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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

February 7, 2025

VIA ELECTRONIC TRANSMISSION

The Honorable Pamela J. Bondi
Attorney General
Department of Justice

Dear Attorney General Bondi:

The False Claims Act (FCA) is our Nation's greatest tool to fight and deter government fraud and return money to the taxpayers. A critical part of the FCA is its *qui tam* provision which allows whistleblowers, who typically have inside knowledge of fraudulent conduct, to sue on the government's behalf.[1] Since the updates I authored to the *qui tam* provision were enacted into law, the FCA has recovered over $78 billion in taxpayer dollars and saved billions more by deterring would be fraudsters.[2] According to Justice Department statistics, in 2024 FCA cases recovered more than $2.9 billion lost to fraud.[3] Of that $2.9 billion, ***over $2.4 billion came from qui tam cases***.[4]

On March 6 and May 9, 2024, I wrote to the Biden-Harris Justice Department requesting information and statistics concerning the Department's dismissal of FCA *qui tam* cases after the Supreme Court's June 16, 2023, decision in *United States Ex Rel. Polansky v. Executive Health Resources, Inc., et al*.[5] In that case, the Supreme Court ruled that the Justice Department may dismiss a *qui tam* case at any point, so long as they first intervene.[6] I am concerned that the Justice Department, after initially declining to intervene in a case, will now be emboldened to intervene at any point in litigation – even years into litigation – and dismiss FCA cases for reasons unrelated to the merits.[7] My March and May letters were similar to my September 4,

[1] 31 U.S.C. § 3730(c).
[2] Department of Justice, *False Claims Act Settlements and Judgments Exceed $2.9B in Fiscal Year 2024*, Press Release (Jan. 15, 2025) https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-29b-fiscal-year-2024.
[3] *Id*.
[4] *Id*.
[5] *United States, ex rel. Polansky v. Exec. Health Res., Inc*., 599 U.S. 419, 143 S. Ct. 1720, 216 L. Ed. 2d 370 (2023) https://www.supremecourt.gov/opinions/22pdf/21-1052_fd9g.pdf.
[6] *Id*.
[7] G. Norman Acker III, John H. Lawrence, Michael H. Phillips, *Supreme Court Affirms Government's Broad Dismissal Authority In False Claims Act Suits*, US Health Care and FDA Alert (Jul. 5, 2023) https://www.klgates.com/Supreme-Court-Affirms-Governments-Broad-Dismissal-Authority-in-False-Claims-Act-Suits-7-5-2023; *see also* Tirzah S. Lollar and Megan Pieper, *DOJ Flexes Its Post-Polansky (c)(2)(A) Muscles and Moves To Dismiss Qui Tam Midway Through Discovery*, Qui Notes: Unlocking the False Claims Act (Mar. 19, 2024) https://www.arnoldporter.com/en/perspectives/blogs/fca-qui-notes/posts/2024/03/doj-flexes-post-polansky-muscles; Brenna E. Jenny and Matt Bergs, *First Court of Appeals to Apply Polansky Upholds DOJ's Dismissal*, FCA Blog (Aug. 8, 2024) https://fcablog.sidley.com/2023/08/08/first-court-of-appeals-to-apply-polansky-upholds-

2019, letter to then-Attorney General Barr requesting information about the Justice Department's implementation of their new FCA dismissal policy, known as the "Granston Memorandum," and its vague instructions that could potentially lead to a greater number of *qui tam* cases being dismissed for reasons unrelated to their merits.[8] On December 19, 2019, then-Attorney General Barr responded to my letter and provided the list of cases I requested where the government moved to dismiss.[9] However, the Biden-Harris Justice Department failed to respond to both of my letters.

The Biden-Harris Justice Department's failure to provide transparency into the process and standards it used to dismiss *qui tam* cases after initially declining to intervene raises questions with respect to whether fraudsters were potentially let off the hook at significant cost to the taxpayers. The process and standards the Biden-Harris administration used in determining whether to intervene and dismiss FCA cases post-*Polansky* may not align with the priorities of the current administration.

In your response to my questions for the record about FCA dismissals, you stated "I will ensure the Department makes dismissal decisions only as appropriate and in accordance with the relevant facts and law."[10] Accordingly, I strongly urge you to immediately halt all pending dismissals and conduct a review of all *qui tam* cases from June 2023 to the present with pending Biden-Harris Justice Department motions to dismiss to ensure that the decisions were made "only as appropriate and in accordance with the relevant facts and law." Should these motions to dismiss not align with the facts and the law, the Justice Department must withdraw them. In addition, I request that you provide responses to my March 6 and May 9 letters, which the Biden-Harris Justice Department failed to answer, which I've enclosed along with copies of my September 2019 letter to Attorney General Barr and his response.

Thank you for your prompt review and responses. If you have any questions, please contact Brian Randolph on my Committee staff at (202) 224-7708.

Sincerely,

Charles E. Grassley
Chairman
Committee on the Judiciary

Enclosures

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dojs-dismissal/; Paula Ramer and Alejandra C. Uria, *Another One Bites the Dust: The Government Secures Its Third Federal Qui Tam Dismissal Under Its Broad (c)(2)(A) Authority Since Polansky*, Qui Notes: Unlocking the False Claims Act (Apr. 23, 2024) https://www.arnoldporter.com/en/perspectives/blogs/fca-qui-notes/posts/2024/04/another-one-bites-the-dust.

[8] Letter from Senate Judiciary Chairman Charles E. Grassley to Attorney Barr re: Granston Memo, (Sep. 4, 2019) https://www.grassley.senate.gov/imo/media/doc/2019-09-04%20CEG%20to%20DOJ%20(FCA%20dismissals).pdf.

[9] Letter from the Justice Department to Senate Judiciary Chairman Charles E. Grassley re: Granston Memo, (Dec. 19, 2019) https://www.arnoldporter.com/en/-/media/files/perspectives/publications/2020/01/doj-response-to-senator-grassley.pdf.

[10] On file with Committee staff.

United States Senate
WASHINGTON, DC 20510

March 6, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Merrick Garland
Attorney General
Department of Justice

Dear Attorney General Garland:

The False Claims Act is our nation's primary weapon to fight and deter fraud and recover taxpayer dollars that would otherwise be lost. A key feature of the False Claims Act is the *qui tam* provision which allows whistleblowers, known as relators, with inside knowledge of fraudulent conduct, to sue on the government's behalf.[1] The statute requires the relator to file a claim under seal, and then the Justice Department has 60 days to investigate the allegations raised in the complaint.[2] After the 60-day investigatory period, the Justice Department may intervene and prosecute the case themselves, dismiss the case, or decline to intervene.[3] If the government declines to intervene, the relator may continue litigating the case on the government's behalf.[4] On June 16, 2023, the Supreme Court ruled in *United States Ex Rel. Polansky v. Executive Health Resources, Inc., et al.* that the Justice Department "may move to dismiss an FCA action…whenever it has intervened – whether during the seal period or later on."[5] I write today requesting information on the Justice Department's dismissal of *qui tam* cases after initially declining to intervene before and after the Supreme Court's decision in *Polansky*.

According to reports, since the Courts decision in *Polansky*, concerns have been raised the Justice Department will unfairly dismiss *qui tam* cases even when the whistleblower case is strong and for reasons unrelated to the merits of the case.[6] Further, additional concerns have been raised that the Justice Department, after initially declining, will intervene and dismiss False Claims Act cases during the late stages of litigation after the relator has spent years and resources

[1] 31 U.S.C. § 3730(c).
[2] 31 U.S.C. § 3730(b).
[3] *Id*.
[4] *Id*.
[5] *United States, ex rel. Polansky v. Exec. Health Res., Inc.,* 599 U.S. 419, 143 S. Ct. 1720, 216 L. Ed. 2d 370 (2023) https://www.supremecourt.gov/opinions/22pdf/21-1052_fd9g.pdf.
[6] Geoff Schweller, *SCOTUS Rules to Not Curb DOJ's Dismissals of Qui Tam Whistleblower Suits*, Whistleblower News Network (Jun. 16, 2023) https://whistleblowersblog.org/false-claims-qui-tam-news/scotus-rules-to-not-curb-dojs-dismissals-of-qui-tam-whistleblower-suits/.

litigating the case.[7] Denying relators the right to pursue False Claims Act cases if the government doesn't initially intervene is counter to the basic, essential purpose of the Act, which is to empower private citizens to help the government fight and deter fraud. In order to better understand the Justice Department's position with respect to *qui tam* cases before and after the Supreme Court's decision in *Polansky*, please provide answers to the following no later than March 20, 2024.

1. Since 2020 to the date of this letter, provide the number of False Claims Act cases the Justice Department:
    a. Declined to intervene;
    b. Dismissed after initially declining to intervene;
    c. Stage of litigation the case was dismissed;
    d. Average time between declining to initially intervene and dismissal; and
    e. Reason for dismissals after initially declining to intervene.
2. Has the Justice Department updated its policies, guidance, and related documents regarding False Claims Act interventions or dismissals after the Supreme Court's decision in *Polansky*? Provide copies of all policies, guidance, and related documents regarding the Justice Department's intervention and dismissal of False Claims Act cases.
3. What factors does the Justice Department consider when determining to dismiss a *qui tam* action after initially declining to intervene?
4. Does the Justice Department consult with the defrauded agency before determining whether to dismiss a *qui tam* action after initially declining to intervene?

Thank you for your prompt review and responses. If you have any questions, please contact Brian Randolph on my Committee staff at (202) 224-0642.

Sincerely,

Charles E. Grassley
Ranking Member
Committee on the Budget

[7] G. Norman Acker III, John H. Lawrence, Michael H. Phillips, *Supreme Court Affirms Government's Broad Dismissal Authority In False Claims Act Suits*, US Health Care and FDA Alert (Jul. 5, 2023) https://www.klgates.com/Supreme-Court-Affirms-Governments-Broad-Dismissal-Authority-in-False-Claims-Act-Suits-7-5-2023.

United States Senate
WASHINGTON, DC 20510

May 9, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Merrick Garland
Attorney General
Department of Justice

Dear Attorney General Garland:

On March 6, 2024, I wrote you requesting information and statistics concerning Justice Department dismissals of False Claims Act *qui tam* cases.[1] The Justice Department failed to respond by the March 20 deadline. Since then, the Government Accountability Office (GAO) published a report titled, *Fraud Risk Management: 2018-2022 Data Show Federal Government Loses an Estimated $233 Billion to $521 Billion Annually to Fraud, Based on Various Risk Environments*, which illustrates the importance of whistleblowers coming forward to assist the government in recovering taxpayer dollars lost to fraud.[2]

According to GAO, an estimated $233 billion to $521 billion in taxpayer money was lost to fraud ***each year*** between Fiscal Years (FY) 2018 and 2022.[3] GAO found that the hundreds of billions of taxpayer dollars reflects losses associated with direct federal spending and doesn't include fraud losses associated with government fees and other sources of revenue.[4] GAO stated that the estimated losses due to fraudsters represents about 3-7 percent of the average federal obligations between FY 2018 and FY 2022.[5] When put in perspective, GAO calculated that the "lower range of the estimate—$233 billion—is greater than fiscal year 2022 obligation levels for all but the eight largest agencies. There are five agencies with total annual obligations greater than the upper range of $521 billion, based on fiscal year 2022."[6] GAO reported that the "direct annual financial losses due to fraud reflects significant financial impacts to the federal

[1] Letter from Charles E. Grassley to Attorney General Garland (Mar. 6, 2024) https://www.grassley.senate.gov/imo/media/doc/grassley_to_doj_-_false_claims_act.pdf.
[2] Government Accountability Office, *Fraud Risk Management: 2018-2022 Data Show Federal Government Loses an Estimated $233 Billion to $521 Billion Annually to Fraud, Based on Various Risk Environments*, GAO-24-105833, (Apr. 16, 2024) https://www.gao.gov/products/gao-24-105833.
[3] *Id*. at 18.
[4] *Id*.
[5] *Id*.
[6] *Id*. at 19.

government."[7] GAO also found that undetected fraud may be significant, and due to the hidden nature of fraud, a certain portion will go undetected.[8]

Fraud isn't the cost of doing business. The False Claims Act and whistleblowers are a valuable resource to return fraudulently obtained money back to the taxpayers. In many instances, whistleblowers are the sole source of information and knowledge about the fraudulent conduct which would likely go undetected if not for them coming forward.[9] The Justice Department's FY 2023 False Claims Act case statistics are textbook examples of this point. In FY 2023, there were 712 False Claims Act cases filed under the *qui tam* provision as compared to 500 non-*qui tam* actions filed by the Justice Department.[10] In FY 2023, settlements and judgements under the False Claims Act exceeded $2.68 billion, and whistleblowers, through *qui tam* lawsuits, were responsible for helping recover $2.3 billion of that amount.[11] In addition, countless more taxpayer dollars were saved by the False Claims Act deterring would be fraudsters.[12]

Given the trillions of dollars in government spending, the hundreds of billions of taxpayer dollars subjected to fraud each year, and the difficulty in detecting fraud against the government, it's critically important that *qui tam* cases be allowed to continue when the facts and circumstances indicate the case is strong.[13] The Justice Department should do all it can to encourage and promote more whistleblowers to bring more *qui tam* actions to return money back to the taxpayers rather than dismiss them for reasons unrelated to the merits of the case, particularly when the Justice Department declines to initially intervene.[14] As said by Principal Deputy Assistant Attorney General Boynton, the head of the Justice Department's Civil Division, we should be grateful for the "hard work and courage of whistleblowers who play a critical role in identifying fraud, often at substantial risk to themselves."[15] Accordingly, I urge the Justice Department to respond to my March 6 letter expeditiously.

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[7] *Id*.
[8] *Id*. at 34.
[9] The National Whistleblower Center, *The False Claims Act: The False Claims Act (FCA) is one of the strongest whistleblower laws in the United States*, https://www.whistleblowers.org/protect-the-false-claims-act/.
[10] *Id*.
[11] Department of Justice, *False Claims Act Settlements and Judgments Exceed $2.68 Billion in Fiscal Year 2023*, Press Release, (Feb. 22, 2024) https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023.
[12] Courtney Finerty-Stelzner, *Fraud is Not a Cost of Doing Business: Deterring Fraud Through the False Claims Act's Trebling Provision*, TAF Coalition (Apr.3, 2024) https://www.taf.org/deterring-fraud-false-claims-act/.
[13] *See Grassley Redlines President Biden's Budget Proposal*, Press Release (Mar. 11, 2024) https://www.grassley.senate.gov/news/news-releases/grassley-redlines-president-bidens-budget-proposal.
[14] Geoff Schweller, *SCOTUS Rules to Not Curb DOJ's Dismissals of Qui Tam Whistleblower Suits*, Whistleblower News Network (Jun. 16, 2023) https://whistleblowersblog.org/false-claims-qui-tam-news/scotus-rules-to-not-curb-dojs-dismissals-of-qui-tam-whistleblower-suits/.
[15] Justice Department False Claims Act Settlements *supra* note 12.

Thank you for your prompt review and responses. If you have any questions, please contact Brian Randolph on my Committee staff at (202) 224-0642.

Sincerely,

Charles E. Grassley
Ranking Member
Committee on the Budget

CHUCK GRASSLEY, IOWA, CHAIRMAN
MIKE CRAPO, IDAHO
PAT ROBERTS, KANSAS
MICHAEL B. ENZI, WYOMING
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United States Senate
COMMITTEE ON FINANCE
WASHINGTON, DC 20510–6200

September 4, 2019

VIA ELECTRONIC TRANSMISSION

The Honorable William Barr
Attorney General
U.S. Department of Justice
Washington D.C., 20220

Dear Attorney General Barr:

I write today with concerns about the Department of Justice's (DOJ) implementation of the Granston Memorandum and its efforts to dismiss greater numbers of *qui tam* cases for reasons that appear primarily unrelated to the merits of individual cases.[1] Those efforts rely at least in part on vague and at times questionable concerns over prerogatives or limited government resources to handle the cases. Such actions could undermine the purpose of the False Claims Act by discouraging whistleblowers and dismissing potentially serious fraud on the taxpayers.

Originally enacted in 1863, the False Claims Act allows the government to recover triple damages and impose fines against those who knowingly defraud the government.[2] This is a powerful tool in the U.S. government's toolbox to prevent and deter fraud and has resulted in the recovery of more than $59 billion since 1986.[3] The key feature of the False Claims Act is the *qui tam* provision, which allows whistleblowers privy to inside information about fraudulent conduct to sue on the government's behalf.[4] For their efforts, successful whistleblowers may receive a reward of up to 30% of funds recouped by the government.[5] The statute requires that the relator file a claim under seal, and then DOJ has 60 days to investigate the allegations raised in the complaint.[6] After the 60 day investigatory period, DOJ may prosecute the case themselves in a process often referred to as "intervening" in a case.[7] In such intervening cases, the whistleblowers

[1] *See* Motion to Dismiss, United States *ex rel.* Campie v. Gilead Scis., Inc., No. C-11-0941 EMC (N.D. Cal. Mar. 28, 2019).
[2] 31 U.S.C. §§ 3729 -3733 (2012); *See* U.S. Dep't of Justice, *The False Claims Act: A Primer* (Apr. 22, 2011), *available at* https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf.
[3] Civil Div., U.S. Dep't. of Justice, *Fraud Statistics – Overview: October 1, 1986 – September 30, 2018*, (Dec. 21, 2018), *available at* https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.
[4] 31 U.S.C. § 3730(c).
[5] 31 U.S.C. § 3730(c).
[6] 31 U.S.C. § 3730(b).
[7] *Id.*

who alerted the government of the fraud through their *qui tam* claim remain eligible for a reward regardless of DOJ involvement.[8]

On January 10, 2018, Michael D. Granston, Director of the Commercial Litigation Branch at DOJ, issued new guidance on when to seek dismissals of *qui tam* claims.[9] Prior to the memo, motions to dismiss by the government were extremely rare.[10] I raised concerns about this new guidance with you during your confirmation hearing.[11] You assured me that you would review the Granston memo and work with me to address any concerns.[12] As I have noted, the guidance includes several vague criteria for DOJ attorneys to consider.[13] For example, listed as one of the possible reasons to seek dismissals was "preserving government resources."[14] Seemingly in response to the Granston memo, DOJ has moved to dismiss or threaten to dismiss several cases at least in part because of litigation costs, even though its arguments were vague, pretextual and could not demonstrate cost was prohibitive. Some examples follow:

In *United States, ex rel. Cimznhca, LLC v. UCB, Inc.*, relators alleged violations of the Anti-Kickback Statute by several pharmaceutical companies.[15] DOJ moved to dismiss the claim arguing that the case lacked merit, but also because continued litigation would be costly and contrary to governmental prerogatives.[16] DOJ further asserted that substantial costs would be incurred responding to discovery requests and monitoring the litigation.[17]

However, during an evidentiary hearing on the motion, DOJ admitted that it did not thoroughly investigate the specific claims made by the relators.[18] The court noted, "[DOJ] did not review any additional materials from the relator relevant to this case…nor did the Government effort a cost-benefit analysis; it did not assess or analyze the costs it would likely incur versus the potential recovery that would flow to the Government if this case were to proceed."[19] The court also found fault with DOJ's expressed policy interest, highlighting that even the government acknowledges that the allegations made by the relators "assert a classic violation" of the Anti-Kickback Statute.[20] The court ultimately denied DOJ's motion to dismiss finding that its decision

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[8] 31 U.S.C. § 3730(c).; *see also* Paden M. Hanson, *True Damages for False Claims: Why Gross Trebling Should Be Adopted*, 104 IOWA L. REV. 2093, 2099 (2019).
[9] Memorandum from Michael D. Granston, Dir., Commercial Litig. Branch, Fraud Section, to Atty.'s in the Commercial Litig. Branch, Fraud Section (January 10, 2018), *available at* https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.
[10] Schooner, Steven L., *FALSE CLAIMS ACT: Greater DOJ Scrutiny of Frivolous Qui Tam Actions?* (April 2018) 32 NASH & CIBINIC REP. ¶ 20 at 60 (2018) (only a single reported instance between 1986 to 1996 in which the DOJ has sought to dismiss a qui tam suit on the ground that the suit lacked substantive merit or otherwise contradicted the interests of the United States), *available at* https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2593&context=faculty_publications.
[11] *Nomination of the Honorable William Pelham Barr to be Attorney General of the United States*, 116th Cong. (2019) (statement of Sen. Charles E. Grassley, Member, S. Comm. on the Judiciary).
[12] *Id*.
[13] *Id*.
[14] Memorandum from Michael D. Granston, *supra*, note 9.
[15] *See* United States *ex rel.* Cimznhca, LLC. v. UBC Inc., No. 17-CV-765 –SMY-MAB (S.D. Ill. April 15, 2019) (order denying government's motion to dismiss); *see also* 42 U.S.C. § 1320a-7b(b).
[16] UBC Inc., No. 17-CV-765 –SMY-MAB at 6.
[17] *Id*. at 5.
[18] *Id*. at 6.
[19] *Id*. at 6.
[20] *Id*. at 6.

was arbitrary and capricious, and likely motivated by animus towards the relator.[21] To summarize, DOJ did not thoroughly investigate a case it argued lacked merit; argued for dismissal on policy grounds while admitting the claims present a classic violation of law; and finally, failed to do a cost-benefit analysis while arguing that litigation would be too costly.

In *United States*, *ex rel. Campie v. Gilead Scis. Inc.*, DOJ made similar cost-based arguments.[22] The relators in *Campie* alleged that Gilead Sciences Inc. manufactured certain drugs using illicit and potentially dangerous ingredients from unregistered facilities in China.[23] In the mid-2000's Gilead received approval from the Food and Drug Administration (FDA) for several drugs which contained the active ingredient emtricitabine (commonly known as FTC).[24] Gilead represented to the FDA that it would source its FTC from FDA-approved facilities in Canada, Germany, South Korea, and the U.S.[25] However, for a period of sixteen months beginning in December 2007, Gilead allegedly used illicit FTC purchased from a facility in China in order to cut costs and trigger price reduction clauses in contracts with other FTC suppliers.[26] In an effort to hide its actions, Gilead allegedly falsified labels so that their origins were disguised, and claimed that the FTC had come from an FDA-approved facility in South Korea.[27] On October 2008, Gilead sought FDA approval for the use of FTC purchased in the Chinese facility.[28] However, the relators further alleged that Gilead concealed or falsified quality control issues in the Chinese facility in order to receive FDA approval.[29] Based upon these alleged facts, the relators brought a *qui tam* action in October 2010.[30] DOJ then investigated the allegations for two years before declining to intervene in January 2013.[31] Nonetheless, the relators elected to proceed without the government, and filed an amended complaint to that effect.[32] Years later, the government moved to unilaterally dismiss the relators' claim in 2019.[33]

DOJ's main rationale for seeking to dismiss the *qui tam* claim in *Campie* was that it would "avoid the additional expenditure of government resources on a case that it fully investigated and decided not to pursue."[34] Here, once again, DOJ has attempted to dismiss a claim by citing litigation costs. Similar to the court in *Cimznhca, LLC v. UCB*, the Judge in the *Campie* case asked DOJ if a cost-benefit analysis had been performed, noting that "some meaningful cost-benefit

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[21] *Id*. at 7.
[22] *See* Gilead Scis., Inc., No. C-11-0941 EMC (2019).
[23] *Id*. at 1-2.
[24] United States *ex rel.* Campie v. Gilead Scis., Inc., 862 F.3d 890, 895-96 (9th Cir. 2017).
[25] *Id*. at 896.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *See* Gilead Scis., Inc., No. C-11-0941 EMC at 8 (2019).
[31] *Id*. at 8.
[32] *Id*. at 8.
[33] *Id*. at 8; *see also* United States, ex. rel. Campie *et al.* v. Gilead Scis., Inc,, 2015 WL 3659765 (N.D. Cal. 2015), United States *ex rel.* Campie v. Gilead Scis., Inc., 862 F.3d 890, 895-96 (9th Cir. 2017), Gilead Scis., Inc. v. United States, *ex. rel.* Campie, 139 S.Ct. 783 (2019) (District court dismissed relators claim in 2015, under the theory that fraud was directed at the FDA and not the payer agency, that payment was not conditioned on compliance with FDA regulations but merely FDA approval, and that FCA was not meant to intrude on FDA's regulatory regime. The 9th Circuit Court of Appeals reversed and remanded stating that relators adequately pled theories of factual false certification, implied false certification, and promissory fraud. The Supreme Court denied writ on defendant's appeal of the 9th Circuit's ruling. The case is now pending before the District court).
[34] *See supra*, note 30.

analysis" could be necessary.[35] The court subsequently allowed the government more time to file supplemental briefs to support their claims.[36]

In a similar pattern, I was recently informed that DOJ moved to dismiss *United States ex rel. Polansky v. Exec. Health Res., Inc*, citing the growing cost of discovery as the main rationale.[37] Since litigation began in 2012, the government has produced approximately 42,000 pages of documents for this case.[38] However, the court recently granted Defendant's requests for the production of documents previously withheld and new email discovery limited to three new custodians using previously approved targeted search terms.[39] In response to this court order, DOJ has moved to dismiss this *qui tam* claim on the basis that continued production and litigation would be burdensome and costly.[40] Yet, similar to the aforementioned cases, no cost-benefit analyses have been produced.

More troubling, DOJ has implied that cases where it declines to intervene lack merit or face little chances of success. History has shown that the opposite is true. Since 1986, relators have recovered over $2.4 billion for the federal government via claims in which DOJ chose to not intervene.[41] For example, that's $599,038,273 in *qui tam* cases in 2017 alone.[42] Furthermore, DOJ has repeatedly asserted that a decision to not intervene in a case is based on several factors including resource constraints. For example, during oral arguments before the Supreme Court in 2016, Deputy Solicitor General Malcolm Stewart stated:

> "[W]e don't typically give public explanations of why we don't intervene. Sometimes it's because the dollar amount is small. Sometimes it's because … we think that the relator is capable of handling the case himself, or the relator's counsel. Sometimes we do decline to intervene, because we're skeptical of the merits of a case. But even in those situations, it could be that we agree with the relator's theory and simply don't know whether the facts could be proved."[43]

Not only is DOJ's argument contradicted by its own admissions, it also ignores the statutory intent of the *qui tam* provision. Congress gave whistleblowers the ability to proceed with claims on their own *precisely* for situations in which DOJ either would not or could not pursue the case. We know from experience that without whistleblowers, fraudsters multiply and bad behavior balloons. In 1943, Congress bowed to pressure to undo the Act's crucial *qui tam* provisions and

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[35] Hannah Albarazi, *DOJ's Bid to Toss Whistleblowers' Gilead FCA Suit Hits Snag*, Law360, Aug. 1, 2019, *available at* https://www.law360.com/articles/1184571/doj-s-bid-to-toss-whistleblowers-gilead-fca-suit-hits-snag.
[36] *Id*.
[37] *See* Motion to Dismiss, United States *ex rel.* Polansky v. Exec. Health Res., Inc., No. 12-CV-4239-MMB (E.D. Pa. Aug. 20, 2019).
[38] Id. at 8.
[39] Id.
[40] *Id.*
[41] Civil Div., U.S. Dep't. of Justice, *Fraud Statistics – Overview: October 1, 1986 – September 30, 2018*, (Dec. 21, 2018), *available at* https://www.justice.gov/civil/page/file/1080696/download.
[42] *Id*.
[43] Transcript of Oral Argument at 48, Universal Health Servs. Inc. v. United States *ex rel.* Escobar, 136 S.Ct. 1986 (2016) (No. 15-7), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-7_6537.pdf.

essentially block private actions.[44] Congress assumed that the DOJ could do a good job prosecuting fraud without whistleblowers. They were wrong. In the words of a 1981 report by the Government Accountability Office, "For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . . The sad truth is that crime against the Government often does pay."[45] By 1986, taxpayer dollars became easier and easier to scam, and fraud on the government had skyrocketed.[46] The DOJ estimated at that time that fraud was a drain on 1 to 10 percent of the entire Federal budget.[47] In 1985, that meant fraudulent activity cost taxpayers $10 billion to $100 billion every year.[48]

In 1986, I spearheaded the effort to empower whistleblowers to help the government combat fraud by bringing back the *qui tam* provisions Congress had undone in the 1940s.[49] Denying relators the right to pursue False Claims Act cases if the government does not intervene is counter to the basic, essential purpose of the Act, which is to empower private citizens to help the government fight fraud. DOJ's actions in these cases will send a clear message that bad actors can get away with fraud as long as they make litigating painful and sufficiently burdensome for the government. By opting to save resources without first conducting a sufficient cost-benefit analysis, DOJ is circumventing Congress and taking a shortsighted position that may end up costing taxpayers much more money in the future.

The facts show that the False Claim Act is working. The *qui tam* provisions have reinvigorated an Act which had been mostly left for dead after the 1940s. In order for the law to continue working, DOJ must let the *qui tam* provision work the way it was intended and allow relators to proceed with litigation on their own. In order to better understand DOJ's plans with respect to future *qui tam* cases, please answer the following questions no later than September 18, 2019.

1. Did FDA request that DOJ dismiss the *qui tam* claim in *Campie*? If so, what reasoning did FDA give?

    a. How much deference does DOJ give to regulatory agencies in deciding whether to petition a court to dismiss a *qui tam* claim?

    b. In the past 10 years, has DOJ ever moved to dismiss a claim in order to shield an agency's decision-making process? If so, please list each case.

2. Is DOJ concerned that by moving to dismiss *Campie* and similar cases, such a precedent will lead other defendants to seek to make litigation as costly as possible in order to incentivize DOJ to dismiss future claims? If not, why not?

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[44] *Oversight of the False Claims Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 11 (2016) (statement of Sen. Grassley, Chairman, S. Comm. on the Judiciary).
[45] *Id*.
[46] *Id*.
[47] *Id*. at 12.
[48] *Id*.
[49] False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).

3. What role did the Granston memo play in DOJ's decision to move to dismiss in *Campie*? Is the decision to dismiss in line with the Granston memo? Would DOJ have moved to dismiss the case absent the Granston memo?

4. Please explain the cost-benefit analysis process DOJ uses in determining which cases warrant dismissal at least in part due to litigation costs. Please provide examples of any previously used cost-benefit analysis documents. Who in DOJ ultimately makes these decisions?

5. How many cases has DOJ moved to dismiss since the publication of the Granston memo? Please describe the reasons for moving to dismiss each case and note the point of litigation at which DOJ moved to dismiss the case.

    a. In how many of the above cases did the relator(s) survive a motion to dismiss prior to DOJ filing its motion to dismiss?

    b. How much time had passed since the relator(s) filed the case under seal?

    c. How many discovery obligations remain outstanding?

6. Since the Granston memo, what resources have been devoted to dismissing *qui tam* claims? Are there staff specifically devoted to working on dismissals? If so, please provide the number of staff, to include full time and part time, devoted to determining whether a claim should be dismissed.

Should you have any questions, please contact Dario Camacho of my Committee staff at (202) 224-4515. Thank you for your attention on this important matter.

Sincerely,

Charles E. Grassley
Chairman
Senate Committee on Finance

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

DEC 19 2019

The Honorable Charles E. Grassley
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

This responds to your letter to the Attorney General dated September 4, 2019, regarding the Department of Justice's (Department) recent use of its statutory dismissal authority pursuant to the False Claims Act, 31 U.S.C. 3730(c)(2)(A).

As an initial matter, the Department underscores that it shares your view of the importance of the False Claims Act (the Act) and its *qui tam* provisions in combatting fraud against government agencies and programs. Largely because of your efforts to strengthen and reform the statute in 1986, the Act has become the government's single most important tool in combatting fraud. Since 1986, the Department has recovered over $60 billion under the Act, more than 70 percent of which was recovered in connection with lawsuits filed pursuant to the statute's *qui tam* provisions. The Department appreciates the important contributions made by whistleblowers, as well as your staunch support of the Department's False Claims Act enforcement efforts.

While *qui tam* cases serve an important role in identifying fraud against taxpayer-funded programs, not every *qui tam* case advances this objective. In the limited instances where we have determined that a relator's continued pursuit of a *qui tam* case would undermine the goal of preventing fraud or other important governmental interests, we have sought dismissal. From January 1, 2018 to present, over 1,170 *qui tam* actions have been filed, and yet the Department has filed motions to dismiss only 45 cases pursuant to 31 U.S.C.§ 3730(c)(2)(A) during the same period. These statistics demonstrate that the Department has exercised its dismissal authority judiciously and has allowed the vast majority of *qui tam* cases to proceed.

Enclosed please find a chart identifying 42 of the 45 cases that the government has moved to dismiss over the last 22 months; the other three actions remain under seal and thus are not listed. Although these cases involve unique factual and evidentiary considerations, the information below may provide some helpful context.

- Since January 1, 2018, more than 1,170 *qui tam* actions have been filed. Accordingly, the 45 cases that the United States has moved to dismiss since then account for less than 4 percent of the *qui tam* cases that were filed since January 1, 2018.

- The above referenced 45 cases involve a wide variety of federal agencies, including, but not limited to: the Department of Health and Human Services; the Department of Defense; the Department of Housing and Urban Development; the Department of Education; the Department of Energy; the Department of Commerce; the Department of Transportation; and the Department of the Treasury.

- Courts have rendered decisions in 26 of the 45 cases, granting the Department's motions to dismiss in 25 cases, and denying the Department's motion to dismiss in one case. In the one case where the government's motion was denied, the Department has appealed the decision.

- Ten of the cases the United States moved to dismiss were filed by the same for-profit private investment group that filed *qui tam* complaints throughout seven judicial districts against 38 defendants; the allegations in the 10 complaints were substantially the same (at times copied word-for-word) and all lacked merit.

- Twelve cases were filed by relators who were unrepresented by counsel, notwithstanding that every appellate court that has considered the question has concluded that *pro se* relators may not prosecute *qui tam* actions once the United States has declined to intervene.

- Two cases were filed by a relator who is alleged to have shorted the stock of the defendants named in his complaints.

- In several cases, the relators filed claims that are not legally cognizable under the False Claims Act.

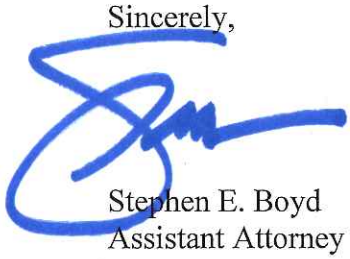
- In ten cases, the affected agency expressed valid concern that the cases could undermine patient care. For that reason and others, the United States sought their dismissal.

- In one case, the Department cited, among other factors, the United States' interest in safeguarding classified information from inadvertent disclosure.

With respect to each *qui tam* action filed, the Department investigates the matter and evaluates the facts, law, and claims asserted before deciding how to proceed. The Department seeks dismissal only when we have determined that the relator's pursuit of the case would adversely affect the government's interests. The fact that we have sought to dismiss fewer than 4% of cases reflects our serious commitment to allow appropriate *qui tam* matters to proceed. Neither the government, the taxpayers, nor future whistleblowers benefit when poorly devised cases proceed. As such, he Department strives to reach a decision that best protects the public interest in each case.

The Department is proud of its record of recoveries under the False Claims Act and greatly appreciates your continued support of the Act to combat fraud against the taxpayers. We hope this information is helpful. Please do not hesitate to contact this office if we may provide further assistance on this or any other matter.

Sincerely,



Stephen E. Boyd
Assistant Attorney General

Enclosure

Qui Tam Actions for Which the United States Filed Motions to Dismiss Pursuant to 31 U.S.C. § 3730(c)(2)(A) After January 1, 2018[i]

	CASE CITATION	STATUS
1	*United States ex rel. Chang, et al. v. Children's Advocacy Ctr. of Delaware*, No. 1:15-cv-00442 (D. Del.)	Motion Granted
2	*United States ex rel. Maldonado v. Ball Homes, LLC, et al.*, No. 5:17-cv-00379 (E.D. Ky.)	Motion Granted
3	*United States ex rel. Stovall v. Webster Univ.*, No. 3:15-cv-03530 (D. S.C.)	Motion Granted
4	*United States ex rel. Kammarayil v. Sterling Operations, Inc., et al.*, No. 1:15-cv-01699 (D.D.C.)	Motion Granted
5	*United States ex rel. Davis, et al. v. Hennepin Cty., et al.*, No. 0:18-cv-01551 (D. Minn.)	Motion Granted
6	*United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A., et al.*, No. 1:14-cv-01047 (D.D.C.)	Motion Granted
7	*United States ex rel. Sibley v. Delta Reg'l Med. Ctr.*, No. 4:17-cv-00053 (N.D. Miss.)	Motion Granted
8	*United States ex rel. Browne, et al. v. CenseoHealth, LLC*, No. 4:18-cv-00347 (E.D. Tex.)	Motion Granted
9	*United States ex rel. Golden v. Kelley, et al.*, No. 3:18-cv-06051 (W.D. Wash.)	Motion Granted
10	*United States ex rel. De Sessa v. Dallas Cty. Hosp. Dist.*, No. 3:17-cv-01782 (N.D. Tex.)	Motion Granted
11	*United States ex rel. Henneberger v. Ticom Geomatics, Inc.*, No. 1:17-cv-00670 (E.D. Va.)	Motion Granted
12	*United States ex rel. Melhorn v. Hogan, et al.*, No. 3:18-cv-00236 (E.D. Tenn.)	Motion Granted
13	*United States ex rel. Johnson v. Raytheon Co.*, No. 3:17-cv-01098 (N.D. Tex.)	Motion Granted
14	*United States ex rel. Borzilleri, et al. v. AbbVie, Inc., et al.*, No. 1:15-cv-07881 (S.D.N.Y.)	Motion Granted

15	*United States ex rel. Borzilleri v. Bayer, AG, et al.*, No. 1:14-cv-00031 (D. R.I.)	Motion Granted
16	*Kelly v. Carson, et al.*, No. 8:18-cv-00532 (D. Neb.)	Motion Granted
17	*United States ex rel. Little v. Rolls-Royce North America, Inc., et al.*, No. 1:19-cv-0005 (W.D. Tex.)	Motion Granted
18	*United States ex rel. Graves v. ICANN, Inc., et al.*, No. 1:18-cv-05482 (N.D. Ga.)	Motion Granted
19	*United States ex rel. Davidheiser v. Capital Rail Constructors,* No. 1:19-CV-593 (E.D. Va.)	Motion Granted
20	*United States ex rel. Crandell v. Hardy Cty. Rural Dev. Corp.*, No. 2:18-cv-00124 (N.D. W. Va.)	Motion Granted
21	*United States ex rel. Backer v. Cooperative Rabobank, U.A., et al.*, No. 17-cv-02708 (S.D.N.Y.)	Motion Granted
22	*United States ex rel. Campie, et al. v. Gilead Sciences, Inc., et al.*, No. 3:11-cv-00941 (N.D. Cal.)	Motion Granted
23	*United States ex rel. Polansky, et al. v. Exec. Health Res., Inc., et al.*, No. 2:12-cv-04239 (E.D. Pa.)	Motion Granted
24	*United States ex rel. SMSPF, LLC, et al. v. EMD Serono, Inc., et al.*, No. 2:16-cv-05594 (E.D. Pa.)*[ii]	Motion Granted
25	*United States ex rel. Health Choice Group, LLC, et al. v. Bayer Corp., et al.*, No. 5:17-cv-00126 (E.D. Tex.)*	Motion Granted
26	*United States ex rel. Health Choice All., LLC, et al. v. Eli Lilly & Co., et al.*, No. 5:17-cv-00123 (E.D. Tex.)*	Motion Granted
27	*United States ex rel. SCEF, LLC, et al. v. AstraZeneca, PLC, et al.*, No. 2:17-cv-01328 (W.D. Wash.)*	Motion Granted
28	*United States ex rel. SMSF, LLC, et al. v. Biogen Inc., et al.*, No. 1:16-cv-11379 (D. Mass.)*	Dismissed on Defendants' Motion
29	*United States ex rel. SAPF, LLC, et al. v. Amgen, Inc., et al.*, No. 2:16-cv-05203 (E.D. Pa.)*	Dismissed by Relator
30	*United States ex rel. Miller, et al. v. AbbVie, Inc.*, No. 3:16-cv-02111 (N.D. Tex.)*	Dismissed by Relator
31	*United States ex rel. Carle, et al. v. Otsuka Holdings Co., et al.*, No. 1:17-cv-00966 (N.D. Ill.)*	Dismissed by Relator

32	*United States ex rel. Harman, et al. v. BNSF Ry. Co., et al.,* No. 1:17-cv-00059 (D. Mont.)	Dismissed by Relator
33	*United States ex rel. Lubemba v. Garda,* No. 5:17-CV-286 (M.D. Ga.)	Dismissed by Relator
34	*United States ex rel. Haule v. Univ. of Texas Health Science Ctr.,* No. 19-cv-00033 (W.D. Tex.)	Dismissed by Relator
35	*United States ex rel. Haule v. Heggemeier, et al.,* No. 19-cv-00034 (W.D. Tex.)	Dismissed by Relator
36	*United States ex rel. Haule v. Southwest Housing Compliance Corp.* No. 19-cv-0035 (W.D. Tex.)	Dismissed by Relator
37	*United States ex rel. Haule v. Austin, et al.,* No. 19-cv-00036-RP-AWA (W.D. Tex.)	Dismissed by Relator
38	*United States ex rel. Vanderlan v. Jackson HMA, LLC, et al.,* No. 3:15-cv-00767 (S.D. Miss.)	Motion Pending
39	*United States ex rel. NHCA-TEV, LLC, et al. v. Teva Pharm., et al.,* No. 2:17-cv-02040 (E.D. Pa.)*	Motion Pending
40	*United States ex rel. Farmer, et al., v. The Republic of Honduras, et al.,* No. 1:17-cv-00470 (S.D. Ala.)	Motion Pending
41	*United States ex rel. Mikovits v. Whittemore Peterson Institute, et al.,* No. 3:15-cv-409 (D. Nev.)	Motion Pending
42	*United States ex rel. CIMZNHCA, LLC, et al. v. UCB, Inc., et al.,* No. 3:17-cv-00765 (S.D. Ill.)*	Motion Denied; Appeal Pending

[i] This list is based on a review of the Civil Division's records as of October 25, 2019. There are three additional *qui tam* actions that remain under seal for which the United States has filed a motion to dismiss pursuant to 31 U.S.C. 3730(c)(2)(A), of which two have been granted and one remains pending. Because these actions currently remain under seal, they are not listed.

[ii] The use of an asterisk (*) denotes an action filed by the *qui tam* investment group, Venari Partners LLC (dba National Healthcare Analysis Group).