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DOJ's Quid Pro Quo with St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law

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DOJ'S *QUID PRO QUO* WITH ST. PAUL:
HOW ASSISTANT ATTORNEY GENERAL THOMAS PEREZ MANIPULATED JUSTICE AND IGNORED THE RULE OF LAW

Joint Staff Report
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Executive Summary

In early February 2012, Assistant Attorney General Thomas E. Perez made a secret deal behind closed doors with St. Paul, Minnesota, Mayor Christopher Coleman and St. Paul's outside counsel, David Lillehaug. Perez agreed to commit the Department of Justice to declining intervention in a False Claims Act *qui tam* complaint filed by whistleblower Fredrick Newell against the City of St. Paul, as well as a second *qui tam* complaint pending against the City, in exchange for the City's commitment to withdraw its appeal in *Magner v. Gallagher* from the Supreme Court, an appeal involving the validity of disparate impact claims under the Fair Housing Act. Perez sought, facilitated, and consummated this deal because he feared that the Court would find disparate impact unsupported by the text of the Fair Housing Act. Calling disparate impact theory the "lynchpin" of civil rights enforcement, Perez simply could not allow the Court to rule. Perez sought leverage to stop the City from pressing its appeal. His search led him to David Lillehaug and then to Newell's lawsuit against the City.

Fredrick Newell, a minister and small-business owner in St. Paul, had spent almost a decade working to improve economic opportunities for low-income residents in his community. In 2009, Newell filed a whistleblower lawsuit alleging that the City of St. Paul had received tens of millions of dollars of community development funds, including stimulus funding, by improperly certifying its compliance with federal law. By November 2011, Newell had spent over two years discussing his case with career attorneys in the Department of Housing and Urban Development, the U.S. Attorney's Office in Minnesota, and the Civil Fraud Section within the Justice Department's Civil Division. These three entities, which had each invested a substantial amount of time and resources into Newell's case, regarded this as a strong case potentially worth as much as $200 million for taxpayers and recommended that the federal government join the suit. These career attorneys even went so far as to prepare a formal memorandum recommending intervention, calling St. Paul's actions a "particularly egregious example of false certifications."

All this work was for naught. In late November 2011, Lillehaug made Perez aware of Newell's pending case against the City and the possibility that the Justice Department may intervene. A trade was proposed: non-intervention in Newell's case for the withdrawal of *Magner*. Perez contacted HUD General Counsel Helen Kanovsky and asked her to reconsider HUD's support for intervention in Newell's case. Perez also spoke to then-Civil Division Assistant Attorney General Tony West and B. Todd Jones, the U.S. Attorney for the District of Minnesota, alerting them to his new interest in Newell's case. The withdrawal of HUD's support for Newell's case led to an erosion of support in the Civil Division, a process that was actively managed by Perez.

In January 2012, Perez began leading negotiations with Lillehaug, offering him a "roadmap" to a global settlement. Once negotiations appeared to break down, Perez boarded a plane and flew to Minnesota to meet face-to-face with Mayor Coleman. At that early February meeting, Perez pleaded for the fate of disparate impact and reiterated the Justice Department's willingness to strike a deal. His lobbying paid off when Lillehaug accepted the deal on Mayor

Coleman's behalf. The next week, the Civil Division declined to intervene in Newell's case and the City withdrew its *Magner* appeal. The *quid pro quo* had been accomplished.

Still, Perez and several of his colleagues at the Justice Department are unwilling to acknowledge that the *quid pro quo* occurred despite clear and convincing evidence to the contrary. The Administration maintains that although career attorneys in the Department of Justice recommended intervention in Newell's case – and, in fact, characterized the False Claims Act infractions reported by Newell as "particularly egregious" – the case was nonetheless quite weak and never should have been a serious candidate for intervention. The Administration maintains that the United States gave up nothing to secure the withdrawal of *Magner*. Left unexplained by the Administration is why the City of St. Paul would ever agree to withdraw a Supreme Court appeal it believed it would win if the City knew the Department would not intervene in Newell's case. Dozens of documents referring to the "deal," "settlement," and "exchange" between the City of St. Paul and DOJ show that the Administration's narrative is not believable.

There is much more to the story of how Assistant Attorney General Perez manipulated the rule of law and pushed the limits of justice to make this deal happen. In his fervor to protect disparate impact, Perez attempted to cover up the true reasons behind the Justice Department's decision to decline Fredrick Newell's case by asking career attorneys to obfuscate the presence of *Magner* as a factor in the declination decision and by refraining from a written agreement. In his zeal to get the City to agree, Perez offered to provide HUD's assistance to the City in moving to dismiss Newell's whistleblower complaint. The facts surrounding this *quid pro quo* show that Perez may have exceeded the scope of the ethics and professional responsibility opinions he received from the Department and thereby violated his duties of loyalty and confidentiality to the United States. Perez also misled senior Justice Department officials about the *quid pro quo* when he misinformed then-Associate Attorney General Thomas Perrelli about the reasons for *Magner*'s withdrawal.

The *quid pro quo* between the Department of Justice and the City of St. Paul, Minnesota, is largely the result of the machinations of one man: Assistant Attorney General Thomas Perez. Yet the consequences of his actions will negatively affect not only Fredrick Newell and the low-income residents of St. Paul who he championed. The effects of this *quid pro quo* will be felt by future whistleblowers who act courageously, and often at great personal risk, to fight fraud and identify waste on behalf of federal taxpayers. The effects of withdrawing *Magner* will be felt by the minority tenants in St. Paul who, due to the case's challenge to the City's housing code, continue to live with rampant rodent infestations and inadequate plumbing. The effects of sacrificing Newell's case will cost American taxpayers the opportunity to recover up to $200 million and allow St. Paul's misdeeds to go unpunished. Far more troubling, however, is the fundamental damage that this *quid pro quo* has done to the rule of law in the United States and to the reputation of the Department of Justice as a fair and impartial arbiter of justice.

Findings

- The Department of Justice entered into a *quid pro quo* arrangement with the City of St. Paul, Minnesota, in which the Department agreed to decline intervention in *United States ex rel. Newell v. City of St. Paul* and *United States ex rel. Ellis v. City of St. Paul et al.* in exchange for the City withdrawing *Magner v. Gallagher* from the Supreme Court.

- The *quid pro quo* was a direct result of Assistant Attorney General Perez's successful efforts to pressure the Department of Housing and Urban Development, the U.S. Attorney's Office in Minnesota, and the Civil Division within the Department of Justice to reconsider their support for *Newell* in the context of the proposal to withdraw *Magner*.

- The initial development of the *quid pro quo* by senior political appointees, and the subsequent 180 degree change of position, confused and frustrated the career Department of Justice attorneys responsible for enforcing the False Claims Act, who described the situation as "weirdness," "ridiculous," and a case of "cover your head ping pong."

- The reasons given by the Department of Housing and Urban Development for recommending declination in *Newell* are unsupported by documentary evidence and instead appear to be pretextual post-hoc rationalizations for a purely political decision.

- The "consensus" of the federal government to switch its recommendation and decline intervention in *Newell* was the direct result of Assistant Attorney General Perez manipulating the process and advising and overseeing the communications between the City of St. Paul, the Department of Housing and Urban Development, and the Civil Division within the Department of Justice.

- Assistant Attorney General Perez was personally and directly involved in negotiating the mechanics of the *quid pro quo* with David Lillehaug and he personally agreed to the *quid pro quo* on behalf of the United States during a closed-door meeting with the Mayor in St. Paul.

- Despite the Department of Justice's contention that the intervention recommendation in *Newell* was a "close call" and "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.

- Assistant Attorney General Perez offered to arrange for the Department of Housing and Urban Development to provide material to the City of St. Paul to assist the City in its motion to dismiss the *Newell* whistleblower complaint. This offer was inappropriate and potentially violated Perez's duty of loyalty to his client, the United States.

- Assistant Attorney General Perez attempted to cover up the *quid pro quo* when he personally instructed career attorneys to omit a discussion of *Magner* in the declination memos that outlined the reasons for the Department's decision to decline intervention in *Newell* and *Ellis*, and focus instead only "on the merits."

- Assistant Attorney General 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."

- Assistant Attorney General Perez likely violated both the spirit and letter of the Federal Records Act and the regulations promulgated thereunder when he communicated with the City's lawyers about the *quid pro quo* on his personal email account.

- Assistant Attorney General Perez made multiple statements to the Committees that contradicted testimony from other witnesses and documentary evidence. Perez's inconsistent testimony on a range of subjects calls into question the reliability of his testimony and raises questions about his truthfulness during his transcribed interview.

- The ethics and professional responsibility opinions obtained by Assistant Attorney General Thomas Perez and his staff were narrowly focused on his personal and financial interests in a deal and his authority to speak on behalf of the Civil Division, and thus do not address the *quid pro quo* itself or Perez's particular actions in effectuating the *quid pro quo*.

- The Department of Justice violated the spirit and intent of the False Claims Act by privately acknowledging the *quid pro quo* was a settlement while not affording Fredrick Newell the opportunity to be heard, as the statute requires, on the fairness and adequacy of this settlement.

- The *quid pro quo* exposed serious management failures within the Department of Justice, with senior leadership – including Attorney General Holder and then-Associate Attorney General Perrelli – unaware that Assistant Attorney General Perez had entered into an agreement with the City of St. Paul.

- The Department of Justice, the Department of Housing and Urban Development, and the City of St. Paul failed to fully cooperate with the Committees' investigation, refusing for months to speak on the record about the *quid pro quo* and obstructing the Committees' inquiry.

- In declining to intervene in Fredrick Newell's whistleblower complaint as part of the *quid pro quo* with the City of St. Paul, the Department of Justice gave up the opportunity to recover as much as $200 million.

Table of Names

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"[T]he role of a lawyer at the Department of Justice, whether you are in the Civil Division or the Civil Rights Division, is to do justice, is to do what is in the best interests of the United States."

—Thomas Perez, Assistant Attorney General for the Civil Rights Division[1]

"The matters at hand are not just – the ethics of [the Department of Justice] leveraging the False Claims Act lawsuit to secure the disparate impact regulations, or the treatment of myself as a whistleblower, or the influence of the Supreme Court docket. . . . The way that HUD and Justice have used me to further their own agenda is appalling – and that's putting it mildly."

—Fredrick Newell, small-business owner and minister, St. Paul, Minnesota[2]

Introduction

When Assistant Attorney General Thomas Perez traveled to St. Paul, Minnesota, in early February 2012 to meet with St. Paul Mayor Christopher Coleman and other City officials in the Mayor's City Hall offices, he had one goal in mind. He wanted the City to withdraw a potential landmark case scheduled for argument before the United States Supreme Court only days later. The agreement struck between Assistant Attorney General Perez and Mayor Coleman at that closed-door meeting resulted not only in the withdrawal of the appeal, but also the fatal weakening of a whistleblower lawsuit potentially worth $200 million to the federal treasury. The story of this *quid pro quo* is a story of leverage and political opportunism. The effects of the *quid pro quo* are even more unfortunate. The *quid pro quo* not only reflects poorly on the senior leadership of the Department of Justice, but it will have real and lasting consequences for public policy and federal taxpayers.

In the early 2000s, the City of St. Paul began aggressively enforcing the health and safety provisions of its housing code, targeting rental properties. With increased inspections and stricter certifications, the City cited various infractions ranging from broken handrails and torn screens to a toilet in a kitchen and rats in a bathtub.[3] The owners of these properties sued the City, arguing that the aggressive code enforcement adversely impacted their mostly minority tenants. The lawsuit worked its way through the federal court system for years, eventually arriving at the Supreme Court. In November 2011, the Supreme Court agreed to hear the case, known as *Magner v. Gallagher*, to decide whether the Fair Housing Act allows for claims of disparate impact.

Meanwhile, Fredrick Newell, a small-business owner and minister in St. Paul, had been working for years to improve low-income jobs programs in his community. After pursuing

[1] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 208 (Mar. 22, 2013).
[2] Transcribed Interview of Fredrick Newell in Wash., D.C. at 16 (Mar. 28, 2013).
[3] *See* Fredrick Melo, *St. Paul Landlords Discuss their Fight over City Rental Housing Inspection Practices*, Pioneer Press, Oct. 15, 2012; Kevin Diaz, *St. Paul Yanks Housing Fight from High Court*, Star Tribune (Feb. 10, 2012).

various administrative avenues through the Department of Housing and Urban Development, Newell filed a federal whistleblower lawsuit against the City of St. Paul in May 2009. His suit, known as a *qui tam* action and brought under the False Claims Act,[4] was encouraged by HUD employees and supported by career officials in the Justice Department. If successful, Newell's lawsuit could have returned over $200 million of taxpayer funds to the federal Treasury. Although career officials viewed Mr. Newell's lawsuit as a "particularly egregious example" of false claims, Mr. Newell, as it turned out, would never receive a fair shot.

Documents and testimony given to the Committees show that after the Supreme Court agreed to hear *Magner* in November 2011, Assistant Attorney General Perez sought to find a way to prevent the Court from hearing the case and eviscerating disparate impact theory, which Perez had used to secure multimillion dollar settlements. His outreach put him in contact with a Minnesota lawyer named David Lillehaug, a former U.S. Attorney and outside counsel to the City of St. Paul. In discussions between Perez and Lillehaug, a proposal was raised to link the *Magner* and *Newell* cases, in which the City would withdraw *Magner* if the Department did not join Newell's suit. With *Newell* as leverage, Perez went to work to get *Magner* withdrawn. He asked HUD's General Counsel to reconsider HUD's support for *Newell* and raised the prospect of a deal with senior DOJ officials. Slowly, support for intervening in *Newell* eroded among the political DOJ leadership while career DOJ attorneys wondered among themselves what caused the sudden change of course.

Perez facilitated the slow bureaucratic march toward a *quid pro quo* with the City. In early January 2012, as progress on an agreement stalled, Perez began personally leading negotiations with Lillehaug. Once negotiations broke down in late January, and with *Magner* oral arguments looming, Perez made one last attempt to strike a deal. He flew to St. Paul on Friday, February 3, 2012, to lobby the Mayor directly. His persuasion proved successful; the City accepted the deal on the spot. Six days later, DOJ formally declined to join Newell's case. The following day, Friday, February 10, 2012, the City upheld its end of the bargain by withdrawing its *Magner* appeal. Perez's coup was complete.

This joint staff report is the product of a year-long investigation conducted by the House Committee on Oversight and Government Reform, the House Committee on the Judiciary, and the Senate Committee on the Judiciary. The Committees reviewed over 1,500 pages of documents produced by the Department of Justice, the Department of Housing and Urban Development, and the City of St. Paul.[5] The Committees conducted transcribed interviews with Assistant Attorney General Thomas Perez, Acting Associate Attorney General Tony West, former Associate Attorney General Thomas Perrelli, United States Attorney B. Todd Jones, HUD General Counsel Helen Kanovsky, HUD Deputy Assistant Secretary Sara Pratt, and Fredrick Newell. The Committees also interviewed David Lillehaug and St. Paul City Attorney Sara Grewing; Joyce Branda, a Deputy Assistant Attorney General in DOJ's Civil Division; Mark Kappelhoff, former Criminal Section Chief in DOJ's Civil Rights Division; Kevin Simpson, HUD's Principal Deputy General Counsel; and Bryan Green, HUD's Principal Deputy

[4] Under the False Claims Act, an individual may bring a *qui tam* action on behalf of the United States. 31 U.S.C. § 3730.

[5] The City of Saint Paul, however, continues to withhold twenty documents and one audio recording from the Committees.

Assistant Secretary for Fair Housing. Despite repeated requests, DOJ refused to allow the Committees to speak to the Assistant United States Attorney who handled the *Newell* case and HUD refused to allow the Committees to speak to Associate General Counsel Dane Narode and Regional Director Maurice McGough.

How the *Quid Pro Quo* Developed

The Fair Housing Act and Disparate Impact

The Fair Housing Act, found in Title VIII of the Civil Rights Act of 1968, prohibits discrimination in the sale or rental of housing units.[6] As passed by Congress, the Act made it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[7] The Act charged the Secretary of Housing and Urban Development with administering the provisions of the law.[8]

Unlike other federal laws concerning employment discrimination and age discrimination, the plain text of the Fair Housing Act only includes language prohibiting disparate *treatment* – not disparate effects. By contrast, in the employment context, Title VII of the Civil Rights Act of 1964 prohibits an employer from "fail[ing] or refus[ing] to hire or . . . discharg[ing] any individual" on the basis of a protected status, as well as prohibiting action that would "otherwise adversely affect [a person's] status as an employee."[9] Although the Fair Housing Act has language prohibiting the disparate *treatment* of individuals in the housing context, it does not include any similar language prohibiting the disparate *effects* of housing practices.[10] Because the plain language of the Fair Housing Act lacks this disparate effects language, it is clear that Congress never intended the disparate *impact* standard to be cognizable under the Fair Housing Act.

Nonetheless, despite the clear statutory language, some courts and policymakers have read the disparate impact standard into the Fair Housing Act. The roots of disparate impact under the Fair Housing Act can be traced back to Title VII of the Civil Rights Act of 1964, which prohibited employment discrimination based on race, color, religion, sex, or national origin.[11] In a case called *Griggs v. Duke Power Co.*, the Supreme Court interpreted the broad statutory text of Title VII to prohibit "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[12] Congress subsequently codified this disparate impact standard in the context of employment discrimination, creating a separate prohibition in Title VII

[6] 42 U.S.C. § 3604.
[7] *Id.* § 3604(a).
[8] *Id.* § 3608.
[9] 42 U.S.C. § 2000e-2(a).
[10] 42 U.S.C. § 3604.
[11] Pub. L. 88-352 tit. VII, 78 Stat. 241, 253 (1964).
[12] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

for "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[13]

As the courts gained familiarity with the disparate impact standard for employment discrimination, they simultaneously began to interpret the text of the Fair Housing Act "to draw an inference of actual intent to discriminate from evidence of disproportionate impact."[14] Federal agencies likewise began interpreting the Fair Housing Act beyond the strictures of its plain language. In November 2011, HUD issued a proposed rule codifying the disparate impact standard for discrimination claims arising under the Fair Housing Act.[15] The rule proposed to prohibit discriminatory effects under the Fair Housing Act, "where a facially neutral housing practice actually or predictably results in a discriminatory effect on a group of persons."[16] HUD finalized the rule in February 2013.[17] The new Consumer Financial Protection Bureau has also adopted the disparate impact standard for enforcing lending discrimination.[18]

This broad and controversial interpretation of the Fair Housing Act has been roundly criticized. The American Bankers Association, the Consumer Bankers Association, the Financial Services Roundtable, and the Housing Policy Council argue that the Act does not permit disparate impact claims because the law's plain text prohibits only intentional discrimination.[19] Likewise, attorneys from Ballard Spahr note that the Supreme Court's precedents "with regard to disparate impact claims make it clear that such claims cannot be brought under the Fair Housing Act . . . ."[20] Attorneys with BuckleySandler LLP criticize the analogous treatment between Fair Housing Act claims and Title VII claims – due to the express differences in the statutory language – and concluded that disparate impact "claims were neither provided for in the [Fair Housing Act] nor anticipated by the lawmakers who enacted the Act."[21]

The Supreme Court has never directly considered whether the Fair Housing Act supports the disparate impact standard. Although the Court has heard two cases involving disparate impact claims under the Fair Housing Act, both cases were decided on other grounds and the issue was never settled by the Court.[22] By the fall of 2011, as a case involving this precise issue was making its way through the federal court system, the Court was poised to resolve the dispute.

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[13] 42 U.S.C. § 2000e-2(k)(1)(A)(i).
[14] Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 Emory L.J. 409, 426 (1998).
[15] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (Nov. 16, 2011).
[16] *Id.* at 70,924.
[17] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).
[18] Consumer Financial Prot. Bureau, CFPB Bulletin 2012-04 (Apr. 18, 2012).
[19] *See* Brief of Amici Curiae American Bankers Association, Consumer Bankers Association, Financial Services Roundtable, and Housing Policy Council Suggesting Reversal, Magner et al. v. Gallagher et al., No. 10-1032 (filed Dec. 29, 2011).
[20] Ballard Spahr LLP, *Dismissal of Fair Housing Case Perpetuates Uncertainty on Disparate Impact Claims*, Feb. 15, 2012.
[21] Kirk D. Jensen & Jeffrey P. Naimon, *The Fair Housing Act, Disparate Impact Claims, and* Magner v. Gallagher*: An Opportunity to Return to the Primacy of the Statutory Text*, 129 Bank. L.J. 99 (Feb. 2012).
[22] *See* City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 199-200 (2003); Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P., 488 U.S. 15, 18 (1988).

Magner v. Gallagher

On November 7, 2011, the United States Supreme Court granted a petition for a writ of certiorari filed by the City of St. Paul, Minnesota, in the case *Magner v. Gallagher*. In agreeing to hear the case, the Court decided to answer a fairly straightforward question: "Are disparate impact claims cognizable under the Fair Housing Act?"[23]

Magner arose from the City's enhanced enforcement of its housing codes from 2002 to 2005, particularly with respect to rental properties. The City directed inspectors to enforce the "code to the max," conducting unannounced sweeps for code violations and asking residents to report so-called "problem properties."[24] These enhanced enforcement measures documented violations in many properties occupied by low-income residents, including violations for rodent infestations, inoperable smoke detectors, inadequate sanitation, and inadequate heat.[25] The owners of these low-income properties, which housed a disproportionate percentage of African Americans, faced increased maintenance costs, higher fees, and condemnations as a result.[26]

In 2004 and 2005, several of the affected property owners sued the City in federal district court, alleging that the City's aggressive enforcement of the housing code violated the Fair Housing Act.[27] The City asked the court to throw out the cases before trial, arguing in part that its code enforcement did not have a disparate impact on minorities and therefore did not violate the Act.[28] The court agreed and granted summary judgment in the City's favor in 2008.[29] Appealing to the Eighth Circuit Court of Appeals, the property owners renewed their argument that the City violated the Fair Housing Act "because [its] aggressive enforcement of the housing code had a disparate impact on racial minorities."[30] The Eighth Circuit agreed. In its 2010 opinion reversing the lower court, the Eighth Circuit stated:

> Viewed in the light most favorable to [the property owners], the evidence shows that the City's Housing Code enforcement temporarily, if not permanently, burdened [the property owners'] rental businesses, which indirectly burdened their tenants. Given the existing shortfall of affordable housing in the City, it is reasonable to infer that the overall amount of affordable housing decreased as a result. And taking into account the demographic evidence in the record, it is reasonable to infer racial minorities, particularly African-Americans, were disproportionately affected by these events.[31]

[23] Petition for Writ of Certiorari, Magner v. Gallagher, No. 10-1032 (U.S. filed Feb. 14, 2011).
[24] Gallagher v. Magner, 619 F.3d 823, 829 (8th Cir. 2010).
[25] *Id.* at 830.
[26] *Id.*
[27] Steinhauser et al. v. City of St. Paul et al., 595 F. Supp. 2d 987 (D. Minn. 2008).
[28] *Id.*
[29] *Id.*
[30] Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010).
[31] *Id.* at 835

With an adverse decision at the appellate level, the City faced a decision whether to litigate the disparate impact claim before the district court or to appeal the decision to the United States Supreme Court. On February 14, 2011, the City filed a petition for a writ of certiorari, asking the Court to take the case.[32] On November 7, 2011, the Court granted the petition to finally settle whether the Fair Housing Act supports claims of disparate impact.

United States ex rel. Newell v. City of Saint Paul

Fredrick Newell's history with Section 3 of the Housing and Urban Development Act dates back to 1997.[33] Section 3 requires recipients of HUD financial assistance to provide job training, employment, and contracting opportunities "to the greatest extent feasible" to low- and very-low-income residents, as distinct from minority residents.[34] In 2000, Newell began to pursue Section 3 opportunities in St. Paul, but quickly found that although the City had programs for minority business and women business enterprises, the City did not have a program to comply with Section 3 in particular. Newell even offered to start a Section 3 program in St. Paul, but the City refused.[35]

After a lawsuit Newell filed was dismissed because Section 3 does not allow for a private right of action, Newell initiated an administrative complaint with HUD.[36] This administrative complaint led to a formal finding by HUD that St. Paul was not in compliance with Section 3,[37] and eventually to a Voluntary Compliance Agreement that required St. Paul to improve its future compliance with Section 3.[38] The Voluntary Compliance Agreement, however, did not release the City from any liability under the False Claims Act.[39] According to Newell's attorney, the Justice Department reviewed the language of the Voluntary Compliance Agreement to ensure it did not disturb any False Claims Act liability.[40]

In May 2009, Fredrick Newell filed a whistleblower complaint under the *qui tam* provisions of the False Claims Act, alleging that the City of St. Paul had falsely certified that it was in compliance with Section 3 of the HUD Act from 2003 to 2009.[41] In particular, Newell alleged that the City had falsely certified on applications for HUD funds that it had complied with Section 3's requirements when in fact the City knew it had not complied.[42] He alleged that based on these knowingly false certifications, the City had improperly received more than $62

[32] Petition for Writ of Certiorari, Magner v. Gallagher, No. 10-1032 (U.S. filed Feb. 14, 2011).
[33] Transcribed Interview of Fredrick Newell in Wash., D.C. at 9-10 (Mar. 28, 2013).
[34] 12 U.S.C. § 1701u.
[35] Transcribed Interview of Fredrick Newell in Wash., D.C. at 27-28 (Mar. 28, 2013).
[36] Transcribed Interview of Fredrick Newell in Wash., D.C. at 9-10 (Mar. 28, 2013).
[37] *See* Letter from Barbara Knox, Dep't of Housing and Urban Development, to Chris Coleman, City of St. Paul (Aug. 25, 2009).
[38] Voluntary Compliance Agreement; Section 3 of the Housing and Community Development Act between U.S. Dep't of Housing and Urban Development and the City of Saint Paul, MN (Feb. 2010).
[39] *Id.*
[40] Transcribed Interview of Fredrick Newell in Wash., D.C. at 33 (Mar. 28, 2013).
[41] Complaint, United States *ex rel.* Newell v. City of Saint Paul, No. 0:09-cv-1177 (D. Minn. May 19, 2009).
[42] *Id.*

million in federal HUD funds.[43] As a whistleblower, Newell brought the case – *United States ex rel. Newell v. City of St. Paul* – on behalf of the United States.

Like all other alleged violations of the False Claims Act, Newell's complaint was evaluated by career attorneys in the Civil Fraud Section within DOJ's Civil Division as well as career Assistant United States Attorneys in Minnesota. These attorneys spent over two years conducting an exhaustive investigation of Newell's allegations. As a part of this investigation, the attorneys interviewed Newell and his attorney several times, gathered information from HUD, and spoke with the City about its actions. At the conclusion of this investigation, both the Civil Fraud Section and the U.S. Attorneys' Office in Minnesota strongly supported the case.

That these career DOJ officials enthusiastically supported Newell's lawsuit was obvious to Newell and to HUD. His initial relator[44] interview with federal officials in the summer of 2009 included an unusually large number of HUD and DOJ attendees.[45] During his transcribed interview, Newell told the Committees that "[t]here was a real interest . . . and the DOJ felt it was a good case."[46] His attorney stated: "I believe around . . . September-October of 2011, my information was that Justice was working on finalizing its intervention decision. And I don't mean what the decision was. I mean finalizing intervention, because they were going to intervene in the case."[47]

This understanding was confirmed by HUD General Counsel Helen Kanovsky, who told the Committees that career attorneys in DOJ's Civil Fraud Section and U.S. Attorney's Office in Minnesota felt so strongly about intervening in Newell's case that they requested a special meeting with her to convince her to lend HUD's support.[48]

On October 4, 2011, a line attorney in the Civil Fraud Section wrote to HUD General Counsel Dane Narode about the *Newell* case: "Our office is recommending intervention. Does HUD concur?"[49] Three days later, Narode replied, "HUD concurs with DOJ's recommendation."[50] The AUSA in Minnesota handling *Newell* forwarded HUD's concurrence to his supervisor with the comment, "[l]ooks like everyone is on board."[51] On October 26, 2011, the AUSA transmitted a memorandum to the two Civil Fraud Section line attorneys with the official recommendation from the U.S. Attorney's Office.[52] The memorandum recommended intervention. It stated:

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[43] Amended Complaint, United States *ex rel.* Newell v. City of Saint Paul, No. 0:09-cv-1177 (D. Minn. Mar. 12, 2012). The Civil Fraud Section of the Justice Department valued the fraud at $86 million. *See infra* note 336.
[44] A "relator" is the private party who initiates a *qui tam* lawsuit under the False Claims Act on behalf of the United States.
[45] Transcribed Interview of Fredrick Newell in Wash., D.C. at 192-93 (Mar. 28, 2013).
[46] *Id.* at 48.
[47] *Id.* at 55.
[48] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 25-30 (Apr. 5, 2013).
[49] Email from Line Attorney 1 to HUD Line Employee (Oct. 4, 2011, 5:05 p.m.). [DOJ 67]
[50] Email from HUD Line Employee to Line Attorney 1 (Oct. 7, 2011, 11:27 a.m.). [DOJ 68]
[51] Email from Line Attorney 3 to Greg Brooker (Oct. 7, 2011, 11:28 a.m.). [DOJ 69]
[52] Email from Line Attorney 3 to Line Attorney 2 & Line Attorney 1 (Oct. 26, 2011, 3:39 p.m.). [DOJ 71]

> The City was repeatedly put on notice of its obligations to comply with Section 3. At best, its failure to take any steps towards compliance, while continually telling federal courts, HUD and others that it was in compliance with Section 3, represents a reckless disregard for the truth. Its certifications of Section 3 compliance to obtain HUD funds during the relevant time period were knowingly false.[53]

The memo also referenced the HUD administrative proceeding initiated by Fredrick Newell, noting that in the proceeding "HUD determined that the City was out of compliance with Section 3. **It did not appear to be a particularly close call.** The City initially contested that finding, but dropped its challenge in order to retain its eligibility to compete for and secure discretionary HUD funding."[54]

The Civil Fraud Section also prepared an official memorandum recommending intervention in Newell's case. This memo, dated November 22, 2011, found that "[t]he City was required to comply with the statute. Our investigation confirms that the City failed to do so."[55] The memorandum stated:

> To qualify for HUD grant funds, the City was required to certify each year that it was in compliance with Section 3. The City then made claims for payment, drawing down its federal grant funds. Distribution of funds by HUD to the City was based on the City's certifications. Each time the City asked HUD for money, it impliedly certified its compliance with Section 3. At best, the City's failure to take any steps towards compliance while continually telling federal courts, HUD and others that it was in compliance with Section 3 represents a reckless disregard for the truth. **We believe its certifications of Section 3 compliance to obtain HUD funds were actually more than reckless and that the City had actual knowledge that they were false.**[56]

Thus, as of November 22, 2011, HUD, the Civil Fraud Section, and the U.S. Attorney's Office in Minnesota all strongly supported intervention in Fredrick Newell's case, believing it was worthy of federal assistance. There was no documentation that it was a marginal case or a close call.

Executing the Quid Pro Quo

Shortly after the Supreme Court granted certiorari in *Magner* on November 7, 2011, Assistant Attorney General Perez became aware of the appeal.[57] On November 17, he emailed

[53] U.S. Attorney, District of Minnesota, Intervention Memo: *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Oct. 25, 2011). [DOJ 72-79]
[54] *Id.* (emphasis added).
[55] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]
[56] *Id.* at 5 (emphasis added).
[57] Assistant Attorney General Perez testified that he did not become aware of the *Magner* case until after the Court agreed to hear the appeal; however, HUD Deputy Assistant Secretary Sara Pratt told the Committees that she and Perez likely had discussions about the case before the Court granted certiorari.

Thomas Fraser, a partner at the Minneapolis law firm Fredrickson & Bryon, P.A. and an old colleague. Fraser put Perez in touch with his law partner David Lillehaug, who was defending the City of St. Paul in the *Newell* False Claims Act litigation.

On the morning of November 23, 2011, Perez had a telephone conversation with Lillehaug and Fraser. During this conversation, Perez explained the importance of disparate impact theory, calling it the "lynchpin" of civil rights enforcement,[58] and his concerns about the *Magner* appeal. Their accounts of the conversation differed as to when and who first raised the prospect that the City would withdraw *Magner* if the Department declined to intervene in *Newell.* Lillehaug told the Committees that he told Perez that he should know that the City was potentially adverse to the United States in a separate False Claims Act case.[59] Lillehaug further told the Committees that at a subsequent meeting, approximately one week later on November 29, Perez told Lillehaug that he had looked into *Newell* and he had a "potential solution."[60] According to Perez, however, during the initial telephone call on November 23, Lillehaug actually linked the two cases and in fact suggested that if the United States would decline to intervene in *Newell*, the City would withdraw the *Magner* case.[61] Both parties agreed that Perez indicated he would look into the *Newell* case, and they would meet approximately one week later on November 29.

Following his conversation with Lillehaug and Fraser, Perez immediately reached out to HUD Deputy Assistant Secretary Sara Pratt, HUD General Counsel Helen Kanovsky, and then-Assistant Attorney General Tony West. During a telephone conversation with Kanovsky, Perez told her that he had discussions with the City about *Magner* and asked her to reconsider HUD's support for the *Newell* case.[62] On November 29, 2011 – only seven weeks after he signaled HUD's support for intervention and less than one week after Perez's initial telephone call with Lillehaug – HUD Associate General Counsel Dane Narode informed career Civil Fraud Section attorneys that HUD had reconsidered its position in *Newell*.[63] On December 1, Narode memorialized the change in an email to the line attorney.[64]

On December 13, 2011, several City officials – including Mayor Coleman and City Attorney Sara Grewing, as well as Lillehaug – traveled to Washington, D.C., for meetings with HUD and DOJ's Civil Division. In the morning, the City officials met with Sara Pratt, discussing ideas for expanding the City's Section 3 compliance programs. In the afternoon, the City met with officials from the Civil Fraud Section to discuss *Newell* and *Ellis* – which was a second False Claims Act *qui tam* case filed against the City – as well as *Magner*.

At the conclusion of the December 13, 2011, meeting, the Civil Division asked HUD to better explain the reasons for its changed recommendation. Eventually, late on December 20,

[58] Interview with David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[59] *Id.*
[60] *Id.*
[61] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 47-48 (Mar. 22, 2013).
[62] Transcribed Interview with Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 40-41 (Apr. 5, 2013).
[63] Email from Dane Narode to Line Attorney 1 (Nov. 29, 2011, 8:06 p.m.). [HUD 130]
[64] Email from HUD Line Employee to Line Attorney 1 (Dec. 1, 2011, 10:08 a.m.). [DOJ 161/156]

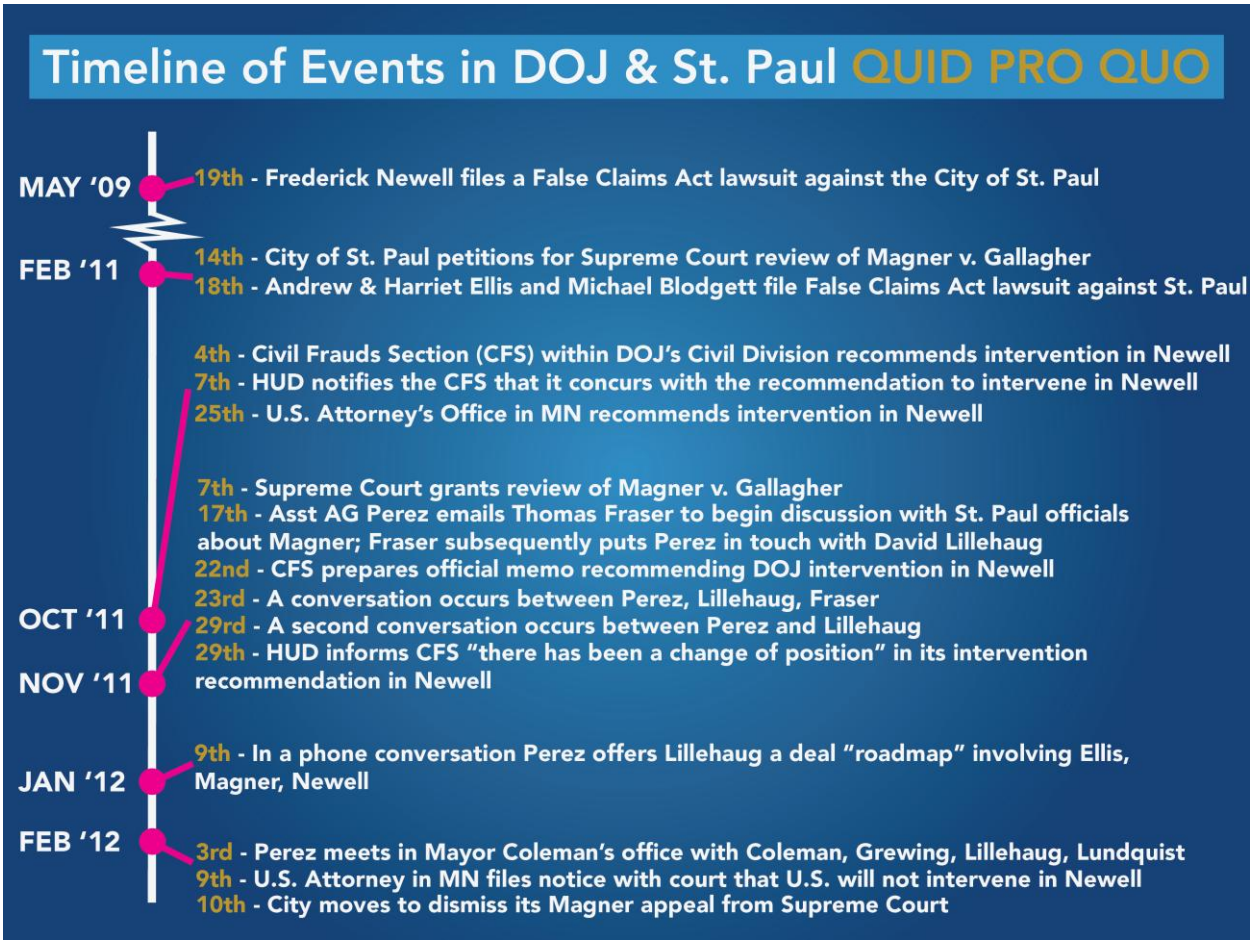
HUD sent its formal explanation to the Civil Fraud Section.[65] The memorandum referenced HUD's voluntary compliance agreement with the City, describing it as "a comprehensive document that broadly addresses St. Paul's Section 3 compliance, including the compliance problems at issue in the False Claims Act case."[66] This explanation did not satisfy the career attorneys in the Civil Fraud Section.

Throughout this period, Perez continued conversations with Lillehaug and the City. In mid-December, Perez had a telephone conversation with B. Todd Jones, the U.S. Attorney for the District of Minnesota, and began to speak regularly with Assistant U.S. Attorney Greg Brooker in Jones's office. In early January 2012, Perez had a meeting with Tony West and Deputy Assistant Attorney General Michael Hertz. According to the DOJ officials with whom the Committees spoke, the Civil Division reached a "consensus" around this same period that the Division would decline intervention in *Newell*.

In early January, Perez personally led the negotiations with Lillehaug about DOJ declining intervention in *Newell* in exchange for the City withdrawing *Magner*. According to Lillehaug, Perez presented a proposal on January 9, 2012, which Lillehaug described as a "roadmap" designed to get the City "to yes."[67] In this proposal, DOJ would decline to intervene in *Ellis,* the City would then withdraw *Magner,* and DOJ would subsequently decline to intervene in *Newell*. In mid-January, Lillehaug made a "counterproposal"[68] in which instead of merely declining to intervene in the *qui tam* cases, DOJ would intervene and settle *Newell* and *Ellis* in exchange for the City withdrawing *Magner*.

By late January, it appeared as if no deal would be reached between the federal government and the City of St. Paul. With the oral argument date in *Magner* quickly approaching, Perez flew to St. Paul to personally meet the Mayor and try once more for an agreement. At a meeting in City Hall on February 3, 2012, Perez lobbied the Mayor on the importance of disparate impact and told him DOJ could not go so far as intervening and settling the cases out from under the relator, but was still willing to decline *Newell* in exchange for the City withdrawing *Magner*. The City officials caucused privately for a short time and eventually returned to accept the deal. The next week, DOJ formally declined to intervene in *Newell* and the City formally withdrew its appeal in *Magner*. After DOJ declined to intervene, Newell's case was fatally weakened, as the declination allowed the City to move for dismissal on grounds that would have been unavailable if the Department had intervened in the case.

[65] *See* Email from HUD Line Employee to Joyce Branda (Dec. 20, 2011, 6:21 p.m.). [DOJ 408/369]
[66] Memorandum for Joyce R. Branda (Dec. 20, 2011). [DOJ 409-10/370-71]
[67] Assistant Attorney General Perez and Acting Associate Attorney General West testified that DOJ never made an offer to Lillehaug. Other testimony and documentary evidence, however, supports Lillehaug's characterization.
[68] In his transcribed interview, West initially characterized this offer as a "counterproposal" from the City, stating: "[T]here was this counterproposal from the City, which we rejected, of intervention and dismissal." Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 90 (Mar. 18, 2013).



The *Quid Pro Quo* Explained

The story of the *quid pro quo* – how one man manipulated the levers of government to prevent the Supreme Court from hearing an important appeal – is itself incredible. The Administration's version of events is even more unbelievable. The post hoc explanations defy common sense and are contradicted by both the tenor and substance of numerous internal documents produced to the Committees.

The Administration maintains that although career attorneys in the Department of Justice recommended intervention in *Newell* – and, in fact, characterized the infractions as "particularly egregious" – the case was nonetheless quite weak and never should have been a serious candidate for intervention. Accepting this as true, Perez's intervention was merely fortuitous to ensuring that the career attorneys with expertise on the False Claims Act had one more shot to reevaluate the case. Because the decision was made to decline *Newell* and – as Tony West told the Committee – that decision was communicated to the City, the Administration maintains that the United States gave up nothing to secure the withdrawal of *Magner*. But the Administration offers no explanation as to why the City would ever agree to withdraw a Supreme Court appeal it believed it would win, if *already* it knew the Department intended to decline intervention in *Newell*. Dozens of documents refer to the "deal," "settlement," and "exchange" between the City and DOJ. These documents cast doubt on the Administration's narrative, as well.

After almost fourteen months of investigating, the Committees found that the Department of Justice agreed to a *quid pro quo* with the City of St. Paul, Minnesota, in which the Department agreed to decline intervention in *Newell* and *Ellis* in exchange for the City withdrawing its appeal in *Magner*. This *quid pro quo* was facilitated, overseen, and consummated by Assistant Attorney General Thomas Perez, who made it known to the City that his "top priority" was to have *Magner* withdrawn from the Supreme Court. To get the deal done, Perez exceeded the scope and authority of his office, manipulated the protocols designed to preserve the integrity of intervention decisions, worked behind the scenes – and at times behind the backs of his colleagues at the Department with whom decision-making authority rested – and took it upon himself to strike an agreement with the City. These are the findings of the Committees' investigation:

The Agreement Was a Quid Pro Quo Exchange

The Department of Justice and the Department of Housing and Urban Development have repeatedly insisted that the agreement with the City was not a "*quid pro quo*." In transcribed interviews, Assistant Attorney General Perez, Acting Associate Attorney General West, and U.S. Attorney Jones all contested the characterization that the agreement was a *quid pro quo* or an exchange between the parties.[69] In particular, Perez told the Committees: "I would disagree with the term '*quid pro quo*,' because when I think of a *quid pro quo*, I think of, like in a sports context, you trade person A for person B and it's a – it's a binary exchange."[70] In fact, that is precisely what transpired.

Although these officials disputed the existence of an exchange, they did not dispute the fact that discussions with the City concerned a proposal that the City withdraw *Magner* if the Department declined *Newell*. Perez testified: "[St. Paul's outside counsel David] Lillehaug raised the prospect that the city would withdraw its petition in the *Magner* case if the Department would decline to intervene in *Newell*."[71] Perez subsequently testified: "What I recall Mr. Lillehaug indicating in this initial telephone call was that if the Department would decline to intervene in the *Newell* matter, that the city would then withdraw the petition" in *Magner*.[72] This testimony shows the exchange between the City and the Department was conditional.

Contemporaneous documents confirm that an exchange took place. An email from a Civil Fraud Section line attorney to then-Civil Fraud Director Joyce Branda expressly characterized the agreement as an "exchange" while explaining the state of negotiations. The attorney wrote: "We are working toward declining both matters [*Newell* and *Ellis*]. It appears that AAG for Civil Rights (Tom Perez) is working with the city on a deal to withdraw its petition before the Supreme Court in the *Gallagher* case **in exchange** for the government's declination in both cases."[73]

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[69] *See* Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 170-71 (Mar. 22, 2013); Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 117 (Mar. 18, 2013); Transcribed Interview of Byron Todd Jones, U.S. Dep't of Justice, in Wash., D.C. at 140-41 (Mar. 8, 2013).
[70] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 170 (Mar. 22, 2013).
[71] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 10 (Mar. 22, 2013).
[72] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 47-48 (Mar. 22, 2013).
[73] Email from Line Attorney 1 to Joyce Branda (Jan. 9, 2012, 1:53 p.m.) (emphasis added). [DOJ 686/641]

In addition, a draft version of the *Newell* declination memo prepared by career attorneys in the Civil Fraud Section in early 2012 clearly stated that the Department entered into an exchange with the City:

> The City tells us that Mr. Perez reached out to them and asked them to withdrawal [*sic*] the *Gallagher* petition. The City responded that they would be willing to do so, only if the United States declined to intervene in this case, and in *U.S. ex rel. Ellis v. the City of St. Paul et al.* The Civil Rights Division believes that the [Fair Housing Act] policy interests at issue here are significant enough to justify such a deal."[74]

The final version signed by Tony West, Assistant Attorney General for the Civil Division, obfuscated the true nature of the exchange. The memo signed by West stated: "The City has indicated that it will dismiss the *Gallagher* petition, and declination here will facilitate the City's doing so."[75]

Former Associate Attorney General Thomas Perrelli told the Committees that he understood from speaking with Perez that the proposal included an exchange. Perrelli testified:

> [Perez] indicated to me that this case [*Magner*] was before the Supreme Court. He indicated the desire for the United States to not file a brief in the case, and expressed the view that this was not a good vehicle to decide the issue of disparate impact, and indicated that the city had proposed to him the possibility of dismissing – and I don't remember whether it was one or more *qui tam* cases – **in exchange** for them not pursuing their appeal to the Supreme Court.[76]

In addition, a chart of significant matters within the Civil Division prepared for the Deputy Attorney General James Cole in March 2012 characterized the agreement with the City as follows: "Government declined to intervene in Newell, and has agreed to decline to intervene in Ellis, **in exchange** for defendant[']s withdrawal of cert. petition in Gallagher case (a civil rights action)."[77]

Based on Perez's admission that negotiations centered on the City of St. Paul's withdrawal of *Magner* if the Department declined intervention in *Newell* and DOJ's own characterization of an exchange, it is apparent that the agreement reached between Perez and the City involved the exchange of *Newell* and *Ellis* for *Magner*. In this exchange, the City gave up its rights to litigate *Magner* before the Supreme Court – an appeal it publicly stated it believed it

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[74] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Jan. 10, 2012) (draft declination memorandum). [DOJ 1089-99/979-89]

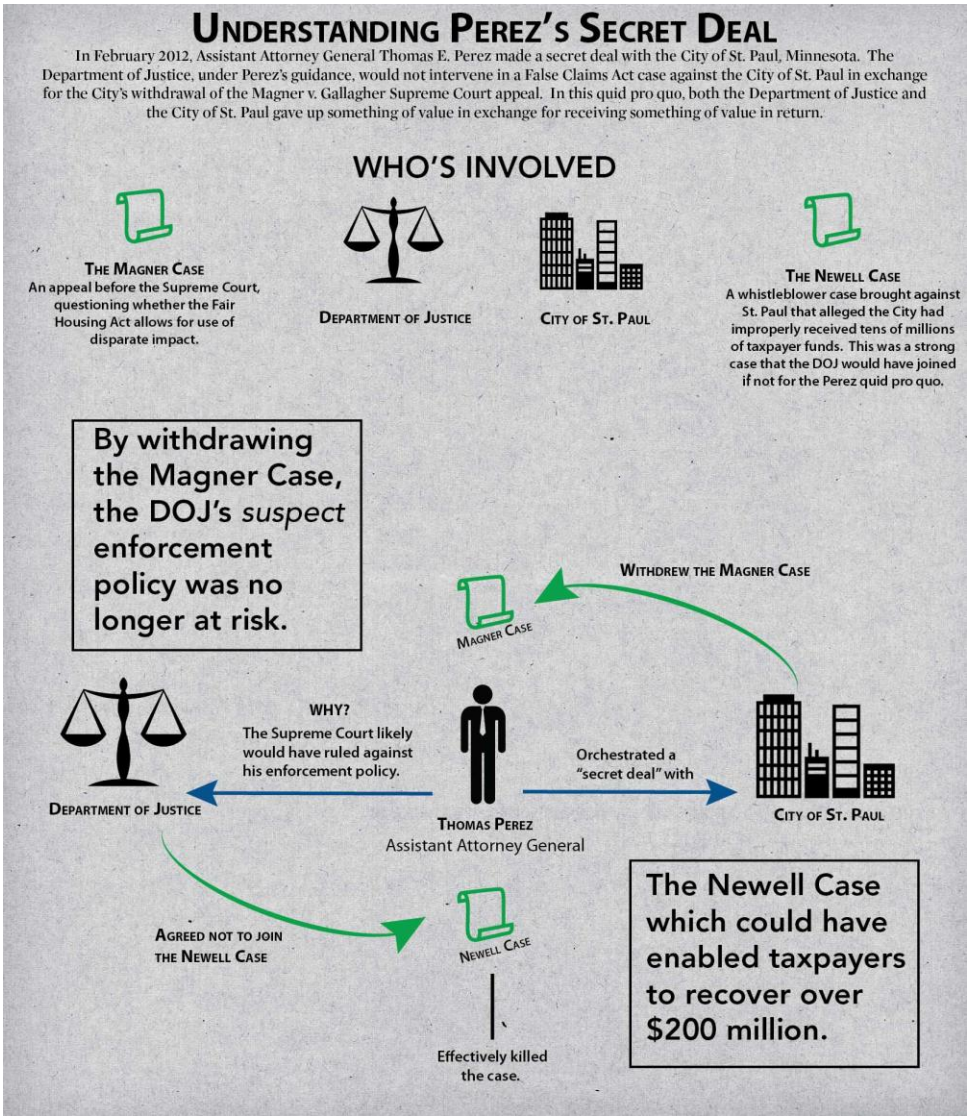
[75] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Feb. 9, 2012). [DOJ 1318-29/1162-73]

[76] Transcribed Interview of Thomas John Perrelli in Wash., D.C. at 16 (Nov. 19, 2012) (emphasis added).

[77] Significant Affirmative Civil and Criminal Matters (Mar. 8, 2012) (emphasis added). [DOJ 1410-12/1248-50]

would win[78] – and DOJ gave up its right to intervene and prosecute the alleged fraud against HUD in *Newell* – a case that career attorneys strongly supported. In return, the City received certainty that DOJ would not litigate *Newell* and DOJ received assurance that the Supreme Court would not consider *Magner*. Therefore, under the common usage of the term, the agreement between DOJ and the City clearly amounted to a *quid pro quo* exchange.

Finding:	The Department of Justice entered into a *quid pro quo* arrangement with the City of St. Paul, Minnesota, in which the Department agreed to decline intervention in *United States ex rel. Newell v. City of St. Paul* and *United States ex rel. Ellis v. City of St. Paul et al.* in exchange for the City withdrawing *Magner v. Gallagher* from the Supreme Court.



[78] Press Release, City of Saint Paul Seeks to Dismiss United States Supreme Court Case Magner v. Gallagher (Feb. 10, 2012)

Assistant Attorney General Perez Facilitated the Initial Stages of the Quid Pro Quo

In the early stages of developing the *quid pro quo*, Assistant Attorney General Perez told the City's outside counsel, David Lillehaug, that withdrawing *Magner* was his "top priority."[79] But arriving at that point was no certainty. Already, three separate entities within the federal government had recommended intervention in *Newell*. For a deal to be made and for *Magner* to be withdrawn, Perez would have to aggressively court key officials in DOJ and HUD.

On November 13, 2011, Perez had an email exchange with HUD Deputy Assistant Secretary Sara Pratt about efforts by housing advocates to facilitate a settlement to prevent the Court from hearing the appeal.[80] After the Court granted certiorari in *Magner*, Perez contacted Minnesota lawyer Thomas Fraser to start a "conversation" with the Mayor and City Attorney about his "concerns about *Magner* and to see whether the City might reconsider its position."[81] When Fraser connected Perez with Lillehaug and Perez became aware of the *Newell* case pending against the City,[82] Perez had found his leverage.[83]

Perez and Lillehaug spoke on the telephone on the afternoon of November 23, 2011.[84] Perez and Lillehaug gave differing accounts of this initial conversation. Perez testified that Lillehaug linked the *Magner* case with the *Newell* case, and offered that the City would withdraw the *Magner* appeal if DOJ declined to intervene in *Newell*.[85] Lillehaug, however, told the Committees that he merely mentioned the *Newell* case because the City may be adverse to the United States, and Perez promised that he would look into the case.[86] Lillehaug told the Committees that it was Perez who first raised the possibility of a joint resolution of *Magner* and *Newell* in a November 29 meeting with Lillehaug and St. Paul City Attorney Sara Grewing.[87] Again, Perez's version of events strains credulity. It is difficult to believe that Lillehaug, during this initial telephone call, would immediately be in a position to make an offer of this nature on behalf of the City without discussing it first with his client.

Immediately after speaking with Lillehaug at 2:00 p.m., Perez went to work, somewhat frenetically. At 2:29 p.m. that day, Perez emailed HUD Deputy Assistant Secretary Pratt, asking to speak with her as soon as possible.[88] At 2:30 p.m., Perez emailed HUD General Counsel Helen Kanovsky, asking to speak about a "rather urgent matter."[89] At 2:33 p.m., Perez emailed Tony West, head of DOJ's Civil Division and thus ultimately responsible for False Claims Act cases like *Newell*. Perez wrote: "I was wondering if I could talk to you today if possible about a

[79] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[80] Email from Sara K. Pratt to Thomas E. Perez (Nov. 13, 2011, 2:59 p.m.). [DOJ 93]
[81] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 9 (Mar. 22, 2013).
[82] Email from Thomas Fraser to Thomas E. Perez (Nov. 22, 2011, 7:07 p.m.). [DOJ 95-96]
[83] Given that Perez called Fraser, who had no involvement with the *Magner* appeal, instead of directly contacting the St. Paul City Attorney's Office, it is likely that Perez contacted Fraser in search of leverage to use to get the *Magner* case withdrawn – and not to start a "conversation" with the City.
[84] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012); Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 127-28 (Mar. 22, 2013).
[85] Transcribed Interview of Thomas E. Perez, U.S. Dep't of Justice, in Wash., D.C. at 10 (Mar. 22, 2013).
[86] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[87] *Id.*
[88] Email from Thomas E. Perez to Sara K. Pratt (Nov. 23, 2011, 2:29 p.m.). [DOJ 103]
[89] Email from Thomas E. Perez to Helen Kanovsky (Nov. 23, 2011, 2:30 p.m.). [DOJ 165-66]

separate matter of some urgency."[90] All three officials – Pratt, Kanovsky, and West – would be vital for making the withdrawal of *Magner* a reality.

The next week, on November 28, Perez had a meeting with several of his senior advisers in the Civil Rights Division. During this meeting, Perez and his advisers discussed a search for leverage in *Magner* and the fact that St. Paul Mayor Coleman's political mentor is former Vice President Walter Mondale, a champion of the Fair Housing Act.[91] Civil Rights Division Appellate Section Chief Greg Friel's notes from the meeting reflect a discussion of the *Newell qui tam* case. Friel's notes stated that "HUD is will[ing] to leverage [the] case to help resolve [the] other case," presumably referring to *Magner*.[92] The last lines of the notes state the Civil Rights Division's "ideal resolution" would be the dismissal of *Magner* and the other case "goes away."[93]

Perez testified that he did not recall ever asking HUD to reconsider its initial intervention recommendation in *Newell*.[94] However, HUD General Counsel Helen Kanovsky's testimony to the Committees directly contradicted Perez's testimony. Kanovsky testified that after HUD recommended intervention in *Newell*, Perez called her to ask her to reconsider. Kanovsky stated:

> Q Did [Perez] ask you to go back to your original position, to reconsider?
>
> A He did. He did.
>
> Q He did? What did he say?
>
> A He said, well, if you don't feel strongly about it, how would you feel about withdrawing your approval and indicating that you didn't endorse the position? And I said, I would do that.[95]

HUD Principal Deputy General Counsel Kevin Simpson verified this account in an earlier non-transcribed briefing with the Committees.[96] Once HUD flipped, support for *Newell* eroded within the U.S. Attorney's Office and the Civil Division. In transcribed interviews, both Acting Associate Attorney General Tony West and U.S. Attorney B. Todd Jones cited HUD's change of heart as a strong factor in their decision to ultimately decline intervention in *Newell*.[97]

Although it is in dispute as to who first raised the idea of exchanging *Newell* for *Magner*, it is clear that the proposal got off the ground within the bureaucracies of HUD and DOJ as a

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[90] Email from Thomas E. Perez to Tony West (Nov. 23, 2011, 2:33 p.m.). [DOJ 104]
[91] Handwritten notes of conversation between Thomas Perez, Jocelyn Samuels, Vicki Schultz, and Eric Halperin (Nov. 28, 2011). [DOJ 111-13/106-08]
[92] *Id.*
[93] *Id.*
[94] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 131 (Mar. 22, 2013).
[95] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 40-41 (Apr. 5, 2013).
[96] Briefing with Kevin Simpson and Bryan Greene in Wash., D.C. (Jan. 10, 2013).
[97] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 100 (Mar. 18, 2013); Transcribed Interview of Byron Todd Jones, U.S. Dep't of Justice, in Wash., D.C. at 39 (Mar. 8, 2013).

result of the machinations of Assistant Attorney General Perez. It was Perez who became aware of the existence of the *Newell* complaint against the City and it was Perez who asked Helen Kanovsky to reconsider HUD's initial recommendation for intervention.[98] Perez also initiated conversations with Tony West about the Civil Division's interests in *Newell*. It was Perez who spoke to HUD's General Counsel Helen Kanovsky about calling Tony West – without telling West that he was doing so.[99] The eventual agreement between the City and DOJ in February 2012 was only possible due to the early politicking done by Perez in late November 2011.

Finding: The *quid pro quo* was as a direct result of Assistant Attorney General Perez's successful efforts to pressure the Department of Housing and Urban Development, the U.S. Attorney's Office in Minnesota, and the Civil Division within the Department of Justice to reconsider their support for *Newell* in the context of the proposal to withdraw *Magner*.

The Initial Stages of the Quid Pro Quo Confused and Frustrated Career Attorneys

As Assistant Attorney General Perez facilitated the early stages of the *quid pro quo*, the high-level communications he initiated about the rather routine intervention decision in *Newell* led to confusion and frustration among career Civil Fraud Section attorneys. HUD's unexpected and unexplained change in its intervention recommendation in late November and the ripple effects it caused in the Civil Fraud Section and U.S. Attorney's Office in Minnesota created an atmosphere of uncertainty and disorder. From late November 2011 to early January 2012, the career attorneys in the Justice Department – including those with expertise and responsibility for enforcing the False Claims Act – were working at cross-purposes with some of the Department's senior political appointees.

In late November 2011, HUD Associate General Counsel Dane Narode informed the Civil Fraud Section that HUD had changed its recommendation. Career officials in DOJ's Civil Fraud Section and the U.S. Attorney's Office expressed surprise about the sudden shift within HUD. One attorney called it "weirdness,"[100] and Greg Brooker, the civil division chief in the U.S. Attorney's Office in Minnesota, wrote "HUD is so messed up."[101] A Civil Fraud line attorney reported to then-Civil Fraud Section Director Joyce Branda that Narode cryptically told her "if DOJ wants further information about what is driving HUD's decision, someone high level within DOJ might need to call [HUD General Counsel] Helen Kanovsky."[102] She also told Branda that Greg Friel, the Appellate Section chief in the Civil Rights Division, had "never heard of the *Newell* case, so he cannot imagine how the *Gallagher* case can be affecting the *Newell* case."[103] Branda passed this uncertainty along to Deputy Assistant Attorney General

[98] Here, again, Perez's testimony contradicts other testimony received by the Committees. Perez testified that he did not recall asking HUD to reconsider its intervention decision; however, Helen Kanovsky told the Committees that HUD only changed its position after being asked to do so by Perez.
[99] *See* Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 149-50, 188-89 (Mar. 18, 2013).
[100] Email from Line Attorney 3 to Greg Brooker (Dec. 2, 2011, 12:02 p.m.). [DOJ 172/164]
[101] Email from Greg Brooker to Line Attorney 3 (Nov. 30, 2011, 10:48 a.m.). [DOJ 120/115]
[102] Email from Line Attorney 1 to Joyce Branda (Dec. 2, 2011, 11:59 a.m.). [DOJ 169/161]
[103] *Id.*

Michael Hertz in an email, where she stated: "I am not sure [h]ow [G]allagher impacts [N]ewell."[104]

HUD's change of heart, however, was no surprise to Assistant Attorney General Perez. On November 30, then-Assistant Attorney General Tony West emailed Perez about *Newell*. He stated: "HUD formally recommended intervention. Let's discuss."[105] Perez responded only minutes later. He wrote: "I am confident that position has changed. You will be hearing from Helen [Kanovsky] today."[106]

What Perez did not tell West was that he was simultaneously communicating with Kanovsky – a fact that West did not know at the time.[107] Later on November 30, after West and Kanovsky spoke, Perez emailed Kanovsky and asked: "How did things do with Tony?"[108] Kanovsky responded the next day. She wrote: "I hope ok. He was aware of our communication to his staff earlier and asked for it in writing. We sent [Line Attorney 1] the requested email this morning."[109]

As the month of December wore on, confusion mounted. At the conclusion of the December 13 meeting with City officials, DOJ's Hertz asked HUD's Dane Narode to provide a fuller explanation of HUD's changed recommendation in *Newell*.[110] When HUD had not offered an explanation by December 20, Civil Fraud reiterated Hertz's request.[111] A Civil Fraud line attorney explained the situation to then-Civil Fraud Section Director Branda in an e-mail: He stated:

> [T]he USAO is inquiring about the status of our position. It is not withdrawing its recommendation to intervene, HUD does not seem inclined to give us its position in writing short of the email it sent . . . . Mike Hertz told Dane at the conclusion of the meeting on December 13 that [HUD's given basis] was not a reason to decline a *qui tam* and asked Dane to follow-up with a formal position. In the meantime, Mike Hertz sent the authority memo back to our office. We are in a difficult position because we have an intervention deadline of January 13 and the USAO does not know what, if anything, it is being asked to do at this point.[112]

Branda told the Committees that when Hertz returned the initial intervention memo, she took that to mean that he had decided against intervention.[113] However, an email between two line attorneys in December 2011 indicates that Hertz returned the memo to allow the attorneys to

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[104] Email from Joyce Branda to Michael Hertz (Dec. 5, 2011, 7:05 a.m.). [DOJ 186/175]
[105] Email from Tony West to Thomas E. Perez (Nov. 30, 2011, 3:07 p.m.). [DOJ 124/119]
[106] Email from Thomas E. Perez to Tony West (Nov. 30, 2011, 3:14 p.m.). [DOJ 124/119]
[107] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 149-50, 188-89 (Mar. 18, 2013).
[108] Email from Thomas E. Perez to Helen R. Kanovsky (Nov. 30, 2011, 7:20 p.m.). [DOJ 165]
[109] Email from Helen R. Kanovsky to Thomas E. Perez (Dec. 1, 2011, 10:50 a.m.). [DOJ 165]
[110] *See* Email from Line Attorney 1 to HUD Line Employee (Dec. 20, 2011, 4:38 p.m.). [DOJ 387/349]
[111] *Id.*
[112] Email from Line Attorney 1 to Joyce Branda (Dec. 20, 2011, 4:44 p.m.). [DOJ 388/350]
[113] Briefing with Joyce Branda in Wash., D.C. (Dec. 5, 2012).

incorporate HUD's "new analysis and explanation for its changed position."[114] A contemporaneous email from Branda supports this understanding. Branda wrote: "I guess the other issue we need to flesh out better (hopefully with HUD) is the extent to which they had a reasonable belief that their compliance with other requirements for minorities and women satisfied Section 3, which I think troubled Mike . . . . The memo may need to address that more fully . . . ."[115]

As the career attorneys at DOJ attempted to get further information on HUD's position, their frustration mounted. One career attorney wrote: "This is ridiculous. I have no control over any of this. Why are higher level people making phone calls?"[116] Another career attorney wrote: "It feels a little like 'cover your head' ping pong. Do we need to suggest that the big people sit in a room and then tell us what to do? I kinda think Perez, West, Helen, and someone from the Solicitor's office need to make a decision."[117]

Kanovsky told the Committees that she was aware of this frustration among the career attorneys in the Civil Fraud Section. Kanovsky testified that the career attorneys were "upset that there was another part of the Justice Department that wanted to go a different direction, which was going to get in the way of them doing what they want to do."[118]

On December 23, 2011, a line attorney in the Civil Fraud Section wrote to another line attorney about HUD's change of heart and the silence from the U.S. Attorney's Office about its position. She wrote: "It seems as though everyone is waiting for someone else to blink."[119] The same day, the line attorney emailed Joyce Branda. The email stated:

> I thought our marching orders were to draft a declination memo and to concur with the USAO-Minn. USAO-Minn. called me today (Greg Brooker, [Line Attorney 3], [Line Attorney 4]). Tony West, Todd Jones, and Tom Perez have apparently had conversations about this. Everything I have is third hand. Tom Perez called Greg Brooker directly yesterday. We discussed this plan today and the USA blessed the idea of [Line Attorney 2] and [Line Attorney 3] reaching out to defendant. The clear implication is that this is what should happen, but certainly I have not heard this directly from Tony West or Perez.[120]

In another email to Branda minutes later, the same line attorney elaborated on her frustration with the process. The email stated:

> By the way, when the district called me this morning to discuss the case, I did not tell them I knew that their USA was planning to decline (as we

[114] Email from Line Attorney 1 to Line Attorney 2 (Dec. 17, 2011, 3:10 p.m.). [DOJ 381/346]
[115] Email from Joyce Branda to Line Attorney 1 (Dec. 20, 4:54 p.m.). [DOJ 390/352]
[116] Email from Line Attorney 1 to Line Attorney 2 (Dec. 20, 5:00 p.m.). [DOJ 397/359]
[117] Email from Line Attorney 2 to Line Attorney 1 (Dec. 20, 2011, 5:02 p.m.). [DOJ 400/362]
[118] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 137 (Apr. 5, 2013).
[119] Email from Line Attorney 1 to Line Attorney 2 (Dec. 23, 2011, 9:35 a.m.). [DOJ 541/501]
[120] Email from Line Attorney 1 to Joyce Branda & Line Attorney 2 (Dec. 23, 2011, 3:47 p.m.). [DOJ 552/512]

> discussed I would not tell them). **It was a difficult conversation to be honest, me playing dumb and them clearly feeling me out to see [if] I had been told about the conversation with their USA.** Eventually they got around to telling me, but clearly they were hoping not to be the first office to say "we will decline." I did tell them that I felt confident that we would concur with their declination and that our offices would not be split on this question (of course I know that was our position). **This really seems extremely off and inefficient.** Why are hire-ups [*sic*] having numerous one on one conversations instead of us all having a conference call with Tony West, Perez, and the USA so we can get perfectly clear on what we are to do.[121]

Documents produced to the Committees show that this confusion continued throughout December 2011. In an early January 2012 meeting between Assistant Attorney General Perez, then-Assistant Attorney General West, and Deputy Assistant Attorney General Michael Hertz, West and Hertz agreed to allow Perez to lead negotiations with the City about *Magner* and the two False Claims Act matters.[122] At this point, the career trial attorneys in the Civil Fraud Section became merely a rubberstamp for Perez's eventual agreement.

Finding: The initial development of the *quid pro quo* by senior political appointees, and the subsequent 180 degree change of position, confused and frustrated the career Department of Justice attorneys responsible for enforcing the False Claims Act, who described the situation as "weirdness," "ridiculous," and a case of "cover your head ping pong."

HUD's Purported Reasons for Its Changed Recommendation in Newell *Are Unpersuasive and a Pretext for HUD's Desired Withdrawal of* Magner

The Department of Housing and Urban Development initially notified the Civil Fraud Section that it had changed its *Newell* recommendation in late November 2011. HUD did not fully explain its reasons until mid-December 2011 – and only then after DOJ attorneys asked HUD to do so. A careful examination of HUD's purported reasons for its changed recommendation reveals that those reasons are unsupported by the evidence and suggests a pretext for a politically motivated decision to prevent the Supreme Court from hearing *Magner*.

On November 29, 2011 – only seven weeks after he signaled HUD's support for intervention and only six days after Perez's first discussion with Lillehaug – HUD Associate General Counsel Dane Narode informed career Civil Fraud Section attorneys that HUD had reconsidered its intervention recommendation in *Newell*.[123] On December 1, Narode memorialized the change in an email. He stated:

[121] Email from Line Attorney 1 to Joyce Branda & Line Attorney 2 (Dec. 23, 2011, 4:11 p.m.) (emphases added). [DOJ 559/519]
[122] *See* Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 79-84 (Mar. 18, 2013).
[123] Email from Dane Narode to Line Attorney 1 (Nov. 29, 2011, 8:06 p.m.). [HUD 130]

> This is to confirm our telephone conversation of Tuesday night in which I informed you that HUD has reconsidered its support for intervention by the government in the St. Paul *qui tam* matter. HUD has determined that intervention is not necessary because St. Paul's programmatic non-compliance has been corrected through a Voluntary Compliance Agreement with HUD.[124]

After DOJ asked for further explanation, a HUD attorney sent HUD's formal explanation in a memorandum to the Civil Fraud Section on December 20.[125] The memorandum referenced HUD's Voluntary Compliance Agreement with the City, describing it as "a comprehensive document that broadly addresses St. Paul's Section 3 compliance, including the compliance problems at issue in the False Claims Act case."[126] The memo stated:

> Given the City's success in ensuring that its low- and very low-income residents are receiving economic opportunities generated by federal housing and community development funding, as required by Section 3, and the financial and other investments that the City has made and is continuing to make from its own resources to accomplish this, HUD considers it imprudent to expend the limited resources of the federal government on this matter.[127]

This explanation initially did not satisfy the career attorneys in the Civil Fraud Section. One line attorney, in an email to her colleague, wrote: "Well that was a fast change of heart."[128] Joyce Branda, the then-Director of the Civil Fraud Section, was even more direct: "It doesn't address the question I have. Do they agree their belief was reasonable about section 3 compliance? Nothing about the merits."[129] When Deputy Assistant Attorney General Hertz forwarded the memo to then-Assistant Attorney General Tony West, he stated that the memo "[s]till principally focuses on the prospective relief."[130]

Unconvinced by HUD's explanation, the Civil Fraud Section asked Narode to address whether HUD believed that St. Paul had complied with Section 3 through its women- and minority-owned business enterprises (WBEs and MBEs).[131] This request sparked a mild panic within HUD. Melissa Silverman, a HUD Assistant General Counsel, wrote to Dane Narode about the City's Vendor Outreach Program (VOP) for WBEs and MBEs, explaining that there were significant problems with the City's VOP and "just because St. Paul had a VOP doesn't mean it met the goals of the VOP or Section 3."[132] Silverman also emailed HUD Deputy Assistant Secretary Sara Pratt to inform her about press reports and an independent audit that

[124] Email from HUD Line Employee to Line Attorney 1 (Dec. 1, 2011, 10:08 a.m.). [DOJ 161/156]
[125] *See* Email from HUD Line Employee to Joyce Branda (Dec. 20, 2011, 6:21 p.m.). [DOJ 408/369]
[126] Memorandum for Joyce R. Branda (Dec. 20, 2011). [DOJ 409-10/370-71]
[127] *Id.*
[128] Line Attorney 1 to Joyce Branda (Dec. 21, 2011, 7:13 a.m.). [DOJ 418/379]
[129] Email from Joyce Branda to Line Attorney 1 & Line Attorney 2 (Dec. 21, 2011, 7:51 a.m.). [DOJ 420/381]
[130] Email from Michael Hertz to Tony West (Dec. 21, 2011, 10:57 a.m.). [DOJ 440/401]
[131] Email from Melissa Silverman to Michelle Aronowitz (Dec. 22, 2011, 3:58 p.m.). [HUD 232]
[132] Email from Melissa Silverman to Dane Narode (Dec. 22, 2011, 12:01 p.m.). [HUD 222]

found problems with the City's WBE and MBE enforcement.[133] Pratt responded: "Yes, I'm treading carefully here."[134]

As HUD struggled to respond to the Civil Fraud Section, Sara Pratt reached out directly to the City to seek its assistance. On the same day that the Civil Fraud Section made its request, Pratt spoke with St. Paul's outside counsel, John Lundquist, a law partner of David Lillehaug.[135] Lundquist responded by sending three separate emails to Pratt with information about the City's programs.[136] These emails included information about the City's VOP and the independent audit, as well as a position paper that the City prepared for the Civil Division.[137] When Pratt forwarded this information to Silverman, Silverman noted her concerns about the information in an email to Narode. She stated:

> Sara's attachment is the City's 'position paper' setting forth reasons why the City thinks the Govt should decline to intervene. Among other things, the City references the Hall audit's review of its VOP, but says nothing other than: 'overall, the results were largely positive.' **This is just not true**. The Hall audit reports the small percentages of contracting dollars directed toward MBEs and WBEs . . . and describes a lack of responsibility, enforcement, etc.[138]

With this information calling into doubt the City's WBE and MBE programs, HUD had difficulty crafting an adequate response. Pratt and other attorneys traded draft language before HUD Deputy General Counsel Michelle Aronowitz suggested, "if we respond at all, why wouldn't we just reiterate that HUD does not want to proceed with the false claims for the reasons stated in our letter, the city is in compliance with HUD's section 3 VCA, and it is possible that compliance with MBE, etc, requirements could result in compliance with Section 3."[139]

This is the path HUD took. On December 22, Melissa Silverman wrote to the Civil Fraud Section line attorney. She stated:

> HUD's Office of Fair Housing and Equal Opportunity has determined that the City of St. Paul is not only in compliance with the VCA, but is also in compliance with its Section 3 obligations at this time. As described in our December 20, 2001 [*sic*] memo, HUD does not wish to proceed with the False Claims Act case. It is possible that notification to MBEs, WBEs, and SBEs could result in compliance with Section 3 requirements, in

[133] Email from Melissa Silverman to Sara K. Pratt (Dec. 22, 2011, 2:16 p.m.). [HUD 225]
[134] Email from Sara K. Pratt to Melissa Silverman (Dec. 22, 2011, 2:24 p.m.). [HUD 225]
[135] *See* Email from John Lundquist to Sara K. Pratt (Dec. 22, 2011, 1:45 p.m.). [SPA 144]
[136] Email from John Lundquist to Sara K. Pratt (Dec. 22, 2011, 2:37 p.m.); [SPA 145] Email from John Lundquist to Sara K. Pratt (Dec. 22, 2011, 3:16 p.m.); [SPA 146] Email from John Lundquist to Sara K. Pratt (Dec. 23, 2011, 2:05 p.m.). [SPA 150-51]
[137] *Id.*
[138] Email from Melissa Silverman to Dane Narode (Dec. 22, 2011, 2:57 p.m.) (emphasis added). [HU D231]
[139] Email from Michelle Aronowitz to Melissa Silverman, Sara Pratt, & Dane Narode (Dec. 22, 2011, 4:57 p.m.). [HUD 240-41]

> which case the existence or non-existence of Section 3 notification procedures would essentially be the basis for technical assistance, not a finding of a violation.[140]

HUD's rationale was so unconvincing that the Civil Fraud Section line attorney had to confirm with Narode that Silverman's email was in response to the Civil Fraud Section's question about St. Paul's compliance with Section 3 via its WBE and MBE programs.[141]

HUD's rationale supporting its declination recommendation is flawed in at least two respects. First, HUD's Voluntary Compliance Agreement (VCA) with the City was never intended to remedy the City's past violations of Section 3. At the time the VCA was consummated, HUD Regional Director Maurice McGough publicly stated: "The purpose of the VCA isn't to address past noncompliance, but to be a blueprint to ensure future compliance."[142]

Further, the plain language of the agreement acknowledges its non-application to the False Claims Act. The agreement states: "[t]his Voluntary Compliance Agreement does not release the City from any claims, damages, penalties, issues, assessments, disputes, or demands arising under the False Claims Act . . . ."[143] By its own terms, therefore, the VCA cannot address the City's "Section 3 compliance, including the compliance problems at issue in the False Claims Act case" as asserted by HUD.[144]

The preservation of False Claims Act liability in the language of the VCA matches what HUD told whistleblower Fredrick Newell at the time. Newell testified to the Committees that "when we met with [HUD Regional Director] Maury McGough in the first interview regarding the [administrative] complaint process, Maury had stated that the process would allow me to be part of the negotiation and that our companies would be made whole."[145] Instead, when HUD settled the administrative complaint without remedying Newell, McGough told him that he would be made whole through the False Claims Act process.[146] Fredrick Newell's attorney stated: "[T]oward the end of 2009, after Fredrick's input was solicited and then it became clear that he wasn't going to be at the table, then they said, 'Don't worry, we'll take care of you later.' . . . I was told, 'do not worry, Fredrick will be taken care of through the False Claims Act.'"[147]

Second, HUD never asserted whether it believed that St. Paul had actually complied with Section 3 through its WBE and MBE programs. The most HUD ever asserted was that "it is **possible**" that the City's WBE and MBE initiatives in its Vendor Outreach Program satisfied the strictures of Section 3.[148] Privately, however, HUD officials acknowledged that the City's WBE

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[140] Email from Melissa Silverman to Line Attorney 1 (Dec. 22, 2011, 6:01 p.m.). [DOJ 541/501]
[141] Email from Line Attorney 1 to Dane Narode (Dec. 23, 2011, 9:43 a.m.). [DOJ 542/502]
[142] Anna Pratt, *Faith Leaders Want St. Paul to Pay for Its Sins*, Minnesota Spokesman-Recorder, Feb. 17, 2010.
[143] Voluntary Compliance Agreement; Section 3 of the Housing and Community Development Act between U.S. Dep't of Housing and Urban Development and the City of Saint Paul, MN (Feb. 2010).
[144] Memorandum for Joyce R. Branda (Dec. 20, 2011). [DOJ 409-10/370-71]
[145] Transcribed Interview of Fredrick Newell in Wash., D.C. at 38 (Mar. 28, 2013).
[146] *Id.* at 39-41
[147] *Id.* at 43-44
[148] Email from Melissa Silverman to Line Attorney 1 (Dec. 22, 2011, 6:01 p.m.) (emphasis added). [DOJ 541/501]

and MBE initiatives were deficient. Newell explained the City's Vendor Outreach Program to the Committees during his transcribed interview. Newell testified:

> St. Paul created had [*sic*] a program called – that resulted in its final naming of the Vendor Outreach Program. That was solely and particularly set up to address minorities and minority contractors. That program is what St. Paul would often throw up when I would say to them that they're not doing Section 3. They would say, We're complying based on our Vendor Outreach Program. The truth of the matter is they wasn't even complying with the Vendor Outreach Program. But I explained to them that they could not meet the Section 3 goals based on the Vendor Outreach Program because the Vendor Outreach was a race based program, and Section 3 was an income based program.[149]

Tellingly, Sara Pratt – a senior HUD official in the Office of Fair Housing and Equal Opportunity, with responsibility for enforcing Section 3 – could not tell the Committee whether the City of St. Paul's WBE and MBE programs satisfied the requirements of Section 3.[150]

Seen in this context, HUD's changed recommendation appears motivated more by ideology than by merits. Early in the process, Assistant Attorney General Perez told his staff that "HUD is willing to leverage the case."[151] Perez testified that HUD recognized the "importance" of the disparate impact doctrine and that HUD's Pratt and Kanovsky "rather clearly expressed their belief" that it would be in the interests of HUD to use *Newell* to withdraw *Magner*.[152] In addition, shortly after the Court agreed to hear the *Magner* appeal, HUD promulgated a proposed regulation codifying the Department's use of disparate impact.[153] HUD did not want *Magner* decided before it could finalize its regulation, as its General Counsel Kanovsky admitted to the Committees. She stated: "[T]o have the Supreme Court grant cert on a legal theory which had been developed by the courts but hadn't yet been part of the regulations of the United States under the Administrative Procedure Act was very problematic to us. We . . . were in the process of meeting our responsibilities to promulgate the rule, and the timing of this was of grave concern."[154]

After carefully examining HUD's reasons for recommending declination in *Newell*, it is apparent that neither basis – the Voluntary Compliance Agreement or the Vendor Outreach Program for women business enterprises and minority business enterprises – justifies the declination. There is simply no documentation to refute the assertion that the only changed circumstance from October 7, 2011 – when HUD recommended intervention – to November 29,

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[149] Transcribed Interview of Fredrick Newell in Wash., D.C. at 24-25 (Mar. 28, 2013).
[150] Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 58-59 (Apr. 3, 2013).
[151] Handwritten notes of conversation between Thomas Perez, Jocelyn Samuels, Vicki Schultz, and Eric Halperin (Nov. 28, 2011). [DOJ 111-13/106-08]
[152] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 130-31 (Mar. 22, 2013).
[153] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (Nov. 16, 2011).
[154] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 35 (Apr. 5, 2013).

2011 – when HUD changed its recommendation – was the Supreme Court's decision to hear the *Magner* appeal and the subsequent association between *Magner* and *Newell*.

Finding: The reasons given by the Department of Housing and Urban Development for recommending declination in *Newell* are unsupported by documentary evidence and instead appear to be pretextual post-hoc rationalizations for a purely political decision.

The "Consensus" that Emerged for Declining Intervention in Newell Directly Resulted from Assistant Attorney General Perez's Stewardship of the Quid Pro Quo

Acting Associate Attorney General West testified that the recommendation of the Civil Division for intervention in *Newell* shifted in January 2011 after a "consensus" began to emerge for declination. As West stated, "by early, mid-January, there was a consensus that had coalesced in the Civil Division that we were going to decline the *Newell* case."[155] Assistant Attorney General Perez similarly testified that a "consensus began to emerge . . . shortly before Christmas that it was in the interest of the United States" to decline intervention in *Newell*."[156] This consensus, however, only resulted from the careful stewardship of Perez in shaping the deal.

After laying the groundwork for the *quid pro quo*, Assistant Attorney General Perez remained closely involved in overseeing the development and execution of the deal. Perez openly advised senior officials at HUD how to communicate with the Civil Division career attorneys and what steps had to be taken to change the Civil Division's impression of *Newell*. He also counseled St. Paul's outside counsel, David Lillehaug, how to approach Civil Division officials about the cases. Throughout the entire process, documents and testimony suggest that Perez remained keenly aware of all the moving parts and what steps needed to occur to arrive at a consensus for declining *Newell*.

As discussions on a possible agreement progressed in early December 2011, Perez began to counsel senior HUD officials about how to effectively shift the opinion of the Civil Division. On December 8, Perez advised HUD Deputy Assistant Secretary Sara Pratt about which Civil Fraud personnel were handling the *Newell* case and who to approach. In an email to Pratt, Perez stated:

> The trial atty assigned to the matter is [Line Attorney 2]. He reports to [Line Attorney 1], who can be reached at 202-[redacted]. [Line Attorney 1] in turn reports to Joyce Branda, I am told, who can be reached at 202-[redacted]. My instinct would be to start with [Line Attorney 1], and see how it goes. I do not know any of these folks. Thx again for agreeing to conduct an independent review of this matter.[157]

[155] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 82-83 (Mar. 18, 2013).
[156] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 87-88 (Mar. 22, 2013).
[157] Email from Thomas E. Perez to Sara K. Pratt (Dec. 8, 2011, 9:27 a.m.). [DOJ 272-74]

Perez offered this information while acknowledging that he was not acquainted with these career attorneys and while he was aware that HUD had already been talking to the Civil Fraud Section. When asked by the Committees, Pratt testified that she did not recall receiving this email.[158]

The same day, Perez alerted HUD General Counsel Kanovsky about "a step that needs to occur in your office that has not occurred and has therefore prevented progress from occurring."[159] Perez testified that he was referring to "the communication to the Civil Division by HUD that they believe that the *Newell* matter is not a candidate for intervention."[160] Perez also told the Committees that at the time, although he was aware that HUD's recommendation had changed, he was unsure if HUD had already conveyed its new recommendation to the Civil Division.[161] His email to Kanovsky, therefore, seems to have been calculated to ensure that the Civil Division knew of HUD's new recommendation so that the *quid pro quo* could continue to progress. When interviewed by the Committees, Kanovsky could not recall this email.[162]

Perez likewise facilitated discussions between the City and HUD. In early December 2011, he asked HUD's Sara Pratt to meet the City's lawyer, David Lillehaug, in advance of a December 13 meeting between the Civil Division and City officials in Washington, D.C.[163] Lillehaug, along with St. Paul City Attorney Sara Grewing, subsequently spoke with Pratt on the morning of December 9, discussing ideas for how the City's Section 3 compliance program could be enhanced.[164] Pratt and Lillehaug agreed to meet on December 13 before the City's meeting with the Civil Division.[165] Lillehaug called Perez afterward and told him that the conversation with Pratt had been "helpful."[166] Pratt similarly reported to Perez that she had a "very excellent call" with Lillehaug and Grewing.[167] The effect of these discussions between the City and HUD was not lost on DOJ officials, as evidenced by notes of one phone call. Notes from the call stated: "HUD is now abandoning ship – may be lobbied by St. Paul."[168]

In advance of the City's meetings on December 13, Perez took an active role in moving the different offices. Perez also appears to have been coaching the City on how to approach its discussions with the Department of Justice. Perez advised Lillehaug "that he should be prepared to make a presentation to the Civil Division about why they think the case, the *Newell* case,

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[158] Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 74 (Apr. 3, 2013).
[159] Email from Thomas E. Perez to Helen R. Kanovsky (Dec. 8, 2011, 9:03 p.m.) [DOJ 275-76]
[160] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 139-40 (Mar. 22, 2013).
[161] *Id.* at 140
[162] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 54-55 (Apr. 5, 2013).
[163] Interview of David Lillehaug (Oct. 16, 2012); Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 65 (Apr. 3, 2013); Email from Thomas E. Perez to Sara K. Pratt (Dec. 8, 2011, 10:42 p.m.). [DOJ 279]
[164] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012). Pratt testified that this call was between her and Lillehaug. Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 65 (Apr. 3, 2013).
[165] *See* Email from Sara K. Pratt to David Lillehaug (Dec. 9, 2011, 10:47 a.m.) ("Thank you for a helpful discussion this morning. I look forward to meeting you on Tuesday at 9:00 am."). [SPA 158]
[166] *Id.*
[167] Email from Sara K. Pratt to Thomas E. Perez (Dec. 9, 2011, 1:04 p.m.). [DOJ 283]
[168] Handwritten notes of conversation between Joyce Branda, Line Attorney 2, and Greg Brooker (Dec. 28, 2011). [DOJ 618/576]

should be declined."[169] Perez also asked Pratt to include him in her meeting with the City. In an email to Pratt, he wrote: "Maybe after you meet with them, you can patch me in telephonically and we can talk to them. We need to talk them off the ledge."[170]

After the meetings, Lillehaug emailed Pratt thanking her for the "productive" meeting with the City.[171] Lillehaug told Pratt "[u]nfortunately, our meeting in the afternoon did not go as well. The possibility of an expanded VCA did not seem to be given much weight by the representatives of the DOJ's Civil Division, who described their job as 'bringing in money to the U.S. Treasury.'"[172] Pratt later emailed Perez: "We should talk; the Tuesday afternoon meeting did NOT go well at all."[173] Perez responded: "I am well aware of that. We will figure it out."[174]

Perez continued to closely oversee the progress of the *quid pro quo* as December progressed. On December 19, Lillehaug and Perez spoke on the telephone. Lillehaug expressed dismay to Perez about the meeting with the Civil Division.[175] Perez told Lillehaug that his "top priority" was to ensure that *Magner* was withdrawn.[176] Perez told Lillehaug that HUD was working the matter "as we speak."[177] Meanwhile, Perez kept the pressure on HUD to ensure that it was satisfying the requests and answering the questions of the Civil Division. In particular, he kept tabs on the progress of a detailed declination memo that Deputy Assistant Attorney General Michael Hertz had requested from HUD after the December 13th meeting. Perez wrote to HUD Deputy Assistant Secretary Pratt on December 20 to ask if the memo had been sent.[178] Pratt responded: "Am trying to find out. I sent to [HUD Line Employee] but didn't hear back from him. [General Counsel] Helen [Kanovsky] has them both and she could send them too . . . but I can't."[179]

In the early weeks of discussions on the *quid pro quo*, there was no guarantee that an agreement would be reached. By the time Perez became aware of *Newell*, three separate entities in the federal government – HUD, the U.S. Attorney's Office in Minnesota, and the Civil Fraud Section – had each recommended that the government intervene in the case. The recommendations of each of these three entities would have to be changed to reach a deal with the City. In early-to-mid-December, Perez painstakingly advised HUD and the City and oversaw their communications with the Civil Division to ensure that these recommendations were changed. Only then did a "consensus" emerge for declining intervention in *Newell*.

[169] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 196 (Mar. 22, 2013).
[170] Email from Thomas E. Perez to Sara K. Pratt (Dec. 12, 2011, 2:03 p.m.). [DOJ 312-13]
[171] Email from David Lillehaug to Sara K. Pratt (Dec. 14, 2011, 12:46 p.m.). [DOJ 371/336]
[172] *Id.*
[173] Email from Sara K. Pratt to Thomas E. Perez (Dec. 16, 2011, 6:13 a.m.). [DOJ 369]
[174] Email from Thomas E. Perez to Sara K. Pratt (Dec. 16, 2011, 8:04 a.m.). [DOJ 369]
[175] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[176] *Id.*
[177] *Id.*
[178] Email from Thomas E. Perez to Sara K. Pratt (Dec. 20, 2011, 4:56 p.m.). [DOJ 403]
[179] Email from Sara K. Pratt to Thomas E. Perez (Dec. 20, 2011, 5:34 p.m.). [DOJ 403]

Finding: The "consensus" of the federal government to switch its recommendation and decline intervention in *Newell* was the direct result of Assistant Attorney General Perez manipulating the process and advising and overseeing the communications between the City of St. Paul, the Department of Housing and Urban Development, and the Civil Division within the Department of Justice.

As Discussions Stalled, Assistant Attorney General Perez Took the Lead and Personally Brokered the Agreement

From the day that Assistant Attorney General Thomas Perez became aware that the Supreme Court granted certiorari in *Magner*, time was working against him. The Court was poised to hear oral arguments in the appeal on February 29, 2012, and the deadline for the Department of Justice to file its amicus brief was December 29, 2011. By early January 2012, with only weeks remaining until oral arguments, Perez personally assumed the lead and negotiated directly with the City's outside counsel, David Lillehaug. When discussions broke down in late January 2012, Perez traveled to St. Paul to seal the deal in person with St. Paul Mayor Coleman.

Once Perez had secured a consensus in support of declining *Newell* in exchange for the City's withdrawal of *Magner*, he began to directly negotiate with Lillehaug on the mechanics of the eventual agreement. Acting Associate Attorney General West testified that the decision to allow Perez to begin leading discussions with the City resulted from a meeting between West, Perez, and Deputy Assistant Attorney General Michael Hertz on January 9, 2012.[180] However, documents show that Perez may have taken it upon himself to lead negotiations even before that meeting. An email from a line attorney in Civil Fraud to then-Civil Fraud Section Director Joyce Branda on January 6 states: "[Line Attorney 2] and I just spoke with USAO-Minn. [Assistant U.S. Attorney] Greg Brooker received a call yesterday from Tom Perez. It sounds like Tom Perez agreed to take the lead on the negotiations with the City of St. Paul, in terms of negotiating a withdraw [*sic*] by the City of the cert petition."[181] Notes of this line attorney's call with Assistant U.S. Attorney Brooker show Perez asked Brooker "where are we on these cases" and "who has lead negotiating," and that Perez said that "he needs to start doing this."[182]

According to Lillehaug, he and Perez had a telephone conversation on January 9 – the same day Perez received the approval of then-Assistant Attorney General West to negotiate on behalf of the Civil Division – in which Perez offered a precise "roadmap" to use in executing the *quid pro quo*.[183] Lillehaug told the Committees that Perez proposed that the Department would first decline to intervene in *Ellis*, then the City would withdraw *Magner*, and finally the Department would decline to intervene in *Newell*.[184] Lillehaug further told the Committees that Perez promised "HUD would be helpful" with the *Newell* case in the event Newell continued his suit after the Department declined intervention.[185] This account is confirmed by a voicemail left

[180] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 79-82 (Mar. 18, 2013).
[181] Email from Line Attorney 1 to Joyce Branda (Jan. 6, 2012, 11:52 a.m.). [DOJ 656/611]
[182] Handwritten Notes (Jan. 6, 2012). [DOJ 647-54/602-09]
[183] Interview of David Lillehaug in Wash., D.C. (Oct. 18, 2012).
[184] *Id.*
[185] *Id.*

for Assistant U.S. Attorney Brooker by Perez on January 12, in which Perez stated: "We should have an answer on whether **our proposal** is a go tomorrow or Monday and just wanted to let you know that."[186] During his transcribed interview, the Committees asked Perez about his use of the phrase "our proposal" on the voicemail during his transcribed interview. Perez testified:

> Q The voicemail says, "And we should have an answer on whether our proposal is a go." What are you referring to when you say "our proposal"?
>
> A Again, up until about the middle of January, the proposal of the United States – the proposal of Mr. Lillehaug was the proposal that was under consideration.
>
> Q Okay.
>
> A And so the Civil Division had completed its review, as I have described, and had determined that it, the *Newell* case, was a weak candidate for intervention. And that is what we are referring to.
>
> Q Okay. I ask because you described it a number of times today as Mr. Lillehaug's proposal, the one he offered the first time you guys spoke on the phone. This is the first time that it's been described, to my knowledge, as "our proposal." And I am wondering if this was a proposal by you on behalf of the Department to Mr. Lillehaug? Or are you describing there the proposal that Lillehaug made to you?
>
> A Well, again, I don't know what you're looking at in reference. But what I meant to communicate in that period of time in January was that the United States was prepared to accept Mr. Lillehaug's proposal.

On January 13, the Civil Fraud Section became aware that Lillehaug had presented a counteroffer to the U.S. Attorney's Office. A DOJ line attorney described the phone conversation in an email to a colleague. He stated:

> Lillehaug says they have been thinking about it, and the City feels pretty strongly that it can win the Gallagher case in the Supreme Court, and will win back at the trial court when it is remanded. The City is concerned that getting us to decline does not really get them what they want – they would still have to deal with the case. The City wants us to consider an arrangement where we agree to a settlement where it will extend the VCA for another year, value that as an alternative remedy, and it would add a small amount of cash for relator's attorney fees, and a small relator's share. They say this has to be a very modest amount of money. In exchange we would have to intervene and move to dismiss.[187]

[186] Voicemail from Thomas Perez to Greg Brooker (Jan. 12, 2012, 5:58 p.m.) (emphasis added). [DOJ 719/670]
[187] Email from Line Attorney 2 to Line Attorney 1 (Jan. 13, 2012, 4:00 p.m.). [DOJ 721/671]

Then-Civil Fraud Section Director Branda's reaction to the development was "quite negative." In an email the same day, she stated: "This is so not what was discussed with [T]om [P]erez as what the plan was – basically we were to decline [E]llis first and use that as the good faith government gesture to get them to dismiss the petition."[188]

By January 18, the prospects for an agreement were beginning to look bleak. In updating Branda on the state of negotiations, a Civil Fraud line attorney explained that the deal was falling apart. He stated:

> [The Assistant U.S. Attorney] says he understood that West, Perez, and Hertz had had a meeting and that the resulting go forward was the plan to decline Ellis, resolve Gallagher, and then decline Newell. . . . [T]he City called and said they are no longer willing to accept the decline [of the] two *qui tams* and dismiss Gallagher deal. That they will not withdrawal [*sic*] Gallagher on that basis, that they are only willing to do the new deal they propose . . . . If we are unwilling to accept this deal, they said they will not dismiss Gallagher.[189]

In the ensuing week, DOJ deliberated about how to respond to the counterproposal from Lillehaug. By late January, the Department had decided to reject the City's counterproposal. On or around January 30, the Assistant U.S. Attorney in Minnesota conveyed to Lillehaug that the Department had declined the counterproposal.[190] The attorney's "conclusion [was] that we are no longer on a settlement track, and we should move forward with our decision making process."[191]

The next day, January 31, Perez emailed Lillehaug, proposing a meeting with the Mayor and City Attorney in St. Paul for February 3.[192] Perez was joined at this meeting by Eric Halperin, a special counsel in the Civil Rights Division. No officials from the Civil Division or the U.S. Attorney's Office were present. At the meeting, Perez initiated a "healthy, robust exchange" about disparate impact and the *Magner* appeal.[193] Perez raised the initial proposal to decline intervention in *Newell* and *Ellis* in exchange for the withdrawal of *Magner* and said the Department could agree to that exchange.[194] The City officials then left the room to caucus privately, and Lillehaug returned to accept the proposal on behalf of the Mayor.[195]

Finding: Assistant Attorney General Perez was personally and directly involved in negotiating the mechanics of the *quid pro quo* with David Lillehaug and he personally agreed to the *quid pro quo* on behalf of the United States during a closed-door meeting with the Mayor in St. Paul.

[188] Email from Joyce Branda to Line Attorney 1 and Line Attorney 2 (Jan. 13, 2012, 5:35 p.m.). [DOJ 735/685]
[189] Email from Line Attorney 2 to Joyce Branda (Jan. 18, 2012, 4:06 p.m.). [DOJ 754/702]
[190] Email from Line Attorney 2 to Line Attorney 1 & Joyce Branda (Jan. 30, 2012, 5:18 p.m.). [DOJ 993/918]
[191] *Id.*
[192] Email from Thomas E. Perez to David Lillehaug (Jan. 31, 2012, 12:09 p.m.). [DOJ 59]
[193] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 48-56 (Mar. 22, 2013).
[194] *Id.*
[195] *Id.*

The Department of Justice Sacrificed a Strong Case Alleging a "Particularly Egregious Example" of Fraud to Execute the Quid Pro Quo with the City of St. Paul

In several settings, officials from the Department of Justice have told the Committees that the decision whether to intervene in *Newell* was a close decision and therefore the United States never gave up anything of substance in exchange for the City withdrawing *Magner*. Assistant Attorney General Perez testified: "[M]y understanding is that the original recommendation was to proceed with intervention, but it was a marginal case."[196] Acting Associate Attorney General West told the Committees "I can tell you that this case was a close call. It was a close call throughout."[197] U.S. Attorney Jones likewise testified: "[T]hey were both marginal cases. We could have gone either way on *Newell*."[198] In addition, now-Deputy Assistant Attorney General Joyce Branda briefed the Committees that after the December 13 meeting with the City, Deputy Assistant Attorney General Michael Hertz whispered to her, "this case sucks," which she interpreted to mean that it was unlikely the Department would intervene.[199] Branda also told the Committees that she personally felt the case was a "close call."[200]

However, testimony and contemporaneous documents indicate that the career Civil Fraud Section and U.S. Attorney's Office in Minnesota officials thought the *Newell* suit was indeed a strong case for intervention. HUD General Counsel Kanovsky told the Committees that these officials had a strong desire to intervene in the case and that they personally met with her in fall 2011 to lobby her to lend HUD's support for the intervention decision.[201] Attorneys from the U.S. Attorney's Office in Minnesota even flew to Washington, D.C. at taxpayer expense specifically for the meeting.[202] At this meeting, Kanovsky did not recall any career attorney mentioning that the case was a "close call" or "marginal."[203]

On October 4, 2011, a line attorney in the Civil Fraud Section wrote to HUD's Associate General Counsel Dane Narode about the *Newell* case: "Our office is recommending intervention. Does HUD concur?"[204] Three days later, Narode replied: "HUD concurs with DOJ's recommendation."[205] The AUSA handling *Newell* in Minnesota forwarded HUD's concurrence to his supervisor with a comment. He wrote: "Looks like everyone is on board."[206]

The memo prepared by the U.S. Attorney's Office in Minnesota recommending intervention used strong language to explain its support for intervention, explaining that the City

[196] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 185-86 (Mar. 22, 2013).
[197] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 53 (Mar. 18, 2013).
[198] Transcribed Interview of Byron Todd Jones, U.S. Dep't of Justice, in Wash., D.C. at 80 (Mar. 8, 2013).
[199] Briefing with Joyce Branda in Wash., D.C. (Dec. 5, 2012).
[200] *Id.*
[201] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 25-30 (Apr. 5, 2013).
[202] *Id.*
[203] *Id.* at 109-11.
[204] Email from Line Attorney 1 to HUD Line Employee (Oct. 4, 2011, 5:05 p.m.). [DOJ 67]
[205] Email from HUD Line Employee to Line Attorney 1 (Oct. 7, 2011, 11:27 a.m.). [DOJ 68]
[206] Email from Line Attorney 3 to Greg Brooker (Oct. 7, 2011, 11:28 a.m.). [DOJ 69]

made "knowingly false" statements and had a "reckless disregard for the truth."[207] This memo also emphasized that administrative proceedings performed by HUD found the City's noncompliance with Section 3 "not . . . to be a particularly close call."[208] Similarly, the initial intervention memo prepared by career attorneys in the Civil Fraud Section described St. Paul's conduct as a "particularly egregious example of false certifications." The memo stated:

> To qualify for HUD grant funds, the City was required to certify each year that it was in compliance with Section 3. . . . Each time the City asked HUD for money, it impliedly certified its compliance with Section 3. At best, the City's failure to take any steps towards compliance while continually telling federal courts, HUD and others that it was in compliance with Section 3 represents a reckless disregard for the truth. We believe its certifications of Section 3 compliance to obtain HUD funds were actually more than reckless and that the City had actual knowledge that they were false.[209]

Neither the U.S. Attorney's Office memo nor the memo prepared by the Civil Fraud Section described the recommendation to intervene as a "close call" or "marginal."[210]

Other documents show that as late as mid-December 2011, career officials in DOJ still supported intervention in *Newell*. On December 20, 2011, then-Civil Fraud Section Director Branda wrote to Deputy Assistant Attorney General Hertz: "The USAO wants to intervene notwithstanding HUD. I feel we have a case but I also think HUD needs to address the question St. Paul is so fixated on, i.e. was their belief they satisfied Section 3 by doing enough with minorities and women reasonable?"[211] On December 21, a line attorney in the Civil Fraud Section wrote to Branda about HUD's memo to decline intervention. The line attorney stated: "Are we supposed to incorporate this into our memo and send up our joint recommendation with the [U.S. Attorney's Office] that we intervene?"[212]

Fredrick Newell and his attorney testified that no individual from DOJ or HUD ever told them that his case was a "close call" or "marginal" or otherwise indicated it was weak.[213] In fact, Newell told the Committees that "[t]here was a real interest . . . and the DOJ felt it was a good case."[214] Newell's attorney stated:

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[207] U.S. Attorney, District of Minnesota, Intervention Memo: *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Oct. 25, 2011). [DOJ 72-79]
[208] *Id.*
[209] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]
[210] U.S. Attorney, District of Minnesota, Intervention Memo: *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Oct. 25, 2011); [DOJ 72-79] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]
[211] Email from Joyce Branda to Michael Hertz (Dec. 20, 2011, 5:05 p.m.). [DOJ 404/365]
[212] Email from Line Attorney 1 to Joyce Branda (Dec. 21, 2011, 7:36 a.m.). [DOJ 419/380]
[213] Transcribed Interview of Fredrick Newell in Wash., D.C. at 55-56 (Mar. 28, 2013).
[214] *Id.* at 48.

> And to build on that, there were a number of indications that Justice was going to intervene in the case, up to and including them saying, we're going to intervene in the case. But it started with the relator interview. And I would say that just the attendance at the interview and the amount of travel expense you're looking at, at the interview, knowing that Justice had already spoken to HUD about the substance of the action and then having that many people from Washington at the meeting [in Minnesota], sent a clear signal to me that this was a case of priority.[215]

Newell's attorney also told the Committees that when the City initially met with DOJ and HUD in 2011, the attorneys from DOJ and HUD were unconvinced by the City's defenses.[216] According to Newell, even then-HUD Deputy Secretary Ron Sims acknowledged the strength of the case, telling Newell in 2009 that the False Claims Act would be the new model for Section 3 enforcement and directing Newell to "keep up the good work."[217]

That the U.S. Attorney's Office in Minnesota and DOJ's Civil Fraud Section perceived Newell's case to be strong is also corroborated by HUD General Counsel Helen Kanovsky's testimony to the Committees. Kanovsky testified that because she believed HUD's programmatic goals regarding future compliance had been met by the VCA, she was not inclined to recommend intervening in *Newell* when it was first presented to her in the summer or early fall of 2011.[218] However, the U.S. Attorney's Office in Minnesota and DOJ's Civil Fraud Division requested a meeting with her in order to persuade her to support intervention. Kanovsky testified:

> Then attorneys from the U.S. Attorney's Office in Minnesota and from Civil Frauds asked if they could meet with me to dissuade me of that and to get the Department to accede to their request to intervene, so there was that meeting. Assistant U.S. Attorneys flew in from Minnesota, people from Civil Frauds came over. They did a presentation on the matter and why they thought this was important from Justice's equities to intervene. And after that presentation, and because this seemed like a matter that was so important to both Main Justice and the U.S. Attorney's Office, we then acceded to their request that we agree to the intervention.[219]

When questioned more closely about her basis for understanding Civil Fraud Division's position, Kanovsky testified:

> A Came from the fact that they and the U.S. Attorney's Office in Minnesota asked for a meeting, came to HUD, spent an amount of time briefing me and trying to convince me that it was in HUD's best interests to agree to

[215] *Id.* at 53-54.
[216] *Id.* at 122-26.
[217] *Id.* at 133-36.
[218] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 25, 30 (Apr. 5, 2013).
[219] *Id.* at 25.

> intervention. So . . . I concluded that the fact that they had come over to make that argument to convince me to go the direction that I had already indicated was not my inclination certainly strongly suggested to me that was where they wanted to go.[220]

This meeting undermines the Justice Department's post hoc claim made during the Committees' investigation that the Civil Frauds Division and the U.S. Attorney's Office in Minnesota saw the case as weak from the beginning.

Finding: Despite the Department of Justice's contention that the intervention recommendation in *Newell* was a "close call" and "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 potentially $200 million to the Treasury.

Assistant Attorney General Perez Offered to Provide the City of St. Paul with Assistance in Dismissing Newell's Complaint

St. Paul's outside counsel, David Lillehaug, told the Committees that during a discussion with Assistant Attorney General Thomas Perez on January 9, 2012, Perez told Lillehaug that "HUD would be helpful" if the *Newell* case proceeded after DOJ declined intervention.[221] Lillehaug further told the Committees that on February 4 – the day after Perez reached the agreement with the City – Perez told Lillehaug that HUD Deputy Assistant Secretary Sara Pratt had begun assembling information from local HUD officials to assist the City in a motion to dismiss the *Newell* complaint on original source grounds.[222] This assistance disappeared, Lillehaug stated, after Civil Division attorneys told Perez that DOJ should not assist a False Claims Act defendant in dismissing a whistleblower suit.[223]

In his transcribed interview with the Committees, Perez testified that he did not recall ever suggesting to Lillehaug that HUD would provide material in support of the City's motion to dismiss the *Newell* complaint on original source grounds.[224] However, contemporaneous emails support Lillehaug's version of events and suggest that Lillehaug in fact believed this additional "support" was included as part of the agreement. On February 7, Lillehaug had a conversation with the Assistant U.S. Attorney handling *Newell* in Minnesota.[225] Later that same day, a line attorney in the Civil Fraud Section emailed then-Civil Fraud Section Director Joyce Branda, explaining that Lillehaug had told the Assistant U.S. Attorney that he believed the deal included an agreement that "HUD will provide material to the City in support of their motion to dismiss on original source grounds."[226] The Civil Fraud Section attorneys disagreed strongly with this promise, and they conveyed their concern to then-Assistant Attorney General Tony West.[227]

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[220] *Id.* at 91-92.
[221] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[222] *Id.*
[223] *Id.*
[224] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 60-61 (Mar. 22, 20113).
[225] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[226] Email from Line Attorney 2 to Joyce Branda (Feb. 7, 2012, 7:17 p.m.). [DOJ 1141/1020]
[227] Email from Joyce Branda to Tony West & Brian Martinez (Feb. 8, 2012, 9:35 a.m.). [DOJ 1141/1020]

West asked his chief of staff, Brian Martinez, to schedule a call with Perez for the morning of February 8.[228]

West told the Committees that providing material to the City outside of the normal discovery processes would have been "inappropriate" and "there was not a question in my mind that we were not going to allow discovery to occur outside the normal *Touhy* channels."[229] West did not recall speaking to Perez about the email from Lillehaug.[230] When asked how the matter was resolved, he replied "[m]y recollection is this somehow got resolved" and "[w]hen I say I don't recall, I don't even know if I know how it was resolved. I just know that that wasn't going to happen, and it didn't happen."[231]

HUD's Sara Pratt testified that she was unaware of any offer for HUD to provide information to the City in support of its motion to dismiss; however, she did state that "to the extent that existing documents or knowledge available at HUD would have supported the City's motion, . . . that doesn't concern me."[232] Although Pratt did not recall any offer for HUD to assist the City in dismissing the *Newell* complaint, on February 8 – the same day West attempted to speak with Perez about the offer – Perez emailed Pratt asking for her to call him.[233] Lillehaug likewise told the Committees that Perez told him on February 8 that HUD would not be providing assistance to the City.[234]

Although Perez testified that he did not recall ever offering HUD's assistance to the City, contemporaneous documents and Lillehaug's statements to the Committees strongly suggest that such an offer was made. This offer was inappropriate, as acknowledged by Acting Associate Attorney General Tony West. However, on a broader level, this offer of assistance potentially violated Perez's duty of loyalty to his client, the United States, in that Newell's lawsuit was brought on behalf of the United States and any assistance by Perez or HUD with the City's dismissal of the case would have harmed the interests of the United States. Because the original source defense would have been unavailable if the United States had intervened in Newell's case,[235] Perez's offer to the City went beyond simply declining intervention to affirmatively aiding the City in its defense of the case.

Finding: Assistant Attorney General Perez offered to arrange for the Department of Housing and Urban Development to provide material to the City of St. Paul to assist the City in its motion to dismiss the *Newell* whistleblower complaint. This offer was inappropriate and potentially violated Perez's duty of loyalty to his client, the United States.

[228] Email from Tony West to Joyce Branda & Brian Martinez (Feb. 8, 2012, 9:48 a.m.). [DOJ 1141/1020]
[229] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 165-67 (Mar. 18, 2013).
[230] *Id.*
[231] *Id.*
[232] Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 82-83 (Apr. 3, 2013).
[233] *See* Email from Thomas E. Perez to Sara K. Pratt (Feb. 8, 2012, 12:35 p.m.). [DOJ 1177/1056]
[234] Interview with David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[235] *See* 31 U.S.C. § 3730(e)(4).

***Assistant Attorney General Perez Attempted to Cover Up the Presence of* Magner *as a Factor in the Intervention Decision on* Newell**

On the morning of January 10, 2012, Assistant Attorney General Perez left a voicemail for Greg Brooker, the Civil Division Section Chief in the U.S. Attorney's Office in Minnesota. In that voicemail, Perez said:

> Hey, Greg. This is Tom Perez calling you at – excuse me, 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 am sure it probably already does this – but it doesn't make any mention of the *Magner* case**. It is 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 are 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 the Civil Division. 202 [redacted] is my number. I hope you are feeling better. Take care.[236]

A career line attorney's notes from a subsequent phone conversation between Brooker and attorneys in the Civil Fraud Section and the U.S. Attorney's Office confirm Perez's request. The notes describe a Tuesday morning "message from Perez" in which he told Brooker "when you are working on memos – make sure you don't talk about Sup. Ct. case."[237] Brooker told those on the call that Perez's request was a "concern" and a "red flag," and that he left a voicemail for Perez indicating that *Magner* would be an explicit factor in any declination memo.[238]

During his transcribed interview, the Committees asked Perez about this voicemail. Perez maintained that the voicemail was merely an "inartful" attempt to encourage Brooker to expedite the preparation of a concurrence memo by the U.S. Attorney's Office. Perez testified:

> So I was – I was confused – "confused" is the wrong term – I was impatient on the 9th of January when I learned that the U.S. Attorney's Office still hadn't sent in their concurrence, because I had a clear impression from my conversation with Todd Jones that they would do that. So I called up and I was trying to put it together in my head, what would be the source of the delay, and the one and only thing I could really think of at the time was that perhaps they hadn't – they didn't write in or they hadn't prepared the language on the *Magner* issue, and so I admittedly inartfully told them, I left a voicemail and what I meant in that voicemail to say was time is moving. . . . And so what I really meant to

[236] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 120-21 (Mar. 22, 2013) (emphasis added).
[237] Handwritten Notes of Line Attorney 2 (Jan. 11, 2012). [DOJ 713/666]
[238] *Id.*

> communicate in that voice message, and I should have – and what I meant to communicate was it is time to bring this to closure, and if the only issue that is standing in the way is how you talk about *Magner*, then don't talk about it.[239]

When pressed, however, Perez stated that he never asked Brooker about the reason for the delay and that he only assumed through "the process of elimination" that the presence of *Magner* as a factor in the decision was delaying the preparation of the memo.[240] He also testified that he believed the memos had not been transmitted to the Civil Division at the time he left the voicemail.[241]

When presented with a transcription of the voicemail and asked why he used the past tense verb "sent" if he believed the memos had not be transmitted to the Civil Division, Perez stated that he disagreed with the transcription of the voicemail.[242] After the Committees played an audio recording of the voicemail for Perez, he suggested that he was unable to ascertain what he had said. He stated: "Having listened to that, I don't think that – I would have to listen to it a number of additional times."[243] However, later in the voicemail Perez again used the past tense, saying he wanted to confirm with Brooker "that you **were** able to get your stuff over to the Civil Division."[244] Perez did acknowledge that his voicemail for Brooker did not mention anything about a delay.[245]

The words that Perez spoke in his voicemail speak for themselves. Perez said: "I . . . wanted to make sure that the declination memo that you sent to the Civil Division . . . doesn't make any mention of the *Magner* case. It is 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." No other witness interviewed by the Committees has indicated that there was any delay in the preparation of a concurrence memo from the U.S. Attorney's Office. Indeed, the U.S. Attorney's Office did not even prepare a concurrence memo for the *Newell* case – instead, it communicated its concurrence in an email from Greg Brooker to then-Civil Fraud Section Director Joyce Branda on February 8, 2012.[246]

Moreover, in a contemporaneous email to Brooker – sent less than an hour after the voicemail – Perez wrote to him: "I left you a detailed voicemail. Call me if you can after you have a chance to review [the] voice mail."[247] This email does not mention any concern about a delay in transmitting concurrence memos. Instead, the email suggests that Perez intended to leave instructions for Brooker, which matches the tone and content of the voicemail to omit a

[239] Transcribed Interview of Thomas E. Perez, U.S. Dep't of Justice, in Wash., D.C. at 111-12 (Mar. 22, 2013).
[240] *Id.* at 113-17.
[241] *Id.* at 117.
[242] *Id.* at 119.
[243] *Id.* at 121.
[244] *Id.* at 121 (emphasis added).
[245] *Id.* at 124.
[246] Email from Greg Brooker to Joyce Branda (Feb. 8, 2012, 4:01 p.m.). [DOJ 1198/1077]
[247] Email from Thomas E. Perez to Greg Brooker (Jan. 10, 2012, 9:52 a.m.). [DOJ 707-08]

discussion of *Magner* from the declination memos. Later the same day, at 1:45 p.m., Perez again emailed Brooker, asking "[w]ere you able to listen to my message?"[248]

Finally, additional contemporaneous documents support a common sense interpretation of Perez' intent. For instance, Perez testified that after he left the January 10 voicemail, Brooker called him back the next day and said he [Brooker] would not accede to his request. And, according to Perez, he told Brooker that in that case he should "follow the normal process."[249] Yet, one month later on February 6, 2012, following Perez' meeting in St. Paul where he finalized the agreement, Line Attorney 1 wrote to Branda updating her on the apparent agreement. The email included eight "additional facts" regarding the deal.[250] Points five and six were:

> 5. Perez wants declination approval by Wednesday, but there is no apparent basis for that deadline.
> 6. USA-MN considers it non-negotiable that its office will include a discussion of the Supreme Court case and the policy issues in its declination memo.[251]

If Perez's version of events were accurate, and the issue was resolved on January 11, 2012, when Brooker returned Perez's phone call, then it is difficult to understand why the U.S. Attorney's office would still feel the need to emphatically state its position that a discussion of *Magner* must be included in the final declination memo approximately one month later on February 6, 2012.

The only reasonable interpretation of the words spoken by Assistant Attorney General Perez in his January 10 voicemail is that he desired the *Newell* and *Ellis* memos to omit a discussion of *Magner*. Acting Associate Attorney General West told the Committees that it would have been "inappropriate" to omit a discussion of *Magner* in the *Newell* and *Ellis* memos.[252] U.S. Attorney B. Todd Jones also told the Committees that it would have been inappropriate to omit a discussion of *Magner*.[253] Thus, even other senior DOJ political appointees felt that Perez was going too far in his cover-up attempt. In addition, the fact that the *quid pro quo* was not reduced to writing allowed Perez to cover up the true factors behind DOJ's intervention decision. When asked by career Civil Fraud attorneys about whether the deal was in writing, Perez responded: "No, just oral discussions; word was your bond."[254] Thus, with nothing in writing, only the fortitude of Assistant U.S. Attorney Greg Brooker in resisting the voicemail request prevented Perez from inappropriately masking the factors in the Department's decision to decline intervention in *Newell* and *Ellis*.

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[248] Email from Thomas E. Perez to Greg Brooker (Jan. 10, 2012, 1:45 p.m.). [DOJ 717-18]
[249] Transcribed Interview of Thomas E. Perez, U.S. Dep't of Justice, in Wash., D.C. at 220 (March 22, 2013).
[250] Email from Line Attorney 1 to Joyce Branda (Feb. 6, 2012, 2:58 p.m.). [DOJ 1027-28/948]
[251] *Id*.
[252] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 133 (Mar. 18, 2013) ("For me, yes, it would have been inappropriate, which is why I included it along with all of the other things I thought were relevant.").
[253] Transcribed Interview of Byron Todd Jones, U.S. Dep't of Justice, in Wash., D.C. at 177-78 (Mar. 8, 2013).
[254] Handwritten notes (Feb. 7, 2012). [DOJ 1059-60/975-76]

Finding: Assistant Attorney General Perez attempted to cover up the *quid pro quo* when he personally instructed career attorneys to omit a discussion of *Magner* in the declination memos that outlined the reasons for the Department's decision to decline intervention in *Newell* and *Ellis*, and focus instead only "on the merits."

Finding: Assistant Attorney General 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."

Assistant Attorney General Perez Made Statements to the Committees that Were Largely Contradicted by Other Testimony and Documentary Evidence

Several times during his transcribed interview with the Committees, Assistant Attorney General Thomas Perez gave testimony that was contradicted by other testimony and documentary evidence obtained by the Committees. These contradictions in Perez's testimony call into question the veracity of his statements and his credibility in general. During his interview, Perez stated that he understood that he was required to answer the questions posed truthfully and stated he had no reason to provide untruthful answers.[255]

Section 1001 of title 18 of the United States makes it a crime to "knowingly and willfully . . . make[] any materially false, fictitious, or fraudulent statement or representation" to a congressional proceeding.[256] Any individual who knowingly and willfully makes false statements could be subject to five years of imprisonment.[257] This section applies to "any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with the applicable rules of the House or Senate."[258]

First, Perez testified repeatedly – both in response to questions and during his prepared testimony delivered at the beginning of the interview – that it was St. Paul's outside counsel, David Lillehaug, during a November 23, 2011, phone conversation, who first proposed the idea of a joint resolution of *Magner* and *Newell* in which the City would withdraw the *Magner* appeal if DOJ declined to intervene in *Newell*.[259] Lillehaug, however, told the Committees that it was in fact Perez who first raised the possibility of a joint resolution of *Magner* and *Newell* in a November 29 meeting with Lillehaug and City Attorney Grewing.[260] Lillehaug also stated that it was Perez who first proposed the precise "roadmap" in early January 2012 that guided how the Department would decline the False Claims Act cases and the City would withdraw *Magner*.[261] This statement is verified by a voicemail from Perez to Assistant U.S. Attorney Greg Brooker on

[255] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 6-7 (Mar. 22, 2013).
[256] 18 U.S.C. § 1001(a).
[257] *Id.*
[258] *Id.* at § 1001(c)(2).
[259] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 10, 43-44 (Mar. 22, 2013).
[260] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[261] *Id.*

January 12, 2012, in which he stated "we should have an answer on whether **our proposal** is a go tomorrow or Monday and just wanted to let you know that."[262]

Second, Perez testified that he did not recall ever asking HUD General Counsel Helen Kanovsky to reconsider HUD's recommendation for intervention in *Newell*.[263] Perez testified:

> Q So just to be clear, you never affirmatively asked [HUD Deputy Assistant Secretary] Pratt or Ms. Kanovsky to reconsider HUD's position in Newell, is that correct?
>
> A Again, my recollection of my conversations with Helen Kanovsky and Sara Pratt was that they concluded, their sense of the Newell case was that it was a weak case and that disparate impact enforcement was a very important priority of HUD, and that they had spent a lot of time preparing a regulation. They were very concerned, as I was, that the Supreme Court had granted cert without the benefit of the Reagan HUD's interpretation. And so for both of them it was based on my conversations with them, they were both very – they rather clearly expressed their belief that it would be in the interests of the Department of Housing and Urban Development to determine whether they could – whether the proposal of Mr. Lillehaug could go forward.
>
> Q I just want to be clear. You never asked them to reconsider that, is that right?
>
> A Again, I don't recall asking them. I don't recall that I needed to ask them because they both understood and indicated their sense that it was a marginal or weak case to begin with, and the importance of disparate impact.[264]

Helen Kanovsky, however, testified that Perez did in fact ask her to reconsider HUD's recommendation. She stated: "He said, well, if you don't feel strongly about it, how would you feel about withdrawing your approval and indicating that you didn't endorse the position? And I said, I would do that."[265] Kanovsky acknowledged that Perez' request was the only new factor in HUD's decision-making process between the time it initially recommended intervention in *Newell* and the time it recommended to not intervene.[266]

Third, Perez's testimony that his voicemail request that Assistant U.S. Attorney Greg Brooker omit a discussion of *Magner* as a factor in the *Newell* declination memo was merely an "inartful" attempt to expedite the memo contradicts the plain language of his request and defies a

[262] Voicemail from Thomas Perez to Greg Brooker (Jan. 12, 2012, 5:58 p.m.) (emphasis added). [DOJ 719/670]
[263] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 131 (Mar. 22, 2013).
[264] *Id.*
[265] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 41 (Apr. 5, 2013).
[266] *Id.* at 48.

commonsensical interpretation. When presented with a transcription and an audio recording of the voicemail, Perez testified that he could not be certain what he had said in the voicemail. Contemporaneous documents show, however, that Brooker, the recipient of the voicemail, understood the voicemail to be a "message from Perez" that "when you are working on memos – make sure you don't talk about Sup. Ct. case."[267]

Fourth, Perez testified before the Committees that he had no recollection of offering to provide HUD assistance to the City in support of the City's motion to dismiss the *Newell* complaint.[268] However, contrary to Perez's testimony, the City's outside counsel, David Lillehaug, told the Committees that Perez told him as early as January 9, 2012, that "HUD would be helpful" if the *Newell* case proceeded after DOJ declined intervention.[269] Lillehaug also explained to the Committees that Perez told him on February 4, 2012, that HUD had begun assembling information to assist the City in a motion to dismiss the *Newell* complaint on original source grounds.[270] Evidence produced to the Committees – including a DOJ email from early February 2012 noting Lillehaug's recitation of the agreement included an understanding that "HUD will provide material to the City in support of their motion to dismiss on original source grounds"[271] – support Lillehaug's account.

Fifth, Perez told the Committee that he only became aware of the *Magner* appeal once the Supreme Court granted certiorari;[272] however, HUD Deputy Assistant Secretary Sara Pratt testified that she and Perez likely had discussions about the *Magner* case well before the Court granted certiorari.[273] Pratt testified:

> Q Do you recall speaking to Mr. Perez during that time period?
>
> A The time frame?
>
> Q Between February 2011 and November 2011?
>
> A I'm sure we did have a conversation.
>
> Q About the *Magner* case?
>
> A Yes. Yes. Nothing surprising, nothing shocking about that.
>
> Q Okay.
>
> A Along with many, many other people.[274]

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[267] Handwritten Notes of Line Attorney 2 (Jan. 11, 2012). [DOJ 713/666]
[268] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 60-61 (Mar. 22, 2013).
[269] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[270] *Id.*
[271] Email from Line Attorney 2 to Joyce Branda (Feb. 7, 2012, 7:17 p.m.). [DOJ 1141/1020]
[272] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 39-40 (Mar. 22, 2013).
[273] Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 33 (Apr. 3, 2013).
[274] *Id.*

Sixth, during his transcribed interview, Perez was asked whether he had used a personal email to communicate about matters relating to the *quid pro quo* with the City of St. Paul.[275] Perez answered: "I don't recall whether I did or didn't" and later clarified, "I don't have any recollection of having communicated via personal email on – on this matter."[276] However, a document produced to the Committees by the City of St. Paul indicates that Perez emailed David Lillehaug from his personal email account on December 10, 2011, to attempt to arrange a meeting with the City the following week.[277] This revelation that Perez used his personal email address to communicate with Lillehaug about the *quid pro quo* raises the troubling likelihood that his actions violated the spirit and the letter of the Federal Records Act.

Seventh, Perez testified that he understood *Newell* to be a "marginal case" and a "weak" case;[278] however, the initial memoranda prepared in fall 2011 by the Civil Fraud Section and the U.S. Attorney's Office never described the recommendation to intervene as a "close call" or "marginal."[279] In addition, whistleblower Fredrick Newell and his attorney testified that no individual from DOJ or HUD ever told them that the case was a "close call" or "marginal" or otherwise indicated it was weak.[280]

The contradictions and discrepancies in Perez's statements in his transcribed interview cast considerable doubt on his truthfulness and candor to the Committees. His testimony departed significantly from that of the City outside counsel, David Lillehaug, on several key elements about the development and execution of the *quid pro quo*. Because documentary evidence exists to support Lillehaug's testimony, the Committees can only conclude that Perez was less than candid during his transcribed interview.

Finding: Assistant Attorney General Perez made multiple statements to the Committees that contradicted testimony from other witnesses and documentary evidence. Perez's inconsistent testimony on a range of subjects calls into question the reliability of his testimony and raises questions about his truthfulness during his transcribed interview.

Finding: Assistant Attorney General Perez likely violated both the spirit and letter of the Federal Records Act and the regulations promulgated thereunder when he communicated with the City's lawyers about the *quid pro quo* on his personal email account.

[275] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 161 (Mar. 22, 2013).
[276] *Id.*
[277] Email from Thomas Perez to David Lillehaug (Dec. 10, 2011). [SPA 159]
[278] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 185-86, 257 (Mar. 22, 2013).
[279] U.S. Attorney, District of Minnesota, Intervention Memo: *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Oct. 25, 2011); [DOJ 72-79] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]
[280] Transcribed Interview of Fredrick Newell in Wash., D.C. at 55-56 (Mar. 28, 2013).

The Ethics and Professional Responsibility Opinions Obtained by Assistant Attorney General Perez Were Not Sufficient to Cover His Actions

In late November 2011, Assistant Attorney General Thomas Perez obtained an ethics opinion from the designated ethics official within the Civil Rights Division and his staff obtained separate professional responsibility guidance from another official.[281] Perez told the Committees that he orally recited the situation to the ethics officer. [282] And when asked, he testified that he "believe[d]" he explained that the United States was not a party to the *Magner* appeal.[283] The ethics official – who was also a trial attorney reporting to Perez in the normal course of his duties – found no ethical prohibition. The attorney wrote:

> You asked me whether there was an ethics concern with your involvement in settling a Fair Lending Act challenge in St. Paul that would include an agreement by the government not to intervene in a False Claims Act claim involving St. Paul. You indicated that you have no personal or financial interest in either matter. Having reviewed the standards of ethical conduct and related sources, there is no ethics rule implicated by the situation and therefore no prohibition against your proposed course of action. Please let me know if you have any questions.[284]

By its terms, the ethics opinion that Perez received advised him that there were no personal or financial conflicts prohibiting his involvement in the *quid pro quo*. It did not address the propriety of the agreement itself or any conflicts broader than Perez's personal or financial interests. As a general matter, ethics officers within the Justice Department answer questions of government ethics, such as conflicts of interest. These officials do not handle questions of professional ethics at issue here, such as duties to clients and global resolution of unrelated cases. The Justice Department's ethics website specifically states: "Questions concerning professional responsibility issues such as the McDade amendment and contacts with represented parties should be directed to the Department's Professional Responsibility Advisory Office."[285] Thus, the ethics opinion Perez received did not address the propriety of the agreement itself or any conflicts broader than Perez's personal or financial interests.

Moreover, two additional points cast doubt on the adequacy of the opinion. First, based on Perez's testimony that he "believe[d]" he informed the ethics advisor the United States was not party in *Magner*, it is not clear Perez equipped him with a full set of facts. Understanding that the United States was not a party to *Magner* – and in fact that it had no direct stake in the outcome – was of course a significant fact. Second, it is curious that Perez did not seek the ethics opinion until well after he had set in motion the entire chain events. More specifically, Perez spoke with Lillehaug for the first time on November 23, 2011. Nine minutes after that telephone call, Perez emailed HUD Deputy Assistant Secretary Pratt, asking to speak with her as

[281] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 191, 202-03 (Mar. 22, 2013).
[282] *Id.* at 194-95.
[283] *Id*.
[284] Email from Civil Rights Division Ethics Officer to Thomas E. Perez (Nov. 28, 2011, 3:53 p.m.). [DOJ 114/109]
[285] U.S. Dep't of Justice, Departmental Ethics Office, http://www.justice.gov/jmd/ethics/.

soon as possible.[286] One minute later, at 2:30 p.m., Perez emailed HUD General Counsel Helen Kanovsky, asking to speak about a "rather urgent matter."[287] At 2:33 p.m., Perez emailed Tony West, head of DOJ's Civil Division and thus ultimately responsible for False Claims Act cases like *Newell*. Perez wrote: "I was wondering if I could talk to you today if possible about a separate matter of some urgency."[288] All of these actions set in motion the quid pro quo. Yet, he did not receive his "ethics opinion" until five days later on November 28.

Assistant Attorney General Perez received no written professional responsibility opinion about his involvement in the *quid pro quo*. Perez told the Committees that he inquired orally, through an intermediary, and "the answer that we received on the professional responsibility front was that because the United States is a unitary actor, that we could indeed proceed so long as the other component did not object and . . . would continue to be the decisionmaking body on those matters that fall within their jurisdiction."[289] This guidance, as described to the Committees by Perez, focused narrowly on his authority to speak on behalf of the Civil Division when negotiating with the City of St. Paul. It did not affirmatively authorize Perez to enter into the *quid pro quo*.

Because both the ethics opinion and the professional responsibility opinion were limited to Assistant Attorney General Perez's theoretical involvement in negotiating the *quid pro quo* – and do not affirmatively approve the agreement or his particular actions in reaching the agreement – the opinions do not suffice to cover the entirety of his actions in the *quid pro quo*. Neither the ethics opinion nor the professional responsibility opinion sanctioned Perez's actions in offering the City assistance in dismissing the whistleblower complaint against his client, the United States. Nor would the ethics opinion have absolved him of responsibility for his attempt to cover up the fact that *Magner* was underlying reason for the *Newell* declination decision.

Finding: The ethics and professional responsibility opinions obtained by Assistant Attorney General Thomas Perez and his staff were narrowly focused on his personal and financial interests in a deal and his authority to speak on behalf of the Civil Division, and thus do not address the *quid pro quo* itself or Perez's particular actions in effectuating the *quid pro quo*.

The Department of Justice Likely Violated the Spirit and Intent of the False Claims Act by Internally Calling the Quid Pro Quo a "Settlement"

The False Claims Act exists to help the United States recover taxpayer dollars misspent or misallocated on the basis of fraud committed against the government. Since it was amended in 1986, the False Claims Act has helped recover over $40 billion of taxpayer dollars that would otherwise be lost to fraud and abuse of federal programs.[290] The Act includes a whistleblower provision allowing private citizens to bring an action on behalf of the United States.[291] This

[286] Email from Thomas E. Perez to Sara K. Pratt (Nov. 23, 2011, 2:29 p.m.). [DOJ 103]
[287] Email from Thomas E. Perez to Helen Kanovsky (Nov. 23, 2011, 2:30 p.m.). [DOJ 165-66]
[288] Email from Thomas E. Perez to Tony West (Nov. 23, 2011, 2:33 p.m.). [DOJ 104]
[289] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 201-02 (Mar. 22, 2013).
[290] *The False Claims Act*, TAF http://www.taf.org/fraud-cases/false-claims-act (last visited April 12, 2013).
[291] *See* 31 U.S.C. § 3730.

provision is powerful, and according to the Department's own press release, since 1986, 8,500 *qui tam* whistleblower suits have been filed since 1986 totaling $24.2 billion in recoveries.[292] Where the government intervenes in the private action and settles the complaint, or where the government pursues an alternate remedy, the whistleblower is afforded the opportunity to contest the fairness and adequacy of the settlement or alternate remedy.[293]

As a result, the False Claims Act, and the *qui tam* whistleblower provisions have become an important part of the Civil Division's enforcement efforts and a key component of Senate confirmation hearings for senior officials at the Department. In fact, Attorney General Holder, Deputy Attorney General Cole, then-Associate Attorney General Perrelli, and Assistant Attorney General West were all asked specific questions about the False Claims Act and all answered that they supported the law and would work with whistleblowers to ensure that their cases were afforded due consideration and assistance from the Department.[294]

Unfortunately, despite these successes, and contrary to the assertions about support for the False Claims Act, the *qui tam* whistleblower provisions, and whistleblowers, Fredrick Newell, was treated differently and given no opportunity to contest the fairness and adequacy of the settlement or alternate remedy– despite DOJ privately labeling the resolution a "settlement."

Several contemporaneous documents suggest that DOJ viewed the *quid pro quo* with St. Paul as a settlement. In fact, in the initial ethics opinion that Perez received, the Division ethics officer evaluated Perez's "involvement in **settling** a Fair Lending Act challenge in St. Paul that would include an agreement by the government not to intervene in a False Claims Act claim involving St. Paul."[295] Handwritten notes of a subsequent meeting between then-Civil Frauds Section Director Joyce Branda, Deputy Assistant Attorney General Michael Hertz, and a Civil Fraud line attorney likewise reflect that "Civil Rights wants a settlement; St. Paul brought up another case," in reference to the *Newell qui tam*.[296] Even then-Assistant Attorney General Tony West's own handwritten notes of a Civil Division senior staff meeting in early January 2012 call the *quid pro quo* a settlement. West's notes state: "City: we've learned that as settlement City means they'll just withdraw the petition."[297] Other notes from January 2012 similarly state:

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[292] Press Release, Office of Public Affairs, U.S. Department of Justice, Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), *available at* http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html.

[293] *Id.* § 3730(c).

[294] *See generally*, *Nomination of Eric H. Holder, Jr., Nominee to be Attorney General of the United States*, 111th Cong. 276−277 (2009) (Responses to Written Questions of Senator Chuck Grassley); *Nomination of James Micheal Cole, Nominee to be Deputy Attorney General, U.S. Department of Justice*, 111th Cong. 148−150 (2010) (Responses to Written Questions of Senator Chuck Grassley); *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to be Associate Attorney General of the United States and Elena Kagen Nominee to be Solicitor General of the United States*, 111th Cong. 129 (2009) (Responses to Written Questions of Senator Chuck Grassley to Thomas Perrelli, to be Associate Attorney General for the U.S. Department of Justice); and *Confirmation Hearings on Federal Appointments*, 111th Cong. 784−785 (2009) (Responses to Written Questions by Senator Chuck Grassley).

[295] Email from Civil Rights Division Ethics Officer to Thomas E. Perez (Nov. 28, 2011, 3:53 p.m.) (emphasis added). [DOJ 114/109]

[296] Handwritten Notes of Line Attorney 2 (Dec. 7, 2012). [DOJ 230/217]

[297] Handwritten Notes of Tony West (Jan. 3, 2012). [DOJ 627/585]

"Newell – mtg w/ Joyce; decline the second case first; do not say there is a *quid pro quo* settlement; settlement is not contingent on declination."[298]

When Perez testified before the Committees, he stated that his discussions with the City's outside counsel, David Lillehaug, about the *quid pro quo* were "settlement negotiations." Perez testified:

> Q Mr. Perez, I just have a couple of follow up questions for you just to clarify some of the discussion you had with my colleague in the previous round. In the time period that we have been discussing, November 2011 to February 2012, is it fair to say that you were the primary representative of the Department in the settlement negotiations with the *Magner* and *Newell* cases with the city?
>
> A Here is how I look at it. I had initial conversations with Mr. Lillehaug, after I had spoken to Mr. Fraser and then Mr. Fraser put me in touch with Mr. Lillehaug. We had those conversations and then took the appropriate measures that I discussed this morning. During a substantial part of this period, Mr. Lillehaug, as I understand it, was also in contact with the U.S. Attorney's Office in Minnesota, so those conversations were occurring. And he obviously met directly with the Civil Division in connection with the discussion of the *qui tams* when the mayor came in, and I was not part of that. So there were a number of different conversations that were ongoing. I was involved in some of them, the U.S. Attorney's Office was involved in others, and the Civil Division was involved in yet others.
>
> *** * ***
>
> Q Were there settlement negotiations going on with the city in January and February of 2012?
>
> A We had – there were discussions underway in January and February of 2012 relating to Mr. Lillehaug's proposal.
>
> Q So the answer to my question is yes then?
>
> A Well, again, there were a number of different – Mr. Lillehaug was talking to the U.S. Attorney's Office, I was discussing – I was having discussions with him. So the reason I wanted to be complete in your other question was about whether it was just me, and I wanted to make sure that the record was complete in connection with the various people with whom Mr. Lillehaug I think was communicating.[299]

[298] Handwritten Notes (Jan. 2012). [DOJ 653/608]
[299] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 105-07(Mar. 22, 2013).

Only after the Department's counsel interjected did Perez begin to contest the characterization of the discussions as "settlement negotiations."[300]

Although the Department of Justice decided to decline intervention in Newell's case in exchange for the City's withdrawal of the *Magner* Supreme Court appeal, Newell was never afforded the opportunity to contest the fairness or adequacy of this resolution. Simultaneously, however, internal Department documents reflect that high-level officials with the Department saw the *quid pro quo* as the outgrowth of settlement discussions with the City. As such, Newell should have been involved in these discussions and allowed the opportunity to opine on the resolution in a fairness hearing. Because he was not, the Department of Justice likely violated the spirit and intent of the False Claims Act.

Finding: The Department of Justice violated the spirit and intent of the False Claims Act by privately acknowledging the *quid pro quo* was a settlement while not affording Fredrick Newell the opportunity to be heard, as the statute requires, on the fairness and adequacy of this settlement.

The Quid Pro Quo Exposed Management Failures Within the Department of Justice

The process by which the Department of Justice arrived at this *quid pro quo* with the City of St. Paul is not at all a template for Departmental management. The Committees' investigation has exposed how Assistant Attorney General Thomas Perez was able to manipulate the bureaucratic mazes of DOJ and HUD to ensure that *Magner* was withdrawn from the Supreme Court. The management failures, however, run far deeper. According to information given to the Committees, senior leadership in the Department – up to and including Attorney General Holder – was unaware of the extent to which Perez had gone to realize his goal.

In November 2011, after the Supreme Court granted the City's appeal in *Magner*, Assistant Attorney General Perez initiated a process that ultimately resulted in an agreement with the City to withdraw the appeal. In this process, Perez asked HUD to reconsider its support for *Newell*, causing HUD to change its recommendation and subsequently eroding support for the case in DOJ's Civil Division. Once a consensus had been reached to decline *Newell*, Perez personally began leading negotiations with the City on the *quid pro quo*. His efforts paid off in February 2012, as the City agreed to withdraw *Magner* in exchange for the Department's declination in *Newell* and *Ellis.*

Senior leadership within the Department of Justice, however, was unaware of the full extent of Perez's actions. Former Associate Attorney General Thomas Perrelli, Perez's supervisor at the time of the *quid pro quo*, told the Committees that he was not aware that the Department of Justice entered into an agreement with the City until he was interviewed by Department officials in preparation for dealing with congressional scrutiny of this matter.[301] While Perrelli stated he was aware of Perez's discussions with the City, he was under the impression that an agreement had never been reached.[302] Perrelli testified that when he became

[300] *Id.* at 109-10.
[301] Transcribed Interview of Thomas John Perrelli in Wash., D.C. at 19 (Nov. 19, 2012).
[302] *Id.* at 94.

aware that *Magner* had been withdrawn from the Supreme Court, Perez told him that it was the "civil rights community" that had encouraged the City to withdraw the case. Perrelli testified:

> A I do remember a conversation with Tom Perez – and I can't remember whether it was a conversation or voicemail, what it was – where he – where I expressed surprise that the case had been dismissed. And he indicated that the civil rights community had encouraged the city to dismiss.
>
> Q So that's all he told you, civil rights community had encouraged the city to dismiss?
>
> A That's what he told me.
>
> Q He didn't tell you anything about the arrangement, *Newell*, the two *qui tam* cases?
>
> A That was the substance of the conversation.
>
> *** * ***
>
> Q And you were surprised because you had thought that this would be so difficult to get done?
>
> A I was surprised because I wasn't aware that the case was going to be dismissed. Obviously, I knew, you know, as Tom had indicated, that was something he was interested in. But I hadn't talked to him about it in a long time and was unaware that that would happen.
>
> Q And at that time, did it occur to you that an agreement may have been reached been [*sic*] the department and the city?
>
> A I was not aware that one was reached at that time and
>
> Q Did the thought cross your mind?
>
> A It didn't, frankly, or at least I don't remember it crossing my mind.[303]

Perrelli also testified that after a congressional inquiry from House Judiciary Committee Chairman Lamar Smith, Perrelli briefed Attorney General Holder on the *quid pro quo* and he "indicated to him that there had been these discussions in the Department that the City had put on the table this idea of the *qui tam* cases, but that that hadn't happened."[304] Instead, Perrelli passed on to Attorney General Holder the incomplete information from Perez that

[303] *Id.* at 96-97.
[304] *Id.* at 104.

encouragement from the civil rights community led to the City's withdrawal of the appeal.[305] Perrelli acknowledged that due to Perez's omission, he "didn't give [Attorney General Holder] a complete set of facts" about the *quid pro quo*.[306]

Finding: The *quid pro quo* exposed serious management failures within the Department of Justice, with senior leadership – including Attorney General Holder and then-Associate Attorney General Perrelli – unaware that Assistant Attorney General Perez had entered into an agreement with the City of St. Paul.

The Department of Justice, the Department of Housing and Urban Development, and the City of St. Paul Obstructed the Committees' Investigation

The House Committee on Oversight and Government Reform and the House Committee on the Judiciary first began investigating the circumstances surrounding the withdrawal of *Magner* in February 2012. The Department of Justice did not acknowledge the existence of the *quid pro quo* until a non-transcribed staff briefing in August 2012. The City of St. Paul, likewise, did not acknowledge the existence of the *quid pro quo* to the Committees until October 2012. This obstruction by DOJ and the City – as well as similar obstruction by HUD – has unnecessarily delayed the Committees' investigation.

For six months, DOJ refused to allow the Committees to speak on the record about the *quid pro quo* with Department officials. The Department reluctantly allowed the Committees to speak to Assistant Attorney General Perez, U.S. Attorney Jones, and Acting Associate Attorney General West in March 2013 only after the Committee on Oversight and Government Reform began to prepare deposition subpoenas. DOJ also refused to allow the Committees to transcribe an interview in December 2012 with Deputy Assistant Attorney General Joyce Branda. During the transcribed interviews, DOJ also attempted to frustrate the Committee's fact-finding effort. A Department attorney directed Perez not to answer questions posed to him about whether he has communicated with any officials at HUD or the parties to *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action*, a pending Supreme Court appeal with precisely the same legal question as *Magner*.[307]

Similarly, HUD refused for over four months to allow the Committees to speak on the record about the *quid pro quo* with HUD officials. HUD eventually agreed to allow the Committees to speak with General Counsel Helen Kanovsky and Deputy Assistant Secretary Sara Pratt; however, the Department continues to refuse the Committees' requests to speak with Associate General Counsel Dane Narode and Regional Director Maurice McGough. Even during the interviews of Kanovsky and Pratt, HUD objected to the presence of Senator Grassley's staff and their right to ask questions of the witnesses. HUD attorneys also directed Kanovsky and Pratt to not answer questions about the *Mt. Holly* Supreme Court appeal.[308]

[305] *Id.* at 152.
[306] *Id.* at 154.
[307] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 141-43 (Mar. 22, 2013).
[308] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 80-82 (Apr. 5, 2013); Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 85-90 (Apr. 3, 2013).

The City of St. Paul's cooperation with the investigation has been no better. After the Oversight Committee first wrote to Mayor Coleman in February 2012, City Attorney Grewing telephoned Committee staff and indicated that the City would fully respond to the inquiry. When the City eventually sent its response, it declined to answer any questions about the withdrawal of *Magner*. It was not until May 2012 that the City substantially complied with the investigation. Even today, however, the City continues to withhold twenty documents and one audio recording from the Committees. The City also denied the Committees the opportunity to review these documents *in camera*.

A key difficulty throughout this investigation has been DOJ's insistence that former Deputy Assistant Attorney General Michael Hertz motivated the Department's ultimate decision to decline intervention in *Newell*. Both Acting Associate Attorney General West and Assistant Attorney General Perez testified that Hertz expressed concern about the *Newell* case and suggested that Hertz's negative opinion about the case carried considerable weight.[309] Branda also told the Committees that Hertz expressed to her privately that the *Newell* case "sucks," which she understood to mean that it was unlikely the Department would intervene.[310] The Department positioned Hertz as the central figure in its narrative, which Perez alluded to in his testimony. Perez testified:

> Well, as I said before, in the end, the United States made a decision in this matter, and the decisions in the *qui tam* matters were made at the highest levels of the Civil Division, Mike Hertz and – who is, again, the Department's preeminent expert on *qui tam* matters, personally participated in the meeting and weighed all of the factors, including the weakness of the evidence, in his judgment, resource issues, and policy considerations, and the Magner matter, and they made the decision that it was in the interests of justice to agree to the proposal that – the original proposal that Mr. Lillehaug had put forth.

Sadly, Michael Hertz passed away in May 2012, so the Committees have been unable to ask him about DOJ's assertions about his statements and opinions. Documents produced by the Department, however, call into question the Department's narrative about Hertz's opinions. In particular, an email from Principal Deputy Attorney General Elizabeth Taylor to then-Associate Attorney General Thomas Perrelli in January 2012 suggests that Hertz had some concern about declining *Newell* as a part of the *quid pro quo*. Taylor stated: "Mike Hertz brought up the St. Paul 'disparate impact' case in which the SG just filed an amicus in the Supreme Court. He's concerned about the recommendation that we decline to intervene in two *qui tam* cases against St. Paul."[311]

In addition, notes from a meeting in early January 2012 reflect that Hertz expressed the opinion that the *quid pro quo* "looks like buying off St. Paul" and "should be whether there are

[309] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 54-56, 77-78 (Mar. 18, 2013); Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 89-90 (Mar. 22, 2013).
[310] Briefing with Joyce Branda in Wash., D.C. (Dec. 5, 2012).
[311] Email from Elizabeth Taylor to Thomas Perrelli (Jan. 5, 2012, 34:43 p.m.). [DOJ 631/588]

legit reasons to decline as to past practice."[312] It remains unclear how Hertz truly viewed the merits of the *Newell* case or the propriety of the *quid pro quo* in general.

Finding:	The Department of Justice, the Department of Housing and Urban Development, and the City of St. Paul failed to fully cooperate with the Committees' investigation, refusing for months to speak on the record about the *quid pro quo* and obstructing the Committees' inquiry.

Consequences of the *Quid Pro Quo*

The *quid pro quo* exchange between the Department of Justice and City of St. Paul, Minnesota, is no mere abstraction and not simply a theoretical proposition. This *quid pro quo* has direct and discernible real-world effects. The manner in which the Department of Justice – and in particular Assistant Attorney General Thomas Perez – sought to encourage a private litigant to forego its Supreme Court appeal and the leverage used to achieve that goal have lasting consequences for whistleblowers, taxpayers, and the rule of law.

The Sacrifice of Fredrick Newell

Fredrick Newell has spent over a decade of his life working to improve jobs and contracting programs for low-income residents in St. Paul. A part-owner of three small construction companies, Newell became exposed to the value of Section 3 programs in creating economic opportunities for low-income individuals. St. Paul's noncompliance with Section 3 limited the available contracting opportunities and prevented him from hiring and training new workers.[313] As a minister as well, Newell was acutely aware of the broader effect of Section 3 noncompliance on the community. To help solve this problem, Newell founded a nonprofit organization "to be a watchdog group that would be able to ensure that Section 3 was taking place" in his community.[314]

Since 2005, Newell has fought in the courts and through HUD to improve Section 3 programs in the City of St. Paul. As a result of his advocacy, HUD found six separate areas of noncompliance with Section 3 in St. Paul and further found that the City had "no working knowledge of Section 3 and was generally unaware of the City's programmatic obligations thereto."[315] Newell's advocacy resulted in a Voluntary Compliance Agreement between HUD and the City to ensure improved compliance with Section 3 in the future. Newell pressed for the agreement to include some restitution for the community's opportunities lost by the City's noncompliance. HUD finalized the agreement without Newell's suggestions, however, and HUD officials told Newell that his goals would be met through the False Claims Act.

[312] Handwritten Notes (Jan. 4, 2012). [DOJ 639/587]
[313] Newell testified that "St Paul is a union town, and . . . one of the problems we ran across is most of [the trained workers] couldn't get into the union because they couldn't get someone to hire them." Transcribed Interview of Fredrick Newell in Wash., D.C. at 169 (Mar. 28, 2013).
[314] Transcribed Interview of Fredrick Newell, U.S. Dep't of Justice, in Wash., D.C. at 20 (Mar. 28, 2013).
[315] *Id.* at 11.

In pursuing his False Claims Act cases, Newell indicated that he intended to put the recovered money back into the community. "From the beginning," Newell testified, "when I first started this – and, like I said, as I trace it back to 2000 – it's all been with the efforts of trying to build the Section 3 community."[316] He stated:

> [T]he bottom line is those opportunities belong to those communities. And what's been happening is you've got companies coming out of the suburbs come in, do the [construction] work, hire nobody from the city, and go and take the funds back to the suburbs. And so we wanted this program to work that these communities could be rebuilt.[317]

Every indication Newell received from HUD and DOJ about his False Claims Act lawsuit was positive – that is, until the day that the Department declined to intervene in his case. With DOJ declining to intervene, Newell's complaint stood little chance of success.

The Justice Department – including all three DOJ officials interviewed by the Committees – has maintained that its non-intervention did not affect Newell's case because Newell was still able to pursue the claim on his own.[318] However, the Department's decision had a direct practical effect on Newell's case by allowing the City to move for dismissal of the case on grounds that would have otherwise been unavailable if the Department had intervened. Newell's attorney testified:

> The jurisdictional defense raised in the district court by the City of St. Paul is not available against the United States. Ultimately, at the trial court level, St. Paul prevailed on the theory that the court lacked subject matter jurisdiction over the claims because the relator was not an original source, and the court also relied on prior public disclosures . . . . The point being: a defendant can't raise those defenses on an intervening case because the United States – there's always the subject matter of jurisdiction when the United States intervenes and is the plaintiff before the court.[319]

The Department of Justice's *quid pro quo* sacrificed Fredrick Newell to ensure that an abstract legal doctrine would remain unchallenged. It cut loose a real-world whistleblower and an advocate for low-income residents to protect a legally questionable tactic. When asked whether he believed justice was done in this case, Newell answered "no" and explained: "The problems that existed, they still exist. Our aims weren't just to walk in and blow a whistle on someone or collect money; it was for the greater good of our community. And I have yet to see that happen."[320] Yet, despite the double crossing by the Justice Department, Newell remains optimistic that greater good may still be achieved. He testified: "And like I said earlier, when I

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[316] *Id.* at 81.
[317] *Id.* at 83.
[318] *See* Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 110 (Mar. 22, 2013); Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 98-99 (Mar. 18, 2013); Transcribed Interview of Byron Todd Jones, U.S. Dep't of Justice, in Wash., D.C. at 54 (Mar. 8, 2013).
[319] Transcribed Interview of Fredrick Newell in Wash., D.C. at 101-02 (Mar. 28, 2013).
[320] *Id.* at 134.

said Section 3 is that important, to me, and I'm going to speak from the minister's perspective, God just moved us into a bigger ballpark."[321]

The Chilling Effect on Whistleblowers

Above and beyond Fredrick Newell, the *quid pro quo* will likely have a severe chilling effect on whistleblowers in general. The Civil Fraud Section within DOJ's Civil Division is entirely dedicated to litigating and recovering financial frauds perpetrated against the federal government.[322] Acting Associate Attorney General Tony West – who had previously led the Civil Division – told the Committees that the Division takes fraud "very seriously" and that he made "fighting fraud one of [the Division's] top priorities."[323] In particular, he praised the whistleblower *qui tam* provision of the False Claims Act, calling them "a very important tool" that "really allow us to be aggressive in rooting out . . . fraud against the government."[324]

The current *qui tam* provisions of the False Claims Act were authored by Senator Grassley in 1986 and have been a valuable incentive for private citizens to expose waste and wrongdoing. Since 1986, whistleblowers have used the *qui tam* provisions to return over $35 billion of taxpayer dollars to the federal treasury.[325] Without the assistance of private citizens in uncovering waste, fraud, and abuse, the Justice Department's enforcement of the False Claims Act would not be as robust.

The *quid pro quo* between Assistant Attorney General Perez and the City of St. Paul threatens the vitality of the False Claims Act's *qui tam* provisions. In this deal, the Department gave up the opportunity to litigate a multimillion dollar fraud against the government in *Newell* in order to protect the disparate impact legal theory in *Magner*. In doing so, political appointees overruled trial-level career attorneys who initially stated that the allegations in *Newell* amounted to a "particularly egregious example of false certifications." These career attorneys were never given the opportunity to prove Newell's allegations and hold the City of St. Paul accountable for its transgressions.

More alarmingly, the Department abandoned the whistleblower, Fredrick Newell, after telling him for years that it supported his case. The manner in which the Department treated Newell presents a disconcerting precedent for whistleblower relations. Newell stated:

> As noted by Congress, the protection of the whistle blower is key to encouraging individuals to report fraud and abuse. The way that HUD and Justice have used me to further their own agenda is appalling – and that's putting it mildly. This type of treatment presents a persuasive argument

[321] *Id.* at 86.
[322] *See* U.S. Dep't of Justice, Commercial Litigation Branch, Fraud Section, http://www.justice.gov/civil/commercial/fraud/c-fraud.html.
[323] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 18 (Mar. 22, 2013).
[324] *Id.* at 19.
[325] Press Release, Senator Charles Grassley, Grassley Law Recovers Another $3.3 Billion of Taxpayer Money Otherwise Lost to Fraud (Dec. 4, 2012).

> for anyone who is looking for a reason to not get involved in reporting fraud claim or even discrimination.[326]

Rather than protecting and empowering the whistleblower, the Department used him and his case as a bargaining chip to resolve unrelated matters. This type of treatment and horse trading will likely discourage other potential whistleblowers from staking their time, money, and reputations on the line to fight fraud. This conduct should not be practice of the Department and it should not have been the treatment of Fredrick Newell.

The Missed Opportunities for Low-Income Residents of St. Paul

The saddest irony of this *quid pro quo* is that the Department of Justice and the Department of Housing and Urban Development, by maneuvering to protect a legally questionable legal doctrine, directly harmed the real-life low-income residents of St. Paul who they were supposed to protect. By declining intervention in *Newell*, the Department of Justice has contributed to a continuation of Section 3 problems in St. Paul.

Congress passed Section 3 of the Housing and Urban Development Act of 1968 "to ensure that the employment and other economic opportunities generated by Federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very low-income persons."[327] Section 3 requires recipients of HUD financial assistance to provide job training, employment, and contracting opportunities to these low- and very-low-income residents.[328] However, HUD by its own admission has failed to vigorously enforce Section 3. Even Sara Pratt told the Committees that HUD does "not do a lot of enforcement work under Section 3, much, much less than we do in all our other civil rights matters."[329]

In the wake of the settlement in *United States ex rel. Anti-Discrimination Center v. Westchester County*,[330] a landmark 2009 case in which DOJ and HUD used the False Claims Act to enforce fair housing laws, the Administration signaled a new reinvigorated approach to fair housing enforcement. At the time, then-HUD Deputy Secretary Ron Sims proclaimed: "Until now, we tended to lay dormant. This is historic, because we are going to hold people's feet to the fire."[331] Deputy Secretary Sims even told Newell in 2009 that "the False Claims Act lawsuit was the new model for ensuring compliance" with federal housing laws.[332]

With the Administration's actions in the *quid pro quo*, HUD has all but given up on using the False Claims Act as a tool to promote fair housing and economic opportunity. Fredrick Newell testified:

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[326] Transcribed Interview of Fredrick Newell in Wash., D.C. at 16 (Mar. 28, 2013).
[327] 12 U.S.C. § 1701u(b).
[328] 12 U.S.C. § 1701u.
[329] Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 22 (Apr. 3, 2013).
[330] United States ex rel. Anti-Discrimination Center v. Westchester County, No. 06-Civ.-2860 (S.D.N.Y. 2009).
[331] Peter Applebome, *Integration Faces a New Test in the Suburbs*, N.Y. Times, Aug. 22, 2009.
[332] Transcribed Interview of Fredrick Newell in Wash., D.C. at 134-35 (Mar. 28, 2013); *see also id.* at 170-71.

> The Section 3 regulations and the Section 3 community have languished under a period of noncompliance and lack of enforcement of the Section 3 statute and regulations for over 45 years. The Section 3 program received its impetus from incidents such as the Watts riot of 1968 and the Rodney King riots of 1992. The Section 3 community has long sought a catalyst to revive this program, the Section 3 program. The Section 3 False Claims Act lawsuit was heralded even by HUD itself to be such a catalyst [of] Section 3 compliance – a nonviolent catalyst. A valuable tool was taken away with the *quid pro quo*.[333]

Newell still sees problems with Section 3 compliance in St. Paul, explaining that: "there's a whole list and host of problems that are there. Some of it is not knowing how the program works. Some of it is just simply no interest, from my belief, no interest in really complying."[334]

If given a fair opportunity with the assistance of the federal government, he could have made a difference. Newell told the Committees that he intended to use his lawsuit as a vehicle to improve economic opportunities in the St. Paul community by putting any False Claims Act recovery back into the community.[335] Now, unfortunately, the *quid pro quo* is just a missed opportunity for the federal government to provide real assistance to the low- and very-low-income residents of St. Paul.

Taxpayers Paid for the Quid Pro Quo

The *quid pro quo* was not cheap for federal taxpayers. The Department of Housing and Urban Development, the U.S. Attorney's Office in Minnesota, and the Civil Fraud Section within the Justice Department each spent over two years investigating and preparing the *Newell* case. By November 2011, all three entities were uniformly recommending that the government join the case. According to the memorandum prepared at the time by the Civil Fraud Section, Newell had exposed a fraud totaling over $86 million.[336] Because the False Claims Act allows for recovery up to three times the amount of the fraud, the United States was poised to potentially recover over $200 million.[337]

The deal reached by Assistant Attorney General Thomas Perez prevented the United States from ever having a chance to recover that money – and odds were high that the case would be successful. The memorandum prepared by the Civil Fraud Section in November 2011 called St. Paul's actions "a particularly egregious example of false certifications" and found that the City knowingly made these false certifications.[338] Newell told the Committees his impression

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[333] Transcribed Interview of Fredrick Newell in Wash., D.C. at 17-18 (Mar. 28, 2013).
[334] *Id.* at 22.
[335] *Id.* at 78-79.
[336] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]
[337] In his amended complaint, Newell valued the fraud at $62 million, meaning the government could have recovered over $180 million. *See* First Amended Complaint, United States *ex rel.* Newell v. City of St. Paul, Minnesota, No. 09-SC-1177 (D. Minn. filed Mar. 12, 2012).
[338] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]

that it was a strong case matched the language used by the November 2011 memorandum.[339] Newell's attorney called the case a "dead-bang winner,"[340] and indicated to the Committees that federal officials expressed their support for the case to him.[341]

Some of the dollars improperly received by the City appear to be HUD funds financed by the Obama Administration's stimulus in 2009. According to the Civil Fraud Section memorandum, the City initially contested HUD's administrative finding that it was out of compliance with Section 3, "but dropped its challenge in order to renew its eligibility to compete for and secure discretionary stimulus HUD funding."[342] Newell and his attorney confirmed this understanding, telling the Committees that the City disputed HUD's findings and HUD put a deadline on the City to resolve the dispute or risk losing stimulus funding.[343]

The amount of the fraud alleged in *Newell* did not appear to be a concern for HUD. In a briefing with Committee staff, HUD Principal Deputy General Counsel Kevin Simpson stated: "The monies don't supplement HUD's coffers, so [the money] wasn't much of a factor."[344] He elaborated that "HUD did have an institutional interest [in recovering the funds], but it was outweighed by other factors."[345] In the same briefing, Elliot Mincberg, HUD's General Deputy Assistant Secretary for Congressional and Intergovernmental Relations, added that $200 million "wasn't all that much money anyway."[346] HUD Deputy Assistant Secretary Sara Pratt testified that the amount of the alleged fraud was not a factor in her decision whether to recommend intervention in the case.[347] While this funding may not be "much of a factor" for federal bureaucrats, it is no insignificant amount to American taxpayers.

Finding: In declining to intervene in Fredrick Newell's whistleblower complaint as part of the *quid pro quo* with the City of St. Paul, the Department of Justice gave up the opportunity to recover as much as $200 million.

Disparate Impact Theory Remains on Legally Unsound Ground

Assistant Attorney General Perez's machinations to stop the Supreme Court from hearing *Magner* prevented the Court from finally adjudicating whether the plain language of the Fair Housing Act supports a claim of disparate impact. Although courts and federal agencies have asserted that it does, considerable doubts remain about the legality of disparate impact claims. Perez's *quid pro quo* prevented the Court from finally bringing clarity and guidance to this important area of federal law.

[339] Transcribed Interview of Fredrick Newell in Wash., D.C. at 58-61 (Mar. 28, 2013).
[340] Jim Efstathiou Jr., *Whistle-Blower Blames Lost Millions on Perez's Settlement*, Bloomberg, Mar. 22, 2013.
[341] Transcribed Interview of Fredrick Newell in Wash., D.C. at 53-55 (Mar. 28, 2013).
[342] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]
[343] Transcribed Interview of Fredrick Newell in Wash., D.C. at 41-46 (Mar. 28, 2013).
[344] Briefing with Kevin Simpson and Bryan Greene in Wash., D.C. (Jan. 10, 2013).
[345] *Id.*
[346] *Id.*
[347] Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 123 (Apr. 3, 2013).

Perez testified to the Committees that he encouraged the City to withdraw its *Magner* appeal – and later agreed to exchange *Newell* and *Ellis* for *Magner* – because he believed that "*Magner* was an undesirable factual context in which to consider disparate impact."[348] He also stated that he was concerned that HUD had not yet finalized a rule codifying its use of disparate and believed the Court would benefit from HUD's final regulation.[349] Perez testified:

> [T]he particular facts of *Magner* I thought did not present a good vehicle for addressing the viability of disparate impact. If the court is going to take on the question of the viability of disparate impact it was my hope that they would do so in connection with a typical set of facts. This was not a typical set of facts. And it was further in my view that if the court was going to take a case of this nature that they should have the benefit of HUD's thinking, and the reg was very much in the works and I don't believe the court was aware of that. And so those two factors were sources of concern for me.[350]

HUD General Counsel Helen Kanovsky also testified to the Committees that she feared an "adverse decision" from the Supreme Court that could upset HUD's rulemaking.[351]

The *quid pro quo* did little to bring certainty or clarity to disparate impact claims arising under the Fair Housing Act. In June 2012, the Township of Mount Holly, New Jersey, filed a petition for certiorari asking the Supreme Court to hear its appeal on precisely the same legal issue as *Magner*: whether claims of disparate impact are cognizable under the Fair Housing Act.[352] The Court has yet to decide whether to take the appeal, but has asked the Solicitor General for his thoughts on whether to hear the case. Within this context, there are concerns in some quarters that discussions are underway to prevent the Court from hearing this case as well.[353] When the Committees inquired about the *Mt. Holly* case during the transcribed interviews, Assistant Attorney General Perez, HUD General Counsel Kanovsky, and HUD Deputy Assistant Secretary Pratt were all ordered not to answer by Administration lawyers.[354]

The Rule of Law

Most fundamentally, the actions of the Department of Justice in facilitating and executing the *quid pro quo* with the City of St. Paul represent a tremendous disregard for the rule of law. The Department of Justice was created "[t]o enforce the law and defend the interests of the

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[348] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 9 (Mar. 22, 2013).
[349] *Id.* at 43.
[350] *Id.* at 42.
[351] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 36 (Apr. 5, 2013).
[352] Petition for a Writ of Certiorari, Township of Mount Holly et al. v. Mt. Holly Gardens Citizens in Action, Inc., No. 11-1507 (U.S. filed June 11, 2012).
[353] *See* Alan S. Kaplinsky, *Will Mt. Holly Take A Dive Just Like St. Paul*, CFPB Monitor (Jan. 10, 2013).
[354] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 141-43 (Mar. 22, 2013); Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 80-82 (Apr. 5, 2013); Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 85-90 (Apr. 3, 2013).

United States according to the law; . . . to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans."[355] In this *quid pro quo* with the City of St. Paul, the Department of Justice failed in each of those respects.

Rather than allowing the Supreme Court to freely and impartially adjudicate an appeal that the Court had affirmatively chosen to hear, the Department – led by Assistant Attorney General Thomas Perez – openly worked to get the appeal off of the Court's docket. Rather than allowing the normal intervention decision-making process to occur within the Civil Division, Assistant Attorney General Perez usurped the process to ensure his preferred course of action occurred. The Department's action in departing from the rule of law to exert arbitrary authority to jointly resolve two wholly unrelated matters, including one in which the United States is not even a party, is extremely concerning.

Conclusion

The *quid pro quo* resulted in the Department of Justice declining to intervene in two whistleblower False Claims Act lawsuits, *Newell* and *Ellis*, in exchange for the City of St. Paul's withdrawal of *Magner v. Gallagher* from the Supreme Court. The process that culminated in this *quid pro quo* was facilitated and executed by Assistant Attorney General for the Civil Rights Division Thomas E. Perez.

In November 2011, after the Court agreed to hear the *Magner* appeal, Perez's search for leverage against the City led him to discover the existence of *Newell* and the City's desire to jointly resolve both cases. This discovery began a series of events in which Perez asked the Department of Housing and Urban Development to reconsider its initial support for *Newell* and the subsequent erosion of support in DOJ's Civil Division and the U.S. Attorney's Office in Minnesota. Eventually, by January 2012, Perez's machinations had created a "consensus" within DOJ to decline *Newell* and *Ellis* as part of the deal with the City. Perez then began personally leading negotiations with the City, offering a roadmap in early January for how to jointly resolve the cases and asking career attorneys to cover up a linkage between the cases. By late January, as negotiations broke down, Perez flew to St. Paul to personally meet with Mayor Coleman and strike a deal. The agreement he reached with the Mayor led to the Department declining intervention in *Newell* and *Ellis* in exchange for the City withdrawing *Magner*.

This *quid pro quo* has lasting consequences for the Department of Justice, the City of St. Paul, and American taxpayers. In sacrificing Fredrick Newell to protect an inchoate theory, the Department weakened its own False Claims Act standards and created a large disincentive for citizens to expose fraud. The City of St. Paul, likewise, missed a tremendous opportunity to improve the economic opportunities available to the low- and very-low-income residents that Newell championed. American taxpayers lost a good chance to recover as much as $200 million of fraudulently spent funds. Above all, however, the *quid pro quo* demonstrated that the Department of Justice, led by Assistant Attorney General Thomas Perez, placed ideology over objectivity and politics over the rule of law.

[355] U.S. Dep't of Justice, About DOJ, http://www.justice.gov/about/about.html.

Appendix I: Documents