

October 27, 2021

Dear Republican Senator:

We write to you to share our serious reservations about S. 2428, the False Claims Amendments Act of 2021.

The Institute for Policy Innovation (IPI) is a 34-year-old conservative, free-market policy think tank based in Dallas. We engage on issues related to economic liberty and individual liberty, and that includes issues related to legal liability for private sector companies, and so it is appropriate that we share our thoughts on S. 2428.

Regardless of the intent of its authors, S.2428 is an ill-advised change to the existing False Claims Act (FCA), which was updated and strengthened in 1986. There is no real problem that needs solving by the proposed amendments; in fact, if S. 2428 became law it would seriously weaken the FCA and would be a boon to trial lawyers, which is never a good thing.

The proposed legislation would lower evidentiary standards and lower the burden of proof for the government as it pursued claims, which would render accused companies as guilty until proven innocent. And, because the legislation is retroactive, it would allow trial lawyers and even private individual “bounty hunters” to sue companies for *conduct that was legal at the time*.

While we are generally supporters of legislation that overturns bad Supreme Court rulings, the opposite is here the case. In a unanimous Supreme Court ruling written by Justice Clarence Thomas (*Universal Health Services v. United States, ex rel. Escobar*), the Court upheld the high burden of proof standard of the existing FCA. Conservatives in particular should be skeptical of government attempts to favor itself in its prosecution of private sector companies through the courts. If anything, we should require a higher burden of proof for government when it challenges private sector companies, not a lower burden of proof.

Politically, this legislation seems to be animated by a desire to control healthcare costs; in this case making it easier to sue and to collect judgments from healthcare providers. But though there may very well be ways to control healthcare costs, lowering evidentiary standards and otherwise weakening legal protections for the accused is the wrong way to do it. Not very often have we seen Republicans conscript trial lawyers as a means of pursuing their policy goals, and we suggest that doing so here is the wrong way to pursue whatever the desired policy goal may be.

A better option might be to commission a study of the effectiveness of the current FCA, to determine whether there even is an actual problem that needs solving. We understand that an amendment to this effect may be put forward, which seems like a much more reasonable starting point, particularly since few if any hearings have been held thus far on this legislation.

We appreciate the opportunity to share our thoughts with you on this proposed legislation, and hope you'll carefully consider these points as you do your important work.

Sincerely,

A handwritten signature in blue ink that reads "Tom Giovanetti". The signature is written in a cursive style with a long horizontal stroke at the beginning.

President