds were expended.

One of the issues here today must be the intent or the intended outcome of Section 3. That intended outcome is employment. It is training and contracting opportunities for the communities in this country where those Federal funds are being spent. Basically, Section 3 epitomizes the essence of fair trade by requiring that the

community, that the local community benefit from the opportunities in their community.

Let us be clear, Section 3 focuses on these three things, employment, training, contracting, for the low-income community.

Section 3 is a race-neutral program that takes into account that the Federal Government is spending money in these impoverished areas and seeks to use those funds to create those opportunities that I have mentioned for the residents of those areas. Those aren't just the inner cities. HUD funds are also expended in remote areas such as the Appalachian Mountains. HUD funds are spent in Wyoming, in Idaho, any State or city where poverty or divestment has occurred.

Section 3 is not a new tool but a critical tool for the low-income community. The same principles were seen in the Work Progress, or Project Program, as some called it, or the Works Project Administration of the 1930s, and 1940s.

As noted in a 2011 Section 3 report by the American University School of Public Affairs, entitled "Section 3 Regulation As Policy," the merits—that report states, The merits of Section 3 are compelling, as they aim to provide preference to low- and very low-income persons and businesses as a means to promote self-sufficiency among this constituency and correct for an unlevel playing field in the labor market.

However, through its nearly 43 years, it has encountered a number of barriers to successful implementation, including challenges in collecting accurate and useful data from HUD funding recipients, confusion, or lack of awareness on the part of the funding recipients and the intended beneficiaries, and a lack of training to qualify low and very low income people for the Section 3 opportunities.

It is from this aim that I spent over 13 years of my life pursuing opportunities for the low-income community, both for St. Paul and nationally.

So, as you hear the term "Section 3," please think of the true issues, employment, training, and contracting opportunities for people who really want and need them just like in 1968.

Mr. NEWELL. Now I have elected to use the remainder of my time to read into the record a letter that I had written or drafted back in January of this year. This letter was and is addressed to Attorney General Holder and Secretary Donovan. I had proposed and intended to send this out back in January, but, unfortunately, my attorneys felt it best that I did not.

Mr. JORDAN. Mr. Newell?

Mr. NEWELL. Yes.

Mr. JORDAN. We may just have you enter that—we can enter that letter into the record instead of having you read that, if that's okay.

Mr. NEWELL. That is fine.

Mr. JORDAN. Okay. Thank you for your testimony.

[Prepared statement of Mr. Newell follows:]

Fredrick Newell
2040 9th Avenue #314
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January 31, 2013

The Honorable Shaun Donovan
Secretary
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
Washington, DC 20530

Sirs,

My name is Fredrick Newell and I am writing to each of you in as much as you are heads of federal agencies of which I have become all too familiar within the past four years. The experience of those years are a typecast of the 45 years of broken promises and rejection experienced by the Section 3 community of this country.

I am the relator/whistleblower of the Section 3 False Claim Act lawsuit, United States ex rel. Newell v. City of St. Paul ("Newell"), that was used by HUD and DOJ to leverage a "global resolution" as so characterized by Tracy Schmaier, Justice Department spokeswoman.

I write this letter in hopes of bringing to your attention the discriminatory effects of the actions of the Department of Justice and Department of Housing and Urban Development on the Section 3 community and on me. These actions were dubbed the "Quid Pro Quo" by the US Congressional Judiciary Committee and the Committee on Oversight and Government Reform. I, through this letter, hope to confer upon you the importance of the Section 3 efforts that were sacrificed and the need for corrective actions on your respective parts.

Ironically, the Section 3 community has been subjected to discriminatory effects in the name of promulgating disparate impact regulations.

The Section 3 community of St. Paul has been fighting to secure opportunities afforded by the federal regulations 24 CFR Part 135, a.k.a. Section 3, for over 30 years. My efforts to secure Section 3 opportunities began in the year 2000. As a construction contractor, I helped to train over 50 individuals in the various phases of hazardous waste remediation in hopes of providing opportunities for employment. I approached the City of St. Paul regarding contracting opportunities and was told that the City was not taking on any new contractors. I tried for over five years to get the City to implement Section 3 to no avail.

In 2006, I filed a Section 3 lawsuit against the City in federal court, alleging non-compliance with the Section 3 statute and regulations. The case was dismissed on terms of "no private right of action".

In 2008, I brought a series of administrative complaints to HUD alleging violation of Section 3 by Saint Paul. In 2009, based on evidence that I filed, HUD issued a finding of noncompliance against the Saint Paul substantiating each allegation I had made. In 2010, HUD negotiated a voluntary compliance agreement (or "VCA") with Saint Paul. During the VCA process, HUD neglected to provide any relief for me and very little relief for the Section 3 community, over my objections and subsequent appeal.

Between 2010 and 2011, HUD and DOJ, citing interference with the FCA settlement negotiations, requested that I cease further efforts to work with the City of St. Paul, despite evidence that the City of St. Paul remained in non-compliance with the VCA and the Section 3 regulations.

HUD and DOJ constantly represented that I would be made whole through the settlement of my false claim lawsuit.

I write this letter at a time when information has come to light, through congressional inquiries, supporting the allegation that key individuals in your agencies have chosen to leverage my years of Section 3 advocacy in St. Paul to secure protection for the disparate impact theory.

According to the statement from Tracy Schmalzer, my FCA lawsuit was leveraged to achieve a global resolution of which I was not allowed to participate or benefit, thus negating the inference of it being a "global resolution".

According to information obtained from the on-going investigation of the Judiciary Committee and the Oversight Committee, the purpose of the global resolution was to induce the City of St. Paul into withdrawing the *Magner v. Gallagher* case from the United States Supreme Court docket. Additionally, the City of St. Paul has admitted that DOJ and HUD agreed to reverse its support for my false claim act lawsuit "Newell" based on the terms of a global resolution (*Quid Pro Quo*).

According to the terms of the *Quid Pro Quo*, the City of St. Paul withdrew the *Magner v. Gallagher* case from the Supreme Court docket; on or about February 9, 2012, DOJ notified me of its intention to decline intervention in the FCA case; DOJ and HUD accomplished its goal to protect the disparate impact theory and the US government was able to hold numerous mortgage lenders accountable under the disparate impact theory resulting in the well publicized mortgage settlements.

According to information from the congressional inquiries, DOJ and HUD appear to have provided the City with information and/or assistance in defeating my false claim lawsuit, *United States ex rel. Newell v. City of St. Paul*.

Accordingly, DOJ and HUD accomplished its goal to protect the disparate impact theory and successfully negotiated settlements worth tens of billions of dollars with the banks. The City of St. Paul has for the time being avoided the consequences of its fraudulent actions – and potential liability of over \$200M. The Section 3 community and I, as the whistleblower, received no recovery through the False Claim Act lawsuit or restitution from the voluntary compliance agreement. Further, I have received no acknowledgement or due process regarding the outstanding Section 3 appeals and complaints since 2010.

I imagine there are a number of times where such decisions or practices are common and deemed "for the greater good". Ironically, HUD and DOJ have caused the very effects that the disparate

impact regulations were designed to address. Further, your agencies aligned itself with an accused offender of the disparate impact theory in order to "protect the disparate impact regulations"

It is my belief that the actions of your respective agencies have caused great harm to the Section 3 community locally and nationally. It is my belief that there were less discriminatory alternatives available whereby HUD and DOJ could have achieved the desire outcome without compromising the Section 3 efforts and gains that we so desperately need.

During the last eight years, I have been a staunch advocate for revising the Section 3 statute and regulations. I have worked along with Congresswoman Nydia Velazquez's office, the Washington Section 3 office and with a number of Section 3 advocates to craft changes to the Section 3 statutes and regulations, with particular interest of including a private right of action.

I participated in the 2010 Section 3 Listening Forum hosted by the Section 3 office and provided best practices and other comments in order to strengthen the Section 3 program. In other words, I'm not just a whistle-blower. I've worked diligently to secure the Section 3 opportunities that have been denied the low-income community.

The False Claim Act lawsuit was heralded by the present administration as a potential game changer for compliance with HUD regulations. My Section 3 false claim lawsuit was heralded, even by HUD itself, to be a catalyst for Section 3 compliance, a non-violent catalyst. My Section 3 false claim lawsuit was not rejected based on the merits of the case but rather used as leverage due to its perceived value. The rejection has removed an important tool from the Section 3 community's arsenal.

The Section 3 regulations were promulgated based on the HUD Act and is not governed by the Fair Housing Act as the disparate impact regulations. The Section 3 program, when properly operated, is an opportunity generating, proactive, job creating program/regulation while the disparate impact regulations are preventive and reactive by design. I do not contend with the need for disparate impact regulations. I do, however, contend with elevating the need for disparate impact regulations over the unfulfilled promises of the 1968 HUD Section 3 regulations.

Mr. Holder/Donovan, the Section 3 community of St. Paul can not afford to wait another forty years or even ten years for enforcement of Section 3. The Section 3 community can not afford to wait another four years for the next false claim lawsuit to navigate the legal process.

It is my belief that the Department of Justice and Department of Housing and Urban Development have it within their power to remedy the on-going injustice perpetrated against the Section 3 community.

I encourage you to take corrective actions that address the harm caused the Section 3 community and myself.

Respectfully,

Fredrick Newell

Testimony before the Committee on Oversight and Government Reform
 By
 Fredrick Newell

First and foremost, I want to thank God for this opportunity... and then as is proper and customary, I want to thank the Congressional Committee for this opportunity to present before you as representatives of our great nation, facts and concerns that has brought **each of us to this appointed occasion.**

In as much as my attorney, Thomas Devincke, has been introduced, I just want to take this opportunity to thank him for his help over the past eight years. This man has been my legal counsel, my shadow, since 2005 and to date, have received no monetary compensation.

I will make constant reference in my testimony to a HUD program called Section 3. Section 3 is a federally mandated HUD program that was created to address the national issues facing this nation in 1968. The issues of that day were highlighted by the Kerner Commission formed by President Lyndon Johnson. The Kerner Report concluded that this nation was moving towards two societies, one black, one white- separate and unequal. Its finding was that the riots of 1968 resulted from the Black community's frustration at a lack of economic opportunities.

The report urged legislation to promote racial integration, and to enrich slums, primarily through the creation of jobs, jobs training programs, and decent housing. To mark the thirtieth anniversary of the Kerner Report, the Eisenhower Foundation sponsored two complementary reports, The Millennium Breach and Locked in the Poorhouse. The Millennium Breach, co-authored by former Senator and Commission member Fred R. Harris, found the racial divide had grown in the subsequent years with inner-city unemployment at crisis levels.[8]

The Millennium Breach found that most of the decade that followed the Kerner Report, America made progress on the principal fronts the report dealt with: race, poverty, and inner cities. Then progress stopped and in some ways reversed by a series of economic shocks and trends and the government's action and inaction.

Harris reported, "Today, thirty years after the Kerner Report, there is more poverty in America, it is deeper, blacker and browner than before, and it is more concentrated in the cities, which have become America's poorhouses." [9]

From the Kerner Report the Section 3 legislation, 24 CFR Part 135, was passed by Congress in 1968.

The resulting Section 3 program was established to ensure that contracting, training and employment opportunities were provided to low and very low-income individuals in communities where HUD funds were expended.

⁸ Harris, Fred R, and Lynn A Curtis, eds. Locked in the Poorhouse: Crisis, Race, and Poverty in the United States. Lanham, MD: Rowman & Littlefield Publishers Inc. 1998.

⁹ Harris

So one of the issues here today is the intended outcome of Section 3. That intended outcome is employment, training and contracting opportunities for the communities in this country where federal funds are being spent. Basically, Section 3 epitomized the essence of fair trade by requiring that the local community benefits from the opportunities in their community.

Let's be clear, Section 3 focused on creating employment, training and contracting for the low-income community.

Section 3 is a race-neutral program that takes into account that the federal government was and is expending federal funds in impoverished areas and seeks to use those funds to create economic opportunities for the residents of those areas. Those areas aren't just the inner cities. HUD funds are also expended in remote areas such as the Appalachian Mountains. HUD funds are expended in Wyoming and Idaho, any State or City where poverty or divestment has occurred.

Section 3 is not a new tool. The same principles can be seen in the Works Project Administration of the 1930's and 40's.

As noted in a 2011 Section 3 Report by the American University, School of Public Affairs, entitled Section 3: Regulation as Policy....."The merits of Section 3 are compelling, as they aim to provide preference to low and very-low income persons and businesses as a means to promote self-sufficiency among this constituency and correct for an "uneven playing field" in the labor market. However, through its nearly 43-year history, it has encountered a number of barriers to successful implementation, including challenges in collecting accurate and useful data from HUD funding recipients, confusion or lack of awareness on the part of the funding recipients and intended beneficiaries, and a lack of training to qualify low and very low-income people for Section 3 opportunities."

It is from this aim that I have spent over thirteen years of my life pursuing opportunities for the low-income community both of St. Paul, MN and nationally. So as you hear the term Section 3, please think of the true issue.....employment...training...and contracting opportunities for people who really want and need them, just like in 1968.

Now I have elected to take the remainder of my time to read into the record one of the documents that I first drafted in January of this year. This is a copy of a letter that I intended to send to Attorney General Holder and Secretary Donovan. Because I have this shadow, Mr. Devincke, and pending legal actions I was advised not to send the letters at that time but feels that it is important and pertinent to this proceeding. Hopefully, the committee will note and understand the tense of the language used in the letter.

Mr. JORDAN. It is my understanding Mr. Newell's attorney, Thomas DeVincke, is present to assist and advise his client this morning and may be called upon to answer questions on behalf of his client. Pursuant to committee policy, we will now swear in Mr. DeVincke. However, the subcommittees recognize that Mr. DeVincke is not here as an independent factual witness but, rather, here in his capacity as counsel to Mr. Newell.

Please raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, whole truth, and nothing but the truth, so help you God?

Mr. DEVINCKE. I do.

Mr. JORDAN. Let the record show that Mr. DeVincke answered in the affirmative.

Mr. NADLER. Mr. Chairman?

Mr. JORDAN. The gentleman from New York.

Mr. NADLER. Let the record show that I object to Mr. DeVincke's being sworn. I know he is going to be because of force majeure. But the fact is, his testimony was not noticed, and it's improper under the rules of the House.

If he's not testifying, why was he sworn? And if he's answering questions, he's testifying. And it was not noticed. It's a violation of the Rules of the House. I object.

Mr. JORDAN. Objection is noted.

The gentleman from Arizona, the chairman of the Constitution Subcommittee, is recognized for his 5 minutes of questioning.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Newell, I want to express a sincere gratitude to you. I know that, you know, this place is replete with political nuances, and I understand it; my own comments will be interpreted as such. But people like yourself, regardless of what the outcome of this hearing is, are the ones that really create the kind of forward movement in this country that is important to all of us. And I appreciate your courage and your tenacity and just your heart.

Mr. NEWELL. Thank you.

Mr. FRANKS. And, with that I guess the first question I'd like to ask you, just in your own words—I know sometimes we're all called upon to read statements. I have to do it all the time, and it's kind of a challenge to really get people to know what really you're feeling. But can you just tell me, tell us all, what, honest to God, is your goal in bringing this False Claims Act case in the first place?

Mr. NEWELL. My aims were accountable follow-up, and I'm referring to bringing the False Claim Act lawsuit. It was a follow-up to actions to make a program work in St. Paul that we found would help our people.

When I first started, I started somewhere around 2000 pushing for Section 3. And as I did, we found that St. Paul didn't have a Section 3 program. So I went from that point of encouraging them to about 2006, when I finally, after St. Paul deciding they weren't going to start this program, I decided to file a Federal case in district court. As I did, this district court kicked the case out, basically saying that Section 3 had no private right of action in it.

From that point, I went another 3 years of trying to encourage St. Paul, the public housing agency, and the city to do Section 3,

writing emails, encouraging them, talking to them, talking to the Section 3 program, providing them with information to try to get this program off the ground. And when they didn't do it, then in 2009 is when I filed and encouraged HUD to come into town.

But had also looked at HUD's programs, their solutions not to be adequate to what I was really hoping for. So, from that point, I also simultaneously, or within the months thereafter, filed a False Claim Act lawsuit.

Mr. FRANKS. Well, I want you to feel free to consult with your counsel on any question here. But when DOJ says you were free to continue your case without them after this *quid pro quo*, it doesn't sound like it's really that simple to me, and I'd like for you to address that.

And, essentially, how did DOJ's secret deal not to intervene in your fraud case affect your chances of success in the court? The Senator tried to respond to that to some degree already, Senator Grassley, but I would like to hear your perspective on how it affected the potential success of your case.

Mr. NEWELL. There is a—I'm told by my attorney there is a political—I mean, a legal land mine that I have to try to dodge here. And so if I get kicked under the table, I hope you will excuse my reactions.

Mr. DEVINCKE. Congressman, the issue as addressed by Senator Grassley, who I think got it largely correct, relates to a jurisdictional defense that's available to claims that are being pursued by a relator after a case is declined by the Department of Justice.

That question and the answer to that question touches also, Mr. Chairman, on your question about why Mr. Newell pursued Section 3 complaints at every level and has been doing it for the last 8 years.

In this case, which has been dismissed, as has been pointed out, by the United States District Court but which is currently on appeal to the United States Court of Appeals for the Eighth Circuit, St. Paul successfully raised a public disclosure bar defense and convinced, prevailed upon the court to conclude that Mr. Newell was not an original source of the allegations upon which the fraud counts are based.

That defense is not available against claims that are pursued by the United States against the United States. That defense can still be raised as to a relator in a case that is accepted by the Department of Justice, as we believe this case would be. But Mr. Newell, importantly, has never pursued these matters for personal gain.

And the False Claim Act played an important role in Section 3 enforcement on the nationwide model. The only available remedies available other than a False Claim Act for Section 3 enforcement were administrative complaints before HUD, which are relatively finite proceedings defined jurisdictionally by HUD to include matters that have arisen in the past 6 months. If you've ever seen the one-page HUD complaint form for a Section 3 complaint, in a sense that form itself confines the jurisdiction of HUD on those administrative complaints. It's quite limited.

And as Mr. Newell pointed out, he attempted a direct complaint against St. Paul alleging a violation of Section 3, and, again, a jurisdictional defense was raised that the court lacked subject-matter

jurisdiction because the statute did not confer an implied private cause of action. Respectfully, Mr. Newell and I disagreed with that conclusion, but we did not take an appeal, mindful that we didn't want to create some bad law in the circuit. I think that issue has been raised, which is always on an attorney's mind no matter what they are working on; I agree with that thought.

So point being, even if the public disclosure bar was raised on an intervened case and Mr. Newell's relator standing was attacked, the lawsuit still would have served a great purpose for Mr. Newell's Section 3 advocacy. The False Claim Act filled in or provided another level of enforcement for Section 3 that HUD had not pursued. To my knowledge, it was the first use of the False Claim Act in this specific context, first false certifications of Section 3 compliance. These cases are filed under seal, but enough time has gone by since it was filed, and I believe it's only one.

Mr. JORDAN. The gentleman's time has expired.

We'll now turn to the gentleman from Pennsylvania, Mr. Cartwright.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

Now, I have some legal questions, Mr. Newell. And I'm going to invite your counsel, Mr. DeVincke, to jump right in and help you, but, certainly, I don't mean to preclude you, Mr. Newell, from answering any of these questions. And I welcome you here today, the both of you gentlemen.

We heard Senator Grassley testify earlier today, and he talked about this defense, the public disclosure bar defense. And the idea is that you're not really a whistleblower if you're complaining about things that are available to the public in general. And the idea is a qui tam lawsuit can be dismissed because if it's public information, there really isn't a whistleblower involved in this particular case.

Am I getting that right, Mr. DeVincke?

Mr. DEVINCKE. As right as I'd probably get it, sure.

Mr. CARTWRIGHT. All right. So that Senator Grassley did testify that, in this case, if the DOJ had pursued the case, then the public disclosure bar would not have been available as a defense. And that wasn't quite right, was it, Mr. DeVincke?

Mr. DEVINCKE. You want me to disagree with Senator Charles Grassley about the False Claim Act. You know, I was not top of my class in law school, so I'm not going to take that invitation, but I'll just say this: That defense is not available against the United States and against the United States bringing its claim. It can be raised as to the relator at any time is my understanding.

And I'll just say this: This case is still on appeal. That issue could be litigated at a later date. That's my answer.

Mr. CARTWRIGHT. So that Senator Grassley's statement was a bit of a broad-brush statement. It's not quite as clear as he said it, is it?

Mr. DEVINCKE. Things are never that clear, are they? It was a bit of—

Mr. CARTWRIGHT. Thank you.

Mr. DEVINCKE. —a broad statement.

But I would say, I think—to be fair, he's not here—I think Senator Grassley was mindful of the amendments that would not apply

to this case, which was prior filed. This is a 2000, and—I can't speak for the Senator. I'll just say this case was before the most recent amendments to the act, and perhaps he had those in mind. But it was a broad statement, yes.

Mr. CARTWRIGHT. And, now, Mr. DeVincke, you started to go into your own pedigree as an attorney, and I don't mean to interrupt you on that. Now, can you give us here in the hearing room an idea of how many False Claim Act cases you have litigated to verdict or judgment other than the Newell case?

Mr. DEVINCKE. This is the only False Claim Act I've worked on, and I don't—I don't hold myself out as a False Claim Act expert. I am an expert on Mr. Newell and Section 3.

But with that in mind, I co-counseled with Michael Allen of Relman Dane here in D.C., who, to my mind—and it might be too strong a word, but he in some ways pioneered the use of false certifications in a False Claim Act lawsuit regarding false certifications made to HUD, and he did that in the Westchester County case, which is of some renown in the practice of False Claim Act litigation. That case—

Mr. CARTWRIGHT. I don't mean to cut you off. I only have a limited—

Mr. DEVINCKE. Of course.

Mr. CARTWRIGHT. —time, Mr. DeVincke. And I appreciate that. You do not hold yourself out as an expert in False Claim cases, correct?

Mr. DEVINCKE. That is correct.

Mr. CARTWRIGHT. All right. We do have an expert in False Claim cases here today, and it's attorney Shelley Slade. Now, you've heard of her, I take it.

Mr. DEVINCKE. I have.

Mr. CARTWRIGHT. Okay.

Mr. DEVINCKE. And I do not mean to occupy her panel if she's supposed to be here. So my apologies if I'm in her—

Mr. CARTWRIGHT. I think you're a lot safer not being on her panel.

All right, so here's my question. The case of *Rockwell v. United States ex rel. Stone*, that's a False Claims case, right?

Mr. DEVINCKE. It is.

Mr. CARTWRIGHT. And you are familiar with that, are you?

Mr. DEVINCKE. I'm having, like, law school flashbacks and nightmares right now, but, yeah, I've heard of the case. I'm not intimately familiar with it.

Mr. CARTWRIGHT. Is it not the case that *Rockwell v. United States ex rel. Stone*, which is a qui tam False Claims case, is the governing United States Supreme Court case on the issue of whether the public disclosure bar would be a defense if the Department of Justice had pursued the claim?

Mr. DEVINCKE. Correct.

Mr. CARTWRIGHT. You're aware that that's the governing law?

Mr. DEVINCKE. That's correct. I am.

Mr. CARTWRIGHT. All right.

Mr. DEVINCKE. And I think I agree that the defense could still be raised as to the relator, but the United States would proceed with the claim.

And I hope I've been clear about how important that was to Mr. Newell, because Section 3 really suffered from a lack of visibility and enforcement. And the intervened case, whether a motion was brought as to the relator under the jurisprudence controlling a lot that I mentioned—

Mr. CARTWRIGHT. I have one more question—

Mr. DEVINCKE. Oh, sure. I'm sorry.

Mr. CARTWRIGHT. —Mr. DeVincke. The question is, not ever having handled a False Claims case or a qui tam case other than this one, when you agreed to take the case, did you have any frame of reference to say whether this was a good case, a bad case, or a better-than-average case? Did you have any frame of reference from your own practice?

Mr. DEVINCKE. Frame of reference? I researched the area of law generally and spoke to attorneys who practiced in the field. Is that frame of reference what—

Mr. CARTWRIGHT. But from your own experience, you had no way of judging whether this was better than other qui tam cases you had handled, because you never handled any other such cases. Am I correct in that?

Mr. DEVINCKE. Well, respectfully, I had worked on Section 3 issues with St. Paul—

Mr. CARTWRIGHT. I yield back, Mr. Chairman.

Mr. DEVINCKE. —for many years, and I was well aware that there are certifications to the United States Government were made in a knowingly false manner. HUD understood that. The Department of Justice clearly understood that. There were no questions in my mind about the strength of the case, in that there were false certifications for which payment was made.

You know, the issues we would look at, materiality is always going to be a thorny issue. So you look at whether, you know, it's a condition of payment versus a condition of participation. Being in the Eighth Circuit, you look at the Vigil case.

And—I'm sorry, Chairman.

Mr. JORDAN. That's fine. I thank the gentleman.

The gentleman from Florida is recognized, Mr. DeSantis.

Mr. DESANTIS. Thank you, Mr. Chairman.

Mr. Newell, thank you for coming here today.

It seems to me whistleblowers are supposed to and can serve a vital function in highlighting governmental abuses so that waste and fraud can be remedied and that they shouldn't be subordinated to the ideological predilections of a political appointee at the Department of Justice. And I would just note that the Department of Labor, of which Mr. Perez is nominated to be the head of, that they have roughly 20 whistleblowing statutes that are implicated in that agency. And so I think this is an important issue.

And I just wanted to ask you, Mr. Newell, when you're doing this as a whistleblower, bringing a case like that, is that something that's easy to do, or was it difficult for you?

Mr. NEWELL. Actually, it is difficult if you understand the potential kickback, if you would, from the communities that you're in. Everything we've done in—on Section 3 have not been well received in St. Paul. And thereby our first actions to get Section 3 off the ground was rebuffed. And when we filed a case in 2005, then there

was some rebuffing. And as such, our company suffered. And even to when we brought the HUD complaints, we were even retaliated against. And even to this date, there is still—as you say, it’s not easy. There is much pushback.

Mr. DESANTIS. Thanks. And my next question, I think you spoke to it. So you do feel that you did face retaliation through this process?

Mr. NEWELL. We were—we filed a number of retaliation cases. And I say “a number” based on the fact that that—our initial filings with HUD was against St. Paul, against the St. Paul Public Housing Authority, against another entity in the city, the health department in Ramsey County.

And St. Paul Public Housing Authority was found—HUD did investigate and found that the housing authority had retaliated against us. The Ramsey County Health Department retaliation complaint was investigated maybe 2 years after the complaint was lodged. And they stated they could—I believe the language was they could find no connection between the persons whom we say was involved in the retaliation and the ones who actually made the decision.

And then we held presently a retaliation complaint against St. Paul itself that has yet to be addressed, where we had projects we bidded on or where we had opportunities we sought, and the city did not respond to us to let us take part in those projects. We basically documented for 2 years after they did a voluntary compliance agreement where we went to them, kept contacting them, saying to them we want these opportunities, and the city refused to let us in the door.

And as a matter of fact, finally, we was asked by Department of Justice and HUD, or at least through—I believe it was through HUD that we stop contacting the city pressing for those things, because there seemed to be some issue of us pressuring them.

Mr. DESANTIS. Are you going to add something?

Mr. NEWELL. Yes. My attorney was just kind of pointing out a point that may be well introduced. And that is, our companies in time past, when we first started this, or, better still, as you heard in the introduction, we started in 1995. Our companies had great potential. As companies, we had approximately eight different disciplines that we operated in. And from the year 1997—we started in 1995. About year 1997, we were working with the Minneapolis public housing program, and they had a Section 3 program or at least were producing one. As such, our revenues went from the basic first year, second year of \$20,000, \$30,000, \$100,000 to where we begin to peak out as \$300,000, \$400,000 worth of work from ’97 through 2000, where we had begin to do work and quality work. And so we were doing demolition, asbestos abatement, lead abatement. We had a number of other areas. We were licensed as residential builders.

So within that period of time, we had even got accredited, according to our growth, that we were awarded with two awards as Entrepreneur of the Year and/or runner-up in a certain community. After we started pushing for Section 3 in 2000, then in St. Paul a lot of my efforts went toward trying to get that program off the ground by a factor of contacting the city, saying to them, “We can

help with you this program. We've got people we can work with." We even went to the community development corporation then, got them to nominate low-income individuals from their communities, saying to them, "If you will nominate them, we will put them into the work we're doing. We'll get them trained using HUD dollars, and we will get them into jobs." Nothing prevailed. We got the people trained, but no work came out of it.

And so, as a company, when we pushed for Section 3 in St. Paul, we started getting instant pushback. We were told, we're not hiring, we're not taking on any new contractors. And the more we pushed, the more resistance.

Mr. DESANTIS. Great. Thank you for that.

I see my time has expired, and I yield back.

Mr. JORDAN. The gentleman from New York is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Newell, it seems to me we're really talking about two different things here. One is Section 3.

Mr. NEWELL. Go ahead.

Mr. NADLER. And the other is the whistleblowers and qui tam. Now, in 2007, you filed a Federal lawsuit against the city of St. Paul, Nails Construction Company et al. v. City of St. Paul.

Mr. NEWELL. 2006.

Mr. NADLER. 2006, excuse me. In that lawsuit, you alleged the city had failed to comply with Section 3 in a number of ways.

Mr. NEWELL. Correct.

Mr. NADLER. Why was the case dismissed?

Mr. NEWELL. The case was dismissed because the Federal courts, not just on my case but in a number of cases, were determining that the language that enforced Section 3 did not provide for a private right of action for individuals to bring this case before the Federal courts.

Mr. NADLER. But wasn't it also true that the court found that you had not been on the contracts and had no personal injury in that case—

Mr. NEWELL. There was—

Mr. NADLER. —and, therefore, no standing?

Mr. DEVINCKE. I can comment.

Mr. NEWELL. Please.

Mr. DEVINCKE. The court in dicta was not the holding of the court. The court in dicta mentioned that, because the plaintiff had not identified a contract to which they would be entitled under Section 3, they lacked Article 3 standing to pursue the claim.

Mr. NADLER. Exactly, they lacked standing. So, in other words, Mr. Newell lacked standing, and the case had to be dismissed.

Now, presuming—

Mr. DEVINCKE. If I may—and I understand the time is short—we respectfully disagree with that.

Mr. NADLER. You disagree with the court. Fine. But that was the holding of the court.

Mr. DEVINCKE. Correct.

Mr. NADLER. Mr. Newell, presuming you were able to overcome the standing issue and other issues, do you think that Congress should work to create a private right of action under Section 3?

Mr. NEWELL. I appreciate the question. That's something that I've been pushing for for the last—since that time, since 2005.

Mr. NADLER. Okay.

Mr. NEWELL. A lot of our work with Congresswoman Velazquez has been toward that end.

Mr. NADLER. Well, I would agree with you. But what you're really saying, or at least my conclusion about what you're really saying is that your beef is with Congress for not creating the private right of action and not really with what we're talking about here today.

Now, would you have—the False Claims Act, as we know, we have discussed this already—well, if you had—if Congress had created that private right of action, you would not have needed to pursue a False Claims Act case, correct?

Mr. NEWELL. That may be so.

Mr. NADLER. You would have pursued—

Mr. NEWELL. I think part of it would've been determined by the possible remedies for the community that we were seeking.

But you made a statement. You said the beef is regarding not having a private right of action.

Mr. NADLER. Well, the chief—

Mr. NEWELL. I take—and it would have been in one of my—in my statements. I take issue only to the point that my beef, I guess, goes a little deeper. And I don't like the term "beef," but since you used it—

Mr. NADLER. All right, but go ahead.

Mr. NEWELL. Okay. We pushed for this in 2005 hoping to get for that community because of the problems that were in that community. And believe me, Minneapolis-St. Paul is considered the worst in the country. Please, let me—

Mr. NADLER. Excuse me, I only have 5 minutes—we know—I'll grant that St. Paul isn't very good on this stuff. So just go ahead.

Mr. NEWELL. Okay, then my point is this: We pushed Federal courts. That did not work. We went to HUD. We did not go to HUD first because we were concerned that HUD would only do administrative actions. When we finally got to HUD, we got administrative actions that was very limiting. But we were also encouraged by HUD that they would support this False Claim Act lawsuit. And, as such, we saw this as the true opportunity.

Mr. NADLER. Okay. So HUD said, or someone at HUD said they would support a False Claims Act. But, of course, you realize that HUD has to go to the Department of Justice, which makes all litigation decisions for the Federal Government.

Mr. NEWELL. And so when we met with the Department of Justice and HUD in St. Paul, it's similar to how I kind of have been meeting individuals here. There are times when individuals will come to you and shake your hand and say, "Good job." That's what—that's the response we got when we met with Justice and HUD, that they felt this was a good case.

Mr. NADLER. Okay.

Mr. DEVINCKE. I do want to comment generally that an express private cause of action would go a long way to address all of the flaws in the enforcement model that we talked about earlier.

Mr. NADLER. I certainly agree with that, and we should do that.

Now, we have discussed in this hearing so far the public disclosure bar which prohibits lawsuits on the False Claims Act by people who do not know anything beyond—who aren't alleging something that isn't publicly already known.

Now, I gather that you are barred, in effect, by the False—not by the—by the public disclosure bar. You said that had the Federal—had the Justice Department sued, that would have eliminated that problem. But—no?

Mr. DEVINCKE. It doesn't take the issue completely out of the case—

Mr. NADLER. Yeah, I was coming to that. My understanding is that Mr. Newell would still have been dropped from the case as a result of the public disclosure bar, but the Justice Department could have continued on its own, the United States could have continued on its own.

But, in effect, what you're saying is that the Federal Government should have had its own lawsuit with Mr. Newell out of it.

Mr. DEVINCKE. No. We would never say that. We're saying that—

Mr. NADLER. But that's what you're saying would have happened, at best.

Mr. DEVINCKE. I'll say this: I believe Mr. Newell is an original source, and I'm hopeful that on appeal the Eighth Circuit will agree with me. He does have independent direct knowledge of the fraud. And because that issue is on appeal, all I can respectfully say is, you know, I don't want to speculate in that direction. I will say this: The public disclosure bar can still be an issue in a case even on an intervened case, generally speaking.

Mr. NADLER. I see my time has expired. Thank you.

Mr. JORDAN. I thank the gentleman.

The chairman of the Judiciary Committee, the distinguished gentleman from Virginia, is recognized.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Chairman, I would like to start by reminding folks why we're here today, which is to examine a secret deal struck by a senior Justice Department official, Assistant Attorney General Thomas Perez. This secret deal was brokered by Mr. Perez with the city of St. Paul in order to prevent a case from being decided by the Supreme Court. In this exchange, Mr. Perez pressured officials at both the Justice Department and the Department of Housing and Urban Development to overrule career attorneys and abandon two pending False Claims Act cases against St. Paul. This quid pro quo potentially cost American taxpayers over \$200 million.

The Judiciary and Oversight and Government Reform Committees have been conducting an investigation into this matter for over 6 months. And I would point out that is long before Mr. Perez was nominated by the President to a Cabinet-level position in another department.

And last month, the committees released a report detailing this background deal. The report found, among other things, that Assistant Attorney General Perez was personally and directly involved in negotiating the mechanics of the quid pro quo, and he personally agreed to the quid pro quo on behalf of the United States during a closed-door meeting with the mayor of St. Paul;

that despite the Department of Justice's contention that the intervention recommendation in Newell was a, "close call," and, a "marginal," contemporaneous documents show the Department believed that Newell alleged a particularly egregious example of false certifications, and, therefore, the United States sacrificed strong allegations of false claims worth as much as \$200 million to the Treasury; that Mr. Perez attempted to cover up the quid pro quo when he personally instructed career attorneys to omit a discussion of the Supreme Court case in the declination memos that outlined the reasons for the Department's decision to decline intervention in Newell and Ellis; and that Mr. Perez attempted to cover up the quid pro quo when he insisted that the final deal with the city settling two cases worth potentially millions of dollars to the Treasury not be reduced to writing, instead insisting that, "your word was your bond"; and that Mr. Perez made multiple statements to the committees that contradicted testimony from other witnesses and documentary evidence.

So, Mr. Newell, I want to first thank you for coming forward today and ask you, first of all, how all this made you feel after you saw the courage you had to take to step forward, the wrongs that you were trying to right, and to see it all subverted as a part of a much larger deal.

Mr. NEWELL. As this issue was brought to light, many people say, "Aren't you upset?" Now, I believe that there's a good reason that I'm here today and would not have come otherwise. It wasn't to undercut but to finish the agenda that I had, which was making Section 3 work.

Section 3 was and is so important to me that when I looked at disparate impact regulations, my first response was they've caused the very results by protecting the disparate impact that disparate impact was designed to do, and that is to not cause discriminatory effects.

We pressed for Section 3. We took every effort we could, and we found after court actions and HUD actions that we couldn't make any inroads on Section 3. And then we found that the False Claim Act lawsuit was a real possibility. The administration—

Mr. GOODLATTE. Let me interrupt you right there because I want to ask you a question about that.

So you had discussions with representatives of the Department of Justice and the Department of Housing and Urban Development about the False Claims Act case that you thought you had. What kind of statements did you receive from them about whether they planned to pursue your False Claims Act case? And how strong, in your mind, were those signals?

Mr. NEWELL. The False Claim Act lawsuit went under seal in 2009. And so there weren't a lot of direct communications on it. There was encouragement from the HUD Department in our actions. I remember being at one particular seminar with Deputy Secretary Sims, who was heralding Section 3—I mean, False Claim Act as the remedy for a lot of the regulatory actions that couldn't be addressed otherwise. Same individuals came to me thereafter and shook my hand, who didn't know me, and said "Hey, good job. Keep up the good action." So a lot—

Mr. GOODLATTE. Let me ask you one more question, since my time has expired.

How do you think your experience might affect the willingness of future whistleblowers to come forward?

Mr. NEWELL. I think—

Mr. GOODLATTE. Isn't that really why you're here today?

Mr. NEWELL. I'm sorry?

Mr. GOODLATTE. Isn't that really why you're here today, to make sure that the opportunity to step up and call attention to wrongdoing is not something that is subverted and discouraged but, in the future, that people don't feel that way? And how do you think how this case was handled will affect those future whistleblowers?

Mr. NEWELL. That is number two on my agenda, it is, because I do believe that—let's say it this way. One of the individuals before I left St. Paul who deals with a lot of the Section 3 businesses made a statement to me, and he said that one of my biggest concerns is that most of these contractors who I deal with will not want to go through what you went through. They will not want to file a complaint, knowing that the city of St. Paul will retaliate, that the administration or, if you would, HUD will not support, and that their actions can cause the kind of actions or results that you've experienced.

So you're more than correct. It is, in my eye, a real travesty what has happened. I hope to turn it into an opportunity, as everything else I've done. But, yes, it is truly—and I can't imagine that even the administration would think otherwise, that the efforts that we went through and that they supported just got sold, according to what I was told. But being sold, it also sold the Section 3 community and me down the road.

Mr. GOODLATTE. Mr. Newell, I thank you for coming forward today.

Thank you, Mr. Chairman.

Mr. JORDAN. I thank the chairman.

The ranking member of the Oversight Committee is recognized, the gentleman from Maryland.

Mr. CUMMINGS. Thank you very much.

Mr. Newell, I want to thank you for your testimony.

Mr. NEWELL. Yes, sir.

Mr. CUMMINGS. Your concerns about people being left out, not being given opportunities, being treated unfairly—

Mr. NEWELL. Yes, sir.

Mr. CUMMINGS. —working hard all their lives simply to have a piece of the American pie, never getting it, and then they die.

Mr. NEWELL. Go ahead.

Mr. CUMMINGS. So I can understand your concerns. And I want to just go to your lawyer.

The majority, Mr. DeVincke, has made a claim that Mr. Perez—who, by the way, I've known for over 15 years and is one of the most honorable people I know—manipulated the decision-making process for intervention in a False Claim Act case—and I understand that you don't consider yourself an expert, I understand that, but I'm sure you can easily answer this question—resulting in a consensus of the Federal Government to switch its recommendation and decline intervention.

I just want to ask you two questions about intervention decisions and DOJ's decision-making process. And I'm going to ask the same thing of Ms. Slade.

And, Ms. Slade, I wish you were on this panel because it would have made it a lot more—I mean, I think we could have been much more effective and efficient in our time and our efforts.

But be that as it may, Mr. DeVincke, are there any requirements in the False Claims Act that mandate that the government intervene?

Mr. DEVINCKE. I can answer that one. No.

Mr. CUMMINGS. Yeah, good.

Mr. DEVINCKE. I was afraid I wouldn't be able to.

Mr. CUMMINGS. There's nothing that mandates it; is that right?

Mr. DEVINCKE. No.

Mr. CUMMINGS. And isn't it true that DOJ intervenes in only 25 percent of False Claims Act cases that are brought to the Department?

Mr. DEVINCKE. That I have heard, but I don't know.

Mr. CUMMINGS. Okay.

So, you know, it's certainly no coincidence that today's hearing is being held 1 day before a committee vote in the Senate to confirm Tom Perez as the President's nominee for Secretary of Labor. Today's hearing is an unfortunate and highly partisan exercise intended to raise unfounded questions about the reputation of Mr. Perez, despite the fact that there is no evidence that his actions were anything but professional and in the best interests of combating discrimination in our Nation's housing.

The core allegation leveled by the Republicans is that Mr. Perez, as the head of the Civil Rights Division at the Department of Justice, inappropriately coordinated a quid pro quo agreement with the city of St. Paul in which the Department declined to intervene in two False Claim Act cases in exchange for St. Paul withdrawing a separate case before the Supreme Court.

The problem with the Republican theory is that Mr. Perez did nothing wrong. He obtained clearance from the ethics officials at the Department. He coordinated properly with the head of the Civil Division. And he and others at the Department relied on career experts with decades of experience, who concluded after a careful review of the evidence that the False Claims Act cases were too weak to recommend that the government expend resources to litigate them.

Since then, a host of other legal experts have backed up the Department's conclusions. For example, in a statement issued yesterday, Professor Stephen Gillers, who has taught legal ethics for more than 30 years at the New York University School of Law, wrote that a Republican report issued last month suggesting that Mr. Perez acted improperly, "cites no professional conduct rule, no court decision, no bar ethics opinion, and no secondary authority that supports this argument." The reason, he explained, is that there is no authority that supports it.

In addition, one of today's witnesses, Shelley Slade, is an attorney with 20 years of experience in False Claim Act cases. She explained in her written statement, "I am confident that the decisions taken by the Civil Division officials with regard to the Newell qui

tam case, including the factors that were considered in declining the decision, were fully consistent with the law as well as ethical and professional obligations.”

She went on to say, “If my law firm had been contacted about taking on this case, we would have rejected it. Notwithstanding the apparent strong evidence that St. Paul engaged in repeated and egregious violations of Section 3 of the Housing and Urban Development Act of 1986, the qui tam case presents serious litigation risks on a number of fronts.”

And, with that, I yield back.

Mr. JORDAN. I thank the gentleman.

Mr. Newell, you’ve lived in St. Paul how long?

Mr. NEWELL. Since 1985.

Mr. JORDAN. 1985. You are a successful businessman, award-winning small-businessman, it was cited earlier. You’ve been a pastor in that community for how long?

Mr. NEWELL. Since—officially, just since 2006.

Mr. JORDAN. You’ve been a pastor in that community. You are a founder of a nonprofit. You care about the people you live with and work with and minister to; is that correct?

Mr. NEWELL. Correct.

Mr. JORDAN. And you cite in your testimony, let’s be clear, Section 3, focus on creating employment, training, contracting for the low-income community.

Mr. NEWELL. Correct.

Mr. JORDAN. That’s what it’s about. And St. Paul wasn’t doing the job. And you knew they weren’t doing the job. You saw it firsthand, they weren’t doing the job. And you said, this is not right, they are wasting taxpayer money, and they not helping the people they are supposed to help, the people I care about, the people I live with, the people I minister to.

And you were mad about it. And you said, “You know what? I’m going to take action.” And even if you couldn’t proceed personally, you wanted the United States to proceed and intervene because you wanted to fix the problem. Isn’t that correct?

Mr. NEWELL. That is correct.

Mr. JORDAN. And you not only knew that they were wrong, the Department of Justice knew they were wrong.

Put up slide 1, if you would, please.

Right here it says, “The United States Attorney’s Office for the District of Minnesota and HUD recommend that we intervene.” This is a November 2011 letter to Tony West, Assistant Attorney General for the Civil Division.

Put up slide 2, please.

“We recommend—” same letter—“We recommend intervening in this action to assert false claims actions and common law claims against the city.” They know what you know. They know St. Paul ain’t doing the job.

Put up slide 3, if you would, please.

The city knew about its obligation to comply with Section 3 but failed to comply. The Justice Department knew exactly what you saw firsthand.

Mr. NEWELL. Correct.

Mr. JORDAN. They said it three times now in the same stinking letter.

Slide 4, please.

We believe this is a particularly egregious example of false certifications given by the city. Repeatedly shown what it had to do, repeatedly failed not to do it. Right?

Mr. NEWELL. Correct.

Mr. JORDAN. Now, let's go to—let's go to a year later. Same people, career attorneys at Justice, writing to the same guy, Tony West, Assistant Attorney General, Civil Division. Now, this is exactly like slide 1 except for two words. It says, "The United States Attorney's Office for the District of Minnesota and HUD recommend that we decline to intervene." So something's changed.

Mr. NEWELL. Correct.

Mr. JORDAN. One year later, we got the exact same language, except they add words, "We decline to intervene."

Slight 6, if you could, please.

They say it was a close call, this decision not to intervene a year later. Now, just a few months before that they had said it's egregious, it's false, they failed to comply, we've never seen anything like this, this is a terrible example, we agree with Mr. Newell, we know how bad it is. And now they call it a close call.

Slide 7, please.

Again, they say, "We decline to intervene after going through it."

And then we have the—where they go through—in the last slide, slide 8, they refer to the case. They refer to Magner in the last case.

And so here's my question to you: What changed their mind? What event took place between November 2011 and the February 2012 letter? What happened?

Mr. NEWELL. Well, sir—

Mr. JORDAN. Well, let me suggest something here.

Mr. NEWELL. Go ahead.

Mr. JORDAN. I would say this: I would say Mr. Perez got on the phone and started talking to the folks in St. Paul, at the city, said, "Hey, guys, you're in trouble. I got smart people at Department of Justice who say you guys are in big trouble."

Mr. NADLER. Point of order, Mr. Chairman.

Mr. JORDAN. The gentleman will state his point.

Mr. NADLER. You're asking a witness questions of which he can possibly have no knowledge. You ought to be asking this of Justice Department officials as to what changed. Mr. Newell—

Mr. JORDAN. I would love to ask Justice Department officials. All I know is Mr. Newell was supposed to testify a week ago—

Mr. NADLER. Mr. Newell can have no—

Mr. JORDAN. —and the hearing was cancelled.

Mr. NADLER. Mr. Newell—

Mr. JORDAN. And I didn't interrupt you during your 5 minutes, so I would like to go ahead and ask the witness questions.

Mr. NADLER. I am making a point of order. You're asking a witness questions of which he has no possible knowledge, namely what changed within the Department—

Mr. JORDAN. I'll rephrase it.

Mr. NADLER. Let me finish. Namely what changed within the Department of Justice.

Mr. JORDAN. I'm asking—

Mr. NADLER. Mr. Newell has no knowledge of that.

Mr. JORDAN. Mr. Newell has a lot of knowledge of this case. That's why he's the whistleblower in front of the committee.

Mr. NADLER. He knows nothing of the decision-making process within the Department of Justice, which is what you're asking about.

Mr. JORDAN. Okay. Well, let's say, Mr. Newell, would you hazard a guess as to why this dramatic change from Justice, what events may have transpired in the interim to take the Justice Department saying it's egregious, they failed to comply, I've never seen anything like this, to, oh, now it's a close call, we're not going to weigh in?

And all I'm suggesting is I know one event that took place. Mr. Perez called the attorneys at St. Paul, talked to the folks—in fact, on February 3rd, Mr. Perez took what I would assume was a pretty unprecedented action, got on a plane, flew to St. Paul, sat down in a closed-door meeting with the lawyers in St. Paul, and the next thing we know they're saying this is a close-call case and we're not going to intervene.

Do you know of anything else that could have possibly been an event that would change what the Justice Department interpretation of this whole case was?

Mr. NEWELL. In answer to your question, sir, no.

I was going to say a second ago that in reading much of or all of the data that's been flowing out—and I'm not referring only to that he told the reporters reports, but the understanding from the statements from the Department of Justice—

Mr. JORDAN. Well, let me just ask you this, Mr. Newell, because my time is running short. Those first four slides I showed—egregious, both Justice and HUD said we should intervene, we concur that career—this is Justice and HUD from Minnesota and—they're all saying we should jump into this case, this is a strong case, St. Paul is pathetic, they're not doing the job, we should get involved.

Did they relate that to you guys when you were having conversation?

Mr. NEWELL. Yes.

Mr. JORDAN. So that's consistent with what they told you.

Mr. NEWELL. That is consistent with—

Mr. JORDAN. And then suddenly this dramatic change. And the only event I can think of that might have had—and, now, Mr. Nadler may think it's something else, but I think maybe there's a chance when Mr. Perez gets on the phone and calls them, gets on a plane and flies up there personally, I don't know that—you know, why not just let the same lawyers who've been doing it handle this case? It was moving along fine. But, no, he personally flies to St. Paul, goes in a closed-door meeting, and, shazam, everything changes. Go figure that.

I see my time has expired. With that—

Mr. DEVINCKE. Mr. Chairman, we can say that—I had most of the conversations with the United States Attorney's Office. And I

can tell you that as of November 7th of 2011, it was accepted without debate that the United States would intervene in this case.

And, in fact, I had been contacted by the Department of Justice on two fronts: one, to gather information that would counter and address St. Paul's defense that it did not have substantial funds to pay a settlement; and, two, that I should reach out to my local media contacts to get Fredrick's story out because Justice expected that St. Paul would get its story out and it would be negative toward my client, and that Justice wanted me to run point on public outreach on the case.

Mr. JORDAN. To me, this is as obvious as it gets. This is someone in a position of power who said, You know what? Forget what the facts say. Forget what the people who for over 2 years have looked at this case and said this case is one we should intervene in. Forget all that. I care more about this theory and what may happen in front of the United States Supreme Court. And because I'm in a position of power, I'm going to hurt the poor people in St. Paul, Minnesota, that Mr. Newell pastors to, ministers to, and works with. I'm going to hurt them.

And that's exactly what—and anyone with common sense can see this pattern. They can see the memos and the emails sent in November 2011. And they can see the abrupt change after Mr. Perez gets on a plane, flies to St. Paul, goes in a closed-door meeting, and changes people's minds because he is powerful and he's now going to be potentially the next Secretary of Labor. And that's why this is wrong, and that's why this hearing is so important.

With that, I'd yield to—

Mr. DEVINCKE. Mr. Chairman, may I comment on that briefly?

Mr. JORDAN. No. I'm going to recognize Ms. Kelly first; then we'll—

Mr. DEVINCKE. Of course.

Mr. JORDAN. We'll keep going.

Ms. Kelly, I'm sorry.

Ms. KELLY. I have no questions for this panel.

Mr. DEVINCKE. If I may comment briefly on the prior statement?

We don't know or believe that Mr. Perez—personally, I've never met the man. I don't think he bears any ill will toward Mr. Newell.

Mr. NEWELL. Mr. Perez?

Mr. DEVINCKE. Yeah.

But I do want to say that, you know, my client was overlooked here in this process. And we feel that Mr. Perez's department or he himself should have taken Mr. Newell into account at some point in this process. He was the relator on this case, and yet he was not told about any resolution reached. He was not told that the Magner case was connected to his case in any way. And he wasn't given any share of any proceeds of anything that the government received ultimately.

And that's on appeal right now. We want to have some discovery on these issues regarding whether there was a settlement or an alternate remedy under the statute. But as a relator, he had rights.

Mr. JORDAN. Ms. Kelly, you yield your time back?

Ms. KELLY. Yes.

Mr. JORDAN. Okay.

We'll recognize chairman of the full committee, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

I'd ask unanimous consent that my letter to the Honorable Thomas Perez of May 6th, 2013, be entered in the record.

Mr. FRANKS. [Presiding.] Without objection.

Mr. ISSA. Thank you.

Mr. ISSA. In this letter, I'm making it clear that, as of today, this committee has had zero response as to what is known to be 1,200 emails, of which at least 35 occasions we know that these emails were in violation by Mr. Perez of the Federal Records Act.

And this remains one of the great questions of this committee, is: If somebody works at the highest levels of law enforcement, circumvents a Federal law, why is it the Justice Department, the very entity that to a certain extent is on trial here today for their wrongful actions against Mr. Newell, why they refuse to make these records available?

We do have one record I'd like to make available in realtime.

Could we have the voicemail played, please?

This is an actual call.

[Voice message begins.]

"Mr. Perez: Hey, Greg. This is Tom Perez, calling you at 9 o'clock on Tuesday. I got your message. The main thing I wanted to ask you—I spoke to some folks in the Civil Division yesterday, and wanted to make sure that the declination memo that you sent to the Civil Division—and I'm sure it probably already does this—but it doesn't make any mention of the Magner case, it's just a memo on the merits of the two cases that are under review in the qui tam context. So that was the main thing I wanted to talk to you about. I think, to use your words, we're just about ready to rock and roll. I did talk to David Lillehaug last night. So if you can give me a call, I just want to confirm that you got this message and that you were able to get your stuff over to——

[Voice message ends.]

Mr. ISSA. Thank you.

Mr. Newell——

Mr. NEWELL. Yes.

Mr. ISSA. —were you aware of this kind of direct action by Mr. Perez?

Mr. NEWELL. No, I was not.

Mr. ISSA. Earlier, one of the Members, Mr. Nadler, apparently decided that you didn't have knowledge of certain things so you couldn't be asked a question. Having heard this, do you believe that this and other phone calls and emails may have contributed to your case, your valid case, your valid concern on behalf of your community essentially being circumvented by Mr. Perez?

Mr. NEWELL. Based on everything I've read, even in the reports from the committee, I would say they all had a definite bearing.

Mr. ISSA. And I think for your counsel: In your experience, this kind of ex parte intervention, do you find that a little unusual to come out of somebody who is supposed to stand on behalf of civil rights as the law is written?

Mr. DEVINCKE. Mr. Chairman, I will duck your question a little bit and just say this generally. What was most disturbing to my client and I was—and we don't know this to be the fact, but the suggestion in the record evidence that there may have been an af-

firmative offer from either HUD or Justice to aid St. Paul in defending my client's False Claim Act case when these were the two departments that worked so closely with my client for so many years and had pledged support to him and he had dedicated his time and resources to the cause. And then to find out that, in fact, they provided material support or may have promised to provide material support to the defendant in a False Claim Act case was very troubling. And it remains troubling.

Mr. ISSA. Well, there are two things I'd like to put in the record at this time.

First of all, this committee will not cease its investigation until we have interviewed individuals who changed their position as to what caused them to change their position. We will interview any and all necessary for that. And we look forward hopefully to finding whistleblowers who will tell us about these ex parte conversations and how this may have led to it.

Secondly, I would call on Mr. Cummings, my ranking member, to join with me to insist that Mr. Perez provide these emails which were done in violation of the Federal Records Act, to make them all available to the committee to be reviewed to find out how many additional documents were used and what the documents' contents are.

I'd yield to my ranking member.

Mr. CUMMINGS. Let me just ask you this. I understand that some of these—some of these records were received and reviewed by committee, the committee staff. Is that right? In camera at the Department.

Mr. ISSA. The—Mr. Perez—you're somewhat correct. Mr. Perez initially said under oath that there were none, then 1, then now 34 additional, which we were allowed to see in camera but not allowed to have copies of.

The committee has requested all roughly 1,200 to be reviewed since he has, one, had a lack of memory of actual violations of Federal record, and, quite frankly, the committee has a right to look at all documents that he used on this quasi-government email to determine whether or not he has been truthful.

Mr. CUMMINGS. Well, would the—just this one thing. I'm happy to—you know I'm happy to cooperate with you. Contrary to some of the things that have been said on national media, we on this side do care about whistleblowers. We do care about whistleblowers. I want to make that real clear. And I resent anybody saying anything different than that.

And we will work with you. As I've said to you many times, I will follow the evidence wherever it may lead. And so I'd be happy to—I just need to know exactly what I'm agreeing to, that's all.

Mr. ISSA. Well, and let me rephrase it. The 34 that we were allowed to see in camera were redacted. We want the unredacted versions of that. And we'd like to have all 1,200—in other words, all the emails that he used—for an in camera, unredacted review.

Now, if they're personal, the committee, on a bipartisan basis, can say "next, next," until we've gone through them all. But in the sense that initially it was claimed he had zero, then 1, now 35, and we haven't been able to see them in the entirety, it would certainly

seem that we, the committee, should be the judge of whether any or all of the 1,200 additional ones are germane.

Mr. CUMMINGS. All right, I will join you and work—

Mr. ISSA. I thank the gentleman.

Yield back.

Mr. JORDAN. [Presiding.] I thank the gentleman.

I now recognize the gentleman from Nevada, Mr. Horsford.

Mr. HORSFORD. Thank you, Mr. Chairman. I'm going to reserve my time for the third panel.

Mr. JORDAN. Got it.

Mr. HORSFORD. And I know we have been asking for this to be both sides of the issue, and we have spent now 2 hours and haven't heard from the other side.

Mr. JORDAN. Okay. Fine.

The gentleman from North Carolina, Mr. McHenry, is recognized.

Mr. MCHENRY. Thank you, Mr. Chairman. And thank you for having this very important hearing and publishing the report.

This committee has worked very diligently over the last Congress and this Congress to find the truth in what is a very bad situation, tragic in its results for you, Mr. Newell, and awful in its intent by somebody who's going through Senate confirmation today, who is a high-ranking government official, Mr. Perez. Mr. Perez' actions raise great questions about his intentions on this matter and even to the question about his willingness to provide very important information, not even following through and following through in delivering records for a subpoena request.

So I do want to ask about this whistleblower lawsuit because this matters to taxpayers. This matters to taxpayers, though Mr. Perez has brought himself into great question based on his actions and his interventions against what was working through the process with career Department of Justice officials who, apparently, according to the records we've seen, thought that, Mr. Newell, you had a strong case.

Now, Mr. Newell, how long were you working with the Department of Justice on your case?

Mr. NEWELL. We first met with Department of Justice in 2009, and so it started from that point.

Mr. MCHENRY. 2009.

Mr. NEWELL. Correct.

Mr. MCHENRY. And how long did they work with you until—how long did they work with you?

Mr. NEWELL. We finally got an indication or declination in 2012.

Mr. MCHENRY. 2012.

Mr. NEWELL. Correct.

Mr. MCHENRY. Mr. DeVincke, you're an attorney by trade.

Mr. DEVINCKE. Right.

Mr. MCHENRY. When you're working with the Department of Justice, did they give you an indication you had a weak case in the, you know, 2, 3 years that you're working with them on this? Did they say, you know what, we're not going to throw government resources on this whistleblower claim; you know, we're just going to—I mean, did you get any indication?

Mr. DEVINCKE. The indications were uniformly that the case had merit. This position was strengthened by St. Paul's response to the

claims against them, which Justice found to be further evidence of knowingly false certifications in support of the case.

Also, Justice served a lengthy subpoena on the city of St. Paul that resulted in a what we call open-file discovery where the Justice Department, I believe through the United States Marshals Service, conducted open-file discovery at city hall in St. Paul.

Mr. MCHENRY. So is that—I'm not an attorney, and I know we've got Judiciary folks here. They are well-versed in that. Is that kind of standard for a weak case?

Mr. DEVINCKE. I am no expert on—

Mr. MCHENRY. I'm sorry. I wish the ranking member would jump in and tell me that was a bad question to ask.

Mr. DEVINCKE. I would say—

Mr. MCHENRY. So let me just ask this.

Mr. DEVINCKE. They spent 2 years and 9 months, significant attorney time, investigator time, and resources on the case. They tied out the damages to the penny. And—

Mr. MCHENRY. And what was that? What did they come out to?

Mr. DEVINCKE. \$86 million and change—

Mr. MCHENRY. Oh, and change. Okay.

Mr. DEVINCKE.—was the received funds. And then—

Mr. MCHENRY. So we're Congress, so we won't worry about the change. We'll just talk about the \$86 million.

And as a result of that claim, what would the taxpayers recoup?

Mr. DEVINCKE. If it was trebled, the maximum recovery under the damages model that would be most aggressive would be approximately \$260 million, plus penalties, plus fees, plus costs.

However, there are—that's a simple answer because you're asking for the biggest number possible. There are alternate damages models. And we never really got there, just because the number was so high already. In fact, there was quite a debate over whether they were even going to spend all the time to tie out the damages to the penny because, as some attorney at Justice said, what's the point? We know it's in the tens or hundreds of millions. And we also know that, it being a taxing-authority municipality, we're not going to try to essentially bankrupt the city of St. Paul. That would not be in anyone's interest.

Mr. DEVINCKE. So the point being, the actual amount of damages—

Mr. MCHENRY. Okay.

Mr. DEVINCKE. Once you hit a certain number, you go to settlement.

Mr. MCHENRY. Thank you.

So, Mr. Newell—

Mr. NEWELL. Yes.

Mr. MCHENRY. —are there still problems with the St. Paul low-income jobs programs?

Mr. NEWELL. There are.

Mr. MCHENRY. Okay. Now, have you ever met with the Assistant Attorney General, Tom Perez?

Mr. NEWELL. No, I have not.

Mr. MCHENRY. Okay. Have you ever talked to Mr. Perez about the problems in St. Paul with Section 3 compliance?

Mr. NEWELL. With Mr. Perez, no.

Mr. MCHENRY. Okay. Mr. Newell, you know, when we are going through these records, we see an obvious quid pro quo by the Assistant Attorney General.

Mr. NEWELL. Okay.

Mr. MCHENRY. That is a deep issue for us, as an oversight panel, to make sure that we get the facts of your case. And my understanding is, through this whole process, there are documents that were jaw-dropping to you and your attorney based on the fact that you had the Department of Justice moving forward and they were going to support your claim.

Mr. NEWELL. Go ahead.

Mr. MCHENRY. Politics intervened. An Assistant Attorney General, using his personal email account to get around government records requests, counter to the law that is existent for the executive branch, trying to use his personal email account and some of these games that you played with voicemails so that he wouldn't have to disclose the fact that he was putting the screws to you and your case and the taxpayers.

This is the deeply devastating thing that we have to bring to light. And I ask my colleagues on the other side of the Capitol Building to think twice about Mr. Perez' nomination based on the records that we have simply come through with on this committee. It raises great question about his government service. What we want is honorable and good folks that are there for the government good and the public good, not simply out for politics.

And this is obviously what Assistant Attorney General Perez was all about. That's what we see in his records, and that's why we need more records, to actually verify what we have seen is, in fact, true.

And, with that, I yield back.

Mr. JORDAN. I thank the gentleman.

I now yield to another gentleman from North Carolina, Mr. Meadows.

Mr. MEADOWS. Thank you, Mr. Chairman.

And thank you, Mr. Newell, for having the courage to come and testify, but not only having the courage to come and testify, to stand up for those that don't have a voice. And we appreciate your willingness to do that.

And I want to get right to some of the points that have been made. Obviously, as we look at it, in testimony there has been an indication from the get-go from Mr. Perez that this was a weak candidate for intervention. Was that your understanding from career staff people that you talked to?

Mr. NEWELL. No, sir.

Mr. MEADOWS. So you never got that indication, that it was a weak candidate?

Mr. NEWELL. No, sir.

Mr. MEADOWS. All right. Let me go on a little bit further. And so, as we start to see this, if indeed it was not a weak candidate, do you believe that they would have been investing all this time and your time to look at this, the amount of dollars to pursue this, if they didn't have some hopes that it would have merit?

Mr. NEWELL. No, sir.

Mr. MEADOWS. So when we start to see this—you know, my colleagues opposite here have created this almost sainthood of Mr. Perez in terms of who he is. In fact, I think to quote Mr. Cartwright, he said that there's not a single thing that he has done wrong.

And would you agree with that, having read some of the things that are here, would you agree with that characterization, that there is not a single thing that he has done wrong?

I can see you are reluctant to answer that, and so I'm going to go on because my time is limited.

So the committee has done a great job. And as I started to review all of this, I said, well, obviously, even the President can't know all this stuff that has gone on with Mr. Perez and feel good about this nomination because of some of the things that are there. And so, everything that you have heard from career attorneys, would you say that it was a marginal case based on what you have heard from them?

Mr. NEWELL. I have yet to hear—well, you say have I heard from any attorney that it was a marginal case?

Mr. MEADOWS. In general. Did most of the attorneys indicate that it was a marginal case?

Mr. NEWELL. And are you referring to attorneys that worked from Justice, HUD, or what are you referring?

Mr. MEADOWS. From Justice.

Mr. NEWELL. I will confess that all communications with the Department of Justice and HUD was through my attorney.

Mr. MEADOWS. Okay.

Mr. NEWELL. But all references to me from my attorney was that our case was not only a good case, but in the phrase of Justice was discussing settlement of the case, and that's why they kept extending—

Mr. MEADOWS. So they thought there was enough merits there to discuss settlement?

Mr. NEWELL. Correct.

Mr. MEADOWS. All right. Let me go on a little bit further. We talked just a few minutes ago about these emails, these nonofficial emails, that have been sent by the Assistant Attorney General, Mr. Perez.

Were you aware of that, that he was sending personal emails to different folks?

Mr. NEWELL. No.

Mr. MEADOWS. Okay. I have a letter here that was sent to him that outlines the fact that there has been some 1,200 times that his personal email has been used. And I'm troubled by some of the things that I see in there, mainly because we want to make sure that it gets covered.

In this particular letter, it refers to the fact that there are 34 separate violations of the Department of Justice, the Federal Records Act. Were you aware that he was violating the Federal Records Act some 34 times?

Mr. NEWELL. No, sir.

Mr. MEADOWS. All right. Let me go on a little bit further, because, in this, it is real troubling that he actually sends a personal email to a New York Times reporter on information from the De-

partment of Justice that was not public. And to quote this, it says, "Just closed a deal 15 minutes ago. Will announce at 3 o'clock tomorrow."

Okay? So when you look at this email, he is sending private information from the Department of Justice to a New York Times reporter of a deal that, quite frankly, was about Countrywide Financial Corporation. And so would you not think that that would be inappropriate?

Mr. NEWELL. Not—my attorney kind of put the answer that I would have said, which is simply, I'm not in a position to be able to, you know, evaluate or judge those particular actions.

Mr. MEADOWS. Well, I guess my question is, as a citizen, when I read this, I would say, well, why would a New York Times reporter be privy to information from the Department of Justice? Would that not—would you do the same thing? Let me ask you that, Mr. Newell.

Mr. NEWELL. Would I—

Mr. MEADOWS. Would you let somebody, a reporter know about nonpublic information before it's known to the public if you were working for the Department of Justice?

Mr. NEWELL. I'm not clear on the constraints that he would have.

Mr. MEADOWS. All right.

Well, I can see my time is out. I yield back, Mr. Chairman. Thank you for your indulgence.

Mr. JORDAN. I thank the gentleman.

I now recognize the gentleman—we started with an Iowa guy, and we are finishing here with an Iowa guy—the gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman. Mr. Chairman, I thank you for this hearing.

And, Mr. Newell, I very much thank you for your testimony and for your willingness to step up for all this time and take on something that I think you view as an injustice.

And as I listen to the testimony and the questions in this hearing, I just reflect upon—you deliver a sermon from time to time, Mr. Newell?

Mr. NEWELL. Yes, I do.

Mr. KING. And I don't have any knowledge of this, but I'm going to ask you a question, and that is: Have you ever contemplated or delivered a sermon on the irony of a dishonorable man from the Department of Justice delivering injustice to honorable people?

Mr. NADLER. I have—Mr. Chairman?

Mr. JORDAN. The gentleman is recognized.

Mr. NADLER. If Mr. King will not take back his words referring to the Assistant Attorney General as a dishonorable man, I think his words ought to be taken down.

Mr. JORDAN. I think the gentleman was talking about a sermon that Mr. Newell may have delivered about honorable—

Mr. NADLER. I think he was referring to the subject of this hearing, and I think that it was clear from the context.

Will Mr. King make clear that he was not referring to Mr. Perez when he commented in any way or analogizing Mr. Perez when he commented on a dishonorable man?

Mr. JORDAN. I don't think the gentleman mentioned anyone's name in his comments. He was talking about——

Mr. NADLER. I asked Mr. King if he would——

Mr. JORDAN. And I am the chairman of the committee, and I was just saying what I heard, what I think what most people heard——

Mr. NADLER. I'm glad what you heard. I asked Mr. King a question. I am entitled to do that before I move to take down his words, if I do.

Mr. JORDAN. I was going to let him answer your question.

Mr. NADLER. Fine. Thank you.

Mr. JORDAN. All I'm saying is, I think the gentleman was asking Mr. Newell, in his duties as a pastor——

Mr. NADLER. You don't have to instruct him how to answer the question. He is smart enough to answer for himself.

Mr. JORDAN. I know he is smart enough to answer for himself. I just wanted to give you my opinion of what I think most people in the room heard. He can respond.

Mr. KING. I thank you both for the endorsement of my ability to answer this question.

And I'd make the point that I specifically didn't name anyone. This is a question—I can repeat it again—about a dishonorable man from the Department of Justice delivering such injustice to honorable people.

And I would point out that in the previous discussion that we have had here, I remember Mr. Nadler saying that this is a shameful smear campaign against Mr. Perez, and went on, and the gentleman from Maryland said that he is one of the most honorable men I know.

Mr. NADLER. I agree.

Mr. KING. So I have heard the endorsement of Mr. Perez. I didn't state his name in my question. And I wouldn't be willing to change the definition or the meaning of what I said, nor ask my words be taken down, be removed——

Mr. CUMMINGS. Mr. Chairman?

Mr. KING. —because the answer is no.

Mr. CUMMINGS. Mr. Chairman?

Mr. JORDAN. The ranking member is recognized.

Mr. CUMMINGS. I'm going back to what Mr. Nadler said. It sounds like he was referring—I mean, just based on what he just said, it sounds like he was referring to Mr. Perez.

I'm just, I mean, I'm listening here. And, by the way, when I said honorable, I was saying something good about the person who I know. I was not, you know, going against his character or making him sound like some bad person. There is a big difference between what I did and what you did.

Mr. KING. Since you have all brought up this discussion about the honorability or dishonorability of the individual I didn't name, I would point out that individual testified before the Judiciary Committee twice that I can recall, once in 2009, once in 2011. And in 2009 Mr. Gohmert asked the gentleman you are referring to if he had seen the video of the New Black Panthers, and it took five questions to get the answer "yes" to that. When I asked him on June 1st of 2011, did you provide the highest penalty under law to the individual who was the principal in the New Black Panthers

case, his answer was, yes, the highest penalty under law. We know that wasn't true.

So I'm going to suggest when I say the dishonorable man, you know the facts that I have just listed here, and that's why you jumped to the conclusion that I was talking about Mr. Perez.

Mr. CUMMINGS. Well, who are you talking about?

Mr. KING. I asked a hypothetical question to the witness, and you are all inflammatory here, inflamed because you know that the question itself goes so close to the real truth that we are talking about here, and that is the lack of integrity that is being presented by the President.

Mr. JORDAN. The gentleman has 4 minutes and 20 seconds.

Mr. NADLER. Mr. Chairman, I move to take down the gentleman's words.

Mr. CUMMINGS. By the way, Mr. Chairman, we are not being inflammatory.

Mr. JORDAN. In the practice of the House, I would just—Members may employ, when referring to references to executive officials, which Mr. King didn't do, but nevertheless, if he was referring to an executive official, he is permitted to employ strong language in criticizing the government, government agencies, and government policies. So I think the—and he did not say anything personally offensive toward the President.

And the gentleman from New York, if he wants words taken down, he needs to specifically decide which words he wishes taken down. I don't believe there was a violation of the House practice or committee rules, and would recognize the gentleman from Iowa for his remaining 4 minutes and 20 seconds.

Mr. NADLER. Mr. Chairman, my—

Mr. KING. Thank you, Mr. Chairman.

Mr. NADLER. —motion has to be disposed of.

Mr. JORDAN. Yeah, and I indicated that the gentleman needs to state which specific words he wants taken down.

Mr. NADLER. I want the words specifically in which it was clear from the context he was referring to Mr. Perez. He said the word "dishonorable."

Mr. JORDAN. The chair rules that the words of the gentleman from Iowa are not parliamentary because they—excuse me. The chair overrules the point of order by the gentleman from New York but asks that the Members please afford all of the Members the respect that they are entitled and refrain from using rhetoric that could be construed as an attack on the motives or the character.

Mr. NADLER. Given the ruling of the chair and hoping that Mr. King will adhere to those, I will withdraw the motion.

Mr. JORDAN. I appreciate the gentleman withdrawing.

The gentleman from Iowa is recognized.

Mr. KING. Thank you, Mr. Chairman. I will revert back to my natural gentle nature and turn to the witness at hand.

And I would ask you then, Mr. Newell, when did you first suspect that there might have been a quid pro quo?

Mr. NEWELL. We—right after we got our declination, about I would say within the next month or so, I was approached by a gentleman who was part of the Wagner case, who then asked me if I knew of some connecting issues there.

Mr. KING. And then when—you've got a question about that. When was it confirmed? When did you learn about the Perez involvement?

Mr. NEWELL. The actual Perez involvement came to my attention when the letters went out to the—or when I received copies of the letters to the Secretary of HUD and the Secretary of—I mean, Assistant Secretary—Attorney General.

Mr. KING. And the copies of the letters, they would be some of the letters that Mr. Issa introduced into the record?

Mr. NEWELL. Correct. That would be about September or October of 2012.

Mr. KING. Uh-huh. And yet Mr. Perez said that there wouldn't—this wouldn't be documented, it would be your word was your bond, if I remember the discussion. Had you run across that language previously?

Mr. NEWELL. I have.

Mr. KING. And then did it seem curious to you that he would be willing to put such a message on an audio of a voicemail that—had you heard that voicemail before today?

Mr. NEWELL. No, I had not.

Mr. KING. Does it seem curious to you that a man that is so careful about making sure that there isn't a trail would leave a voicemail?

Mr. NEWELL. The advice was similar to my own thought, and that is not a personal—or not wanting to make the speculation based on knowing his intent.

Mr. KING. Let me state, it seems curious to me, Mr. Newell.

Mr. NEWELL. I understand.

Mr. KING. And do you have the sense now that you have been sold out?

Mr. NEWELL. If I go by the language of the letter or the statement made by Miss Tracy, I believe, from the Department of Justice that that was a global resolution, I kind of count that as being, "sold out" or cut out of what was an actual deal that was made.

So, in a sense of the word, her statement says they did make a deal, that they did have a global settlement, a global resolution. And I, you know, I have not been a party to that resolution at all.

Mr. KING. And, Mr. Newell, I can only imagine what it must be like to toil every day to help people the way you do in a number of different ways, multitasking to do so, and step into something like this, like this qui tam case. And impossible to anticipate that a very questionable legal theory called disparate impact could be a legal theory that would be so important to be defended that the interest of the taxpayers and the people in the community and those that you work for and represent should pay such a price to try to advance such a questionable legal theory. And I question whether justice ever comes from the levels that we have seen in this way.

And so I just appreciate your testimony. And I hope and I pray that the energy that you put into the community and into helping the people you minister, that it is not drained away by these kind of confrontations, that it strengthened instead of weakened, and that you can go forward from this and look back on it being strong-

er and better. And I thank you for your contributions to your community and your country.

And I yield back.

Mr. JORDAN. I thank the gentlemen.

Mr. Newell, we want to thank you again for your courage in stepping forward and for the work you are doing in St. Paul to make life better for the families that you get a chance to interact with and minister to and work among.

And, Mr. DeVincke, we want to thank you, as well.

We will now move to our third panel. If staff could get the table ready for Ms. Slade.

Mr. NADLER. Mr. Chairman?

Mr. JORDAN. The gentleman from New York. I've said that how many times, I wonder, today.

Mr. NADLER. You will say it more.

Mr. JORDAN. I figured I would.

Mr. NADLER. Mr. Chairman, before we start this third panel, I just want to note for the record my objection to this absolute travesty that you have perpetrated here today, in which the minority party's witness was not permitted to testify on the same panel. We have had 2-1/4 hours of that panel. Virtually none of the Republicans are here for the second panel—for the third panel, rather. Consequently, it will be a much shorter panel. And you have had 2-1/4 hours of one-sided presentation before—

Mr. JORDAN. If the gentleman would yield?

Mr. NADLER. I will not yield.

Mr. JORDAN. If the gentleman wants 2-1/4 hours for Ms. Slade, he can have it.

Mr. NADLER. Very good. We will take as much time as we think necessary because there are not—but the fact is, I have never seen in a committee of this House before where you had the one side's witnesses on one panel and the other witness on a subsequent panel.

Mr. JORDAN. Because you are not a member of the Oversight Committee. If you were, you would have seen it.

And you used the word "travesty." The travesty is what has been done to Mr. Newell. And—

Mr. NADLER. Well, that is the subject of—

Mr. JORDAN. No, no, no, no.

Mr. NADLER. That is the subject of the hearing that you will discuss.

Mr. JORDAN. No, you used the term "travesty."

Mr. NADLER. About the committee hearing, not about the subject—

Mr. JORDAN. The travesty is families in St. Paul are not getting the kind of support they need, and now they will be continued to be denied that because this suit couldn't go forward. That is the travesty.

Mr. NADLER. The subject matter—

Mr. JORDAN. And the travesty is Mr. Newell was supposed to testify a week ago in a Senate committee and he was denied his chance to tell his story.

Mr. NADLER. The subject—

Mr. JORDAN. He needed a single panel to do that, and that's why we afforded him that opportunity.

Mr. NADLER. The subject matter of the hearing, namely what went on in St. Paul and whether that is good or bad or indifferent, we have talked about for the last 2 hours, will—

Mr. JORDAN. Indifferent?

Mr. NADLER. Wait, wait.

Mr. JORDAN. Minneapolis citizens you're indifferent about?

Mr. NADLER. I'm certainly not indifferent. I'm saying whether that was good or bad or whatever, the merits of that we have talked about for the last 2 hours. We will continue talking about it in the next panel.

What I'm saying was the travesty is not anything to do with the subject matter but the manner of conduct of this hearing. Totally unfair.

Mr. JORDAN. The longer the gentleman talks, the longer we'll have to wait for Ms. Slade to give her testimony.

Ms. Slade, we want to thank you for joining us today on this all-important third panel.

We'd ask that you stand up. We have the practice where witnesses need to be sworn. And stand up, raise your right hand.

Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Ms. SLADE. I do.

Mr. JORDAN. Let the record show that the witness affirmed the statement.

And you are now recognized, Ms. Slade. You've been here, saw how this works, and you've probably testified in front of Congress before.

Ms. Slade is a lawyer here in Washington, D.C.

And you now have your 5 minutes.

STATEMENT OF SHELLEY R. SLADE, PARTNER, VOGEL, SLADE & GOLDSTEIN, LLP

Ms. SLADE. Okay. Thank you.

Good afternoon, Committee Ranking Minority Member Cummings, Subcommittee Chairmen Jordan and Franks, Ranking Minority Members Cartwright and Nadler, and members of the subcommittee. Thank you for the invitation to testify.

I am here in my personal capacity as an attorney with more than 20 years' experience handling qui tam cases filed under the False Claims Act. For the last 13 years, I have been a partner in a law firm dedicated to the representation of False Claims Act whistleblowers. Before that, I spent 10 years in the Civil Division of the Department of Justice handling False Claims Act matters.

I plan to address two issues. First, I will summarize the law and procedures that ordinarily govern the Department of Justice's decision-making process with regard to intervention in qui tam cases. Second, I will provide my perspective as a qui tam practitioner on the Department of Justice's decision to decline to intervene in the U.S. ex rel. Newell v. City of St. Paul lawsuit.

The False Claims Act provides that a private party, referred to as a qui tam plaintiff, may bring a False Claims Act action on behalf of the United States by filing a complaint under seal and serv-

ing the complaint on the United States alone. After the government investigates the case while it remains under seal—and the investigation may last as long as 4 or even 5 years—the United States must notify the court whether it will intervene in the case. In those instances in which the government declines to intervene, the qui tam plaintiff may proceed to litigate the case on their own under a private attorney general provision in the law.

The Department has broad discretion in making its intervention decisions. As the U.S. Supreme Court held in *Heckler v. Chaney*, “An agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”

The courts that have elaborated on this principle in the False Claims Act context have ruled that a Department of Justice decision on whether to pursue a qui tam case need bear no more than a rational relationship to a legitimate government purpose. Accordingly, courts have upheld even motions to dismiss qui tam cases, which is not at issue here, over the objections of the whistleblower, on grounds such as working to achieve peace among competitors, protecting national security, and conserving scarce law enforcement resources.

As a matter of practice, when the Department of Justice decides whether to intervene, it relies heavily on recommendations from affected program agencies. Those recommendations often take into account the agencies’ broad programmatic interests.

Although this hearing is focused on Mr. Perez, this hearing is also implicitly examining whether it would have been improper or unusual for the Civil Division to take into account broad programmatic interests of the client agency in deciding whether to intervene in the Newell case.

I would see nothing the least bit untoward or unusual if this, in fact, was the case. The Civil Division’s decisions on intervention, by relying on program agency recommendations, often take into account the agency’s broad policy concerns. Moreover, knowing, as I do, the clear managers who have overseen the False Claims Act work in the Department, I am confident that the Civil Division’s actions were fully consistent with the law as well as ethical and professional obligations.

With regard to the merits of the Newell case, it is surprising to me that the line attorneys originally recommended intervention. If my law firm had been contacted about taking on this case, we would have rejected it. Notwithstanding the apparent evidence that the city of St. Paul engaged in egregious regulatory violations and notwithstanding the commendable efforts of Mr. Newell to correct those infractions, the case, as a qui tam case, presents serious litigation risks.

To be successful, a False Claims Act plaintiff must establish much more than violations of a regulation. Most courts hold that the plaintiff must demonstrate that the agency consider compliance with the regulation to be a prerequisite for or material to the payment decision. Yet, in the Newell case, there appears to be evidence that HUD, one, knew about the city’s failure to submit required Section 3 reports; two, likely learned about the city’s failure to comply with Section 3 during the agency’s annual reviews; and,

three, on at least two occasions exercised a legal option to continue funding the city after having found that the city was out of compliance with Section 3.

Learning of the factors that the Department of Justice may have taken into account in deciding whether to intervene in this case will not, in my judgment, deter whistleblowers or their counsel from bringing meritorious qui tam cases. Given the legal challenges, the equities, and the broader programmatic concerns, the Department's decision-making process, in my view, was fully consistent with its usual policies and practices.

Thank you.

Mr. JORDAN. Thank you, Ms. Slade.

[Prepared statement of Ms. Slade follows:]

TESTIMONY OF SHELLEY R. SLADE

Before the

House Committee on Oversight and Government Reform's
Subcommittee on Economic Growth, Job Creation and
Regulatory Affairs and the House Committee on the
Judiciary's Subcommittee on Constitution and Civil
Justice

Hearing on "DOJ's *Quid Pro Quo* with St. Paul: A
Whistleblower's Perspective"

May 7, 2013, 10 a.m.

Background

I am testifying today in my personal capacity as an attorney with more than 20 years' experience handling *qui tam* cases filed under the federal False Claims Act. I am a partner with Vogel, Slade & Goldstein, LLP, a Washington, D.C., law firm dedicated exclusively to the representation of *qui tam* plaintiffs in such cases. I have been a partner at Vogel, Slade & Goldstein for 13 years. For the last five years, I have also served as a member of the Board of Directors of Taxpayers Against Fraud Education Fund. This organization is a non-profit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. I currently serve on the Executive Committee of that Board.

Between 1990 and 1999, I was a Trial Attorney and then Senior Counsel for Health Care Fraud in the Commercial Litigation Branch of the Civil Division of the U.S. Department of Justice. As a Trial Attorney in the Commercial Litigation Branch, I handled dozens of False Claims Act *qui tam* cases for the United States. As Senior Counsel for Health Care Fraud for the Civil Division, I coordinated the handling of health care fraud policy and legislative matters among DOJ components, between DOJ and other government agencies and between DOJ and the private sector. Throughout my tenure at the Department of Justice, I reported to Michael F. Hertz, who at the time was

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overseeing the Frauds Section as a Director of the Commercial Litigation Branch in the Department of Justice's Civil Division. Joyce Branda served as Mr. Hertz's deputy during most of my time at the Department.

I am a 1980 graduate of Princeton University and a 1984 graduate of Stanford Law School.

I will address three issues in my testimony that I hope the Committee on the Judiciary and the Committee on Government Oversight and Government Reform will find relevant to the matters at issue in this hearing: i) the law and procedures that govern the Department of Justice's decision-making process with regard to intervention in *qui tam* cases; ii) my personal experiences with regard to those intervention decisions and how they inform my view of the declination decision in *United States ex rel. Newell v. City of St. Paul*, Civil Action No. 09-1177 (D. Minn.); and iii) my perspective, as a *qui tam* practitioner, on the merits of the allegations asserted by the *qui tam* plaintiff in *United States ex rel. Newell, supra*.

Before preparing my testimony, I reviewed the April 15, 2013 Joint Committee Report entitled "DOJ's *Quid Pro Quo* with Saint Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Law," including the documents in Appendix I, the Report of the Minority, the U.S. Department of Justice's memoranda recommending intervention and recommending declination in the *United States ex rel. Newell* case, the district court's opinions in the case, and the April 22, 2013 letter from Thomas F. DeVincke to the Health, Education, Labor and Pension Committee Chairman Tom Harkin and Ranking Member Lamar Alexander.

Intervention Law and Procedures

The False Claims Act provides that a private party, referred to as a *qui tam* plaintiff or relator, may bring a False Claims Act cause of action on behalf of the United States by filing a complaint under seal and serving the complaint and disclosure of material evidence and information on the United States. 31 U.S.C. § 3730(b). The False Claims Act then provides the United States with sixty days, plus any extensions granted by the court for "good cause" shown, to investigate the

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relator's allegations while the case remains under seal and decide whether to intervene in the case, or, in other words, to join the case as a party and take over the litigation. *Id.* The case remains under seal until the deadline for Government's decision on intervention. *Id.*

At the end of this period of time, the United States must notify the court whether it wishes to intervene in the lawsuit. Importantly, when the government decides not to intervene in a case, it is neither resolving the case nor dismissing the case. The False Claims Act contains a "private attorney general" provision that permits the *qui tam* plaintiff to proceed with the litigation on his or her own following a government declination. 31 U.S.C. § 3730(b).

In the False Claims Act, Congress did not dictate to the U.S. Department of Justice the criteria it should employ in making this intervention determination. This is appropriate under our Constitution. The Constitution entrusts the Executive with the duty to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. As the U.S. Supreme Court held in *Heckler v. Cheney*: "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Cheney*, 470 U.S. 821, 831 (1985).

In the False Claims Act context, the U.S. Court of Appeals for the District of Columbia has ruled that "[the decision whether to bring an action on behalf of the United States is . . . therefore 'a decision generally committed to [the government's] absolute discretion.'" *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). In the case at issue in this hearing, *U.S. ex rel. Newell v. City of Saint Paul*, *supra*, the district court likewise ruled that: "[t]here is nothing in the FCA which requires the government to intervene, even if it has sufficient information to justify intervention." *Id.*, Doc. No. 75, Memorandum and Order, November 26, 2012, at 3.

The federal courts have addressed the question of what it means for the Department of Justice to have virtually "unfettered discretion" over a prosecutorial decision in a False Claims Act case. When addressing the legality of a Department of Justice motion to dismiss a *qui tam* case over the objections

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of the relator -- a decision of greater consequence than the Department's decision whether to intervene or decline in a case, since a case may still go forward without the Department's participation -- courts that have looked at the issue have emphasized the broad discretion vested in the Department of Justice to decide what is in the best interests of the United States in making its enforcement decisions. See, e.g., *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65, 380 U.S. App. D.C. 185 (D.C. Cir. 2008); *Ridenour v. Kaiser-Hill Co., L.L.C.*, 397 F.3d 925, 936 (10th Cir. 2005); *Swift v. United States*, 318 F.3d 250, 252, 355 U.S. App. D.C. 59 (D.C. Cir. 2003); *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998); *United States ex rel. Stevens v. State of Vt. Agency of Natural Resources*, 162 F.3d 195, 201 (2d Cir. 1998), rev'd on other grounds, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000). The D.C. Circuit held that § 3730(c)(2)(A) "give[s] the government an unfettered right to dismiss an action," rendering the government's decision to dismiss essentially "unreviewable." *Swift v. United States*, supra, 318 F.3d at 252.

Several courts have elaborated on this general principle. Those courts, which include the U.S. Courts of Appeals for the 2nd, 9th and 10th Circuits, have ruled that the dismissal decision need bear only a rational relationship to a legitimate government purpose. See *Ridenour v. Kaiser-Hill Co., L.L.C.*, supra; *United States ex rel. Stevens v. State of Vt. Agency of Natural Resources*, supra; *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, supra.

The courts have upheld government dismissals of *qui tam* cases when the government agency purpose that is furthered by the dismissal falls within the mission of the government agency. For example, in the False Claims Act context, they have found legitimate purposes to include: achieving peace among competitors and regulators in the citrus industry; preventing the release of classified information; protecting national security; and, conserving scarce law enforcement resources.

Far short of deciding whether to dismiss a case over the objection of a relator, the Department of Justice must first decide whether to intervene in and conduct the case as the

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primary plaintiff. The Department of Justice generally makes this determination after it has completed its investigation of the Relator's allegations, a process that can take several years.

The first step in the Department's decision with regard to intervention is the formulation of a recommendation by the line attorneys that have handled the case. In cases above a specified monetary threshold, these attorneys typically draft a memorandum for the Director of the Commercial Litigation Branch to submit to the Assistant Attorney General for the Civil Division. In doing so, they solicit the recommendation of the program agency affected by the alleged fraud and the U.S. Attorney for the judicial district in which the case has been filed. Only in rare cases would a Commercial Litigation Branch attorney submit a recommendation in favor of intervention without the support of both the program agency and the U.S. Attorney's Office. The program agency generally is in the best position to assess whether it has been a victim of false claims and whether broader programmatic concerns and priorities argue for or against pursuit of the *qui tam* case. The U.S. Attorney's Office would necessarily be closely involved in litigating the matter before the court.

During my tenure at the Department of Justice, the time period that might elapse between the line attorney's submission of a recommendation on intervention and the decision by the Assistant Attorney General on that recommendation was typically between 10 and 14 days. My experience is that this period of time now may have lengthened given the scarcity of resources at the Department, and can sometimes exceed three weeks. As noted above, the trial attorneys on the case generally do not prepare their memorandum seeking authority to intervene or decline until the Government has completed its investigation of the Relator's allegations.

The Department of Justice intervenes in only about 20 percent of filed *qui tam* cases. My experience has been that, in making its intervention decisions, the Department of Justice frequently considers recommendations from affected program agencies that take into account the broad programmatic interests

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of the agencies, rather than focusing solely on the possibility of achieving a monetary recovery in the specific case at hand.

My Perspective on the Declination Decision in the *Newell* Case

Although this hearing is focused on Mr. Perez, this hearing is also implicitly examining whether it was improper or unprecedented for the Civil Division of the Department of Justice to consider broad programmatic interests of the United States in deciding not to intervene in the *Newell* qui tam action. I see nothing the least bit untoward or unusual about that action. As I have already noted, in my experience, the Civil Division's decisions on intervention often take into account another agency's broader policy concerns or interests outside the four corners of the case.

It is worth noting that the Department's action in the *Newell* case - declining to join the case - was neither a dismissal of the case nor a settlement of the underlying claims. It was not a dismissal because following a declination by the Government, pursuant to the False Claims Act, the relator may proceed with the False Claims Act on his or her own pursuant to the False Claims Act's "private attorney general" provision. The declination was not a settlement of the claims because the underlying claims of the plaintiff were not released by the Government. This is worth emphasizing as the Majority Report shows some confusion on this part: the Department of Justice did NOT agree with the request of the City of St. Paul to settle this case. To the contrary, the Department of Justice allowed the case to proceed with the relator litigating on behalf of the Government.

I would also like to comment on the exceptional ethics and professionalism of the career management that oversees False Claims Act cases within the U.S. Department of Justice. While working at the Department, and in the years since, I have been repeatedly struck by the exceptional level of integrity and extraordinary, selfless dedication to the public interest of the career managers. They have not only been apolitical and highly ethical in their decision-making; they also have been intelligent and careful. These characteristics translate into consistently well-reasoned decisions on furthering the public interest and on complying with professional responsibility and

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ethical obligations. I am confident that the actions taken by the Civil Division officials with regard to the *Newell qui tam* case, including the factors that were considered in the declination decision, were fully consistent with the law, as well as ethical and professional obligations.

I also see nothing unusual or improper about career managers rejecting the staff's recommendation with regard to a significant action in a *qui tam* case. The career managers in the False Claims Act area are particularly experienced in their field and closely oversee the work of the line attorneys. They have never, in my experience, operated as a "rubber stamp" on staff recommendations. They review the relevant considerations closely and, when they disagree with the recommendations coming from below, they make their own decisions.

My Perspective on the Merits of the Newell Qui Tam Action

Given False Claims Act case law, it is somewhat surprising to me that the line attorneys handling the *Newell qui tam* case originally recommended intervention in the case. If my law firm had been contacted about taking on this case, we would have rejected it. Notwithstanding the apparent strong evidence that the City of St. Paul engaged in repeated and egregious violations of Section 3 of the Housing & Urban Development Act of 1986, the *qui tam* case presents serious litigation risk on a number of fronts.

To be successful, a *qui tam* plaintiff must establish much more than the violation of a regulation. When a False Claims Act case is based on the defendant's violation of a regulation, a number of courts have held the plaintiff must demonstrate that the agency considered compliance with the regulation to be a prerequisite for the defendant to be entitled to receive the funds, *see, e.g., United States v. Southland Management Company*, 326 F.3d 669, 676 (5th Cir. 2003) (*en banc*); or, as stated by other courts, the regulatory noncompliance must be "material" to the government's payment decision. *See, e.g., U.S. ex rel. Vigil v. Nelnet*, 639 F.3d 791, 796 (8th Cir. 2011); Another important factor is whether the defendant "knew" that its' claims were false under the regulations and program instructions governing the agency program.

Significantly, the facts at issue in *Southland Management, supra* - facts which caused the 5th Circuit to uphold the district court's summary judgment in favor of the defendants - are similar to the facts in the *Newell* case. As in the *Newell* case, the plaintiff alleged in the *Southland Management* case that the defendants, owners of low income housing projects, had submitted claims for financial assistance to the U.S. Department of Housing & Urban Development (HUD) at a time when they were out of compliance with conditions imposed by HUD. In the *Southland Management* case, the recipients of the funds were required to keep housing properties that benefitted from HUD assistance in a decent, safe and sanitary condition pursuant to the recipients' Housing Assistance Payment (HAP) agreement with HUD. As in the *Newell* case, however, HUD learned of the non-compliance and elected to work with the defendants to address the problems while continuing to provide financial assistance. The Court of Appeals consequently found that the facts did not give rise to a cause of action under the False Claims Act because:

[A]ccording to the HAP [Housing Assistance Payment] Contract, if the property is not decent, safe, and sanitary and HUD chooses to work with the Owners to remedy the property's condition, the Owners remain entitled to housing assistance payments until HUD provides written notice, prescribes a time for corrective action, and notifies the Owners that they have failed to take the necessary corrective action within the specified time period.

Southland Management, supra, 326 F. 3d at 677. In the circumstances present in the case, the Court determined that, under the governing contract, compliance with the "decent, safe and sanitary" provision was not a prerequisite to a person's entitlement to HUD financial assistance and, accordingly, there was no valid cause of action under the False Claims Act.

The "materiality" standard set forth in the 8th Circuit Court of Appeals' decision in *U.S. ex rel. Vigil, supra*, is controlling precedent in the *Newell* case, since the latter case is filed in the 8th Circuit. Given the fact that the City of St.

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Paul's noncompliance with Section 3 should have been readily apparent to HUD's reviewers, according to the Department of Justice line attorneys who handled the case, and given the fact that HUD elected to enter into voluntary compliance agreements with the City St. Paul, and to continue providing financing, even after it apparently learned that the City had been out of compliance with Section 3 for many years, there is a significant question in this case as to whether HUD truly considered St. Paul's compliance with the requirements of Section 3 to be material to HUD's payment decisions.

Indeed, even the original Civil Fraud Section memorandum that recommended intervention in the case recognized significant litigation risk for the government, including the following challenges to establishing that compliance with Section 3 was a condition of payment and that the City of St. Paul "knowingly" submitted false claims that caused damage to the federal government:

- "HUD will have to admit, and has publicly acknowledged, that for a significant period of time it was not focused on Section 3 compliance anywhere in the country."
- "HUD employees conducted annual reviews of St. Paul and regularly approved the City's Action Plans and Consolidated Annual Performance and Evaluation Reports, and conducted on site performance reviews, but did not notice or flag the City's Section 3 deficiencies."
- "Even a cursory examination of the City's practices would have revealed the City's non-compliance."
- "The City has already noted that previous federal administrations were not concerned with Section 3 (a position with support in recent HUD public comments)";
- "We will have to admit that the City was failing to comply with Section 3 in ways that should have been apparent to HUD";
- Given the various procedures available to HUD besides exclusion from the program to address non-compliance with Section 3 requirements, such as time lines and procedures for the cure of identified deficiencies, "there is a risk a trial court in the Eight Circuit will consider the annual

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certifications in this case conditions of participation that will not support an FCA claim."

- Under the governing case law, the Government's damage theory admittedly was "aggressive" and the line attorneys had not developed an alternative theory.

These conclusions by the staff - which ironically are set forth in the original memorandum recommending intervention - in-and-of-themselves would have been more than an adequate basis to recommend declination during the ten years during which I handled *qui tam* cases and health care fraud policy matters for the United States in the Civil Division of the U.S. Department of Justice.

If this case had come to our firm, we also would have been concerned about the potential public disclosure problem. At the time this case was filed, the applicable provision of the False Claims Act provided that the court lacked jurisdiction over a *qui tam* case if the allegations of fraud had been disclosed publicly, unless the relator had "direct and independent knowledge" of the allegations and had provided that information to the Government before filing his case. My opinion is that there were many public disclosures relating to the allegations at issue in the case; and, given the fact that the relator was not an insider within the City of St. Paul government, it would have been unclear to our firm whether a court would consider him to have had direct and independent knowledge of the facts underlying his lawsuit. Given the additional difficulty of establishing liability and significant damages, we would not have taken on this case.

During the Congressional investigation of this matter, former Deputy Assistant Attorney General Michael F. Hertz, who was widely considered at the time to be the Government's preeminent expert on the False Claims Act, was quoted as having said that this case "sucks." His opinion does not surprise me, given the litigation risks set forth above.

Learning of the factors that the U.S. Department of Justice took into account in deciding whether to intervene in this case does not in any fashion deter me or the other members of my law firm from bringing *qui tam* cases. I doubt very much that it

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will deter any of my colleagues in the *qui tam* bar or potential whistleblowers either. Given the legal challenges in the case, the equities, and the broader programmatic concerns of HUD and the Civil Rights Division, the Department of Justice's ultimate decision was fully consistent with its usual policies and practices. Moreover, it bears emphasizing that in the *Newell* case, the Department did not do anything to limit the rights of the *qui tam* relator to go forward with the case; the Department decided only that it was not in the interest of the Department to intervene in the case and pursue it as the primary plaintiff. If, under the law, the relator were eligible to pursue the case and could prevail on the merits, the Department of Justice did not prevent the relator from doing so.

Mr. JORDAN. The gentleman from Pennsylvania is recognized for 5 minutes.

Mr. CARTWRIGHT. Thank you, Attorney Slade, for coming here today and sharing your expertise. Unfortunately, you are the only qui tam expert we have heard from in the testimony today. We had Mr. Newell's attorney admit candidly that he is not a qui tam expert and a False Claims Act expert. So it is very important that we hear from your testimony today.

Now, we did hear the chairman of the Judiciary Committee, Mr. Goodlatte, say on the record today that dropping the Newell case cost the U.S. Government over \$200 million. Did you hear him say that?

Ms. SLADE. I did.

Mr. CARTWRIGHT. Well, based on your review of the claims and the defenses in the Newell case, was this any \$200 million case, counselor?

Ms. SLADE. Well, the first point to be made is that there are serious problems to establishing liability in the case, in my view.

Second, even if liability were to be established, then there would be the question of establishing what the damages were. There are varying court decisions on how you measure damages in a case like this, where you have a service that's been delivered but regulatory noncompliance.

I find it extremely unlikely that a court would determine single damages to be the \$85 million figure.

Mr. CARTWRIGHT. Okay. And so, unlikely that they were talking about a \$200 million case here. But even beyond that, assume for the moment that it were a \$200 million case, we are talking about money that would be coming from where? The city of St. Paul, is that right?

Ms. SLADE. That's right.

Mr. CARTWRIGHT. And you also heard Mr. DeVincke, Mr. Newell's lawyer, candidly state on the record that a figure like that would have just bankrupted the city of St. Paul. Does that make sense to you?

Ms. SLADE. I don't know the particulars of the city's finances, but it sounds like a lot of money for a city to pay.

Mr. CARTWRIGHT. In other words, anybody who suggests to the public at large that dropping the government's involvement in the Newell case cost the U.S. taxpayers money, we are talking about any \$1 coming out of that case would have been coming from the taxpayers of the city of St. Paul. Am I correct on that?

Ms. SLADE. That's right.

Mr. CARTWRIGHT. All right.

Now, in this case, was Mr. Newell a whistleblower?

Ms. SLADE. I believe your question goes to whether the court had jurisdiction over the case in light of the public disclosure bar.

Mr. CARTWRIGHT. Right.

Ms. SLADE. And there was, again, serious litigation risk on that front for this qui tam plaintiff.

Mr. CARTWRIGHT. And the idea is that the public disclosure bar means that if you are bringing a False Claims Act case based on information that is available to the public at large, you don't have

the kind of inside information that makes you a whistleblower. Am I getting that right?

Ms. SLADE. Well, there is an exception to that bar for somebody with direct and independent knowledge who is considered an original source.

Mr. CARTWRIGHT. Right.

Ms. SLADE. That can be a difficult standard to meet in these cases. And, generally, you need to be an insider, although not always.

Mr. CARTWRIGHT. So did you hear anything or read anything about this case that would have qualified Mr. Newell for that exception?

Ms. SLADE. I think he had challenges to meeting that standard, serious challenges.

Mr. CARTWRIGHT. So that if anybody mentions this Newell case as if it is a whistleblower case and he is to be commended for coming forth with his secret, inside information, and saving the American taxpayers money thereby, there is nothing to that at all, is there?

Ms. SLADE. Well, the points you made, I think, overlap to some degree with the problems of liability, because you have a situation here where HUD did learn—should have known all along but did eventually learn and decided to employ a voluntary compliance agreement as the remedy. And the court would not ignore that and may well have considered that in connection with the public disclosure decision without articulating it.

Mr. CARTWRIGHT. Thank you, Ms. Slade.

Now, another point that you brought up was the discretion of the Department of Justice Civil Division to pursue broader policy goals. Did you talk about that?

Ms. SLADE. Yes.

Mr. CARTWRIGHT. And that's the biggest point of all here, is that the United States Department of Justice and the people who run it do have the unfettered discretion to pursue broad policy goals of the administration, do they not?

Ms. SLADE. That's right. They are representing the program agencies.

Mr. CARTWRIGHT. And are you aware of any restriction placed upon the Department of Justice from managing its litigation docket in a way that will promote its policy and broader goals of the administration?

Ms. SLADE. I am not.

Mr. CARTWRIGHT. That's the most important answer all day. Thank you, counselor. Appreciate it.

I yield back.

Mr. JORDAN. I thank the gentleman.

The gentleman from Arizona, the chairman of the Constitution Committee, is recognized.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And thank you, Ms. Slade, for being here.

Ms. Slade, you have testified that you would not have recommended intervening in Mr. Newell's case if you had reviewed it. And, certainly you are entitled to that opinion.

However, career attorneys at DOJ and HUD did disagree with your assessment. On November 22nd, 2011, the Civil Frauds section drafted a formal memo recommending intervention and outlining the reasons. The memo found that, “The City of St. Paul was required to comply with the statutes. Our investigation confirms that the City failed to do so.” The memo further stated that, “We believe that its certification of Section 3 compliance to obtain HUD funds were actually more than reckless and that the City had actual knowledge that they were false.”

Thus, as of November 22nd, 2011, HUD and the Civil Frauds section and the U.S. Attorney’s Office in Minnesota all strongly recommended intervention in Mr. Newell’s case. There is no documentation that they viewed the case as marginal or even a close call. Indeed, last week, the highest career official at HUD to have reviewed the case stated to committee investigators in a transcribed interview that he still stands by his original recommendation that HUD should have recommended intervening in the case.

So, after reviewing all of the evidence in this matter, it is clear that the only factor, at least from my perspective, that the only factor that led to the government declining to intervene in this case was Mr. Perez’s desire to have the Supreme Court not hear the *Magner* disparate impact case.

So my question to you is, while you were an attorney at the Justice Department, did you ever provide evidence to a False Claims Act defendant to help that defendant win a motion to dismiss on public disclosure bar grounds?

Ms. SLADE. No.

Mr. FRANKS. Would it have been appropriate for you to have shared such information?

Ms. SLADE. I haven’t researched that question. I don’t know the answer.

Mr. FRANKS. Okay. You contend, Ms. Slade, that Mr. Newell undermined the False Claims Act because the district court determined that he was not the original source of the allegations in this complaint; is that correct?

Well, either way—

Ms. SLADE. Yeah, it was that he had litigation risks, serious litigation risks on that front.

Mr. FRANKS. Okay. And in *United States ex rel. Lisitza v. Johnson & Johnson*, the district court determined that your client was not the original source of the allegations and that your client’s complaint “simply adds a sprinkle of factual garnish,” to the original—to the true original source’s allegations.

So, you know, there is a dual issue here. It sounds like you are guilty of what you’ve accused Mr. Newell of doing.

Ms. SLADE. You mean—I’m not sure I follow.

Mr. FRANKS. Well, your client in this stated case was not the original source of the allegations, and that your—the court said this, that your client’s complaint, “simply adds a sprinkle of factual garnish” to the true original source’s allegations.

In fact, in Mr. Newell’s case, he was the only one pursuing an FCA case against the city of St. Paul. In your case, your client was kind of attaching himself to the complaint of another whistleblower

who was already pursuing a case on behalf of the United States. So help me understand the conflict here.

Ms. SLADE. Okay. Well, I will say that we disagree with the court's decision, but that litigation has not yet been resolved, so it is not appropriate for me to comment on it.

Mr. FRANKS. Okay. All right.

Your written testimony notes that—well, I'm afraid my time has expired. Maybe—no, I'm sorry, I'm looking at the wrong button here.

Your written testimony notes that during the congressional investigation of this matter, the former Deputy Assistant Attorney General, Michael Hertz, who was widely considered at the time to be the government's preeminent expert on False Claims Act, was quoted, to use his term, was quoted as saying this case sucks. You add that this, "opinion does not surprise you."

During the investigation, Hertz was also quoted as saying, "It looks like buying off St. Paul." Does that surprise you?

Ms. SLADE. That he would have said that?

Mr. FRANKS. That he would have said—do you think that he—what is your perspective of his perspective?

Ms. SLADE. Well, I will just state generally that the first comment, I think, is a very important one to focus on because, as I understand it, it was said early on when the intervention memo first came up, the memo recommending intervention. Apparently, he confided in his deputy, Joyce Branda, that he felt that the case sucks. And knowing, having worked with and for Mike for 10 years, he was to the point—

Mr. FRANKS. It sounds like that's something he might say.

Ms. SLADE. And when I asked him—

Mr. FRANKS. But when he said, "looks like buying off St. Paul," what is your perspective on that?

Ms. SLADE. I have no—

Mr. FRANKS. Was he confused?

Ms. SLADE. I wasn't in that meeting. I can't be a witness on that topic.

Mr. FRANKS. No, I understand.

Ms. SLADE. Yeah.

Mr. FRANKS. All right. Well, thank you, Ms. Slade.

And, Mr. Chairman, I would just suggest to you that the bottom line here is that Mr. Perez intervened in a case, and the result was that the people of St. Paul were ill-served and so was this country. And, ultimately, it was to save a false process of the court to indicate that disparate impact—that he knew that this was going to be in trouble before the court, and I believe that's why he did it. And I think that's the real issue here.

And, with that, I yield back.

Mr. MEADOWS. [Presiding.] I thank the gentleman, and he yields back.

And the chair recognizes the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Meadows.

We welcome your testimony here today. You've been very patient in waiting your turn.

And you said that there may be a concern about the potential public disclosure problem. Would you describe that a little bit for me, please?

Ms. SLADE. Sure.

Well, the False Claims Act, at the time when the misconduct in this case occurred, the alleged misconduct, had a public disclosure provision that provided that a court lacked jurisdiction over a qui tam action if it was based on matters that had been publicly disclosed in various forums—the media, litigation, administrative proceedings.

The exception to that bar is where the whistleblower is an original source of the information, in that he or she has direct and independent knowledge of it and has gone to the government before filing suit.

Mr. CONYERS. Uh-huh.

Now, even if a lot of allegations here are true, even if the Newell and Ellis cases were appropriate for intervention, even if the Associate Attorney General actively sought to decline intervention in these cases in exchange for the city's withdrawal of Magner, would anything illegal or improper have occurred under those circumstances in this case, in your view?

Ms. SLADE. I don't know of any law or rule of ethics that would have prohibited the Department of Justice from acting as a single entity taking into account and coordinating among its components to get the best possible outcome for the United States.

Mr. CONYERS. Uh-huh.

Ms. SLADE. It seems to me that that's what happened here.

Mr. CONYERS. Thank you.

Now, in the Department of Justice for a decade or longer, can you give me an idea of the professionalism of the Civil Litigation Division when these False Claim Act cases arise?

Ms. SLADE. Sure. I worked closely, as I mentioned, with Michael Hertz, who sadly passed away about a year ago, and with Joyce Branda, who had always been his number two. The two of them not only are extremely capable and experienced—I think Mike Hertz handled False Claims Act matters for about 30 years—they also have impeccable integrity. They are selfless public servants. And I can't imagine that a final decision on this case would have been made in anything but the most ethical fashion.

Mr. CONYERS. I thank you so much for your response to these questions and commend you for being our most effective witness here so far. And I—

Mr. CONNOLLY. Would my colleague yield?

Mr. CONYERS. Surely.

Mr. CONNOLLY. I thank my colleague.

I just want to say, Ms. Slade, look around. There is obviously a reason why you were not put on the second panel. And the press, of course, got the story they wanted, so apparently your testimony, expert testimony, isn't really important.

Most of my colleagues on the other side of the aisle that had plenty to say in terms of assassinating the character of the pending Department of Labor Secretary are all gone, because why would they want to hear from an expert? They would rather hear from some poor soul and his erstwhile lawyer who has zero experience

in this endeavor so that they can make a case against an honorable man yet again.

And I say to my colleague, Mr. Nadler, on the Judiciary Committee, I'm very pleased to see you shocked. Unfortunately, it is de rigueur here at the Oversight and Government Reform Committee, travesty upon travesty in terms of sham hearings to assassinate someone's character or to make some blatant political point rather than actually try to get at the truth.

I apologize to you, Ms. Slade, for the fact that you had to wait for the third panel and, of course, you have so little by way of audience here at the committee.

Mr. CONYERS. Do you yield back to me?

Mr. CONNOLLY. I'm very pleased to yield back to you, Mr. Conyers. And thank you for letting me have my moment.

Mr. CONYERS. Well, my pleasure, indeed.

I want to associate myself with the shock that you ascribe to Mr. Nadler. And I thank you very much for your testimony.

Is there anything you would want to add in this discussion?

Ms. SLADE. No. Thank you for the opportunity to testify.

Mr. CONYERS. Thank you.

I yield back, sir.

Mr. MEADOWS. I thank the gentleman from Michigan.

And the chair reserves his time, 5 minutes, for later and will defer to the gentleman from Nevada.

Mr. HORSFORD. Thank you, Chairman Meadows, and to the committee.

I also want to express my disappointment in how this hearing has been conducted. You know, I'm a freshman, but I still read the rules, and Rule XIV(c) says that a ranking minority member of the full committee shall select a ranking minority member for each panel. And that is in the rules. And that was not followed today. And now we are on the third panel, and you did not have an opportunity to bring forward the minority's perspective in the course of this debate until now. So that's unfortunate, and it is clearly politically motivated by the majority side.

And we also have two chambers. And I didn't believe that it's the House of Representatives that is involved in the confirmation process, but that's reserved for the Senate. But apparently some Members of the House believe it's their job to do everything.

I would like to ask Ms. Slade here, you know, the Republicans have made numerous allegations that there is something improper about the Department of Justice considering broader interest of the United States in its intervention decision in a False Claims Act case. As someone who has been at the Department of Justice and represented whistleblowers and is an expert on the False Claims Act in general, let me ask you: Is there anything unethical or improper in what the Department of Justice did in this broader interest?

Ms. SLADE. I don't see anything unethical or improper about considering broader programmatic interests of the client agencies in a decision on a qui tam case.

And I also did want to point out that I believe it may have been gratuitous to even reference the fact that the Supreme Court petition for cert was being withdrawn as a factor in the memo recom-

mending declination. I think it may well be the case, based on what I know of Mr. Hertz' views on cases and the legal risks in this case that the Department of Justice, when the decision got up to his level, that they were going to be declining. And he is a career manager.

I think it may well be that they were going to decline the case anyway, so that that reference being in there was in there for full transparency, that there had been discussion about it, but it was not necessary to the decision.

Mr. HORSFORD. Okay. In fact, as you explain in your written testimony, "In the False Claims Act, Congress did not dictate to the U.S. Department of Justice the criteria it should employ in making this intervention determination. Every single court that has looked at the issue has emphasized the broad discretion vested in the Department of Justice to decide what is in the best interest of the United States in making its enforcement decisions."

That is the law; is that correct?

Ms. SLADE. Yes.

Mr. HORSFORD. And so let's also indicate what Professor Stephen Gillers, who has taught legal ethics at the New York University School of Law since 1978, examined the Republicans' allegations. Professor Gillers identified, "no authority to support the notion that such a consideration is unethical."

And Mr. DeVincke is no longer here, so I can't ask him the question that I had for him.

But, Ms. Slade, on February 9th, 2012, a Department of Justice memo signed by Tony West authorizing the government to decline intervention transparently refers to *Magner v. Gallagher* as a factor in the Department of Justice's decision-making. It reads, "The city has indicated that it will dismiss the Gallagher petition, and declination here will facilitate the city's doing so. Under the circumstances, we believe this is another factor weighing in favor of declination."

Ms. Slade, is there any problem that you are aware of in law or legal ethics with linking two cases in the interest of a single client?

Ms. SLADE. No.

Mr. HORSFORD. So then the entire spectacle that we have had here today basically, unfortunately, using Mr. Newell as a pawn—you know, I would really take objection to so many Members who claim that they are concerned about the interests of low-income families.

When I read about what was happening in St. Paul and with some of the landlords here, you literally had them bringing suits against the city rather than bringing their units up to code. That's the part of this hearing that was not discussed. One landlord plaintiff was so negligent about addressing a rat infestation that his tenant resorted duct-taping rat holes in a failed attempt at containment.

So if you want to fix something, let's fix that, and stop making false allegations against members of the public service.

Thank you, Mr. Chairman.

Mr. JORDAN. I thank the gentleman.

I'd just point out, the declination statement with the reference to *Magner* was put in there even though Mr. Perez said he didn't

want it in there because, I mean, it seems obvious to me that the career attorneys at Justice said, we've got to include that, this is what this is all about. That's why they put it in there.

Ms. SLADE, we understand that you are affiliated with an organization called Taxpayers Against Fraud?

Ms. SLADE. That's right.

Mr. JORDAN. Is that accurate? Are you testifying on behalf of Taxpayers Against Fraud today?

Ms. SLADE. No, I'm not.

Mr. JORDAN. Why not? Did they tell you not to do that, or did you ask if I could testify on their behalf, or—

Ms. SLADE. I was asked to testify in my personal capacity. There was never any discussion of testifying on—

Mr. JORDAN. Are you on the board of that organization?

Ms. SLADE. I am, yeah.

Mr. JORDAN. Okay. But they didn't give you any instructions about coming here today?

Ms. SLADE. No, they did not.

Mr. JORDAN. Okay. Thank you.

Let's put up the—we have—we got this yesterday. I mean, we've been asking for documents for a long time, but we—

Ms. SLADE. Actually, Mr. Jordan, could I correct my statement?

I did inform Taxpayers Against Fraud staff that I would be testifying. And I did ask a factual question or two of them, and I did get back answers to my factual questions.

However, I contacted them having accepted the invitation to testify already—

Mr. JORDAN. Oh, okay.

Ms. SLADE. —without any communication before I accepted the invitation.

Mr. JORDAN. In that communication that you had with the staff people at Taxpayers Against Fraud, which you are a board member of, in any of that communication did they tell you, you know what, we wish you weren't testifying on this situation, this case? We wish you weren't going to this hearing and testifying?

Ms. SLADE. I'm—

Mr. JORDAN. It's a pretty simple question.

Ms. SLADE. No, I know, I know—

Mr. JORDAN. Did they say to do it or not do it? Did they say, you know, we wish you really weren't doing that, we are supposed to represent fraud, there is obviously fraud that occurred here, as evidenced by the memo—

Ms. SLADE. I believe I got a communication that they thought it was a politically motivated investigation and hearing and that I shouldn't expect it to be really about the merits of the issues.

Mr. JORDAN. What?

Mr. NADLER. And they were correct, obviously.

Ms. SLADE. You asked a question.

Mr. JORDAN. Okay, well, I want to get to the—not a politically motivated thing—I want to get to the—this is from U.S. attorneys from St. Paul who came to Washington, gave a PowerPoint in front of main Justice. And let's just go the last page, the conclusions. "The city has long been aware of its obligation under Section 3. The city repeatedly told HUD and others that it was in compliance with

Section 3. The city has failed to substantially comply with Section 3.”

So I guess I want to go back with you. In fact, let’s go back to the very first slide. So we’ve got this—we’ve got U.S. attorneys from St. Paul, from Minnesota, flying to main Justice saying, you know, it is a strong case.

Let’s go back to the very first slide I had up back in—slide 1, if we could.

I want to go back to where I was with Mr. Newell and Mr. DeVincke in the last—it is not just Justice or HUD or the folks in St. Paul. It’s Justice, the U.S. attorneys in St. Paul, and HUD. Everyone recommends they intervene.

Slide 2. “We recommend intervening in this action to assert a False Claims action in common law claims against the city.”

Slide 3. You even used this in your testimony. I think this is where we talk about “egregious.” Is this the one, the slide that talks about “egregious”? I guess that’s the next one. “The city knew about its obligation and failed to comply.”

Here, slide 4, they use the same term you used in your testimony. “This is a particularly egregious example of false certifications.”

So, I mean, this is pretty strong, Ms. Slade. And I know you have a background in this and you are the expert and all, but it seems to me a reasonable person would look at all of this, U.S. attorneys flying to D.C. saying, look, they didn’t comply, here is a PowerPoint presentation. Everyone agrees, attorneys in Minnesota, attorneys at HUD, attorneys at Justice, everyone agrees, even Ms. Slade, the expert, agrees it is egregious and we should proceed.

And then the one thing that happens, the only thing I can see, maybe there is something else, but the one big event that happens between all this communication and the sudden change of heart is Mr. Perez gets on an airplane, personally flies to St. Paul, and suddenly everything changes.

And you say, oh, this is common practice. It is common practice for everyone to agree, for U.S. attorneys to fly to Washington, make a PowerPoint presentation, HUD attorneys, U.S. Attorneys in Minnesota, folks at main Justice, everyone agrees, let’s go forward. In fact, they communicated that to Mr. Newell and his counsel: This is a strong case, we are going to intervene, we are going to move forward. Mr. Newell is excited because he doesn’t want to personally benefit from this; he just wants to help the people in St. Paul.

And then suddenly things change. And the only thing I can see that could cause that is Mr. Perez flying to St. Paul, a closed-door meeting. Everything changes after that meeting on February 3rd, 2012.

Ms. SLADE. Well, I guess in response I will say that my use of the word “egregious” was with respect to the violations of Section 3, not with respect to violations of the False Claims Act—

Mr. JORDAN. No, that’s how they used it, too.

Ms. SLADE. —and there is a difference.

Mr. JORDAN. I understand that.

Ms. SLADE. That’s right.

Mr. JORDAN. That’s how they used it in the memo.

Ms. SLADE. Yeah.

Mr. JORDAN. I can read the memo.

Ms. SLADE. Right.

And in terms of everybody being on board, you failed to mention a key player, and that is Michael Hertz. It was going to be Michael Hertz' decision and then, above him, the decision of Tony West. And Michael Hertz is the first—

Mr. JORDAN. Well, then why did Perez have to fly to St. Paul? Why didn't Michael Hertz fly to St. Paul? Why didn't Tony West?

Ms. SLADE. I don't know the answer to that.

Mr. JORDAN. Oh, well, you just said those are the guys who made the decision. But all I know is the guy who flew to St. Paul, got in a closed-door meeting, and then everything changed a week later, it wasn't Michael Hertz or it wasn't Tony West. It was—oh, it was Mr. Perez. Imagine that.

Ms. SLADE. I think there is a good bit in the record about the view—first of all, even the memo recommending intervention identifies some fairly serious possible defenses that could be made by the city of St. Paul.

Mr. JORDAN. Well, they knew—these are—you worked at Justice, right? You are one of the—you know these lawyers. They are good, smart people. They had 2-1/2 years, and they all said, let's intervene. Suddenly they didn't think of that until—oh, I get it. Tom, he is so smart, he is the only one who thought about, you know what, there's some problems, and I'm going to get on a plane and I'm going to fly to St. Paul and we are going to change everyone's mind.

Is that how it happened? It probably doesn't work that way normally at Justice, does it?

Ms. SLADE. These—

Mr. JORDAN. Does it? No, is that the normal practice? One guy flies to St. Paul and everything changes?

Ms. SLADE. I disagree with your characterization of what the record indicated—

Mr. JORDAN. No, you indicated that there were problems with the case, and what I said is, well, then why did everybody? You know, you would have a point if two of the three, if the attorneys in Minnesota said we want to intervene, and the folks at HUD said we want to intervene, but then the career folks at Justice, main Justice here in Washington, said, you know what, we don't think so, there's problems with the case.

Ms. SLADE. Either—

Mr. JORDAN. Or if it was HUD who said, you know what—the other two said we want to intervene, and HUD says, no, we don't want to do that, you would have a point.

But when everybody, every single expert career attorney who looks at this says we need to intervene—and the two folks you said who make the decision, they don't show up in the narrative, they are not flying to St. Paul. It is only Mr. Perez.

Ms. SLADE. There are instances from time to time, and I have heard of instances in the past year and before, where—

Mr. JORDAN. Time to time, and you've heard of them. We don't want time to time, we don't want you've heard of them.

Mr. NADLER. Could you let her answer instead of interrupting her all the time, sir?

Mr. JORDAN. I think, Mr. Nadler, I'm the chairman, and I can ask the questions the way I want to ask the questions.

Mr. NADLER. Let her answer the question instead of interrupting her five times in one sentence.

Mr. JORDAN. I will. I will let her answer.

Mr. NADLER. You want to be civil, but it's getting incredible here.

Mr. JORDAN. Well, you used the term "civil." You've interrupted more people in this hearing than any other member of the committee.

Ms. Slade, you can—Ms. Slade, you can proceed.

Ms. SLADE. Yeah, I was just going to say, the Deputy Assistant Attorney General for the Civil Division does not serve as a rubber stamp. The person filling that role does from time to time overrule, reject the decisions, the recommendations coming from below and make the decision on their own—

Mr. JORDAN. Which begs my question again. Why didn't that person, if it was such a close call, why didn't that person, who you just cited, who from time to time overrules, why didn't that person get on an airplane, fly to St. Paul, meet with the attorneys at St. Paul, and cut the deal that way?

Ms. SLADE. Well, that person was Mike Hertz. My understanding is he did say the case sucks when he first saw the memorandum seeking authority to intervene. So that was his first opinion of the case, and he was really the ultimate—

Mr. JORDAN. Still gets to the question. Why didn't he fly to St. Paul, then? If he is the guy making the call, why didn't he do it? Why does Mr. Perez have to step in and do it?

Ms. SLADE. I don't know.

Mr. JORDAN. Okay. Any further questions for our witness?

Mr. HORSFORD. Been going to over 2 hours.

Mr. JORDAN. Mr. Nadler, I thought you had been recognized. I had to step out.

The gentleman from New York is recognized.

Mr. NADLER. Thank you.

Ms. Slade, in your written testimony, you comment on the memorandum from all these slides today. And you quote some of what the slides show, and then you say, "These conclusions by the staff—which ironically are set forth in the original memorandum recommending intervention—in and of themselves would have been more than an adequate basis to recommend declination during the 10 years which I handled qui tam cases and health care fraud policy matters for the United States and Civil Division of the U.S. Justice Department," Why?

Ms. SLADE. There were serious problems with the case in terms of establishing whether compliance with the Section 3 regulations was a condition of payment, which the courts, most of the courts require. There are serious problems with establishing that compliance with those Section 3 requirements was material to HUD's payment decisions. And particularly relevant here is the fact that HUD, when it learned of the problem, worked out a Voluntary Compliance Agreement. That was their solution, to continue financing the city nonetheless. But the optics of that and the law are not favorable for the qui tam plaintiff.

Mr. NADLER. So these factors are factors which would lead a rational, knowledgeable, experienced attorney to say this isn't a winning case and we shouldn't do it. Right?

Ms. SLADE. That would have been my recommendation at the time.

Mr. NADLER. Thank you.

Now, secondly, Mr. Jordan, the distinguished gentleman from Ohio, showed us a bunch of slides. And he said, well, all the attorneys decided we should,—you know, we have to do this, and Mr. Perez overruled it.

Wasn't it the case that it was more that these were written by rather junior attorneys in the division and that the more senior attorneys, namely Ms. Branda and Mr. Hertz and perhaps others routinely overrule more junior attorneys when it comes time to review such things and that they did so in this case and that they decided that the case ought to be declined on the merits of the case?

Ms. SLADE. From time to time, the deputy assistant attorney general would overrule the recommendations coming from below.

Mr. NADLER. Not the deputy attorney general. Isn't Mr. Hertz a career attorney?

Ms. SLADE. He was the deputy assistant attorney general—

Mr. NADLER. Okay. So senior career attorneys from time to time will overrule junior career attorneys on the merits of whether it makes sense as a legal matter to bring a case.

Ms. SLADE. Of course.

Mr. NADLER. And did so in this case.

Ms. SLADE. That is my understanding.

Mr. NADLER. So the senior attorneys in the division, which division was it—Civil Division, not Mr. Perez' division—in the Civil Division, they decided that, based on the merits of the case, the case should be declined. Correct?

Ms. SLADE. Well, my understanding that there was reference to the Supreme Court on the petition for cert as a factor that was stated in the—

Mr. NADLER. But they also declined it on the merits of the case.

Ms. SLADE. They looked at the merits as well.

Mr. NADLER. Now, let's assume that that wasn't the case. Let's assume—well, before I get to that. Do you think it is accurate to describe the decision not to intervene in Mr. Newell's case as hanging him out to dry or leaving legitimate whistleblowers twisting in the wind?

Ms. SLADE. I don't agree with that characterization.

Mr. NADLER. Because?

Ms. SLADE. First of all, I think the case has, as I mentioned, serious litigation risks. Secondly, there is the private attorney general provision. And if one files a qui tam lawsuit, one can't expect the government to intervene, even if it is meritorious. There may be resources at issue. Other reasons. So one has to be prepared to go forward if the facts and the law appear at the time of declination to be the same as they were when you first filed your case.

Mr. NADLER. And the fact that, according to Mr. Newell, the Department of HUD had told him—I think he said that they would proceed with this case, that doesn't bind the Justice Department or

make it—or give them not the right but the—the right to rely on that before it gets to the Justice Department?

Ms. SLADE. The department of Justice makes the decision on litigation in fraud cases. And the HUD lawyers are not as experienced in False Claims Act matters as the Justice Department officials.

Mr. NADLER. And Senator Grassley expressed his concern that whistleblowers would be discouraged from bringing cases because of Mr. Newell's experience. Do you share his concern?

Ms. SLADE. I do not. I have the greatest respect for Senator Grassley, and all he has done for the False Claim Act and whistleblowers. On this particular issue, I beg to differ. I don't think that any competent qui tam attorney looking at the—this matter closely would be deterred, nor would their clients.

Mr. NADLER. So any characterization, which is what we heard all day today, of Deputy Attorney General Perez selling out—well, let me ask a different question.

The people of St. Paul were allegedly sold out by attorney—Deputy Attorney General Perez. They were sold out from the possibility of having to pay a lot of money in damages out of their tax base. I don't understand that. Could you—if this suit had proceeded, if the Federal Government had intervened, had not declined and had won, what would have been the results to the citizens of St. Paul? Would they have had to pay a lot of money to somebody else?

Ms. SLADE. Yeah. I would think that it would have come out of their taxes, yes. I think that they would have been the ones to suffer. It wasn't as if the case was against a Boeing or a Pfizer or a private entity that had unduly profited as a result of fraud.

Mr. NADLER. So there is no way of saying that the people of St. Paul were injured by not having to defend a case which had they lost would have cost them as taxpayers a lot of money.

Ms. SLADE. I believe that is right.

Mr. NADLER. Thank you.

Lastly, let me just ask this. Let's assume that all this weren't the case. Let's assume that the case had—that the—that all this weren't the fact. Let's assume that the—Mr. Newell's case was strong on the law, instead of having many litigation risks. Let's assume that it was a meritorious case. And it may be a meritorious case, but let's assume there were no problems with the case. And that on the merits, the Department of Justice might have—will have not declined the case, but that the attorney general or deputy attorney general decided as a matter of policy that rather than proceed with the Magner case, it was worth trading off this. Is that within the purview of the proper exercise of discretion of the department to make such decisions? And if it made such a decision—which, again, it is a hypothetical that this case, in fact, had a lot of merits, which it apparently didn't, and didn't have a lot of litigation risk, which apparently it does—would there be anything improper, improper, illegal, unethical with the department deciding this one is more important than that one?

Ms. SLADE. Well, I think that gets us back to the case law that I mentioned in my written testimony and oral testimony. In the context of government motions to dismiss qui tam cases over the objections of a whistleblower, which is a far more extreme action than merely declining to intervene, in that context, the courts have

said the Department of Justice has unfettered discretion in making that decision. And several courts, several courts of appeals have elaborated on that and said, as long as the decision has a rational relationship to a legitimate government purpose, the government may even dismiss a case—

Mr. NADLER. And it is certainly a legitimate government purpose, whether you agree with it or not, to avoid taking something to the Supreme Court, which the decision maker thinks may get a result that he thinks is damaging to the United States.

Ms. SLADE. I would agree with that.

Mr. NADLER. Okay. So, to summarize, to summarize, number one, the Newell case—Newell is not a whistleblower, although he was a legitimate qui tam complainant because of the public disclosure bar, one; two, his case had major legal problems associated with it that could—that could cause and in your experience would have caused senior litigation attorneys in the Department of Justice to say we should not get involved in this case; three, the decision to do so was basically made on the merits by senior litigation—by senior people in the Civil Division, namely Mr. Hertz and Ms. Branda, concurred in by the assistant attorney general; four, that it is common or oftentimes that the senior litigation—that the senior attorneys in the department will overrule the junior attorneys who wrote the memos and slides that we have seen; five, that there is nothing improper about their doing so; six, that there is nothing improper about the attorney general agreeing with them; and, seven, that even if that all—if all that weren't the case—oh, seven, that by doing so, they weren't hurting the citizens of St. Paul, who were evading—avoiding, I should say, not evading—avoiding thereby a possibility of having to pay higher taxes because of a huge penalty against the City; eight, that Mr. Newell, who is sympathetic and doing the right thing here nonetheless had no right to expect that the Federal Government would intervene in the case; and, finally, that even if all this weren't the case, it is within the proper discretion of the Justice Department to decide that it is better to have a—to—to not decline—to decline in this case so as to get a result in that case or not to get a result in that case if that is indeed the tradeoff, and there is nothing immoral or unethical about that. Have I summarized your testimony correctly?

Ms. SLADE. That was a fairly long question. And I agree with most of what you said. I did write notes on a couple areas that I would phrase a little differently. With regard to the public disclosure issue, I think Mr. Newell had litigation risk, is the way I would put it. I wouldn't say categorically that he definitely is not qualified to bring a False Claims Act case. With regard to the career Department of Justice managers, I would say that from time to time, they will object—

Mr. NADLER. Overrule.

Ms. SLADE. —to a recommendation coming from below. I wouldn't say commonly.

Mr. JORDAN. Can I just pick up there real quickly? Then I will yield to Mr. Meadows.

You said, "from time to time." How often does that happen? I mean, you got unanimous, everyone says let's intervene, let's proceed. How often does it happen? Time to time. Mr. Nadler tried to

get to you confirm his “routinely.” You stuck with “time to time.” What does that mean? 10 percent? 80 percent?

Ms. SLADE. I can’t give you a precise number. I just know I hear of it from time to time.

Mr. JORDAN. Your practice. You worked there. How often was it done?

Ms. SLADE. I worked there 13 years ago.

Mr. JORDAN. But you worked there. That is why I am asking how often is it typically done?

Ms. SLADE. Very rough guess. Very rough. I mean——

Mr. JORDAN. Let me ask you this——

Mr. NADLER. Let her answer.

Mr. JORDAN. I think she is going to say “time to time” again.

I want to yield to Mr. Meadows, too.

Mr. NADLER. You said a rough guess, and she was about answer your question.

Mr. JORDAN. Give me the answer, then. Rough guess is what percentage?

Ms. SLADE. Okay. Well, first of all, the way things work is that ordinarily you have a dialogue before you send your memo up. And sometimes in that dialogue, you will learn that your supervisors aren’t on board or have serious questions about your analysis. So sometimes that dialogue will result in your going down a different path.

Mr. JORDAN. Well, we are way past that on this.

Ms. SLADE. Right. In terms of the actual memo be prepared and being—going up the chain and then coming back without approval, when I was—it is very hard to place a number on it. But I would say maybe 1 out of 30, 1 out of 40.

Mr. JORDAN. That few a times.

Ms. SLADE. That is a rough guess. It is a guess, nothing more.

Mr. JORDAN. When you say “from time to time,” it is like very rarely. Right?

Ms. SLADE. I don’t know how you—that number is a guess. It could be——

Mr. JORDAN. One out of 30.

Ms. SLADE. Yeah. It is a guess.

Mr. JORDAN. I thought 1 out of 10, 10 percent—like 1 out of 30.

Ms. SLADE. I could qualify that. I was not——

Mr. JORDAN. Mr. Nadler wants to make 1 out of 30 routine.

Mr. NADLER. She wants to qualify.

Ms. SLADE. I was not a reviewer at the departments, so I didn’t see——

Mr. JORDAN. You are the expert and you just said 1 out of 30. Mr. Nadler says, that is routine. You say 1 out of 30 is time to time. We are now saying——

Now let me ask you this way: One out of 30 times that it gets overturned, how many of those 1 out of 30 take 3 years?

Ms. SLADE. Again, 1 out of 30 is a guess. With regard to the——

Mr. JORDAN. One out of 30, 3 years of time, effort, and frankly, taxpayer money, which Mr. Nadler suddenly cares a lot about—taxpayer money put to use for 3 years they are all pursuing it, and it is still overturned.

Ms. SLADE. Believe it or not——

Mr. JORDAN. And that is routine, according to Mr. Nadler.

Ms. SLADE. —time of filing until the decision on intervention. Qui tam actions will—and this time I will use the word “commonly,” they commonly last more than 2, 3, or 4 years before the government gets to the point of deciding on intervention.

Mr. JORDAN. One out of the 30. One out of 30, great.

Ms. SLADE. Again—

Mr. JORDAN. Gentleman from if North Carolina is recognized.

Ms. SLADE. That is a guess.

Mr. NADLER. Excuse me. I am still on my time, I think.

Mr. JORDAN. No, you are not. I gave you 11 minutes.

Mr. NADLER. You said you will give us 2 and a quarter hours to question this witness.

Mr. JORDAN. I know. I didn't say I will give all the 2 and a quarter to you. Our guys want to ask questions, too. We did a back and forth. Right? Mr. Gohmert hasn't asked any questions yet, and you have had—

Mr. GOHMERT. Eleven minutes and 45 seconds.

Mr. JORDAN. I was being liberal with the time.

Mr. Meadows, then we will go back on anyone on your side. If Mr. Nadler wants more, we will give him more. Then we will go to Mr. Gohmert.

Mr. MEADOWS. Thank you, Mr. Chairman.

And thank you, Ms. Slade, for coming to testify.

And as you mentioned that just a few minutes ago, you said there was one key person, Michael Hertz, you know, that would make the difference. Did you speak to Michael Hertz personally?

Ms. SLADE. He passed away a year ago.

Mr. MEADOWS. Yes, he did. So you didn't speak to Michael Hertz personally.

Ms. SLADE. Not about this case.

Mr. MEADOWS. And so, before today, had you ever met Mr. Newell?

Ms. SLADE. No.

Mr. MEADOWS. And so were you involved in any discussions with Mr. Newell, the Department of Justice, and HUD about this False Claims Act?

Ms. SLADE. No.

Mr. MEADOWS. So were you involved in any discussions with Mr. Newell's attorney and the Department of Justice, and HUD with regards to this False Claims Act?

Ms. SLADE. No, I was not.

Mr. MEADOWS. So you have no personal knowledge of this particular case that you come to testify as an expert witness today, and you have really no personal knowledge of any of that.

Ms. SLADE. In preparing my testimony, I did first read all of the documents in Appendix I to the majority report. And I gained my knowledge about the deliberative process and the facts—

Mr. MEADOWS. So when you go to court—you are a litigator, I would guess. When you go to court, do you normally interview people before you make a particular assumption? Yes or no. Would you normally interview somebody?

Ms. SLADE. It would depend.

Mr. MEADOWS. So normally not? I mean, it is a yes or no. Normally, you would or—more than 50 percent of the time would you normally have of a conversation with somebody?

Ms. SLADE. I am unclear on your question.

Mr. MEADOWS. Let me go on a little bit further. You said that it sucks, was the comment by—so how did you know that he said that if you hadn't talked to him?

Ms. SLADE. In the majority report, I believe appendix—well, in one of the reports I read—

Mr. MEADOWS. So it was something you read.

Ms. SLADE. I read that Joyce Branda was interviewed and quoted Mr. Hertz as having said that.

Mr. MEADOWS. I have got a note here that says that—by the same Michael Hertz, “looks like buying off St. Paul.” So how would you say “it sucks” compared to “it looks like it's buying off St. Paul”? How do you reconcile those two?

Ms. SLADE. I don't think it is difficult at all to reconcile the two statements if in fact, you know—

Mr. MEADOWS. Well, it sucks that they are buying off St. Paul.

Ms. SLADE. No. He said the case sucks. So I think it is fully consistent that he thought the case had some fatal flaws in terms of legal theories, but at the same time, he was concerned about the appearance—

Mr. MEADOWS. So you are coming to day to testify as an expert witness from a legal theory point of view and not from a personal knowledge point of view.

Because you—it doesn't sound like you have any personal knowledge of this case, other than what you have read because they got you because you 13 years ago worked for the Department of Justice in their Civil Division. Is that correct?

Ms. SLADE. I did work for the Civil Division 13 years ago. That is true.

Mr. MEADOWS. Okay. So that is where your expertise comes from is working for the Civil Division of the Department of Justice, and that is why you are here today.

Ms. SLADE. Well, in addition, I have handled exclusively qui tam False Claims Act cases during the 13 years since I left the department.

Mr. MEADOWS. You have represented whistleblowers.

Ms. SLADE. That is right.

Mr. MEADOWS. And so do you not see a conflict today where we have a whistleblower that is coming in and you have represented them and now today you are showing up to discourage that kind of activity? Do you not see a conflict there in terms of your mission with the, I guess it was Taxpayers Against Fraud?

Ms. SLADE. I don't see any conflict in providing truthful information—

Mr. MEADOWS. Did anybody at Taxpayers Against Fraud see that as a conflict? Did anybody?

Ms. SLADE. Nobody mentioned it to me.

Mr. MEADOWS. Nobody mentioned that they were concerned about you coming here today and what it might appear to the client?

Ms. SLADE. I am here in my personal capacity.

Mr. MEADOWS. I understand you are here in your personal. Did anybody there say that they were concerned about you doing that with regards to how it may be affecting other whistleblowers?

Ms. SLADE. I don't think so.

Mr. MEADOWS. You don't think so.

Ms. SLADE. I can't recall that they did.

Mr. MEADOWS. Let me go on a little bit further, because you mentioned about the Civil Division.

How often is it—I understand that Mr. Perez was not really in the Civil Division; he was in the Civil Rights Division, which is a different division. How often is it that an assistant attorney general of a different division would intervene in a Civil Division jurisdiction? Is that common?

Ms. SLADE. I can't answer that. I don't know.

Mr. MEADOWS. In your experience with the Civil Division, how many times did it happen when you were there—because, obviously, it is not a normal thing that somebody from the Civil Rights Division, who had no jurisdiction over this, would come and intervene. So how many times did that happen when you were there in the Civil Division?

Ms. SLADE. I can't answer because I wasn't at the level at which those communications took place.

Mr. MEADOWS. So what level were you at? I mean, they are bringing you in here as an expert, so we would think that you would be able to talk about all those things with expert testimony. So what level were you at?

Ms. SLADE. Well, for the first 8 years, I was a trial attorney; for the last 2 years, I was a Senior Counsel for Health Care Fraud for the Civil Division.

Mr. MEADOWS. Okay.

Mr. Perez, from what I understand, spoke directly with career attorneys in the Civil Division. Is that normal? Yes or no, is that normal?

Ms. SLADE. I can't answer that. Well, what is normal is for Department of Justice—

Mr. MEADOWS. Now, I asked you if that was normal. I didn't ask you what is normal; I asked you, is that normal?

Ms. SLADE. I don't know; I didn't overlap with Mr. Perez.

Mr. MEADOWS. Okay. Did it ever happen when you were there?

Ms. SLADE. I don't believe he was there when I was at the department.

Mr. MEADOWS. No. Did anybody from the Civil Rights Division come in and talk to people in the Civil Division and take the lead in a particular case and start to negotiate anything? Had that ever happened before, Ms. Slade?

Ms. SLADE. I don't know. I wasn't involved.

Mr. MEADOWS. Are you aware of any? Yes or no.

Ms. SLADE. No.

Mr. MEADOWS. You are aware of none.

Ms. SLADE. That is right.

Mr. MEADOWS. All right. So this would unique, then, with your recollection of what you are aware of.

Ms. SLADE. With regard to the cases I handled, which were a subset, of course, of the cases handled by the Civil Division, it didn't happen on my cases.

Mr. MEADOWS. So how many—you are a litigator. How many False Claims Acts have you actually been the lead litigator in?

Ms. SLADE. At the Department of Justice or since?

Mr. MEADOWS. Yes.

Ms. SLADE. At the Department of Justice, again, this is a guess. Perhaps there were 20 or 30.

Mr. MEADOWS. That you were the lead litigator.

Ms. SLADE. Roughly, yes.

Mr. MEADOWS. So did you normally have contacts with other divisions within the DOJ on a regular basis in terms of that litigation? So would you go with and have them come in and confer with you with other departments?

Ms. SLADE. We communicated frequently with the Criminal Division.

Mr. MEADOWS. All right. And so, as we see this, how often do you think that, as we are looking at this, is—this is here, and I can see my time is expiring so I will yield back after this question.

Now, here we are with St. Paul about to be heard before the Supreme Court. They had—they had filed it. And just a few weeks prior to oral arguments, they miraculously decide that they are going to withdraw. Now, the fact that the case, this particular case was dropped on February the 9th and they withdrew on February the 10th, do you not see that as extremely coincidental in terms of those time frames, February 9th to February 10th?

Ms. SLADE. I think the documents and Appendix I speak for themselves as to that matter.

Mr. MEADOWS. I am asking you, not what the documents say. Do you not see that that is unbelievably coincidental that those two documents or those two things would have happened without some kind of outside interference?

Ms. SLADE. I believe there has been acknowledgment, has there not, that there was a linkage between the two events.

Mr. MEADOWS. So there is a linkage. So who was the causal effect of that linkage?

Ms. SLADE. Are you asking me to interpret what I read in Appendix I?

Mr. MEADOWS. Who do you think was the causal effect, Ms. Slade?

Ms. SLADE. I think the Department of Justice—

Mr. MEADOWS. So the Department of Justice was the causal effect of why that happened.

Ms. SLADE. Department of Justice and the City of St. Paul, along with—

Mr. MEADOWS. Which division? The Civil Division or the Civil Rights Division.

Ms. SLADE. I think the Department of Justice was acting as a single entity with input from—

Mr. MEADOWS. But don't they have different jurisdictions, Ms. Slade?

Ms. SLADE. They do.

Mr. MEADOWS. So whose jurisdiction would it have been? Civil?

Ms. SLADE. The qui tam cases, of course, were within the jurisdiction of Civil. And the civil rights issues within the—

Mr. MEADOWS. But this was not—this was a whistleblower. This was not a civil rights issue. The—the Supreme Court was a totally separate issue; it wouldn't have been anything to interfere in. Isn't that correct?

Ms. SLADE. The components of the Department of Justice are—

Mr. MEADOWS. Let me finish up. What personal motivation brought you here today? I mean, you say you are here because you want to see justice. Is that what it is, Ms. Slade?

Ms. SLADE. I was asked to testify. And I want the record to be—

Mr. MEADOWS. So you were asked to testify by who?

Ms. SLADE. By the minority.

Mr. MEADOWS. Okay. And your motivation is what?

Ms. SLADE. To provide truthful information to the best of my ability.

Mr. MEADOWS. Okay. To help taxpayers?

Ms. SLADE. In the interests of truthfulness in our public discourse.

Mr. MEADOWS. Thank you.

I yield back. Thank you for your patience, Mr. Chairman.

Mr. JORDAN. Mr. Cummings and then Mr. Gohmert.

Mr. CUMMINGS. Ms. Slade, let me tell you something. What just happened, I don't want you to be discouraged. What just happened. You came here as a lawyer and as someone who was volunteering your time to be here. You have represented whistleblowers. And you came here to testify with regard to this case what you know. We had a gentleman here a few minutes ago, in the first panel, where this type of case was his first case. You have talked about years and years of experience. And I guess my point is, is that when somebody who has represented whistleblowers can come in and, as you said, simply coming to give truthful testimony, and it just so happens that your opinion is—may not, you know, whistleblowers may not love it, but you are merely telling the truth, to me, that is even more credibility that you were even—that you would do that.

So I want to just ask you a few questions. And the reason why I said don't be discouraged is because I want more people like you, people who have an expertise, more expertise than many of us, who have spent year after year, first of all, in training, in law school, and going all through that thing, they are going through school, I mean, they are going through various jobs and then ending up where you are now. Everything that has happened to you up until this moment prepared you for this moment. And we are the beneficiaries of it. And I thank you for saying over and over and over again that you simply came here to tell the truth.

Now, the majority has made the claim that Mr. Perez manipulated the decisionmaking process for intervention in a False Claims Act case, resulting in a consensus of the Federal Government to switch its recommendation and decline intervention. I would like to ask some questions about intervention in DOJ's decision making process. Ms. Slade, are there any requirements in the False Claims Act that mandate that the government intervene?

Ms. SLADE. No, there are not.

Mr. CUMMINGS. Isn't it true that DOJ intervenes in only 25 percent of False Claims Act cases reported to the department. Is that right?

Ms. SLADE. That number is approximately correct.

Mr. CUMMINGS. All right. When you say "approximately," does that mean it is 26? 27?

Ms. SLADE. Over the years, I have heard 20 percent, I have heard 25 percent, I have heard 18 percent.

Mr. CUMMINGS. But 25 percent is a safe figure.

Ms. SLADE. That would be the highest figure.

Mr. CUMMINGS. So most False Claim Act cases are treated no differently than Mr Newell's.

Ms. Slade, your testimony described the unfettered discretion provided to the department in decisions regarding the False Claim Act. Can you explain this unfettered discretion? What does that mean?

Ms. SLADE. It would—the two circuit courts, I believe it is the Ninth Circuit and the 10th Circuit that have elaborated on that have stated that what it means is that the government needs to have a rational relationship between its decision and any legitimate government purpose. And that is really the strictest standard. Most courts just say "unfettered discretion." And it emanates from the U.S. constitution, the Take Care Clause, that the executive branch is vested with that discretion.

Mr. CUMMINGS. Ms. Slade, are you familiar with the internal process of DOJ as far as deciding whether or not to intervene in a case. Is that correct?

Ms. SLADE. That is right.

Mr. CUMMINGS. Given the fact that the department declines to intervene in the False Claims Act cases most of the time and the many significant weaknesses in Mr. Newell's case, specifically, does it surprise you that the government declined to intervene if Mr. Newell's case?

Ms. SLADE. It does not surprise me.

Mr. CUMMINGS. And you have seen no evidence that one DOJ official manipulated that process to get the specific decision in the Newell case. Is that right?

Ms. SLADE. I wouldn't use the word "manipulation." I think what happened was a consideration of the broader interests of the United States in a very thoughtful and coordinated fashion within the Department of Justice looking at broader interests and that the—it was not a question of manipulation; it was a question of trying get to the right result for the government as a whole.

Mr. CUMMINGS. In fact, you once worked with the career False Claims Act experts at the department who worked on the case, Mike Hertz and Joyce Branda. Isn't that correct?

Ms. SLADE. I did.

Mr. CUMMINGS. Knowing them, what do you have to say about the suggestion that they may have been manipulated?

Ms. SLADE. In my experience, that is highly, highly unlikely. They are—again, have great integrity. They are very experienced. They are very capable. They can't be bullied.

Mr. CUMMINGS. Thank you very much. I see my time is up.

Mr. MEADOWS. [Presiding.] I thank the gentleman.

And the chair recognizes the gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. And thank you, Miss Slade, for being here today.

Ms. SLADE. Thank you.

Mr. GOHMERT. Who is Tony West?

Ms. SLADE. Tony West is the—well, was at the time the assistant attorney general for the Civil Division.

Mr. GOHMERT. And who is Brian Martinez?

Ms. SLADE. Brian Martinez.

Mr. GOHMERT. Yes. A year ago.

Ms. SLADE. I am not sure.

Mr. GOHMERT. You are not sure.

Ms. SLADE. Yeah. I believe I read his name in the materials, but I am forgetting—

Mr. GOHMERT. How about Stuart Goldberg?

Ms. SLADE. I don't know his position.

Mr. GOHMERT. And James Cole?

Ms. SLADE. I don't know his position.

Mr. GOHMERT. Or David O'Neill.

Ms. SLADE. I am sorry, the last name?

Mr. GOHMERT. David O'Neill.

Ms. SLADE. I do not know his position.

Mr. GOHMERT. Okay. Well, you had indicated previously that you had reviewed the documents in the case. And so I am sure you are familiar with the email that was generated from Brian Martinez and that included the report as to the situation with regard to U.S. v. City of St. Paul, Minnesota and, in parentheses, involves two different qui tam cases. Are you familiar with that? And it has got stuff blotted out. I don't know if they can be thrown up on the screen.

Ms. SLADE. Yes, I have that in front of me.

Mr. GOHMERT. Right. And so, well, would you tell us again exactly what this was—this document was part of? I mean, it was conveyed by email. But—and that was what was furnished from the department of attorney general. So what is this document?

Ms. SLADE. Are you referencing the document that was the memorandum recommending intervention?

Mr. GOHMERT. No.

Ms. SLADE. Then I may not have it.

Mr. GOHMERT. Do you have that where you can put it up on the screen?

This is the recommendation with regard to major cases. And it is the list that was the Civil Division significant ongoing affirmative matters as of 3/8/12.

Ms. SLADE. Yeah, I did see that in the materials. I remember it.

Mr. GOHMERT. That was set to the deputy attorney general. So you are familiar with that, you did see it?

Ms. SLADE. I remember it.

Mr. GOHMERT. Apparently, we don't have it to put up on the screen.

But, in any event, you know, you had mentioned in—that the Justice Department has unfettered discretion in some cases on what they pursue, what they do not pursue.

But in this report regarding significant cases that was being sent to the deputy attorney general, this reads, specifically, it says, The Ellis case alleges that the City of Minneapolis is inappropriately condemning and knocking down low-income housing, which has a disparate racial impact. Government declined to intervene in Newell and has agreed to decline to intervene in Ellis in exchange for defendants' withdrawal of cert petition in the Gallagher case and, parentheses, a civil rights action.

So you had read that. Correct?

Ms. SLADE. I saw—I at least saw reference to it in the materials. I am not sure if I saw the actual document, but I saw reference to in the materials I read in preparation for coming here today.

Mr. GOHMERT. Right. And this was the document that was being sent to the deputy attorney general with regard to the significant cases. And you have done an excellent job of testifying about all the different considerations that may go into deciding to pursue or not pursue a case. But in this case, when a report is going to the deputy attorney general and you are listing many other cases, obviously, you would submit what would you felt like would be the most important aspects of the case for the deputy attorney general to know. Correct?

Ms. SLADE. Correct.

Mr. GOHMERT. And that is why the preparation of this document going to the deputy attorney general makes the point, it doesn't discuss all the other things that you have done an excellent job of covering; it gets right down to the nitty-gritty and says government declined to intervene in Newell and has agreed to decline to intervene in Ellis in exchange for defendants' withdrawal of cert petition in the Gallagher, the *Magner v. Gallagher* case.

That is the report that we were provided that went to the deputy attorney general to explain to the deputy attorney general the real nuts and bolts of why this decision was made. And it does appear to be a quid pro quo from the documents we were provided. And so do you have any information that would indicate that on the report of the significant civil cases going to the deputy attorney general, there was in any way an intent to give false information to the deputy attorney general about what was the reason, the real underlying reason for declining or withdrawal of cert petition in the Gallagher case? Do you know of any reason they would try to mislead to deputy attorney general?

Ms. SLADE. I have no information one way or the other on that issue.

Mr. GOHMERT. Thank you.

Now, I appreciate my friend, Mr. Cummings, pointing out how many times you have said, I just came here to tell the truth.

Obviously, you are an excellent trial lawyer. You have quite a reputation, and you are to be commended. It is good when we have people that have tried a lot of cases, and we appreciate you subjecting yourself to the laws of having to tell the truth before a congressional body. And so we appreciate you coming up, with those

penalties hanging over your head for not being truthful, so I know you will be.

How many times—can you have any kind of estimate how many times you may have told witnesses, as you prepared them to testify in a case that if somebody starts attacking your credibility, just say something to the effect, I just came here to tell the truth?

Ms. SLADE. I have never told a witness that.

Mr. GOHMERT. You have never ever told a witness that if somebody questions your motivation, I just came to tell the truth?

Ms. SLADE. I have never—

Mr. GOHMERT. Not even words to that effect?

Ms. SLADE. No, of course, I advise them to tell the truth. But I don't say that you should maintain that they are only there to tell to the truth in response to an attack on credibility. No, I have never, ever.

Mr. GOHMERT. How about when you talk to a witness about if they are attacked and it is made to look as if the lawyer put words in their mouth, because in proper preparation for a witness, an attorney will usually say, You may have questions come up about our conversation. You've talked to witnesses about that, surely?

Ms. SLADE. You mean in terms of asserting privilege?

Mr. GOHMERT. No. I am just talking about talking to a witness before they are to testify in a case, because you can't have a very good reputation as a trial attorney if you don't talk to your witnesses before they go in to testify. Do you not talk to witnesses before going to testify?

Ms. SLADE. Well, I would counsel my client, of course.

Mr. GOHMERT. Okay.

Ms. SLADE. Prepare them for the deposition or whatever the situation is.

Mr. GOHMERT. Right. And would you prepare them for cross-examination at all?

Ms. SLADE. Yes.

Mr. GOHMERT. And you have surely heard on cross-examination, a cross-examiner ask, Did you have a conversation with your attorney about this testimony?

Ms. SLADE. In depositions, I have heard that said, yes.

Mr. GOHMERT. And have you not told a witness that they can expect a question about, Did you talk to your attorney about this testimony?

Ms. SLADE. I think what I usually counsel clients is that the communications with me are privileged. And of course, they can acknowledge that they have prepared with their counsel. But the preparation process is privileged.

Mr. GOHMERT. Yes. But that doesn't prevent a question being asked with regard to someone who is not a client, who is a witness that you have offered, who is being cross-examined. And I got to come back. You are saying you never talked to a witness, who is not a client, and tell them about what to expect when they come in a courtroom. I am shocked that you never talked to anybody but a client about what they can expect during cross-examination. Is that your serious contention before us? How many cases have you tried?

Ms. SLADE. I think you are mischaracterizing what I—

Mr. GOHMERT. Okay. Well, then, you characterize it for me. This was what I got to earlier, and you corrected me when I said, "Have you talked to witnesses?" And you said, "No, I've talked to clients." And so I want to get back to what I—apparently, you have talked to witnesses in preparation for their going before a court to testify, have you not?

Ms. SLADE. I have talked to—I am thinking back on my time at Department of Justice. I don't know if you know this but the False Claims Act cases, ordinarily, if they are any good and the government intervenes, and then they settle before trial about 90 percent of the time or more.

Mr. GOHMERT. Right. And that is about standard. But so you don't try many cases?

Ms. SLADE. No. That is right. We don't. We—

Mr. GOHMERT. Okay. How about a deposition? Have you not prepared witnesses for depositions in preparation for cross-examination, who were not your clients?

Ms. SLADE. Well, while at the Department of Justice, I did prepare client agency employees. But the client agency was our client.

Mr. GOHMERT. So you have never prepared witnesses who are about to go in and testify and talk to them about what to expect on cross-examination.

Ms. SLADE. I may have. Right now, just thinking back, most of my focus has been on my qui tam relator clients so—

Mr. GOHMERT. So you have never offered a witness in deposition for anything?

Ms. SLADE. Well, when I was with the Department of Justice, we were offering witnesses from client agencies and those—

Mr. GOHMERT. I am asking you a question, and you are dancing around it. Have you ever provided, proffered, offered a witness to be—to provide testimony in a deposition?

Ms. SLADE. Who wasn't a client, is your question?

Mr. GOHMERT. Who was not a client.

Ms. SLADE. Sitting here today, I am tired—it's 1:30, I haven't had lunch. We've been here for about 3 and a half hours—I cannot recall. I could get back to you on that and write you a letter with the information.

Mr. GOHMERT. You have no idea if you have ever provided a witness for testimony. Well, I am just blown away that we have somebody up here as an expert that has never even provided a witness for a hearing. I am just shocked. I am shocked. I cannot believe. And I am sure that if trial lawyers across this country, no matter whether plaintiffs or defense attorneys, hear this, they will be shocked as well at the kind of people that are handling the kind of cases that are this important. I yield back.

Mr. JORDAN. Thank the gentleman.

Ms. Slade, if you can stay 5 more minutes, Mr. Nadler gets 5 more minutes.

Mr. NADLER. I won't take time 5 minutes.

I just want to, first of all, join Mr. Cummings in thanking you for your testimony. And I suppose—thank you for your testimony, period.

You have been through a lot. Some of it, you shouldn't have had to go through.

Let me just say you said that you were—you handled a lot of qui tam cases when you were with the Department of Justice.

Ms. SLADE. That is right.

Mr. NADLER. And since you were with the Department of Justice, which I think was the last 13 years, you have also handled a lot of qui tam cases representing whistleblowers?

Ms. SLADE. That is right.

Mr. NADLER. So you have handled qui tam cases basically for 23 years.

Ms. SLADE. That is correct.

Mr. NADLER. So you are the only witness we have heard today who has, aside from Mr. DeVincke, who is working on his first qui tam case, with any experience in judging the strength of a qui tam case or whether it makes sense or anything else about it. Is that correct? On an experience basis; I am not talking about intelligence or anything else.

Ms. SLADE. Yes.

Mr. NADLER. Okay. I thank you. I yield back.

Mr. JORDAN. Want to thank Ms. Slade for being here today. Hearing is adjourned.

Mr. CARTWRIGHT. Mr. Chairman, I ask—

Mr. JORDAN. I am sorry.

Mr. CARTWRIGHT. Unanimous consent to enter into the record statements of four legal experts refuting allegations made by the majority—

Mr. JORDAN. Without objection.

Mr. CARTWRIGHT. A letter received yesterday by the committees—

Mr. JORDAN. Without objection. We got them.

Mr. CARTWRIGHT. You got them? Thank you, Mr. Chairman.

[Whereupon, at 1:38 p.m., the subcommittees were adjourned.]

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February 27, 2012

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The Honorable Christopher B. Coleman
Mayor
City of Saint Paul
390 City Hall
15 West Kellogg Boulevard
Saint Paul, MN 55102

Dear Mayor Coleman:

On February 10, 2012, the City of Saint Paul (“the City”) withdrew its petition for Supreme Court review of *Magner v. Gallagher*.¹ The case, involving an important aspect of the Fair Housing Act,² was set for oral argument on February 29, 2012.³ In light of news reports that have indicated that the City may have withdrawn the case under pressure from federal entities,⁴ I write with questions about the City’s decision to forego Supreme Court review.

The Fair Housing Act prohibits property owners and municipalities from impeding access to housing on the basis of race, color, religion, sex, familial status, or national origin.⁵ In assessing violations of the Act, a “disparate impact” analysis has been developed in which a violation can be proven if “a facially neutral policy has a significant adverse impact on members of a protected minority group.”⁶ Because a disparate impact claim does not require a showing of discriminatory intent,⁷ the Department of Justice (DOJ) and the Department of Housing and Urban Development (HUD) have embraced this approach.⁸ The Supreme Court, however, has

¹ See Kevin Diaz, *St. Paul Yanks Housing Fight from High Court*, Star Trib. (St. Paul, Minn.), Feb. 10, 2012.

² 42 U.S.C. § 3601 *et seq.*

³ Supreme Court of the United States, October Term 2011, Monthly Argument Calendar for Session beginning February 21, 2012, http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalFEB2012.pdf (last visited Feb. 13, 2012).

⁴ See, e.g., *Squeezed in St. Paul*, Wall St. J., Feb. 12, 2012.

⁵ 42 U.S.C. § 3604(a)-(b).

⁶ *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003).

⁷ See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988).

⁸ See Press Release, Assistant Attorney General Thomas F. Perez Speaks at the 15th Annual Community Reinvestment Act and Fair Lending Colloquium (Nov. 7, 2011) (speech of DOJ Assistant Attorney General for Civil Rights); Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. 70921 (Nov. 16, 2011) (*HUD rulemaking*).

The Honorable Christopher B. Coleman
 February 27, 2012
 Page 2 of 5

never expressly addressed the constitutionality of a disparate impact claim in the context of the Fair Housing Act.⁹

In *Magner*, several owners of residential rental properties sued the City arguing that its enforcement of the municipal housing code violated the Fair Housing Act.¹⁰ Among other assertions, the property owners argued that the City violated the Act in that its “aggressive enforcement of the Housing Code had a disparate impact on racial minorities.”¹¹ After the City won in federal district court, the property owners appealed to the Court of Appeals for the Eighth Circuit, which reversed the lower court’s decision.¹² The City, as the losing party at the court of appeals, petitioned the Supreme Court for a writ of certiorari in February 2011.¹³ The Court agreed to hear the City’s appeal, scheduling oral argument for February 29, 2012.¹⁴

On February 10, 2012, in what has been described as “an extremely rare move,” the City asked the Supreme Court to dismiss its appeal.¹⁵ Although the City maintained that it “likely would have won” in the Supreme Court, the City stated that it withdrew the appeal because a victory would have eviscerated the disparate impact doctrine.¹⁶ According to the *Wall Street Journal*, pressure from federal entities likely influenced the City’s decision: “The prospect of losing this political hammer against banks sent the feds scrambling to stop the St. Paul case. Justice, HUD and former Vice President and Minnesota Senator Walter Mondale counseled the city . . . against pursuing the case.”¹⁷

As a result of the City’s withdrawal, the Supreme Court will not have the opportunity to evaluate the constitutionality of a disparate impact claim under the Fair Housing Act. Accordingly, the legality of federal enforcement actions based on a disparate impact analysis will remain uncertain. For these reasons, and to help the Committee better understand why the City chose not to exhaust appellate review, please answer the following questions and provide the requested documents for the period of May 1, 2004, to the present:

1. Please provide a full and complete explanation of the City’s decision to withdraw its petition for review from the Supreme Court. In your response, please include the names of the officials who were involved in making the decision and the date when the decision was made. Please provide documents and communications sufficient to support your response.

⁹ See *Squeezed in St. Paul*, *supra* note 4.

¹⁰ See *Gallagher v. Magner*, 619 F.3d 823, 829-30 (8th Cir. 2010).

¹¹ *Id.* at 833.

¹² *Id.* at 838.

¹³ See Petitioner for Writ of Certiorari, *Magner v. Gallagher*, No. 10-1032 (U.S. Feb. 14, 2011).

¹⁴ Supreme Court of the United States, October Term 2011, Monthly Argument Calendar for Session beginning February 21, 2012, http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalFEB2012.pdf (last visited Feb. 13, 2012).

¹⁵ See *Squeezed in St. Paul*, *supra* note 4.

¹⁶ Press Release, City of Saint Paul Seeks to Dismiss United States Supreme Court Case *Magner vs. Gallagher* (Feb. 10, 2012) [hereinafter “Saint Paul Press Release”].

¹⁷ *Squeezed in St. Paul*, *supra* note 4.

The Honorable Christopher B. Coleman
 February 27, 2012
 Page 3 of 5

2. Please provide a summary accounting of how much taxpayer funds the City spent to pursue litigation in *Magner v. Gallagher*, from the trial level up to and including Supreme Court review.
3. In its petition for certiorari, the City appeared to adopt an inconsequential view of disparate impact claims, arguing that the Fair Housing Act does not support such claims.¹⁸ In withdrawing its petition, however, the City justified its decision on the basis that its suit would eliminate “important and necessary” disparate impact claims under the Fair Housing Act.¹⁹
 - a. Why did the City change its view about the value of disparate impact claims under the Fair Housing Act?
 - b. Did any federal entity influence the City to change its position on the value of disparate impact claims under the Fair Housing Act? If yes, please explain fully.
 - c. Did any federal entity influence the City to withdraw its petition for a writ of certiorari in *Magner v. Gallagher*? If yes, please explain fully.
 - d. Does the City believe that use of a disparate impact claim under the Fair Housing Act is on solid legal ground? Please explain fully.
4. Did any representative of the Department of Justice contact you, City Attorney Sara Grewing, or any other City of Saint Paul official about *Magner v. Gallagher*? If yes, please fully explain these contacts.
5. Did any representative of the Department of Housing and Urban Development contact you, City Attorney Sara Grewing, or any other City of Saint Paul official about *Magner v. Gallagher*? If yes, please fully explain these contacts.
6. Did any representative of the Consumer Financial Protection Bureau contact you, City Attorney Sara Grewing, or any other City of Saint Paul official about *Magner v. Gallagher*? If yes, please fully explain these contacts.
7. Did any representative of any other federal entity contact you, City Attorney Sara Grewing, or any other City of Saint Paul official about *Magner v. Gallagher*? If yes, please fully explain these contacts.
8. Please provide all documents and communications between any and all employees of the City of Saint Paul and any and all employees of the Department of Justice referring or relating to the City’s litigation in *Magner v. Gallagher*.

¹⁸ Petition for Writ of Certiorari, *supra* note 13, at 10-12.

¹⁹ Saint Paul Press Release, *supra* note 16.

The Honorable Christopher B. Coleman
 February 27, 2012
 Page 4 of 5

9. Please provide all documents and communications between any and all employees of the City of Saint Paul and any and all employees of the Department of Housing and Urban Development referring or relating to the City's litigation in *Magner v. Gallagher*.
10. Please provide all documents and communications between any and all employees of the City of Saint Paul and any and all employees of the Consumer Financial Protection Bureau referring or relating to the City's litigation in *Magner v. Gallagher*.
11. Please provide all documents and communications between any and all employees of the City of Saint Paul and any individual – including, but not limited to, former Vice President Walter Mondale – who contacted the City on behalf of a federal entity referring or relating to *Magner v. Gallagher*.

In addition, the Committee requests that all documents and communications between and among City of Saint Paul employees that may reasonably be considered relevant to this investigation be preserved, including any documents and communications sent or received using a personal (non-City) e-mail account. Intentional obstruction of a congressional investigation is a crime.²⁰ To ensure that a full and complete record of all relevant documents can be produced to Congress, please:

1. Preserve all e-mail, electronic documents, and data (“electronic records”) created since May 1, 2004, related to the City's litigation in *Magner v. Gallagher*. For the purposes of this request, “preserve” means taking reasonable steps to prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft, or mutation of electronic records, as well as negligent or intentional handling that would make such records incomplete or inaccessible;
2. Exercise reasonable efforts to identify and notify former employees, contractors, subcontractors, and consultants who may have (or may have had) access to such electronic records that they are to be preserved; and
3. If it is the routine practice of any City employee, contractor, subcontractor, or consultant to destroy or otherwise alter such electronic records, either halt such practices or arrange

²⁰ 18 U.S.C. § 1505 reads, in pertinent part: “Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.” 18 U.S.C. § 1001 reads, in pertinent part: “[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, [and] imprisoned not more than five years.”

The Honorable Christopher B. Coleman
February 27, 2012
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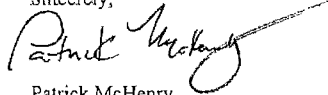
for the preservation of complete and accurate duplicates or copies of such records, suitable for production if requested.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on March 12, 2012. Please directly respond to each question and request as numbered herein. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

Thank you for your cooperation with this request. If you have any questions, please contact David Brewer or Katelyn Christ of the Committee staff at (202) 225-5074.

Sincerely,



Patrick McHenry
Chairman
Subcommittee on TARP, Financial Services and
Bailouts of Public and Private Programs

Enclosure

cc: The Honorable Mike Quigley, Ranking Minority Member
Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs

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April 10, 2012

The Honorable Eric H. Holder, Jr.
 Attorney General
 U.S. Department of Justice
 950 Pennsylvania Avenue, NW
 Washington, DC 20530-0001

Dear Mr. Attorney General:

The Committee on Oversight and Government Reform is examining the circumstances surrounding the City of Saint Paul's (the City) decision to withdraw its petition for certiorari in *Magner v. Gallagher*.¹ According to multiple reports, the Department of Justice (DOJ) influenced the City to withdraw its appeal, despite the City's belief that it would likely have been successful before the Court.² Given the DOJ's alleged involvement in this decision, I write to request your cooperation with this inquiry.

In November 2011, the Supreme Court granted the City's petition for a writ of certiorari to consider the legality of disparate impact claims under the Fair Housing Act.³ The appeal was scheduled for oral argument on February 29, 2012.⁴ On February 10, 2012, in what has been described as "an extremely rare move," the City asked the Supreme Court to dismiss its appeal.⁵ Although the City maintained that it "likely would have won" in the Supreme Court, the City implied that it withdrew the appeal because a victory would have eviscerated the disparate impact doctrine under the Fair Housing Act.⁶

Several reports have suggested that the DOJ pressured the City to withdraw its appeal. As the *Wall Street Journal* explained, "[t]he prospect of losing [the disparate impact doctrine]

¹ *Magner v. Gallagher*, 132 S. Ct. 1306 (Feb. 14, 2012) (dismissing the writ of certiorari).

² See, e.g., *Mr. Perez Works the Phones*, *Wall St. J.*, Mar. 27, 2012; Joan Biskupic, *Analysis: Rights Groups Try to Avoid US High Court Setback*, Reuters, Mar. 2, 2012; Frederick Melo, *How Obama Administration Got St. Paul to Pull Landlord Suit Out of Supreme Court*, Pioneer Press (Saint Paul, Minn.), Feb. 14, 2012; *Squeezed in St. Paul*, *Wall St. J.*, Feb. 12, 2012.

³ See *Magner v. Gallagher*, 132 S. Ct. 546 (Nov. 7, 2011) (granting City's petition for a writ of certiorari); Petition for Writ of Certiorari, *Magner v. Gallagher*, No. 10-1032 (U.S. Feb. 14, 2011).

⁴ Supreme Court of the United States, October Term 2011, Monthly Argument Calendar for Session beginning February 21, 2012, http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalFEB2012.pdf (last visited Feb. 13, 2012).

⁵ See *Squeezed in St. Paul*, *supra* note 2.

⁶ Press Release, City of Saint Paul Seeks to Dismiss United States Supreme Court Case *Magner vs. Gallagher* (Feb. 10, 2012) [hereinafter "Saint Paul Press Release"].

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The Honorable Eric H. Holder, Jr.
 April 10, 2012
 Page 2 of 4

sent the feds scrambling to stop the St. Paul case. Justice, HUD and former Vice President and Minnesota Senator Walter Mondale counseled the city . . . against pursuing the case.”⁷ The *Journal* later elaborated on the extent of federal influence on the City’s decision, reporting that Thomas Perez, the Assistant Attorney General for the Civil Rights Division, asked the City to withdraw its appeal.⁸ Another source reported that Mr. Perez personally lobbied Mayor Christopher Coleman and City Attorney Sara Grewing to withdraw the appeal by emphasizing the “use of the disparate-impact theory in mortgage cases.”⁹ The City has acknowledged to the Committee that the DOJ influenced its decision to some extent, stating that “comments” by the DOJ and other entities helped to lead to the withdrawal of the petition.¹⁰

I am deeply troubled by the possibility that the DOJ pressured the City to withdraw its appeal – which the City believed it would win – because the DOJ feared the Supreme Court’s ultimate adjudication of the issue. As you know, the mission statement of the DOJ is, in part, “to ensure fair and impartial administration of justice for all Americans.”¹¹ These allegations, if true, contravene the DOJ’s commitment to the fair and impartial administration of justice and undermine the integrity of the Department.

For these reasons, I ask that you answer the following questions and provide the requested documents for the period May 1, 2004, to the present:

1. Please provide a full and complete explanation of the DOJ’s interactions with the City of Saint Paul related to *Magner v. Gallagher*. In your response, please include the name and titles of those officials who communicated directly or indirectly with the City, as well as the dates and methods of these communications.
2. Please provide a full and complete explanation of the DOJ’s interactions with the other parties to *Magner v. Gallagher*. In your response, please include the name and titles of those officials who communicated directly or indirectly with these parties, as well as the dates and methods of these communications.
3. Please provide a full and complete explanation of the DOJ’s interactions with federal government entities or other parties interested in *Magner v. Gallagher*. In your response, please include the name and titles of those officials who communicated directly or indirectly with these entities and individuals, as well as the dates and methods of these communications.
4. Please explain why the DOJ chose to influence the City of Saint Paul to withdraw its appeal. In addition, please answer the following questions:

⁷ *Squeezed in St. Paul*, *supra* note 2.

⁸ *Mr. Perez Works the Phones*, *supra* note 2.

⁹ Biskupic, *supra* note 2.

¹⁰ Letter from Mark R. Paoletta, Dickstein Shapiro LLP, to Patrick McHenry, Comm. on Oversight and Gov’t Reform 2 (Mar. 26, 2012).

¹¹ U.S. Dep’t of Justice, About DOJ, Our Mission Statement, <http://www.justice.gov/about/about.html> (last visited Mar. 30, 2012).

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April 10, 2012
Page 3 of 4

- a. Which DOJ officials were consulted in deliberations leading to the DOJ's decision to influence the City to withdraw its appeal?
 - b. Which DOJ officials ultimately approved the DOJ's decision to influence the City to withdraw its appeal?
 - c. Does the DOJ believe that a victory by the City at the Supreme Court in *Magner v. Gallagher* would have eliminated the disparate impact doctrine under the Fair Housing Act? Please explain.
 - d. Did the DOJ offer anything to the City to entice the City to withdraw its appeal? Please explain.
5. Were you aware of the DOJ's actions in influencing the City to withdraw its appeal in *Magner v. Gallagher*? Please explain and provide a detailed account of the timeline of your involvement.
6. If it is the case that the DOJ influenced the City to withdraw its appeal in *Magner v. Gallagher*, what actions do you intend to take to ensure that the DOJ does not inappropriately influence private litigation in the future?
7. Aside from formally entering a case as an intervenor, how often does the DOJ informally intercede in litigation to which the United States is not a party? Please explain and answer the following questions:
 - a. Please provide a detailed listing of the number of cases in which the DOJ has informally swayed the result, including the case captions, the jurisdictions, the subject matter, and the result of the DOJ's actions.
 - b. What tactics does the DOJ employ to informally influence a private litigant to accept the DOJ's preferred outcome or to sway the course of litigation?
 - c. Does the DOJ regularly pressure or influence private litigants to forgo their right of final appeal in the Supreme Court to preserve a favored doctrine of law? Please explain.
8. Please provide all decision memoranda, coordination sheets, and other deliberative material used by the DOJ to arrive at its decision to influence the City to withdraw its appeal in *Magner v. Gallagher*.
9. Please provide all documents and communications between any and all employees of the DOJ and any and all employees of the City of Saint Paul referring or relating to *Magner v. Gallagher*.

The Honorable Eric H. Holder, Jr.
April 10, 2012
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10. Please provide all documents and communications between any and all employees of the DOJ and any and all employees of the Department of Housing and Urban Development referring or relating to *Magner v. Gallagher*.
11. Please provide all documents and communications between any and all employees of the DOJ and any and all employees of the Consumer Financial Protection Bureau referring or relating to *Magner v. Gallagher*.
12. Please provide all documents and communications between any and all employees of the DOJ and any other individual – including, but not limited to, former Vice President Walter Mondale – referring or relating to *Magner v. Gallagher*.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at “any time” investigate “any matter” as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee’s request.

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on April 24, 2012. Please directly respond to each question and request as numbered herein. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

Thank you for your cooperation with this request. If you have any questions, please contact David Brewer or Katelyn Christ of the Committee staff at (202) 225-5074.

Sincerely,



Patrick McHenry
Chairman
Subcommittee on TARP, Financial Services and
Bailouts of Public and Private Programs

Enclosure

cc: The Honorable Mike Quigley, Ranking Minority Member
Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs

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September 24, 2012

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The Honorable Eric H. Holder, Jr.
 Attorney General
 U.S. Department of Justice
 Washington, D.C. 20530

Dear Attorney General Holder:

After repeated inquiries from the Committee on the Judiciary and the Committee on Oversight and Government Reform, the Department of Justice (Department) briefed staff about its involvement in the decision of the City of St. Paul, Minnesota, to withdraw its petition for certiorari in *Magner v. Gallagher*.¹ We were shocked to learn during this briefing and in subsequent document examination that Assistant Attorney General Tom Perez, over the objections of career Justice Department attorneys, enticed the City to drop its lawsuit that Mr. Perez did not want decided by the Supreme Court. This quid pro quo arrangement potentially cost U.S. taxpayers over \$180 million. As such, we write to ask that you produce all documents to the Committees and make Department officials available for transcribed interviews.

On February 10, 2012, the City of St. Paul abruptly abandoned a case before the U.S. Supreme Court that observers said it was poised to win.² Slumlords had sued the city to prevent it from enforcing its housing code on the grounds that it disproportionately decreased the amount of housing available to minorities.³ The City argued that the Fair Housing Act of 1968 (FHA) prohibits only intentional discrimination, not neutral practices like code enforcement that happen to impact particular groups disproportionately.⁴

Mr. Perez fretted that a decision in the City's favor would dry up the massive mortgage lending settlements his Division was obtaining by suing banks for housing discrimination based on disparate effects rather than any proof of intent to discriminate.⁵ Accordingly, as documents reviewed by Committee staff show, he orchestrated a deal to induce the City to drop its Supreme

¹ Committees staff briefing with Mónica Ramirez, U.S. Dep't of Justice (Aug. 16, 2012); see *Magner v. Gallagher*, 132 S. Ct. 1306 (Feb. 14, 2012) (dismissing writ of certiorari).

² See Kevin Diaz, *St. Paul Yanks Housing Fight from High Court*, Star Trib. (St. Paul, Minn.), Feb. 10, 2012.

³ *Id.*

⁴ See Brief for the Petitioners, *Magner v. Gallagher*, No. 10-1032 (U.S. Dec. 22, 2011).

⁵ *Mr. Perez Works the Phones*, Wall St. J., Mar. 27, 2012.

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Court challenge. In exchange for St. Paul dropping its case before the high court, the Justice Department declined to intervene in an unrelated False Claims Act (FCA) case that had the potential to return over \$180 million in damages to the U.S. treasury.

Many observers thought the Supreme Court was poised to hold that the FHA does not permit claims based on disparate impact when it agreed, in late 2011, to hear *Magner v. Gallagher*.⁶ However, on the eve of oral argument, St. Paul dropped the case. News accounts attributed the reversal to calls from the Administration and former Senator Walter Mondale who called the decision “courage[ous].”⁷ However, material reviewed by the Committees reveals the decision was in fact the result of a dubious bargain brokered by Mr. Perez in which the Department agreed, over the objections of career attorneys, not to join an unrelated fraud lawsuit against the City in exchange for the City’s dropping its *Magner* appeal.

In early October, 2011, career attorneys from the Department’s Civil Fraud Section recommended that the United States join a lawsuit called *Newell*, brought by a private whistleblower charging that St. Paul violated the Federal FCA.⁸ The suit alleged that the City falsely certified it was using federal funds to create jobs for low income workers of all races, when in fact it was only focused on employing minorities.⁹ The memo authored by career Department attorneys characterized the City’s behavior as a “particularly egregious example” of false certifications. On October 7, 2011, the Department of Housing and Urban Development (HUD) concurred in the recommendation as did the U.S. Attorney’s office in Minnesota.

In the meantime, City attorneys and Mr. Perez began discussing a quid pro quo. The record over the next five months paints the picture of Mr. Perez’s commitment to closing the deal over the objections of career attorneys in the Civil Division who he does not even control. When the head of the Civil Division, Tony West, objected that HUD formally requested intervention, Mr. Perez replied he was “confident [their] position has changed.” Mr. West was not aware that Mr. Perez had already worked out an agreement with HUD.¹⁰

As Mr. Perez labored to force a reversal, emails show career Department attorneys confused and frustrated. They “cannot imagine” what the *Gallagher* case has to do with *Newell*. “Weirdness” they call it. “This is ridiculous . . . have no control . . . Why are higher level people making phone calls.” Notes from a meeting say it “looks like buying off St. Paul.” As the deal closes, St. Paul’s lawyers push for even more. Panicked attorneys email superiors to tell Mr. Perez to “make no more promises.”¹¹

⁶ *Holding Mr. Holder Accountable*, Wall St. J., Apr. 13, 2012.

⁷ Frederick Melo, *How Obama Administration Got St. Paul to Pull Landlord Suit out of Supreme Court*, Pioneer Press (St. Paul, Minn.), Feb. 14, 2012; *Squeezed in St. Paul*, Wall St. J., Feb. 12, 2012.

⁸ See False Claims Act Complaint and Demand for Jury Trial, United States *ex rel.* *Newell v. City of Saint Paul*, Civ. No. 09-1177 (D. Minn. filed May 19, 2009).

⁹ *Id.*

¹⁰ Committees staff review of documents from the Department of Justice (Aug. 20, 2012).

¹¹ Committees staff review of documents from the Department of Justice (Aug. 20, 2012).

The Honorable Eric H. Holder, Jr.
September 24, 2012
Page 3

Meanwhile, Mr. Perez ordered career attorneys to prepare a revised memo recommending that the Department not intervene in *Newell*. He further instructed them not to discuss the *Magner* case in explaining the reversal. The attorneys objected and included a discussion of *Magner* anyway. On February 9, 2012, Mr. West signed the revised memo. On February 10, 2012, St. Paul requested that the Supreme Court dismiss its appeal.¹²

Reviewing the emails and voice messages, it is clear many of the attorneys involved felt there was an inappropriate quality to the quid pro quo. If the United States had intervened in the *Newell* suit, taxpayers may have recovered as much as \$186 million from the City.¹³ Instead, without the government's intervention, the case was soon dismissed on grounds that would have been inapplicable had the government joined the suit.

At a briefing for Committee staff, Department officials conceded that the quid pro quo is unprecedented.¹⁴ According to the Department officials, Deputy Assistant Attorney General Thomas Perrelli instructed Mr. West that the decision on whether to intervene in *Newell* should be decided "on the merits" alone and not on the City's offer to withdraw its appeal in *Magner*.¹⁵ Apparently those instructions were not followed. It is unclear why the instructions of Mr. West's and Mr. Perez's superior were not followed.

One of the features of this quid pro quo, distinguishing it from a standard settlement or plea deal, was that it obstructed rather than furthered the ends of justice. It was possible only because Mr. Perez knew the disparate impact theory he was using to bring fair lending cases was poised to be overturned by the Supreme Court. So he bargained away a valid case of fraud against American taxpayers in order to shield a questionable legal theory from Supreme Court scrutiny in order to keep on using it.

This quid pro quo raises numerous legal and ethical questions of significant public interest. In order to fully determine why the Department authorized this unusual bargain, we ask that you produce to the Committees all documents and communications reviewed by Committee staff *in camera*. Further, we ask for all ethics and legal opinions related to this quid pro quo arrangement issued by any Department component, including but not limited to the Office of Professional Responsibility, Office of Legal Counsel, Office of the Deputy Attorney General, Civil Rights Division, or the Office of the Attorney General. Please produce these materials to the Committees by September 28, 2012.

Additionally, because evidence reviewed by the Committees references critical conversations of which there is no documentary record, we ask that you make available the following Department officials for transcribed interviews: Tom Perez, Tony West, B. Todd Jones, and Chad A. Blumenfeld. Please make these officials available by September 28, 2012. Congress and the public have a right to know the full rationale for the Department's decision to cast aside the careful analysis of career Department attorneys on the merits of a case with tens of

¹² See Kevin Diaz, *St. Paul Yanks Housing Fight from High Court*, *Star Trib.* (St. Paul, Minn.), Feb. 10, 2012.

¹³ See 31 U.S.C. § 3729(a) (allowing for damages three times the amount of the fraud).

¹⁴ Committees staff briefing with Mónica Ramirez, U.S. Dep't of Justice (Aug. 16, 2012).


¹⁵ *Id.*

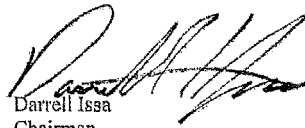
The Honorable Eric H. Holder, Jr.
September 24, 2012
Page 4

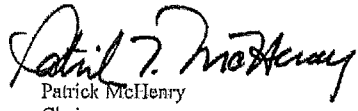
millions in taxpayer dollars at stake in order to get a litigant to drop a completely unrelated case. We appreciate your assistance with this matter.


Please contact Holt Lackey or Daniel Huff of the House Committee on the Judiciary or David Brewer or Katelyn Christ of the House Committee on Oversight and Government Reform no later than September 28, 2012, to schedule the transcribed interviews. Thank you for your attention to this matter.

Sincerely,


Lamar Smith
Chairman
Committee on the Judiciary


Darrell Issa
Chairman
Committee on Oversight and Government Reform


Patrick McHenry
Chairman
Subcommittee on TARP, Financial Services
and Bailouts of Public and Private Programs
Committee on Oversight and Government Reform


Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate

- cc: The Hon. John Conyers, Jr., Ranking Member, Committee on the Judiciary
- The Hon. Elijah Cummings, Ranking Member, Committee on Oversight and Government Reform
- The Hon. Mike Quigley, Ranking Member, Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs
- The Hon. Patrick J. Leahy, Chairman, Committee on the Judiciary, United States Senate

Congress of the United States

Washington, DC 20515

March 27, 2013

The Honorable Thomas E. Perez
Assistant Attorney General
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Perez:

Thank you again for your appearing before the Committees for a transcribed interview on March 22, 2013, about the *quid pro quo* between the Department of Justice and the City of St. Paul, Minnesota. We write to seek additional clarification about a response you gave during the transcribed interview.

During the transcribed interview, you were asked whether you used your personal email address to communicate about matters related to the *quid pro quo* with the City of St. Paul. You responded "I don't recall whether I did or didn't."¹ Later you stated "I don't have any recollection of having communicated via personal email on – on this matter."²

A subsequent review of documents produced to the Committees indicates that you corresponded with a representative of the City of St. Paul using a verizon.net account, which is a non-official email account on at least one occasion. On December 10, 2011, you emailed David Lillehaug, outside counsel for the City, from this email account, writing:

I am in the office Monday and then out the rest of the week. If your clients want to stop in Monday late afternoon, early evening, I am happy to do my best to answer questions, and assuage at least some concerns.³

A copy of the email is also enclosed with this letter. The email was not produced by the Department in response to the Committees' inquiry.

We are troubled by this revelation that additional responsive documents may exist in personal email account(s). This omission prevents the Committees from fully assessing your actions and those of other Department officials in this *quid pro quo*. The omission also potentially implicates federal records requirements for conducting official business of the Department. Your use of a non-official email account to conduct government business raises the prospect that records – as defined by the Federal Records Act – were not captured by official government email archiving systems. It also creates difficulties in fulfilling the Department's obligations under the Freedom of Information Act and other litigation requests.

¹ Transcribed Interview of Thomas E. Perez (Mar. 22, 2013).

² *Id.*

³ Email from Tom Perez to David Lillehaug (Dec. 10, 2011).

The Honorable Thomas E. Perez
March 27, 2013
Page 2

Accordingly, we request that you produce all emails sent to, copied to, received by, or sent from your verizon.net account or any other non-official email account from October 8, 2009, through the present referring or relating to your official responsibilities at the Department of Justice. Please produce any additional responsive documents to the Committees by 5:00 p.m. on Wednesday, April 3, 2013. Thank you for your attention to this matter.

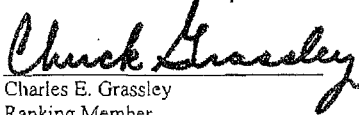
Sincerely,



Darrell Issa
Chairman
Committee on Oversight
and Government Reform
United States House of Representatives



Robert Goodlatte
Chairman
Committee on the Judiciary
United States House of Representatives



Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Member
Committee on Oversight and Government Reform
United States House of Representatives

The Honorable John Conyers, Jr., Ranking Member
Committee on the Judiciary
United States House of Representatives

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate

REDACTED

From: Tom Perez [REDACTED@verizon.net]
Sent: Saturday, December 10, 2011 10:03 PM
To: Lillehaug, David
Subject: Re: From CAO-Copy4

David

I am in the office Monday and then out the rest of the week. If your clients want to stop in Monday late afternoon, early evening, I am happy to do my best to answer questions, and assuage at least some concerns.

tom

On Dec 10, 2011, at 2:49 PM, Lillehaug, David wrote:

>
>
> ----- Original Message -----
> From: [REDACTED]@cl.stpaul.mn.us [mailto:[REDACTED]@cl.stpaul.mn.us]
> Sent: Saturday, December 10, 2011 08:50 AM
> To: Lillehaug, David
> Subject: From CAO-Copy4
>
> <SKMBT_C85011121014480.pdf>

Congress of the United States

Washington, DC 20515

April 4, 2013

The Honorable Thomas E. Perez
Assistant Attorney General
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Perez:

On March 27, 2013, we joined Senate Judiciary Committee Ranking Member Grassley in writing to you to request that you produce all emails sent to, copied to, received by, or sent from your verizon.net or other non-official email accounts referring or relating to your official responsibilities at the Department of Justice. We made this request after becoming aware that you had communicated with the City of St. Paul about official Department business from your personal verizon.net email account. You have not responded to our request.

The revelation that you used a personal email account to conduct official Department business is extremely disconcerting. Your use of a non-official email account to conduct official government business frustrates the goals of transparency laws, such as the Federal Records Act and the Freedom of Information Act. It also hinders the full understanding of your actions in the *quid pro quo* with the City of St. Paul. If you do not produce all responsive documents to the Committees by 5:00 p.m. on Monday, April 8, 2013, the Committee on Oversight and Government Reform will consider the use of compulsory process.

Thank you for your prompt attention to this matter.

Sincerely,



Darrell Issa
Chairman
Committee on Oversight and Government
Reform



Bob Goodlatte
Chairman
Committee on the Judiciary

The Honorable Thomas E. Perez
April 4, 2013
Page 2

cc: The Honorable Charles E. Grassley, Ranking Minority Member
Committee on the Judiciary, United States Senate

The Honorable Elijah Cummings, Ranking Minority Member
Committee on Oversight and Government Reform

The Honorable John Conyers, Jr., Ranking Minority Member
Committee on the Judiciary

The Honorable Patrick J. Leahy, Chairman,
Committee on the Judiciary, United States Senate

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LAWRENCE J. BRADY
STAFF DIRECTOR

The Honorable Thomas E. Perez
Assistant Attorney General
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

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DANNY W. DAVIS, ILLINOIS
PETER WELCH, VERMONT
TONY CARDENAS, CALIFORNIA
STEVEN A. HOGESFORD, NEVADA
MICHELLE L. LUAN GRISHAM, NEW MEXICO

May 6, 2013

Dear Mr. Perez:

I am in receipt of a letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General for Legislative Affairs at the Department of Justice, about your use of a personal, non-official e-mail account to conduct official Department business.¹ Your continued and blatant disregard for a duly issued Congressional subpoena is extremely disconcerting, especially coming from one of the Nation's highest law-enforcement officers sworn to uphold the Constitution. I sincerely hope that you will reconsider your obstruction of this investigation and fully produce all documents responsive to the subpoena.

The need for robust legislative oversight stems from the very concept of a representative democracy. The Supreme Court has clearly explained that "[t]he power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws, as well as proposed or possibly needed statutes. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."² The Committee on Oversight and Government Reform has a special mandate to conduct comprehensive oversight at all levels of government. As the chief investigative body of the House, the Oversight Committee may investigate "any matter" at "any time" pursuant to House Rule X.³

Mr. Kadzik's letter states that the Department believes that it has "satisfied the legitimate oversight interest regarding Mr. Perez's emails."⁴ Please allow me to assure you that this is not the case. It is not the prerogative of the Department of Justice to determine the interests and expectations of the United States Congress. Neither Mr. Kadzik nor you are in a position to adequately determine whether your actions have satisfied any interest of the Congress, let alone whether that interest is "legitimate."

¹ See Letter from Peter J. Kadzik, U.S. Dep't of Justice, to Darrell Issa, H. Comm. on Oversight & Gov't Reform (May 3, 2013).

² *Watkins v. United States*, 354 U.S. 178, 187 (1957).

³ Rules of the House of Representatives, Rule X, cl. 4(c)(2).

⁴ Letter from Peter J. Kadzik, U.S. Dep't of Justice, to Darrell Issa, H. Comm. on Oversight & Gov't Reform (May 3, 2013).


The Honorable Thomas E. Perez
 May 6, 2013
 Page 2

The recent revelation by the Department's Office of Legislative Affairs that you have violated the Federal Records Act on 35 occasions only reinforces the need for the Committee to possess all responsive documents as directed by the terms of the subpoena. In his letter of April 17, 2013, Mr. Kadzik affirmatively represented to the Committee that "[o]nly 34 communications had not previously been sent to or from Department email accounts."⁵ This statement, it turns out, was inaccurate. Department staff informed the Committee on Friday, May 3, 2013, that there was an additional personal e-mail exchange between you and former Michigan Governor Jennifer Granholm that was not captured by Department recording systems. This omission, coupled with the Department's troubling history of misleading Congress, hurts the Department's credibility in asserting that you have complied with the Federal Records Act. Therefore, to accurately and fully assess your compliance with federal law, the Committee requires that you produce all responsive documents.

You have not produced a single e-mail as required by the plain terms of the subpoena issued to you on April 10, 2013. Until you produce all responsive e-mail communications, including at least the 1,200 e-mails that the Department has identified as responsive, you will continue to be noncompliant with the subpoena. As a Senate-confirmed officer of the United States and the President's nominee to lead an executive department of the government, I would expect more from you.

Thank you for your attention to this matter.

Sincerely,



Darrell Issa
 Chairman

cc: The Honorable Bob Goodlatte, Chairman
 Committee on the Judiciary, U.S. House of Representatives

The Honorable Charles E. Grassley, Ranking Member
 Committee on the Judiciary, United States Senate

The Honorable Elijah E. Cummings, Ranking Member
 Committee on Oversight and Government Reform

The Honorable John Conyers, Jr., Ranking Member
 Committee on the Judiciary, U.S. House of Representatives

The Honorable Patrick J. Leahy, Chairman
 Committee on the Judiciary, United States Senate

⁵ Letter from Peter J. Kadzik, U.S. Dep't of Justice, to Darrell Issa, H. Comm. on Oversight & Gov't Reform (Apr. 17, 2013).



COHEN MILSTEIN

Gary L. Azorsky
Jeanne A. Markey
(267) 479-5700
gazorsky@cohenmilstein.com
jmarkey@cohenmilstein.com

May 6, 2013

Via Email Only

The Honorable Jim Jordan, Chairman
Subcommittee on Economic Growth, Job
Creation & Regulatory Affairs Committee on
Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Matt Cartwright, Ranking
Minority Member Subcommittee on Economic
Growth, Job Creation & Regulatory Affairs
Committee on Oversight and Government
Reform
2471 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Trent Franks, Chairman
Subcommittee on the Constitution and Civil
Justice Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Jeroid Nadler, Ranking
Minority Member Subcommittee on the
Constitution and Civil Justice Committee on
the Judiciary
B-351 Rayburn House Office Building
Washington, DC 20515



May 6, 2013
Page 2

Dear Chairmen Jordan and Franks and Ranking Members Cartwright and Nadler:

The undersigned are partners and co-chairs of the Whistleblower/False Claims Act Practice Group at Cohen Milstein Sellers & Toll, PLLC. For over ten years, we have assiduously represented whistleblowers in legal actions brought pursuant to the federal False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, and its state counterparts in federal and state courts throughout the country. We regularly engage in the evaluation of the viability of potential claims under those statutes and work with relators to combat fraud against the government. We have been asked by committee staff to offer our opinion regarding the effect of the Department of Justice's decision to decline to intervene in the *qui tam* cases of *United States ex rel. Newell v. City of St. Paul* and *United States ex rel. Ellis v. City of Minneapolis, et al.* What follows is that opinion.

On May 19, 2009, Relator Frederick Newell filed his *qui tam* action under the federal False Claims Act against the City of St. Paul in the United States District Court for the District of Minnesota. On February 9, 2012, the Department of Justice advised the court that it declined to intervene in the case. On March 12, 2012, Mr. Newell filed an amended complaint in response to which the City of St. Paul filed a motion to dismiss based, in part, on the Public Disclosure Bar.

At the time that Mr. Newell filed his initial complaint in his action, the False Claims Act provided a jurisdictional bar to a relator's *qui tam* action commonly referred to as the Public Disclosure Bar. Subsequently amended and rendered a non-jurisdictional basis for dismissal in the Patient Protection and Affordable Care Act of 2010, this section, 31 U.S.C. § 3730(e)(4), provided as follows:

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

On July 20, 2012, the court granted St. Paul's motion to dismiss, finding that it lacked subject matter jurisdiction over Mr. Newell's action because of manifold public disclosures of his allegations predating the filing of his complaint and because he was not an original source of the information on which the allegations were based. Mr. Newell has appealed the dismissal of



May 6, 2013
Page 3

his case and his appeal is currently pending before the United States Court of Appeals for the 8th Circuit.

On February 18, 2011, Relators Andrew Ellis, Harriet Ellis and Michael Blodgett filed their *qui tam* action under the federal False Claims Act against, among others, the Cities of Minneapolis and St. Paul in the United States District Court for the District of Minnesota. On June 18, 2012, the Department of Justice filed a Notice of Election to Decline Intervention. The defendants in that case subsequently filed motions to dismiss the Relators' complaints, which the court denied without prejudice. That case remains pending as of the date of this letter.

The effect of the government's decision not to intervene in these two *qui tam* cases is central to the issues presently being considered by your subcommittees. Indeed, it is important to understand that, contrary to conclusory statements set forth in the Congressional Committees' Joint Staff Report of April 15, 2013, the decision by the Department of Justice not to intervene in Mr. Newell's case did not allow the City of St. Paul to move for dismissal of the case "on grounds that would have otherwise been unavailable if the Department had intervened." (Joint Staff Report, p. 58). In fact, the same motion would have been available to the City whether or not the government had intervened in the case. In *Rockwell Intl. Corp. v. United States ex rel. Stone*, 549 U.S. 457 (2007), the United States Supreme Court rejected the argument that government intervention provides jurisdiction to a Relator who is not an original source. Even had the government intervened, Mr. Newell would have been vulnerable to the exact same public disclosure jurisdictional bar.

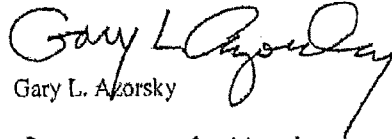
Likewise, in declining to intervene in Mr. Newell's *qui tam* action, the Department of Justice did not "give up the opportunity to recover as much as \$200 million." (Joint Staff Report, p. 4). A declination of intervention has never been recognized by any court as tantamount to the termination of the government's right to pursue the claim asserted in the action. In fact, the federal False Claims Act specifically provides that if the government initially elects not to proceed with the action, it may intervene at a later date upon a showing of good cause. 31 U.S.C. § 3730(o)(3). The government can decline to intervene in one action and, after that complaint is dismissed, decide to intervene in a subsequently filed action. Or the government can institute and pursue its own action under the False Claims Act. Moreover, the dismissal of Mr. Newell's complaint does not affect the government's ability to pursue the same claims itself. Thus, in declining to intervene in the Newell and Ellis actions, the government is not foreclosed from pursuing the claims that Mr. Newell could no longer himself pursue or to intervene at a later date in the Ellis action, nor is it foreclosed from pursuing remedies that might be available under any other statutory or regulatory provisions. In fact, in declining to intervene in these actions, it "gave up" no rights or opportunities whatsoever.

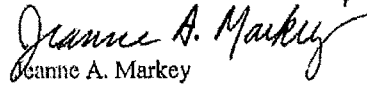
We trust that the foregoing sheds light on the effect of the government's decision not to intervene in the Newell and Ellis *qui tam* actions and that this letter is helpful to the work of your committees.



May 6, 2013
Page 4

Respectfully submitted,


Gary L. Azorsky


Jeanne A. Markey



Ben Vernia
Tel. (202) 349-4053
Fax (866) 572-6728
bvernia@vernialaw.com

1455 Pennsylvania Avenue, NW
Suite 400
Washington D.C. 20004
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May 6, 2013

The Honorable Representative Jim Jordan
Chairman
Subcommittee on Economic Growth, Job
Creation & Regulatory Affairs
Committee on Oversight and Government
Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Representative Matt Cartwright
Ranking Minority Member
Subcommittee on Economic Growth, Job
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Reform
2471 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Representative Trent Franks
Chairman
Subcommittee on the Constitution and Civil
Justice
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Representative Jerold Nadler
Ranking Minority Member
Subcommittee on the Constitution and Civil
Justice
Committee on the Judiciary
B-351 Rayburn House Office Building
Washington, D.C. 20515

Re: Declination by the United States Department of Justice in
United States ex rel. Newell v. City of St. Paul, Civil No. 09-SC-001177 (D.Minn.)

Dear Messrs. Jordan, Cartwright, Franks, and Nadler:

I am writing in advance of the Committee's May 7, 2013 hearing regarding the Department of Justice's declination of the False Claims Act *qui tam* cases, *United States ex rel. Newell v. City of St. Paul, Minnesota*, Civil No. 09-SC-001177 (D.Minn.), and *United States ex rel. Ellis v. City of St. Paul*, Civil No. 11-CV-0416 (D.Minn.), to provide my comments on certain of the conclusions reached in the Joint Staff Report, *DOJ's Quid Pro Quo with St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law* (April 15, 2013). I appreciate the opportunity to address the Committee.

For most of my twenty years practicing law, I have handled investigations and cases brought under the False Claims Act, 31 U.S.C. §§ 3729, *et seq.* Early in my career, I served for eight years as a Trial Attorney in the Fraud Section of the Commercial Litigation Branch of the Department of Justice's Civil Division. In that capacity, I handled dozens of False Claims Act cases involving numerous federal agencies, including the Department of Housing and Urban Development (HUD). I left the Fraud Section to be a prosecutor in the Criminal Division where, in 2005 I received a John Marshall Award from the Department of Justice, and the National Exploited Children's Award from the National Center for Missing and Exploited Children.

That same year, I joined Covington & Burling LLP, initially focusing on the defense of False Claims Act investigations and suits. I started my own firm in 2009, in part to have the flexibility of

representing whistleblower clients as well as defendants. I have filed numerous *qui tam* suits, and I am now litigating some of those, including a major case against a long-term care pharmacy for prescriptions reimbursed by Medicare Part D. In addition to my work on these cases, I have made presentations on the False Claims Act and related statutes, and I write the best-read legal blog on the topic, www.falseclaimscounsel.com.

I have had no professional involvement in the *Newell* or *Ellis* cases, and have not spoken about them with any of the persons described in the Joint Staff Report. I have, however, reviewed that Report, its attached documents, the Democratic Staff's Report on the same topic (April 14, 2013), and certain of the documents publicly available on the District Court for the District of Minnesota's PACER website.

As one of the few attorneys in private practice with significant Department of Justice experience who represents both defendants and whistleblowers, I read these documents with great interest. With all due respect to the Joint Staff, however, I feel compelled to write to take issue with certain of their factual conclusions. I will limit my comments to those that I feel are critical to assessing the conduct of Department of Justice officials involved in these cases.

Merits of the Newell case

Because the documents do not treat the *Ellis* case as a significant factor in the Department's decision-making, I have not undertaken to analyze the merits of that matter. Let me also preface my remarks by stating that I do not intend this letter to disparage Mr. Newell or his counsel. The Department of Justice appears to have largely corroborated his allegations and his *qui tam* complaint is well-drafted.

I disagree, however, with the Joint Staff's conclusion that "The Department of Justice Sacrificed a Strong Case Alleging a 'Particularly Egregious Example of Fraud.'" See Joint Staff Report at 37. Instead, I believe that the documents evidence significant bases for skepticism by Department of Justice officials.

The Joint Staff's conclusion rests in large part on its rejection of statements by Department of Justice supervisors that whether or not to intervene in *Newell* was a "close call," and its reliance instead on earlier positions in support of intervention taken by the trial attorney and others assigned to the case. But the draft memorandum urging intervention acknowledges several significant potential problems with the case – problems that clearly rebut the conclusion that the case was a "strong" one, as the Joint Staff asserts.

Newell's most prominent weakness was the potential difficulty in proving that St. Paul's non-compliance with Section 3 was material to the decision of HUD to make grant payments. The trial attorney handling the case candidly admitted that there was litigation risk regarding materiality:

The City will argue that even if HUD did not say it explicitly, HUD's silence over many years is tacit approval. We will have to admit that the City was failing to comply with Section 3 in ways that should have been apparent to HUD. The City did not send its HUD 60002 forms each year. HUD never objected to this failure. The City will argue that HUD was so unconcerned with Section 3 compliance that the City's failure to comply did not affect, or could not have affected HUD's decision to pay.

The City will argue that HUD's failure to monitor its Section 3 compliance was consistent with HUD's general lack of oversight of Section 3 during the relevant period. The city has already noted that previous federal administrations were not concerned with Section 3 (a position with support in recent HUD comments), and that it is unfair to require a City to make boilerplate certification each year, ignore the City's non-compliance year-after-year, and then

seek FCA relief when a new administration comes in that is more concerned with compliance with Section 3.

Draft Intervention Memo at 7. Although the trial attorney was optimistic that these arguments could be overcome, there can be no doubt that significant concerns about proving materiality of the City's noncompliance were evident long before the alleged *quid pro quo*.

Reliability of the Draft Intervention Memorandum's Damages Calculation

I also respectfully disagree with the Joint Staff's assertion that the Department of Justice's decision to intervene in the case cost taxpayers a significant opportunity to recover over \$200 million. See Joint Staff Report at 61. This, too, significantly overstates the strength of *Newell*.

The draft intervention memo very briefly describes only one damages theory, which the trial attorney characterizes as "aggressive": that the damages under the False Claims Act were the entire amount of the Section 3 construction project grants (which was some unknown fraction of the overall \$86 million in HUD grants). That "aggressive" theory is an unsettled area of law, however, and the Joint Staff's reliance on it in calculating the cost to taxpayers of declining to intervene in the suit is dubious.

For much of the False Claims Act's 150-year history, computing damages was relatively straightforward: the fact-finder calculated the difference between what the Government actually paid and the value of the goods or services it received. See *United States v. Bornstein*, 423 U.S. 303, 316 n. 13 (1976). When a third-party, and not the Government is the intended recipient of the tangible benefit from the outlay of federal funds, this approach arguably breaks down. The traditional "benefit-of-the-bargain" approach is strained further when the false claim relates not to quality of the goods or services received by the third-party, but to the fund recipient's satisfaction of some other condition intended to benefit society more generally. The *Newell* case falls into this category: the city receives Section 3 funds to improve housing, and allegedly false claims relate to its compliance with a condition unrelated to the quality of that work.

The Courts have struggled with these issues, and four Courts of Appeals – for the Second,¹ Fifth,² Seventh,³ and Ninth⁴ Circuits – have chosen to follow the "aggressive" approach the trial attorney described. The District of Columbia⁵ and Third⁶ Circuits instead continue to employ the "benefit-of-the-bargain" approach, which might result in a very low damages calculation in a case such as *Newell*. I am not aware of any controlling precedent on this issue in the Eighth Circuit, in whose jurisdiction *Newell* was filed.

Given the unsettled nature of this area and the imprecision in the Draft Intervention Memorandum's damages figure, \$86 million represented only a theoretical upper limit on the Government's damages for St. Paul's alleged violations. The Department of Justice trial attorney acknowledged the limitations of this approach, writing in the Draft Intervention Memorandum: "We acknowledge this is an aggressive position, and that some less aggressive approach may be needed for trial. To date, however, we have not yet determined an alternative approach." *Id.* at 5.

¹ See *United States ex rel. Feldman v. van Gorp*, 697 F.3d 78, 86-91 (2d Cir. 2012).

² See *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 473 (5th Cir. 2009) (cited in the Draft Intervention Memorandum at 5).

³ See *United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008).

⁴ See *United States v. Mackby*, 339 F.3d 1013, 1018-19 (9th Cir. 2003).

⁵ *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1279 (D.C.Cir. 2010).

⁶ *United States v. Hibbs*, 568 F.3d 347 (3rd Cir. 2007).

Even if the Department of Justice had intervened and secured a judgment against the City on False Claims Act liability, moreover, there is a significant risk that the District Court or the Court of Appeals for the Eighth Circuit would, under the facts of this case (including HUD's apparent disregard of Section 3 enforcement, and the defendant's status as a taxpayer-funded entity) reject the "aggressive" approach of seeking to recoup all Section 3 grants. Such a decision would hinder the Government and relators in future False Claims Act cases in the Eighth Circuit's jurisdiction.

The Risk of Newell's Dismissal on Public Disclosure Grounds

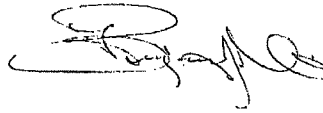
The Joint Staff Report also criticizes the Department's declination on the grounds that it exposed Mr. Newell to dismissal of his *qui tam* suit on grounds that the Court lacked jurisdiction under the False Claims Act's public disclosure bar. See Joint Staff Report at 58; 31 U.S.C. § 3730(e)(4)(A) (2010). I respectfully disagree with the premise of this criticism, which is that the Department of Justice does, or should, evaluate the potential success of a motion to dismiss on public disclosure grounds.

In my experience, both at the Department and in private practice, the Government does not typically investigate the common grounds on which declined *qui tam* suits founder: public disclosure and particularity under Fed. R. Civ. P. 9(b). Although I, as a whistleblower attorney, would prefer that the Department investigate these possible grounds for dismissal prior to deciding whether to decline or intervene a case, there are sound reasons for not doing so: the Department of Justice has inadequate resources to investigate the merits of the fraud allegations; routinely investigating the public disclosures that might lead to the dismissal of a declined *qui tam* would ultimately detract from the Department's ability to carry out the False Claims Act's core mission of detecting and remedying fraud.

Certainly no one has done more than Senator Grassley to encourage whistleblowers to assist the Government in uprooting fraud. The recent amendment to the public disclosure bar demonstrates well his interest in improving enforcement of the Act. I nevertheless believe that Congress could best improve whistleblowers' involvement in fraud enforcement by addressing more significant problems besetting them (such as the application of Fed. R. Civ. P. 9(b) to False Claims Act complaints, which is by far the most common grounds for dismissal of declined *qui tam* cases)

In conclusion, after reviewing the publicly available materials on the Department of Justice's decision to decline to intervene in *United States ex rel. Newell v. City of St. Paul*, I believe that Department officials acted well within the scope of their discretion in declining to intervene in that case. I must respectfully disagree with the contrary conclusions the Joint Staff reached in its Report. I appreciate your consideration.

Truly yours,



Benjamin J. Vernia

STATEMENT OF STEPHEN GILLERS
ELIHU ROOT PROFESSOR OF LAW
NEW YORK UNIVERSITY SCHOOL OF LAW
May 6, 2013

The Joint Staff Report makes many assertions and contains many factual allegations, which may or may not be contested. However, only one issue is described as ethical. It is this issue that the Democratic Staff memo mainly addresses. Stated most favorably from the Joint Staff perspective, the issue is:

Assuming that Assistant Attorney General Tomas E. Perez (Civil Rights Division) was mainly responsible for reaching the agreement with the City of St. Paul described below – even assuming that the agreement would not have happened without his intervention -- but assuming, too, that Assistant Attorney General Tony West (Civil Division), who had ultimate authority to decide whether or not to intervene in *Newell* and *Ellis*, chose not to do so after considering their merits, the United States interest in preserving the disparate impact test under the Fair Housing Act, and the U.S. interest in ensuring (so far as possible) that a Supreme Court ruling on the proper test be based on favorable facts, did Perez violate any rule of professional conduct (ethics rule) governing him as a lawyer by encouraging others at DOJ or HUD (or elsewhere) to refrain from intervention in *Newell* and *Ellis* in exchange for St. Paul's agreement to withdraw the *Magner* appeal?

The Joint Staff Report argues that linking the two cases – withdrawal of the *Magner* appeal and U.S. non-intervention in the two Qui Tam actions, *Newell* and *Ellis* (hereafter *Newell*) – was unethical. However, it cites no professional conduct rule, no court decision, no bar ethics opinion, and no secondary authority that supports this argument. In fact, no authority supports it.

The duty of lawyers for the United States is no different from the duty of lawyers generally, namely to pursue the goals of their client within the bounds of law and ethics. Clients generally identify those goals, but when the client is the government, its lawyers often do so, sometimes in conjunction with agencies, elected officials, or other representatives of the government who are authorized to speak for the client.

The United States had interests in *Magner* and also in *Newell*. Qui Tam actions are brought to vindicate interests of the sovereign, here the U.S. The U.S. interest was to recover money assuming, of course, that *Newell* had merit. The U.S. interest in *Magner* was to avoid Supreme Court review of a legal issue in *Magner*, whose facts were seen as unfavorable to a decision that would sustain a disparate impact test for violations of the Fair Housing Act. Perez believed that preserving the disparate impact test was important to his client and more important than intervention in *Newell*.

I assume that Perez persuaded others with decision-making authority, and in particular West, that withdrawing the *Magner* appeal was more important to U.S. interests than intervention in *Newell*. I also assume, though it is contested, that *Newell* was meritorious and that but for the agreement with St. Paul, the United States would have intervened in *Newell* and perhaps prevailed.

Of course, it is legitimate to argue that Perez, West, and others made the wrong choice and that pursuing *Newell* was more important to U.S. interests than how the Supreme Court would ultimately resolve the issue in *Magner*. I have no view on that question. It is not an ethical question. The question I can answer is whether Perez could ethically make the decision he did and which he encouraged others to accept. Could he ethically decide, when faced with a situation where only one of two possible choices could be made, and where each choice offered a benefit to his client, to choose option A over option B?

The answer is unequivocally yes. Perez was not choosing to advantage one client over another client. There was no conflict here between the interests of two clients because there was only one client. That client, we are assuming, had two interests – withdrawal of *Magner* or intervention in *Newell* -- but under the circumstances, it could pursue only one. Perez made a choice between these options and encouraged others to agree. His conduct violates no ethical rule that governs lawyers. He was acting in what he believed to be the best interests of his client, which is what lawyers are required to do.

Stephen Gillers has taught legal ethics at New York University School of Law since 1978. His c.v. is on the NYU Law School website.

**Statement of Hon. Jerrold Nadler
"DOJ's Quid Pro Quo with St. Paul: A Whistleblower's Perspective"**

Joint Hearing of the Committee on Oversight and Government Reform, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs and House Committee on the Judiciary, Subcommittee on Constitution and Civil Justice

Tuesday, May 7, 2013, at 10:00 a.m.
2154 Rayburn House Office Building

Today's hearing is not about Mr. Newell or protecting legitimate whistleblowers. It is about attacking Tom Perez, the current Assistant Attorney General of the Justice Department's Civil Rights Division and President Obama's nominee to be the next Secretary of Labor. Tomorrow is the Senate mark-up of Assistant AG Perez's nomination. The entire purpose of this hearing is to attack the leadership and reputation of one of this nation's best public servants, Tom Perez.

Of course, the Constitution grants the Senate – not the House – the role of providing advice and consent to the President on nominees. Whatever input into that process we might wish to have, it should not devolve into the type of partisan attack that this hearing represents.

My Republican colleagues have declared that Assistant AG Perez "manipulated justice and ignored the rule of law" by successfully negotiating an agreement with the City of St. Paul, Minnesota to withdraw its appeal to the Supreme Court in *Magner v. Gallagher*. But Assistant AG Perez has done nothing wrong here; in fact, he did what any good lawyer would do and certainly what the steward of the Justice Department's Civil Rights Division should have done to serve the best interests of the United States.

The *Magner* case challenged use of disparate impact theory to enforce our housing laws. Disparate impact theory allows the government to challenge policies or practices that, though seemingly neutral on their face, in practice, result in discrimination against a protected class. It is a critical tool for weeding out all forms of discrimination, whether intentional or not, and ensuring equality of opportunity for all. It has long been used by Republican and Democratic administrations to attack discriminatory lending, employment, and housing practices.

An adverse ruling from the Court in *Magner* could have eliminated use of this critical civil rights enforcement tool.

Assistant AG Perez viewed *Magner* – where landlords of low-incoming housing were making the novel argument that disparate impact theory prevented St. Paul from enforcing its housing codes – as an extremely poor factual vehicle for presenting this critical theory to the Court. Rightly concerned that “bad facts made for bad law,” he seized the chance to reach an agreement with the City to withdraw *Magner* and avoid the risk of an adverse ruling.

My Republican colleagues are unhappy that the Court did not get the opportunity to eliminate disparate impact theory. After all, they dispute the use of disparate impact and dislike the robust enforcement of civil rights laws. And they are unquestionably angry at Mr. Perez for his role in convincing St. Paul to withdraw its *Magner* appeal. But their complaints, and the accusations that they have leveled against Assistant AG Perez, have no legitimate legal, ethical, or professional responsibility basis.

In fact, when the City of St. Paul suggested that it would withdraw its *Magner* appeal if the Civil Division’s declined to intervene in Mr. Newell’s False Claims Act case, Assistant AG Perez sought and received guidance from ethics and professional responsibility experts who approved such an agreement and his role in negotiating it. This alone debunks any claim of improper conduct. Even accepting the Republican’s characterization of the agreement as a “quid pro quo” whereby the City withdrew its appeal “in exchange” for the decision against intervention in Mr. Newell’s case, there is nothing unethical or improper with reaching or brokering such an agreement.

Nor did Assistant AG Perez pressure career DOJ Lawyers into recommending against intervention in Mr. Newell’s case or somehow manipulate the Civil Division’s decision-making process. As the documents and testimony reviewed over the course of the Committee’s eighteen month investigation of this matter confirm, the decision not to intervene in Mr. Newell’s case was made by the Civil Division, based on its independent evaluation of the evidence, witnesses,

litigation risks, lack of HUD support for intervention, burden on the St. Paul taxpayers, and anticipated withdrawal of the City's *Magner* appeal.

At the end of the day, the Justice Department's top career lawyers disagreed with earlier recommendations of more junior colleagues because they concluded that Mr. Newell did not have a strong False Claims Act case on its merits.

My colleagues are free to disagree with the Civil Division's final decision in Mr. Newell's case, just as they are free to disagree with Assistant AG Perez's and the Civil Rights Division's desire to protect disparate impact theory. But let's not pretend that this disagreement have any legitimate ethical or professional responsibility basis. This is, at best, a policy disagreement; and worst, simply partisan politics.

Senator Harkin recognized this when he canceled a hearing on occupational health and safety to which Mr. Newell had been invited to testify. Of course, Mr. Newell's complaints have nothing to do with that subject. And Senator Harkin, who is overseeing Assistant AG Perez's nomination as Chair of the Senate HELP (Health, Education, Labor and Pensions) Committee, appropriately dismissed that effort as a transparent "attack the President's nominee for Secretary of Labor, Thomas Perez" and refused to allow what he deemed an "abuse of process" to go forward.

It is unfortunate that our Committee Majority did not follow Senator Harkin's lead. It is also unfortunate that Mr. Newell has been dragged into this partisan fight. His disappointment that the United States declined to intervene in his False Claims Act case is understandable. But that decision was never Assistant Attorney General Perez's to make and he did not make it. The decision against intervention made by the Justice Department's top False Claims Act lawyers was the right choice, as is confirmed by the testimony that we will hear from Shelley Slade today as well as the letters that we have received from other career False Claims Act lawyers who similarly view Mr. Newell's case as a weak candidate for government intervention. I would ask unanimous consent to have the letters that we've received made part of the record of this hearing.

Assistant Attorney General Perez has done a tremendous job leading the Civil Rights Division, and it is long past time to end the smear campaign against him. We should all be thankful for his service, and look forward to his stewardship as Secretary of Labor. We do not serve the public interest by holding this hearing as part of a shameful smear campaign.

With that, I yield back the balance of my time.

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Opening Statement

Rep. Elijah E. Cummings, Ranking Member

**Committee on Oversight and Government Reform Subcommittee on Economic Growth,
Job Creation and Regulatory Affairs and the Committee on the Judiciary Subcommittee on
the Constitution and Civil Justice**

Joint Hearing on "DOJ's Quid Pro Quo with St. Paul: A Whistleblower's Perspective"

May 7, 2013

Thank you, Mr. Chairman, and thanks to the witnesses appearing here today.

It is certainly no coincidence that today's hearing is being held one day before a committee vote in the Senate to confirm Tom Perez as the President's nominee for Secretary of Labor. Today's hearing is an unfortunate and highly partisan exercise intended to raise unfounded questions about the reputation of Mr. Perez, despite the fact that there is no evidence that his actions were anything but professional and in the best interest of combating discrimination in our nation's housing.

The core allegation leveled by Republicans is that Mr. Perez, as the head of the Civil Rights Division at the Department of Justice, inappropriately coordinated a quid pro quo agreement with the City of St. Paul in which the Department declined to intervene in two False Claims Act cases in exchange for St. Paul withdrawing a separate case before the Supreme Court.

The problem with the Republican theory is that Mr. Perez did nothing wrong. He obtained clearance from ethics officials at the Department, he coordinated properly with the head of the Civil Division, and he and others at the Department relied on career experts with decades of experience who concluded, after a careful review of the evidence, that the False Claims Act cases were too weak to recommend that the government expend the resources to litigate them.

Since then, a host of other legal experts have backed up the Department's conclusions. For example, in a statement issued yesterday, Professor Stephen Gillers, who has taught legal ethics for more than 30 years at New York University School of Law, wrote that a Republican report issued last month suggesting that Mr. Perez acted improperly "cites no professional conduct rule, no court decision, no bar ethics opinion, and no secondary authority that supports this argument." The reason, he explained, is that "no authority supports it."

In addition, one of today's witnesses, Shelley Slade, is an attorney with 20 years of experience in False Claims Act cases. She explained in her written statement:

I am confident that the actions taken by the Civil Division officials with regard to the Newell qui tam case, including the factors that were considered in the declination decision, were fully consistent with the law, as well as ethical and professional obligations.

Ms. Slade explained further:

If my law firm had been contacted about taking on this case, we would have rejected it. Notwithstanding the apparent strong evidence that the City of St. Paul engaged in repeated and egregious violations of Section 3 of the Housing & Urban Development Act of 1986, the qui tam case presents serious litigation risk on a number of fronts.

Another expert, Ben Vernia, a practicing False Claims Act attorney and writer of the legal blog, falseclaimscounsel.com, wrote a letter to our Subcommittees. He cited the "prominent weakness" of the case and explained that even an early document prepared by Department attorneys initially favoring intervention "acknowledges several significant potential problems with the case – problems that clearly rebut the conclusion that the case was a 'strong' one."

In light of these significant legal weaknesses, we can understand why our investigation found that a high-ranking career official at the Department of Justice—considered to be the federal government's preeminent False Claims Act expert—expressed grave doubts about the case.

Mr. Newell probably does not want to hear about weaknesses in the case his lawyer brought, and this is certainly no criticism of him. I appreciate his efforts to combat discrimination, especially affecting his small business. But these weaknesses were both significant and obvious to attorneys experienced in this area of law. Unfortunately, the majority invited Mr. Newell here not because they want to further his anti-discrimination cause, but because they want to use him to further their partisan and unsubstantiated claims against Mr. Perez.

Contact: Jennifer Hoffman, Press Secretary, (202) 226-5181.

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October 4, 2012

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Attorney General Holder:

On September 24, 2012, we wrote to request that the Department of Justice (Department) produce documents and make witnesses available regarding the quid pro quo deal that the Department entered with the City of St. Paul, Minnesota. In this quid pro quo arrangement, the City agreed to drop its Supreme Court appeal in the case of *Magner v. Gallagher* in exchange for the Department's agreement not to intervene in two False Claims Act lawsuits against the City—despite career employees in the Department calling the conduct in the cases “particularly egregious.” That letter set a September 28th deadline for the Department to schedule production of the documents and witness interviews. We are disappointed that the Department did not meet this deadline and that it has not yet responded to our request. We therefore write to renew our request.

The Department's inability to meet the deadline is especially dismaying, and full cooperation with Congressional oversight is especially important, because the Department apparently found time last week to make highly disputable – if not misleading – statements to the press about the agreement. If the Department has time to spin this matter to the press, surely it has time to respond to constitutional Congressional oversight of the matter.

Specifically, a Department spokeswoman told the *Washington Post* that the agreement was “consistent with the Department's practice in reaching global settlements.”¹ However, after consulting with Department veterans, we are unaware of any precedent for the Department trading away a direct financial interest in recovering fraudulently obtained taxpayer dollars in

¹ Sari Horwitz, “Four Republican Lawmakers Accuse Justice Department of Inappropriate Quid Pro Quo,” *Washington Post*, Sept. 27, 2012, available at <http://www.washingtonpost.com/world/national-security/four-republican-lawmakers-accuse-justice-department-of-inappropriate-quid-pro-quo/2012/09/27/?hpid=hp-top-articles%3Ahomepage%2Fstory&hpid=hp-top-articles%3Ahomepage%2Fstory>.

The Honorable Eric H. Holder, Jr.
October 4, 2012
Page 2

exchange for advancing a mere political interest in a case in which the United States was not even a party. Indeed, the Department represented to Committee staff at the August 16, 2012, briefing that it too was aware of **no precedent** “analogous” to this quid pro quo deal.²

In addition, a Department official told the *Post* that before cutting this deal, Assistant Attorney General for Civil Rights Tom Perez “consulted with the department’s ethics officials and was advised that there were no concerns.”³ However, the documents reviewed by our staff appear to show that instead of seeking independent advice, Perez merely consulted a Civil Rights division attorney who was his direct subordinate. The perfunctory approval of a direct subordinate is certainly not the type of robust and independent ethical guidance required by an issue of this magnitude and complexity.

Finally, the same Department official argued that it is “unclear whether Justice would have become involved in the lawsuit against the city in the end because the department does not intervene in almost 80 percent of false-claim civil cases.”⁴ However, according to documents reviewed by our staff, career attorneys at the Department had already all but decided to intervene in the *Newell* case. The more relevant statistic would be the frequency with which senior political appointees in the Justice Department overrule a recommendation to intervene from the front-line career attorneys who are most familiar with the facts. This is surely a much rarer occurrence. For the Department to cite general intervention statistics with respect to a case in which it was this far down the road toward intervention is irrelevant and misleading.

On top of this, the Department’s actions in this case raise questions about the role senior political appointees played in this decision. Tony West, the Senate confirmed Assistant Attorney General for the Civil Division—which oversees the Commercial Litigation Branch’s Fraud Section that handles False Claims Act cases—would have played a role in quashing intervention in a False Claims Act case. However, during his Senate confirmation, AAG West responded to questions from Senator Grassley stating “If confirmed, I will work with *qui tam* whistleblowers to support viable claims of fraud, waste and abuse of taxpayer dollars.”⁵ AAG West further responded, “If confirmed, I will work with the career professionals in the Department to respond to Judiciary Committee requests for appropriate information about False Claims Act cases.”⁶ The Department’s actions in this quid pro quo arrangement and the Department’s failure to respond to this inquiry call into question AAG West’s statements made during confirmation and require immediate clarification—especially now that his nomination for Associate Attorney General was just recently transmitted to the Senate.

² Committees staff briefing with Mónica Ramierz, U.S. Dep’t of Justice (Aug. 16, 2012).

³ Horwitz, *supra* note 1.

⁴ *Id.*

⁵ Confirmation Hearings on Federal Appointments, S. HRG. 111-695, Pt. 1, at 784 (2009).

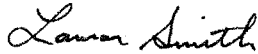
⁶ *Id.* at 785.

The Honorable Eric H. Holder, Jr.
October 4, 2012
Page 3

This is an important matter for Congressional oversight. The Department's actions in trading a direct and substantial interest in recovering taxpayer funds for a political interest in an unrelated case to which it was not a party appears to be unprecedented. These actions raise substantial questions about whether the Department elevated its ideological agenda above the taxpayers' interest in fighting fraud. As Members of Congress with oversight responsibility over the Department of Justice, we are obligated to fully investigate and uncover all of the facts about the quid pro quo arrangement. The documents and interviews requested are necessary to this investigation and are consistent with requests by Congressional committees with which the Department has historically complied.

If the Department does not produce the requested documents and schedule the requested interviews by Wednesday, October 10, 2012, we will be forced to consider use of the compulsory process. Thank you for your attention to this matter.

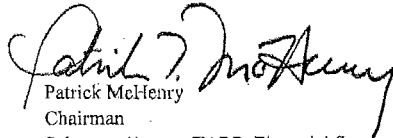
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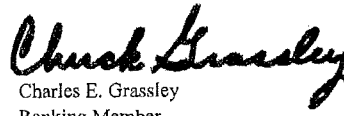
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Chairman
Committee on the Judiciary



Darrell Issa
Chairman
Committee on Oversight and Government Reform



Patrick McHenry
Chairman
Subcommittee on TARP, Financial Services
and Bailouts of Public and Private Programs
Committee on Oversight and Government Reform



Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate

cc: The Hon. John Conyers, Jr., Ranking Member, Committee on the Judiciary
The Hon. Elijah Cummings, Ranking Member, Committee on Oversight and Government Reform

The Honorable Eric H. Holder, Jr.
October 4, 2012
Page 4

The Hon. Mike Quigley, Ranking Member, Subcommittee on TARP, Financial Services
and Bailouts of Public and Private Programs

The Hon. Patrick J. Leahy, Chairman, Committee on the Judiciary, United States Senate