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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

February 24, 2021

**VIA ELECTRONIC TRANSMISSION**

The Honorable Merrick B. Garland  
Attorney General Nominee  
U.S. Department of Justice  
950 Pennsylvania Ave. N.W.  
Washington D.C. 20530-0001

Dear Judge Garland:

If confirmed as our nation's next Attorney General, you will be tasked with overseeing the enforcement of what I consider to be one of the most important pieces of legislation that I have worked on during my time in Congress, the False Claims Act. Since I authored the 1986 amendments, the False Claims Act has returned to the Treasury more than \$64 billion in taxpayer dollars lost to fraud.<sup>1</sup> Continuing the robust enforcement of the False Claims Act is necessary to ensure that the trillions of dollars spent on COVID relief do not end up irrevocably in the hands of fraudsters.

Since the outbreak of COVID-19, Congress has authorized more than \$3 trillion in spending, with Democrats in the House of Representatives poised to pass another \$1.9 trillion relief bill.<sup>2</sup> When it's all said and done, Congress may end up allocating more than \$5 trillion in the span of a year.<sup>3</sup> This unprecedented spending has and will continue to lead to fraud.<sup>4</sup> That is why I'm working with a cadre of bipartisan Senate colleagues to draft legislation that will further strengthen and improve the False Claims Act in light of recent court decisions that have weakened the statute.

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<sup>1</sup> Press Release, Department of Justice, Justice Department Recovers Over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020>.

<sup>2</sup> Committee for a Responsible Federal Budget, <https://datalab.usaspending.gov/federal-covid-funding/> (last visited Feb. 23, 2021); Barbara Sprunt, Kelsey Snell, *Here's What's in the House Democrats' \$1.9 Trillion COVID-19 Relief Plan*, NPR (Feb. 22, 2021), <https://www.npr.org/2021/02/22/970122376/highlights-from-the-house-covid-bill>.

<sup>3</sup> *Id.*

<sup>4</sup> C. Ryan Barber, *DOJ Civil Leader Predicts 'Significant' False Claims Act Cases in Virus Era*, Law.com, Feb. 17, 2021, <https://www.law.com/nationallawjournal/2021/02/17/new-doj-leader-predicts-significant-false-claims-act-cases-in-virus-era/?slreturn=20210119132554>; see also, U.S. Dep't of Justice, Fraud Statistics Overview (Jan. 14, 2021), <https://www.justice.gov/opa/press-release/file/1354316/download> (A total of 922 False Claims Act cases were filed in 2020. This is the single largest amount of cases filed in any single year since the enactment of the act in 1863).

Of course, this is not a new phenomenon – judicial developments that ultimately precipitate the need to clarify congressional intent with respect to the False Claims Act. As a Judge on the D.C. Circuit Court of Appeals, you presided over one such case that required Congressional correction. In *United States ex rel. Totten v. Bombardier Corp.*, you wrote a powerful dissent, correctly arguing that the text of the False Claims Act applies to government money defrauded from government contractors.<sup>5</sup> Congress later amended the False Claims Act in 2009, to explicitly clarify that government money defrauded from government contractors is a violation of the Act.<sup>6</sup>

We once again find ourselves in a place where Congress must intervene. The Supreme Court and several lower courts have read a more stringent materiality standard into the law than Congress wrote or intended. In *Escobar*, the Supreme Court declared that courts may look to the government’s actual conduct as a strong indicator of materiality.<sup>7</sup> Many defendants are now attempting to drive trucks through this narrow opening. These defendants frequently seek extensive and costly discovery, along with witness testimony, to argue that someone, somewhere in the bowels of the bureaucracy was aware of the fraud and didn’t act, thereby demonstrating – incorrectly I might add – that the fraud was not material.

These types of tactics by defendants should not surprise anyone; they have been used before. In 1943, Congress amended the False Claims Act to include a jurisdictional bar that would prevent any claim brought by a relator from going forward if the government had any prior knowledge.<sup>8</sup> Defendants seeking to avoid liability were almost always able to find *some* government official *somewhere* who had *some* knowledge of the fraud.<sup>9</sup> In some cases, and as interpreted by the courts, *any* knowledge was sufficient to bar the relator from going forward even if it was minor or incomplete, or if it was not the “mirror image” of the information brought by the relator.<sup>10</sup>

As noted, we are already seeing similar events play out in the post-*Escobar* jurisprudence. But what these efforts fail to account for is that government bureaucrats are highly segmented and usually not positioned, or are otherwise unable, to move the monolithic bureaucracy that they are a part of. Not to mention that a decision to stop payment by the government is oftentimes a drastic step that can only be taken when the government has fully investigated a claim of fraud and corroborated the evidence. Further, an individual that may have knowledge is rarely motivated to stop even blatant fraud because the money is simply not coming out of their own pocket.

Separately, the Justice Department is moving to dismiss multiple cases brought by whistleblowers, claiming they have unfettered and unchecked discretion to seek these dismissals. I have no objections to the Justice Department dismissing meritless or parasitic cases, however, it is up to the courts, through a hearing, to determine whether or not a case lacks merit. The Justice Department is not, and cannot be, the judge, jury, and executioner of a relator’s claim.

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<sup>5</sup> *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004).

<sup>6</sup> P.L. 111-21, 123 Stat. 1617, 1621 (2209).

<sup>7</sup> *Universal Health Servs. V. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

<sup>8</sup> James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* (3<sup>rd</sup> ed. 2002), at 47.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Congressional action is needed now just like it was needed in 2009, to clarify Congress' intent. If confirmed as our next Attorney General, you will leave the role of an arbiter and enter a position that will allow you to provide technical assistance to members of congress working to adjust and write new laws. It is my hope you and I can work together, along with my Senate colleagues, to further clarify and strengthen the False Claims Act that will better position it to combat fraud of all shapes and sizes well into the future.

Sincerely,

*Chuck*

Charles Grassley  
Ranking Member  
Senate Committee on the Judiciary

*P.S. With over 63B & being returned  
to the federal treasury, I don't need to  
tell you how valuable tool this  
is to fight fraud*

*Please do all you can to not  
hinder use of the False Claims Act  
whether it's DOJ/Relator or just the  
individuals when DOJ doesn't  
want to participate*