Congress of the United States
Washington, DC 20515

April 14, 2013

To: Democratic Members of the Committees on Oversight and Government Reform and Judiciary

Fr: Democratic Staff

Re: Results of Investigation of Justice Department Role in St. Paul's Decision to Withdraw Appeal to Supreme Court in *Magner v. Gallagher*

This memo sets forth the preliminary results of an investigation conducted by the House Committee on Oversight and Government Reform and the House Committee on the Judiciary into the role of the Department of Justice in urging the City of St. Paul, Minnesota, to withdraw its appeal to the U.S. Supreme Court in *Magner v. Gallagher*. As part of this extensive investigation, Committee staff reviewed more than 3,500 pages of documents and conducted six transcribed interviews with officials from the Department of Justice (DOJ) and the Department of Housing and Urban Development (HUD).

This investigation was initiated when former Judiciary Committee Chairman Lamar Smith, Oversight Committee Chairman Darrell Issa, Representative Patrick McHenry, and Senator Charles Grassley accused Tom Perez, the Assistant Attorney General for the Civil Rights Division, of brokering a "dubious bargain" and a "quid pro quo arrangement" with St. Paul "in which the Department agreed, over the objections of career attorneys, not to join an unrelated fraud lawsuit against the City in exchange for the City's dropping its *Magner* appeal."

This memo sets forth several key findings based on the documents produced to the Committees and the transcribed interviews conducted by Committee staff to date:

- First, rather than identifying any unethical or improper actions by the Department, the overwhelming evidence obtained during this investigation indicates that Mr. Perez and other Department officials acted professionally to advance the interests of civil rights and effectively combat the scourge of discrimination in housing.

- Second, the evidence demonstrates that the Department's decisions not to intervene in unrelated False Claims Act cases were based on the recommendations of senior career officials who are regarded as the nation's preeminent experts in their field.

Instead of identifying inappropriate conduct by Mr. Perez, it appears that the accusations against him are part of a broader political campaign to undermine the legal safeguards against discrimination that Mr. Perez was protecting.

The remainder of this memo provides additional background and details regarding these findings.

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BACKGROUND

The Fair Housing Act was passed in 1968 as Title VIII of the Civil Rights Act to prohibit discrimination by landlords and other housing providers based on race, religion, sex, national origin, familial status, or disability.[1] The Act has long been interpreted to ban practices that have an unjustified "discriminatory effect" or "disparate impact," regardless of whether there is evidence of specific intent to discriminate, and eleven federal courts of appeals have upheld this disparate impact standard.[2]

On November 16, 2011, HUD issued a Notice of Proposed Rulemaking to codify uniform standards for "discriminatory effect" claims under the Act, and that rule was finalized in February 2013.[3] Republican Members of Congress opposed codifying this standard and offered an amendment by Rep. Scott Garrett (R-NJ), in the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act for the 2013 Fiscal Year, to prohibit HUD from using funds to finalize or enforce the disparate impact rule. Although this prohibition passed the House, it was not taken up by the Senate.[4]

Before HUD finalized its rule, landlords of low-income housing units filed a lawsuit, *Magner v. Gallagher*, alleging that St. Paul was enforcing its housing safety codes too aggressively in addressing "rodent infestation, missing dead bolt locks, inoperable smoke detectors, poor sanitation, and inadequate heat."[5] The landlords made the novel argument that St. Paul was violating the Fair Housing Act because its enforcement efforts had a racially disparate impact on their tenants. St. Paul challenged the application of the disparate impact standard in this context, arguing that the Act should not be used to permit landlords to avoid bringing low-income housing units into compliance with uniform safety codes.[6] On November

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[1] Department of Justice, *The Fair Housing Act* (accessed Apr. 13, 2013) (online at www.justice.gov/crt/about/hce/housing_coverage.php).

[2] Department of Housing and Urban Development, *Implementation of the Fair Housing Act's Discriminatory Effects Standard,* 78 Fed. Reg. 11460 11482 (Feb. 15, 2013) (final rule) (online at www.gpo.gov/fdsys/pkg/FR-2013-02-15/pdf/2013-03375.pdf).

[3] *Id.*

[4] H.AMDT.1363, 112th Cong. (2012); U.S. House of Representatives, Debate on Amendment Numbered A048, to H.R. 5972 (Jun. 27, 2012); U.S. House of Representatives, Roll Call Vote on Agreeing to .R. 5972 (Jun. 29, 2012); Legislative Research Service, *Bill Summary & Status: H.R. 5972 (112th).*

[5] City of St. Paul, Minnesota, *City of Saint Paul Seeks to Dismiss United States Supreme Court Case Magner vs. Gallagher* (Feb. 10, 2012) (online at www.stpaul.gov/index.aspx?NID=4874&ART=9308&ADMIN=1).

[6] Petitioners' Reply Brief on Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit (June 28, 2011) *Magner v. Gallagher* (No. 10-1032) (online at http://sblog.s3.amazonaws.com/wp-content/uploads/2011/07/Petitioners-Reply-10-1032-Magner.pdf).

7, 2011, the Supreme Court granted St. Paul's petition to hear the case.[7] The first question presented in the case was whether disparate impact claims are cognizable under the Fair Housing Act, thus placing at risk this key civil rights enforcement tool.

On December 29, 2011, the United States filed an *amicus* brief in *Magner* urging the Supreme Court to uphold the disparate impact standard based on the text and history of the Fair Housing Act, as well as consistent interpretations of the Act by appellate courts that allowed the use of disparate impact claims to enforce non-discrimination and equal opportunity requirements.[8]

As this memo explains in more detail below, in November 2011, the Department proposed that St. Paul withdraw the *Magner* case to avoid an adverse ruling by the Supreme Court that could have invalidated the disparate impact standard and impaired its ability to combat discrimination in housing. In response, St. Paul proposed that the Department refrain from intervening in two unrelated False Claims Act cases in which St. Paul was a defendant.

Under the False Claims Act, private citizens referred to as "relators" may file lawsuits alleging fraud against the government and may recover a percentage of awards if fraud is proven. These are also known as "qui tam" cases. The Department of Justice may intervene in False Claims Act cases on the side of relators to become the primary litigant. If the Department declines to intervene, relators may continue to litigate and, if successful, recover damages for themselves and the government.[9]

One of the False Claims Act cases at issue was *U.S. ex. Rel. Newell v. City of St. Paul*, in which the relator argued that St. Paul falsely certified that it was in compliance with Section 3 of the Housing and Urban Development Act of 1968.[10] Under Section 3, HUD requires Public Housing Authorities to use their best efforts to give low-income individuals training and employment opportunities and to award contracts to businesses that provide economic opportunities for low-income individuals.[11]

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[7] Docket, *Magner v. Gallagher* (No. 10-1032) (online at www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1032.htm).

[8] Brief for The United States as Amicus Curiae in Support of Neither Party (Dec. 2011) *Magner v. Gallagher* U.S. (No. 10-1032) (online at http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/10-1032-SG-amicus-brief.pdf).

[9] Department of Justice, *The False Claims Act: A Primer* (undated) (online at www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf).

[10] First Amended Complaint (Mar. 12, 2012), *U.S. ex. Rel. Newell v. City of St. Paul,* D. Minn. (0:09-cv-01177).

[11] Department of Housing and Urban Development, *Programs Administered by FHEO* (Sept. 25, 2007) (online at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdesc/title8).

The other False Claims Act case at issue was *U.S. ex rel. Ellis v. City of St. Paul*, in which the relators argued that Minneapolis, St. Paul, and the Metropolitan Council for the Twin Cities Metro Region falsely certified that they were complying with the Fair Housing Act's requirement to affirmatively further fair housing.[12]

On February 9, 2012, the Department officially declined to intervene in the *Newell* case, while the relator continued to pursue his case and is now appealing a District Court decision dismissing the case.[13] On February 10, 2012, St. Paul withdrew the *Magner* case from consideration by the Supreme Court.[14] On June 18, 2012, the Department declined to intervene in the *Ellis* case, and the relators continued to pursue their case.[15]

METHODOLOGY

Pursuant to multiple requests from the Committees, the Department of Justice produced more than 1,400 pages of documents, HUD produced more than 2,200 pages of documents, and St. Paul produced approximately 150 pages of documents.

Committee staff conducted extensive transcribed interviews with six government officials: Thomas Perez, Assistant Attorney General for the Civil Rights Division; Derek Anthony West, Acting Associate Attorney General and former Assistant Attorney General for the Civil Division; B. Todd Jones, former U.S. Attorney for the District of Minnesota; Thomas Perrelli, former Associate Attorney General; Helen Kanovsky, HUD General Counsel; and Sara Pratt, HUD Deputy Assistant Secretary for Enforcement and Programs.

Committee staff also received briefings from Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch at DOJ and former Director of the Fraud Section at DOJ; Bryan Greene, Principal Deputy in the Office of Fair Housing and Equal Opportunity at HUD; and Kevin Simpson, Principal Deputy in the Office of General Counsel at HUD. Committee staff also spoke with attorneys representing St. Paul and interviewed Fredrick Newell, the relator who filed a False Claims Act lawsuit against St. Paul.

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[12] Order (Dec. 12, 2012) *U.S. ex rel. Ellis v. City of St. Paul,* D. Minn. (No. 11-CV-0416).

[13] The Government's Notice of Election to Decline Intervention (Feb. 9, 2012), *Newell v. City of Saint Paul, Minnesota,* D. Minn. (No. 0:09-cv-01177-DWF-TNL); Notice of Appeal to the United States Court of Appeals for the Eight Circuit (Dec. 4, 2012), *U.S. ex. Rel. Newell v. City of St. Paul,* D. Minn. (0:09-cv-01177).

[14] City of Saint Paul, Minnesota, *City of Saint Paul Seeks to Dismiss United States Supreme Court Case Magner vs. Gallagher* (Feb. 10, 2012) (online at www.stpaul.gov/index.aspx?NID=4874&ART=9308&ADMIN=1)

[15] United States' Notice of Election to Decline Intervention (Jun. 18, 2012) *U.S. ex rel. Ellis v. City of St. Paul,* D. Minn. (No. 11-CV-0416).

FINDINGS

I. NO EVIDENCE OF UNETHICAL OR IMPROPER ACTIONS

Rather than identifying any unethical or improper actions by the Department, the overwhelming evidence obtained during this investigation indicates that Mr. Perez and other Department officials acted professionally to advance the interests of civil rights and effectively combat the scourge of discrimination in housing.

A. Efforts by Perez to Urge St. Paul to Withdraw *Magner* Served the National Interest in Combating Discrimination in Housing

The evidence obtained by the Committee indicates that, by encouraging St. Paul to withdraw the *Magner* case, Mr. Perez was properly performing his role as head of the Civil Rights Division, effectively representing the position of the United States government, and advancing the national interest in combating discrimination in housing.

Multiple witnesses interviewed by the Committee expressed concern that the highly unusual fact pattern of *Magner* involving landlords who were invoking the disparate impact standard to avoid complying with building safety codes rather than tenants utilizing it to ensure equal housing opportunities, did not provide a strong factual context to highlight the importance of the disparate impact theory. Specifically, witnesses expressed concern that the Court could invalidate the disparate impact standard, which has been used for decades to enforce the Fair Housing Act's prohibition against housing discrimination. As the Department stated in a letter to Congress on February 12, 2013:

> [T]he Department believes that carrying out the Fair Housing Act's (FHA) purpose of remedying discrimination, including through disparate-impact enforcement, is an important law enforcement and policy objective.[16]

During his transcribed interview with Committee staff, Mr. Perez explained these vital interests:

> [W]e are a guardian of what Attorney General Holder called the crown jewels, which are the civil rights laws that were passed. The Fair Housing Act was passed a few short days after Dr. King's assassination in 1968. And the United States has very strong equities, and so does HUD, in ensuring the effective and full enforcement of the Fair Housing Act. ... [T]hese civil rights matters are very important, I think, to our national interest.[17]

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[16] Letter from Judith C. Appelbaum, Principal Deputy Assistant Attorney General, Department of Justice, to Senator Patrick J. Leahy, Rep. Bob Goodlatte and Rep. Darrell E. Issa (Feb. 12, 2013).

[17] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 2013).

Mr. Perez explained that urging St. Paul to withdraw *Magner* would avoid a negative Supreme Court decision that could have impaired the ability to enforce laws to combat housing discrimination. He stated:

> I was concerned because I thought that *Magner* was an undesirable factual context in which to consider disparate impact. And because bad facts make bad law, this could have resulted in a decision that undermined our ability and the City of St. Paul's ability to protect victims of housing and lending discrimination.[18]

Mr. Perez also highlighted the importance of the disparate impact standard in obtaining relief for hundreds of thousands of victims in previous Fair Housing Act cases:

> [W]e had just settled a case involving Countrywide Financial, which was the largest residential fair lending settlement in the history of the Fair Housing Act, assisting hundreds of thousands of victims of funding discrimination, including hundreds who reside in the Twin Cities area. And so I was making the point that disparate impact theory in the vast majority of cases assists the Department in these efforts.[19]

Similarly, Assistant Attorney General Tony West, who led the Department's Civil Division, explained during his transcribed interview that a negative Supreme Court ruling would have impaired the ability of law enforcement officials to effectively enforce civil rights protections against housing discrimination. He stated:

> [T]here was a risk of bad law if the Supreme Court had considered this question, that it could undermine the disparate impact work in a very significant way. And, therefore, impair effective civil rights enforcement. And so it was a very important interest of the United States to try to minimize that possibility.[20]

In addition, Associate Attorney General Tom Perrelli stated during his transcribed interview that it was common Department practice to encourage parties not to pursue Supreme Court cases with poor fact patterns that could adversely impact national interests:

> I think the idea of incentivizing parties not to pursue a Supreme Court matter because it's a poor vehicle is not an unusual thing. You know, parties, you know, work to settle cases or resolve cases all the time.[21]

These interests were also extremely important to HUD, which had serious concerns about the Supreme Court issuing a ruling in the *Magner* case before HUD issued its final disparate

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[18] *Id.*

[19] *Id.*

[20] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[21] House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

impact rule. Helen Kanovsky, HUD's General Counsel, explained during her transcribed interview:

> With respect to *Magner*, we had very, very strong equities in not wanting that case to be heard by the Supreme Court at the time and in the posture that it was at because it was directly undermining our rulemaking, and we had huge equities in our discriminatory effects rulemaking process.[22]

There was no dispute among the witnesses interviewed by the Committees that it was appropriate for Mr. Perez, as head of the Department's Civil Rights Division, to handle the *Magner* matter and contact St. Paul to urge the City to withdraw the case. During the course of this investigation, no witness interviewed by the Committees identified any improper or unethical action by Mr. Perez.

B. Perez Received Approval from Ethics Official, Professional Responsibility Official, and Head of Civil Division

When St. Paul proposed linking its withdrawal of the *Magner* case to its request for the Department not to intervene in two unrelated False Claims Act cases, Mr. Perez sought and received approval from a DOJ ethics official, a DOJ professional responsibility official, and the head of the Civil Division before proceeding. These officials agreed that because the United States is a "unitary actor" seeking the best overall results for the nation, it was proper for Mr. Perez to negotiate both the *Magner* case and the False Claims Act cases on behalf of the United States.

During his transcribed interview, Mr. Perez explained that he first contacted David Lillehaug, an attorney representing St. Paul, to urge the City to withdraw the *Magner* case in November 2011. During this conversation, Mr. Lillehaug responded to Mr. Perez's request by proposing that the Department refrain from intervening in the *Newell* case, which had been filed against St. Paul.[23] Mr. Perez described this conversation during his transcribed interview:

> I outlined my concerns about the *Magner* case and my feeling that the mayor, given his longstanding commitment to expanding opportunity for underserved communities, benefits from disparate impact. And he then raised the prospect of linking the two cases, at which point I told him I can't speak for the Civil Division on this qui tam matters, and that's not my area of expertise, and it's not my area of responsibility, and so I'd have to get back to you on whether this proposal that you've presented is something that we can discuss further.[24]

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[22] House Committee on Oversight and Government Reform, Interview of Helen Renee Kanovsky (Apr. 5, 2013).

[23] At the time, St. Paul did not know about the *Ellis* case, which was in a more preliminary stage. In later discussions, the proposal was that the Department decline to intervene in both the *Newell* and *Ellis* cases.

[24] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 2013).

Since the *Newell* case was being brought under the False Claims Act, it fell under the authority of the Department's Civil Division headed by Mr. West instead of the Civil Rights Division headed by Mr. Perez. During his transcribed interview, Mr. Perez explained that he consulted with the Civil Rights Division's Ethics Official and separately with the Division's Professional Responsibility Official. In response to his inquiries, he was informed that his discussions with St. Paul about the *Magner* case and the False Claims Act cases were appropriate. Mr. Perez explained:

> To address this concern my staff and I sought ethical and professional responsibility advice. I was informed that there would be no concern so long as I had permission from the Civil Division to engage in these conversations. I was also informed that because the United States is a unitary actor and entitled to act in its overall best interest, there was no prohibition on linking matters as Mr. Lillehaug had suggested.[25]

Documents obtained by the Committees confirm Mr. Perez's account. Specifically, on November 28, 2011, the Civil Rights Division's Ethics Officer sent an email to Mr. Perez stating:

> 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 this situation and therefore no prohibition against your proposed course of action.[26]

Mr. Perez also reported that a Department professional responsibility official also approved his actions. He stated:

> [T]he 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 as long as and with the understanding that they would continue to be the decisionmaking body on those matters that fall within their jurisdiction.[27]

In addition to obtaining approval from the ethics and professional responsibility officers to engage in these discussions, Mr. Perez also obtained the approval of Mr. West, who led the Civil Division. Mr. Perez stated:

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[25] *Id.*

[26] Email from ["Civil Rights Division Ethics Officer"] to Thomas E. Perez (Nov. 28, 2012) (HJC/HOGR STP 114).

[27] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

He [Mr. West] indicated that he had no objection with proceeding, understanding, of course, that the Civil Division was going to conduct the review of the *Newell* and later the *Ellis* matters, and they were going to make that decision and pursuant to their practice they would make that decision looking at a host of factors, including the strength of the case, the resource issues and potentially the *Magner* case.[28]

Mr. West confirmed this account during his transcribed interview:

I felt comfortable with him [Mr. Perez] speaking for the department when he was talking to the City of St. Paul because I knew that ultimately, any intervention decision rested with the Civil Division.[29]

Mr. West also explained that he and Mr. Perez met in January 2011 and agreed that Mr. Perez would discuss the *Magner* and *Newell* cases with St. Paul with the understanding that the Civil Division "had a process that we had to complete in the Civil Division, and that that decision rested with us as to whether there would be an intervention or a declination."[30]

II. DECISION NOT TO INTERVENE IN FALSE CLAIMS ACT CASES BASED ON RECOMMENDATIONS OF CAREER EXPERTS

The evidence obtained by the Committees during this investigation demonstrates that the Department's decisions not to intervene in the two unrelated False Claims Act cases were based on the recommendations of senior career officials regarded as the nation's preeminent experts in their field.

A. Decision Not to Intervene in *Newell* Based on Recommendation of Preeminent Career Experts with Decades of Experience

The decision not to intervene in the *Newell* case was made by Tony West, Assistant Attorney General for the Civil Division, based on the recommendation of then Deputy Assistant Attorney General Michael Hertz. Mr. Hertz, who passed away in May 2012, had been a career employee of the Department for more than 30 years and was widely regarded as the Department's preeminent career expert on False Claims Act cases.[31]

During his transcribed interview, Mr. West elaborated on Mr. Hertz's qualifications and experience:

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[28] *Id.*

[29] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[30] *Id.*

[31] *Long Time Civil Division Leader Dies of Cancer,* Main Justice (May 7, 2012) (online at www.mainjustice.com/2012/05/07/longtime-civil-division-leader-dies-of-cancer/).

> Mike Hertz was the undisputed expert on qui tam and False Claims Act in the Department of Justice. And that was his reputation. It was his reputation amongst my predecessors in the Civil Division, and certainly I knew that to be true based on my work with him.[32]

According to several witnesses interviewed by Committee staff, Mr. Hertz had concerns about the *Newell* case from the outset, despite the fact that some junior attorneys initially supported intervention. Joyce Branda, who served under Mr. Hertz as Director of the Fraud Section, informed Committee staff that when she submitted a draft memo to Mr. Hertz initially supporting intervention in November 2011, Mr. Hertz returned the memo, which she understood from their 28-years of working together to mean that he disagreed with intervening.[33] Ms. Branda explained that, even as she submitted this draft recommendation, she viewed the decision regarding whether to intervene as "a close call from day one" and communicated that understanding to Mr. Hertz.[34]

Mr. West, the head of the Civil Division, also confirmed during his transcribed interview that Mr. Hertz had concerns with intervening even before learning of the potential link to the *Magner* case. He explained:

> I went to ask Mike Hertz about the *Newell* case. What is this *Newell* case? Mike reminded me in that conversation that he had previously brought the *Newell* case to my attention saying, remember this is that close-call case that I told you I had some doubts about and, you know, some concerns about. He said, I haven't sent you anything on it because I, you know, want the career attorneys to do more work on it.[35]

Mr. Hertz's opposition to intervening in the *Newell* case intensified after a meeting he and Ms. Branda had with the Mayor of St. Paul and other City officials on December 13, 2011. Ms. Branda informed Committee staff that the Mayor was "articulate and persuasive" during the meeting.[36] She also explained that, after the meeting concluded, Mr. Hertz pulled her aside and told her "this case sucks."[37]

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[32] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[33] Briefing by Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch, Department of Justice, to the House Committees on Oversight and Government Reform and the Judiciary, Majority and Minority Staffs (Dec. 5, 2012).

[34] *Id.*

[35] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[36] Briefing by Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch, Department of Justice, to the House Committees on Oversight and Government Reform and the Judiciary, Majority and Minority Staffs (Dec. 5, 2012).

[37] *Id.*

Ms. Branda explained to Committee staff that the December meeting was also a "turning point" for her and that after the meeting, she agreed with Mr. Hertz that the Department should not intervene in the case based on the litigation concerns.[38] Ms. Branda told Committee staff that she never felt any pressure to change her decision.[39]

This account was also confirmed by Mr. West, who stated during his transcribed interview:

> Mike Hertz, who I have described previously as the undisputed expert in the Department on qui tam and False Claims Act, he, the more he learned about the case, and the deeper he got into the case, the more doubtful he became about its worthiness as an intervention candidate, and came away from the impression that it was weak and that we should not litigate this case. That was very significant because when Mike spoke, you know, his opinion carried an enormous amount of weight within the Department, and within the Civil Frauds Section, appropriately so.[40]

During his transcribed interview, former Associate Attorney General Tom Perrelli also confirmed that Mr. Hertz had serious concerns about the merits of intervening in *Newell* and *Ellis*. He explained:

> Mike did give me his impression of the first case, in my parlance. He very clearly said I think we're going to decline. In the second case, he said I think we're going to decline, but it's going to take more time.[41]

On February 9, 2012, Mr. West, the head of the Civil Division, signed an official "declination memo" formalizing the Department's decision not to intervene in the *Newell* case. Since Mr. Hertz had become ill by that time, Ms. Branda submitted the memo in his stead.[42] The declination memo explained the Department's investigation of the *Newell* case and described in detail the factual, legal, and policy reasoning on which the declination decision was based.[43]

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[38] *Id.*

[39] *Id.*

[40] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[41] House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

[42] Memorandum from Tony West, Assistant Attorney General, Civil Division, Department of Justice, for File, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Feb. 9, 2012) (HJC/HOGR 1307-17/ A1151-61). Ms. Branda, who has more than 30 years of experience working as a career attorney on False Claims Act cases for the Department, has now replaced Mr. Hertz as the Deputy Assistant Attorney General for the Commercial Litigation Branch.

[43] *See, e.g.*, Memorandum from Tony West, Assistant Attorney General, Civil Division, Department of Justice, for File, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Feb. 9, 2012) (HJC/HOGR 1307-17 /A1151-61).

Based on the evidence obtained by the Committees, the recommendation to decline intervention was the only recommendation sent to Mr. West, and it was made by senior career officials who concluded that declining to intervene served the best interests of the United States. Although some attorneys within the Department and the U.S. Attorney's Office had advocated in favor of intervention, the ultimate decision reached by Mr. Hertz and Ms. Branda, who were experts in the False Claims Act, was that the Department should not intervene. As Mr. West explained in his transcribed interview:

> The way the process would work is after, you know, the line attorneys, working with Joyce Branda and Mike Hertz, come to a view as to whether or not we ought to intervene, a memo would be prepared, and it would be forwarded to me. And usually there is a cover sheet that indicates whether or not I approve or disapprove of the recommendation decision that is contained in the memo.[44]

According to Mr. West, "by early, mid-January, there was a consensus that had coalesced in the Civil Division that we were going to decline the *Newell* case."[45] He added:

> I wanted to make sure that we employed our normal, regular process in assessing whether or not intervention was appropriate in this case, and that's what we did.[46]

B. ***Ellis* Case Was Never Serious Candidate for Intervention**

Career officials at the Justice Department, the U.S. Attorney's Office in Minnesota, and HUD agreed that the *Ellis* case was not a serious candidate for intervention. Mr. West, the head of the Civil Division, stated during his transcribed interview:

> [T]he only conversations I had about the merits of the *Ellis* case tended to be conversations that talked about how weak the case was. And so I don't recall anyone calling the *Ellis* case a close call, for instance. I recall only Mike, and to the extent I was aware of the *Ellis* case, people talking about it as if it were a very weak case, a weak candidate for intervention.[47]

Mr. West also stated:

> My consistent recollection of the conversations I had with *Ellis* -- about *Ellis* with members of the Civil Division were all along the lines that *Ellis* was not an appropriate candidate for intervention.[48]

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[44] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

Todd Jones, the U.S. Attorney for the District of Minnesota, confirmed this account during his transcribed interview:

> We weren't going to go with *Ellis*. And I don't -- my recollection is that we weren't -- we weren't considering *Ellis* and an intervention in *Ellis* at any point, as I recall. That was going to be a declination. [49]

C. Department Openly and Properly Considered Impact of *Magner* on Decision Not to Intervene in *Newell*

The evidence obtained by the Committees indicates that the Department openly and properly considered the Department's request to St. Paul to withdraw the *Magner* case as one of many factors it evaluated when deciding not to intervene in the *Newell* case.

The memo officially declining to intervene in the *Newell* case, which was submitted by Ms. Branda and signed by Mr. West on February 9, 2012, set forth "a number of factual and legal arguments that support a decision not to intervene," including St. Paul's withdrawal of the *Magner* case. It stated:

> [T]he City is dismissing a Supreme Court appeal in the *Gallagher v. Magner* case, a result the Civil Rights Division is anxious to achieve. Declination here would facilitate that result which, we are advised, is in the interests of the United States.[50]

In addition, in a section entitled "Other Considerations," the memo explained:

> The Supreme Court has not decided whether the FHA [Fair Housing Act] allows for recovery based on a disparate-impact theory. We understand that the Civil Rights Division is concerned that there is a risk of bad law if the Court rules on the question of whether the City's health and safety efforts her justify a departure from the mandates of the FHA. The City has indicated that it will dismiss the Gallagher petition, and declination here will facilitate the City's doing so. Under the circumstances, we believe this is another factor weighing in favor of declination.[51]

During his transcribed interview with Committee staff, Mr. West explained that the False Claims Act provides the Department with broad discretion to consider multiple factors when deciding whether to intervene:

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[49] House Committee on Oversight and Government Reform, Interview of Byron Todd Jones (Mar. 8, 2013).

[50] Memorandum from Joyce R. Branda, Director, Commercial Litigation Branch, Department of Justice, *Request for Authority to Intervene Re: U.S. ex rel. Newell V. City of St. Paul, Minnesota* Case No. 09-SC-001177 (D. Minn.) (Feb. 9, 2012) (HJC/HOGR 1310-17/ A1154-61).

[51] *Id.*

> Not only are we given broad discretion under the False Claims Act to consider a wide variety of factors in making our intervention decision; it's appropriate because we have a responsibility to act in the best interests of the United States as a whole. And this -- it was appropriate to note that a declination decision here for all of the reasons that we previously stated in our memo, another factor that weighs in favor of declination is that it advances an interest of the United States, an important civil rights equity.[52]

Mr. West explained that his understanding was based on advice from Mr. Hertz, the career expert on False Claims Act cases:

> Mike Hertz had advised me, not just in this context, but just generally about the wide discretion we have under the False Claims Act to reach intervention decisions. And so, you know, it was always the presumption that this was an appropriate consideration under that discretion.[53]

Similarly, Ms. Branda, then the Director of the Fraud Division, confirmed that it was appropriate to consider the *Magner* case and the civil rights equities when weighing the equities of intervening in the *Newell* case.[54]

Associate Attorney General Tom Perrelli also agreed during his transcribed interview that it was appropriate to consider the *Magner* case as one factor in this context:

> I think it is appropriate to consider policy interests, so I don't think there's anything inappropriate about considering any policy interest of the United States.[55]

He also stated that it was not unusual to resolve multiple unrelated issues jointly:

> [T]here are all manner of situations where the United States -- or where parties or the United States will resolve things on multiple fronts at the same time, you know, recognizing that some claims maybe connected, some claims may be unconnected. So I don't think that's atypical.[56]

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[52] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[53] *Id.*

[54] Briefing by Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch, Department of Justice, to the House Committees on Oversight and Government Reform and the Judiciary, Majority and Minority Staffs (Dec. 5, 2012).

[55] House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

[56] *Id.*

Several documents obtained by the Committees include handwritten notes by third parties indicating that, during internal meetings with staff charged with drafting the declination memo, Mr. Hertz supported transparency regarding consideration of the *Magner* case in order to fully explain the Department's decision and avoid any misconceptions about the optics of linking the cases. For example, one note from a regular meeting with the Associate Attorney General's office on January 4, 2012, stated: "Mike – Odd, looks like buying off St. Paul, should be whether there are legit reasons to decline as to past practice." Subsequent notes indicate that all parties, including Mr. Hertz and in particular the U.S. Attorney's Office, agreed on the need for "a very comprehensive memo that discusses the Supreme Ct. case."[57]

Associate Attorney General Tom Perrelli stated during his transcribed interview that he understood that Mr. Hertz's evaluation of the False Claims Act case was "on the merits."[58] He stated:

> I am confident that what he was articulating to me was his view about the case and whether --notwithstanding any other factors related to *Magner*, whether the United States was going to intervene.[59]

According to Mr. West, the head of the Civil Rights Division, by mid-January 2011, there was a broad consensus that the Department should decline intervening in the *Newell* case:

> [B]y early, mid-January, there was a consensus that had coalesced in the Civil Division that we were going to decline the *Newell* case. ... My understanding is that certainly that was Mike Hertz' view, it was Joyce Branda's view, and that represented the view of the branch, U.S. Attorney's Office. Also, I think around that time period would be included in that consensus, it was my view too. It was the view of the client agency, HUD. And this was a view that we had all arrived to having taken into consideration the numerous factors, including the *Magner* case, as really as reflected in our memo. I think the memo -- the declination memo that I signed really does encapsulate what our view was, what that consensus was in the early to mid-January time frame.[60]

D. HUD Recommended Against Intervention in *Newell*

During her transcribed interview, Helen Kanovsky, HUD General Counsel, stated that it was not in HUD's interest to intervene in the *Newell* case because HUD had already entered into a Voluntary Compliance Agreement (VCA) with St. Paul, and the City was complying with that agreement. She stated:

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[57] Handwritten Notes of ["Line Attorney"], Department of Justice (undated) (HJC/HOGR STP 000651).

[58] House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

[59] *Id.*

[60] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

> [T]hey, "they" meaning Civil Frauds and the U.S. Attorney's Office, understood that I had reservations about proceeding, in large part because HUD had no equities in this issue any longer. All of our programmatic goals had already been met. We had a VCA. We were monitoring compliance with the VCA. There was compliance with the VCA. So in terms of the interest that the Department had with respect to ensuring compliance with Section 3, those goals had been met.[61]

Sara Pratt, HUD's career Deputy Assistant Secretary for Enforcement and Programs, confirmed this account in her transcribed interview:

> I had confirmed with my staff that their view was that the City of St. Paul was not only in compliance with the voluntary compliance agreement and had been since it had been entered into, but they were also very much operating in good faith to try to address issues beyond the ones in the voluntary compliance agreement.[62]

As a result, Ms. Pratt also concluded that there would be no programmatic benefit for HUD if the Department intervened in the *Newell* case:

> HUD's programmatic concerns had been fully resolved with the VCA and other activities by the City of St. Paul and that our engagement in further False Claims Act activities would be a drain on our resources financially and staff-wise.[63]

Ms. Kanovsky also expressed concerns about the difficulties in proving the case at issue, stating:

> Because Section 3 cases are very hard to prove, because the standard is best efforts, and since you can't look at the end result, you have to look at the effort. That becomes very difficult and very resource intensive.[64]

Ms. Kanovsky also stated that she did not think that the government would recover funds as a result of the government's intervention in the case:

> Q: But does HUD have an interest in recovering funds that were allegedly improperly allocated based on a false certification to HUD?

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[61] House Committee on Oversight and Government Reform, Interview of Helen Renee Kanovsky (Apr. 5, 2013).

[62] House Committee on Oversight and Government Reform, Interview of Sara Pratt (Apr. 3, 2013).

[63] *Id.*

[64] House Committee on Oversight and Government Reform, Interview of Helen Renee Kanovsky (Apr. 5, 2013).

A: As a hypothetical matter, sure. Did we actually think that there was the capability to do that in this case? No.[65]

Although Ms. Kanovsky initially opposed intervening in the case, she stated that she was approached by attorneys from the Civil Fraud Division and the U.S. Attorney's Office in September or October 2011 requesting that she change her position. Ms. Kanovsky stated that she reluctantly agreed to this request not based on the merits, but because they wanted HUD's support to make their case. She ultimately returned to her original position opposing intervention, however, after being informed that they these attorneys did not represent the Department's consensus position. She stated:

> [W]hen it turned out that we weren't really accommodating Justice, we were just accommodating certain lawyers in Civil Frauds, we sent the memo that said on the merits of the Section 3 claim, which is the basis for the False Claims Act claim, we do not think that the government should go forward.[66]

Ms. Kanovsky stated that she explained her changes in position during a conversation with Mr. Perez:

> I told him that it had been my original inclination that this was not a strong case, and that HUD's equities had already been met, and that we were not inclined to recommend that the United States intervene, but that this had been -- it appeared to me something that Civil Frauds and the U.S. Attorney in Minnesota felt very strongly about and were committed to proceeding with, and therefore we had acceded to their request.[67]

She explained further:

> I said, well, if Justice is not of one mind here, then I certainly have no problem going back to my original position, which is this was not an appropriate case for the United States to intervene in.[68]

Mr. Perez confirmed Ms. Kanovsky's account during his transcribed interview with Committee staff:

> [M]y principal recollection of my conversations with Helen Kanovsky was that she said that in her judgment the *Newell* case was a weak case and that given the pendency of the regulation and the importance of disparate impact for HUD and for United States

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

generally that in her judgment it would be in the interest of justice to see if we could pursue through Mr. Lillehaug's proposal.[69]

Several documents obtained during the investigation include email exchanges among junior line attorneys expressing frustration with Ms. Kanovskey's decision to return to her original position opposing intervention. For example, in one email exchange, a line attorney in the U.S. Attorney's Office reacted to learning of HUD's decision to return to its original position by writing the he would "work to figure out what['s] going on with this."[70] In another email, that same attorney referred to HUD's returning to its original position as "weirdness."[71]

Ms. Kanovsky explained that although she could understand their frustration, she believed HUD's substantive position was justified. She stated:

> They thought that they had the go-ahead to proceed. They asked for the go-ahead to proceed, and we had said we weren't inclined. They had come over and thought they had convinced me to do it, they had gotten a go-ahead and now we were reversing the decision and saying, no, we want to go back to our original position and, no, we do not think this is an appropriate manner in which to intervene.[72]

She explained further:

> If the decision had been totally mine in October, and there weren't any dealings with the Department of Justice that I needed to worry about in terms of a relationship with the Department of Justice, we never -- we never would have recommended an intervening, and if it were my decision whether to intervene or not, I never would have intervened.[73]

During his transcribed interview, Mr. West, the head of the Civil Division, explained the importance of HUD's position on this matter:

> [T]here were a whole variety of factors that went into our decision to decline the *Newell* case. *Magner* was one of them. It was one of many. And as far as I was concerned, it wasn't even the most important one. The most important one was the decision of the

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[69] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

[70] E-mail from ["Line Attorney 3"] to Assistant U.S. Attorney Gregory G. Brooker, Office of the U.S. Attorney for the District of Minnesota, Department of Justice (Nov. 30, 2011) (HJC/HOGR STP 000119).

[71] E-mail from ["Line Attorney 3"] to Assistant U.S. Attorney Gregory G. Brooker, Office of the U.S. Attorney for the District of Minnesota, Department of Justice (Dec. 2, 2011) (HJC/HOGR STP 000172).

[72] House Committee on Oversight and Government Reform, Interview of Helen Renee Kanovsky (Apr. 5, 2013).

[73] *Id.*

client agency not to stand behind this case in the litigation risk analysis that we engaged in.[74]

E. U.S. Attorney Recommended Against Intervention in *Newell*

The evidence obtained by the Committees indicates that Todd Jones, the U.S. Attorney in Minnesota, recommended against intervening in the *Newell* case after being informed that intervention would not serve HUD's interests.

During his transcribed interview with Committee staff, Mr. Jones stated that he concurred with all of the recommendations in the final declination memo that was signed by Mr. West on February 9, 2012. As he explained, he agreed with "all of the rationale, including the *Magner v. Gallagher* factor that was in the Civil – the Civil Fraud Division memo."[75]

Mr. Jones explained that he recommended against intervention because it would have been difficult to prove the case without HUD's concurrence:

> Well, first and foremost was the fact that our client agency, HUD, was not in concurrence about proceeding with the intervention decision anymore. That was first and foremost, because we can't do it without their help.[76]

Mr. Jones also explained that he was not concerned with HUD returning to its original position opposing intervention:

> [I]t didn't cause me any concern, because I've been doing this a long time, and the dynamics and factors that go into litigation decisionmaking, litigation risk, ranging from witnesses' changing positions to the state of the law changing, to staffing or individual – there is all kinds of dynamics. So, no, the fact that at a certain point in time, here is what our decision is and, later on down the road, that decision is changed because there are factors that have changed that add or enhance to the litigation risk, it is not unusual in my experience, and it is not something I am uncomfortable dealing with.[77]

Greg Brooker, the career Chief of the Civil Division within the U.S. Attorney's Office, also concurred with the ultimate decision not to intervene, according to Mr. Jones.[78] This account was confirmed by Mr. Perez, who stated during his transcribed interview:

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[74] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[75] House Committee on Oversight and Government Reform, Interview of Byron Todd Jones (Mar. 8, 2013).

[76] *Id.*

[77] *Id.*

[78] *Id.*

> I had discussions with Greg Brooker, who was our point of contact in the U.S. Attorney's Office in Minnesota. ... And it was my impression from conversations I had with him that he concurred with the conclusions of Mike Hertz and the other senior people in the Civil Division who had determined that this was a weak candidate for intervention.[79]

On January 10, 2012, Mr. Perez returned a telephone call from Mr. Brooker about the status of the declination memo, which had not yet been completed, and left the following voicemail message:

> 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.[80]

When asked about this voicemail, Mr. Perez explained that he was concerned that delay in completing the memo could cause St. Paul to raise additional demands. He stated:

> I was impatient in part because on the 9th of January, I had had another conversation with Mr. Lillehaug [the attorney representing St. Paul] that I outlined earlier and I was growing increasingly concerned that he was running out of patience and might in fact raise additional terms and conditions which turned out to be accurate.[81]

Mr. Perez also stated:

> 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. ... [I]f the only issue that is standing in the way is how you talk about *Magner*, then don't talk about it.[82]

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[79] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

[80] *Id.*

[81] *Id.*

[82] *Id.*

According to Mr. Perez, Mr. Brooker returned his call the next day and informed him that the protocols governing declination memos required a discussion of the *Magner* case as one factor that was considered:

> Mr. Brooker promptly corrected me and indicated that the *Magner* issue would be part of the discussion. I said fine, follow the standard protocols. But my aim and my goal in that message and in the ensuing conversations was to get him to communicate that, so that we could bring the matter to closure.[83]

A document obtained by the Committees includes handwritten notes from a line attorney in the U.S. Attorney's Office confirming this account. The notes indicate that Mr. Brooker received the voicemail from Mr. Perez, describing it as a "Concern for Greg" and a "Red flag."[84] The notes then confirm that Mr. Brooker resolved this question within one day: "Greg left message saying the Sup. Ct. info. will be in the memo."[85]

Mr. Perez stated that although he did not see the final declination memo, he understood that it "did have a discussion of the *Magner* case as a factor."[86]

During his transcribed interview, Mr. Jones, the U.S. Attorney, confirmed that the declination memo did include an appropriate discussion of the *Magner* case.[87] He stated that no attorneys in his office reported feeling pressure to concur in its recommendation, and he characterized the recommendation as "based on the litigation risk and the facts in front of us."[88] He stated:

> [W]hat's reflected in that memo [the *Newell* declination memo] is what's important to us. And that's all the relevant factors articulated in a memo for Tony West's consideration as to whether or not the United States should intervene in the *Newell* case. And that included the *Magner* decision.[89]

F. Justice Decided Not to Intervene Even if St. Paul Pursued *Magner*

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[83] *Id.*

[84] Handwritten Notes of ["Line Attorney"], Office of the U.S. Attorney for the District of Minnesota, Department of Justice (Jan.11, 2012) (HJC/HOGR STP 000713 / Formerly HJC/HOGR A 000666).

[85] *Id.*

[86] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

[87] House Committee on Oversight and Government Reform, Interview of Byron Todd Jones (Mar. 8, 2013).

[88] *Id.*

[89] *Id.*

The evidence obtained by the Committee demonstrates that the Department decided not to intervene in the *Newell* case even if St. Paul planned to go forward with the *Magner* case in the Supreme Court.

During his transcribed interview with Committee staff, Mr. West, the head of the Civil Division, explained that consensus had been reached in January 2012 that the Department would not intervene in the *Newell* case. He explained that at that time, however, St. Paul made a new demand for the Department to intervene in order to settle the *Newell* case, which would mean the relator could not pursue his own case against St. Paul. According to Mr. West, that course of action "was a non-starter" for the Department.[90]

Because the Department refused to agree to this new demand, Mr. West stated that he believed St. Paul would not withdraw the *Magner* case. He stated:

> Our decision in the Civil Division is that we were not going to go forward and litigate the *Newell* case. That meant we were either going to decline it, and if the city was willing to withdraw its *Magner* petition because we declined it, that is great. But it looked like, at one point, that the City was no longer willing to do that. We still weren't going to litigate the case.[91]

During his interview with Committee staff, Mr. Perez confirmed this account:

> Mr. Lillehaug changed the terms of the proposal. He wanted the United States to intervene and settle the case from underneath the relator. And we communicated clearly, based upon the judgment and direction from the Civil Division, that that was unacceptable and that the United States could not agree to those terms.[92]

Ms. Branda, then head of the Civil Fraud Section, also confirmed that the Civil Division decided not to litigate the *Newell* case, regardless of the impact on the *Magner* case.[93] Ms. Branda stated that the decision by her and her office not to intervene was made "on the merits" based primarily on St. Paul's arguments at the December 13, 2012 meeting.[94] Ms. Branda

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[90] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[91] *Id.*

[92] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

[93] Briefing by Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch, Department of Justice, to the House Committees on Oversight and Government Reform and the Judiciary, Majority and Minority Staffs (Dec. 5, 2012).

[94] *Id.*

rejected the argument that she would have recommended intervention "but for" the *Magner* factor.[95]

Once the Civil Division decided not to intervene in the *Newell* case, Mr. Perez accepted and communicated that decision to St. Paul, understanding that the impact of that decision was that St. Paul would go forward with the *Magner* case. During his transcribed interview, he stated: "for a period of time in January it appeared that there would be no agreement."[96] He also stated:

> I remember saying to someone, shortly after this, words to the effect of, well, we gave it our best efforts and we will move on and get ready for oral argument.[97]

In a final attempt to convince St. Paul to withdraw the *Magner* case, Mr. Perez met with the Mayor on February 3, 2012. Mr. Perez described this meeting during his transcribed interview:

> I was aware, however, that civil rights organizations were continuing their efforts and that Vice President Mondale was his mentor and was apparently reaching out to the mayor. And I know when I met with the mayor on February 3rd, he indicated that he had had at least one, and I believe more conversations with the Vice President, who was really one of his idols.[98]

At the February 3 meeting, St. Paul confirmed that it would, in fact, withdraw the *Magner* case, and Mr. Perez reiterated the Department's decision not to intervene in either the *Newell* or *Ellis* cases.[99] Mr. Perez explained:

> During that meeting the city reconsidered its position and we reached an agreement that had as its central terms the original proposal made by Mr. Lillehaug. The Civil Division, having completed its review process, thereafter authorized declination in the False Claims Act cases and the city dismissed its *Magner* appeal.[100]

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[95] *Id.*

[96] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

[97] *Id.*

[98] *Id.*

[99] *Id.* Although some documents produced to the Committees include inquiries by Department attorneys about whether in these discussions Mr. Perez promised to provide HUD documents to support St. Paul's litigation, Mr. Perez said in his transcribed interview that he did not make that offer, and other witnesses confirmed that no documents were ultimately provided. House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

[100] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

St. Paul formally withdrew the *Magner* case on February 10, 2012, and issued the following public statement:

> The City of Saint Paul, national civil rights organizations, and legal scholars believe that, if Saint Paul prevails in the U.S. Supreme Court, such a result could completely eliminate "disparate impact" civil rights enforcement, including under the Fair Housing Act and the Equal Credit Opportunity Act. This would undercut important and necessary civil rights cases throughout the nation. The risk of such an unfortunate outcome is the primary reason the city has asked the Supreme Court to dismiss the petition.[101]

During his transcribed interview with Committee staff, Tom Perrelli, the former Associate Attorney General, stated:

> [I]f you weren't going to intervene in either of the cases, okay, based on the -- based on the merits of those cases, then -- I know you guys talk about quid pro quo. You know, there is no quid because you weren't going to intervene anyways, or maybe no quo.[102]

CONCLUSION

Far from supporting allegations that Assistant Attorney General Tom Perez brokered an unethical or improper *quid pro quo* arrangement with the City of St. Paul, the overwhelming evidence obtained during this investigation indicates that Mr. Perez and other Department officials acted professionally to advance the interests of civil rights and effectively combat the scourge of housing discrimination.

Rather than identifying any inappropriate conduct by Mr. Perez or other Department officials, it appears that the accusations against Mr. Perez are part of a broader political campaign to undermine the legal safeguards against discrimination that Mr. Perez was protecting.

For example, in their letter to the Department on September 24, 2012, former Chairman Smith, Chairman Issa, Representative McHenry, and Senator Grassley attacked the disparate impact standard as a "questionable legal theory" despite the fact that it has been used by law enforcement for decades to combat discrimination, and despite the fact that it has been upheld by eleven federal courts of appeals.[103] They wrote:

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[101] City of St. Paul, Minnesota, *City of Saint Paul Seeks to Dismiss United States Supreme Court Case Magner vs. Gallagher* (Feb. 10, 2012) (online at www.stpaul.gov/index.aspx?NID=4874&ART=9308&ADMIN=1).

[102] House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

[103] Letter from Reps. Lamar Smith, Rep. Darrell Issa, Rep. Patrick McHenry, and Senator Charles E. Grassley to Hon. Attorney General Eric H. Holder, Jr. (Sept. 24, 2012).

> One of the features of this quid pro quo, distinguishing it from a standard settlement or plea deal, was that it obstructed rather than furthered the ends of justice. It was possible only because Perez knew the disparate impact theory he was using to bring fair lending cases was poised to be overturned by the Supreme Court. So he bargained away a valid case of fraud against American taxpayers in order to shield a questionable legal theory from Supreme Court scrutiny in order to keep on using it.[104]

In other words, their letter contends that eliminating the disparate impact standard and diminishing the ability of law enforcement officials to combat discrimination would further "the ends of justice."

These arguments echo those of several conservative organizations that submitted an amicus brief in the *Magner* case in 2011 urging the Court to strike down the disparate impact standard. Filed by the Pacific Legal Foundation, the Center for Equal Opportunity, the Conservative Enterprise Institute, and the CATO Institute, the brief argues that the disparate impact doctrine "encourages racial quotas," would "require imprudent mortgage eligibility determinations to avoid racial disproportionalities," and could place "pressure on banks and mortgage companies to grant loans to applicants with poor credit."[105]

Despite efforts by some to use ethics complaints against Mr. Perez as a proxy for their opposition to legal standards for combating housing discrimination, the Committees have identified no evidence during this investigation that calls into question Mr. Perez's integrity, professionalism, or effectiveness as Assistant Attorney General for the Civil Rights Division in the Department of Justice.

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[104] *Id.*

[105] Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, Competitive Enterprise Institute and CATO Institute in Support of Petitioners *Magner v. Gallagher*, U.S. (No. 10-1032) (online at http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/10-1032-PLF-amicus.pdf).