

Eleventh Circuit to Hear Argument on Article II Challenge to FCA Qui Tam Provisions in Zafirov

December 9, 2025 – FCA Now

by Alex Hontos, Chris DeLong, Matthew Gillespie, and Meredith LaVine

Under the False Claims Act (FCA), private individuals—i.e. *qui tam* relators—file suit on behalf of the government against individuals or organizations, seeking to redress alleged frauds on the government. See 31 U.S.C. § 3730(b). The FCA’s *qui tam* provisions have faced constitutional challenges in the past. But until recently, courts have almost uniformly turned those challenges away, often emphasizing the statute’s “long pedigree” and the role relators have played in enforcing federal law.^[1] This Friday, December 12, a three-judge panel of the Eleventh Circuit will hear argument on whether the *qui tam* relator, particularly one lacking an appointment to the position by the President (which is to say, all of them), is consistent with the dictates of Article II in *United States ex rel. Zafirov v. Florida Medical Associates*.

Recent Supreme Court jurisprudence has put the FCA *qui tam* provisions back in the constitutional crosshairs. In a recent dissent, Justice Thomas reignited debate over the constitutionality of the FCA’s *qui tam* provisions, questioning whether *qui tam* relators were consistent with Article II’s prescriptions of executive power. See *United States, ex rel. Polansky* 599 U.S. 419, 449 (Thomas, J. dissenting) (2023) (“The FCA’s *qui tam* provisions have long inhabited something of a constitutional twilight zone. There are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation.”). In a short and single-purpose concurrence earlier this year, Justice Kavanaugh echoed Justice Thomas’ concerns around the FCA’s *qui tam* provisions, noting the FCA’s “*qui tam* provisions raise substantial constitutional questions under Article II.” See *Wisconsin Bell, Inc. v. United States ex rel. Heath*, 604 U.S. __, __ (2025) (Kavanaugh, J. concurring) (recognizing the constitutional questions were not before the Court, Justice Kavanaugh wrote that “in an appropriate case, the Court should consider the competing arguments on the Article II issue”).

Federal district courts across the country have been asked to revisit the constitutionality of the FCA’s *qui tam* provisions in the wake of these recent opinions from Justice Thomas and Justice Kavanaugh. The first successful challenge has now made its way

Related People

- Alex Hontos
- Chris DeLong
- Matthew Gillespie
- Meredith LaVine

Related Capabilities

- Healthcare Enforcement & Compliance
- Government Enforcement & Corporate Investigations

to the United States Court of Appeals for the Eleventh Circuit. Ahead of oral argument, this blog post summarizes the background of *Zafirov* and the arguments the defendants, relator, and government assert, and highlights how other recent decisions may (or may not) influence the Eleventh Circuit's decision.

United States ex rel. Zafirov v. Florida Medical Associates

In May 2019, in the United States District Court of the Middle District of Florida, Dr. Clarissa Zafirov filed a sealed FCA complaint alleging the defendant organizations inflated risk-adjusted payments by submitting diagnosis codes portraying patients as sicker than they were. After its investigation of the allegations, the government declined to intervene, but the relator pursued its claim, and the case proceeded through discovery for multiple years. In 2024, five years into the litigation and after Justice Thomas's dissent in *Polansky*, the defendants moved for judgment on the pleadings, raising Article II constitutional challenges to the FCA's *qui tam* provisions, including that the provisions violate the Vesting, Take Care, and Appointment Clauses.

District Judge Kathryn Mizelle, a former clerk for Justice Thomas, concluded that Zafirov could not prosecute the case because a *qui tam* relator was an "officer of the United States" who required an appointment by the President, which Zafirov did not have. In determining Zafirov was acting as an "officer of the United States," the court looked to the Supreme Court's test in *Lucia v. SEC*, which asks whether the person (1) exercises significant authority pursuant to the laws of the United States and (2) occupies a continuing position established by law. See 585 U.S. 237, 245 (2018). Judge Mizelle reasoned that Zafirov, as an FCA *qui tam* relator, exercised significant executive power by, among other things, deciding whether to initiate litigation in the name of the United States and controlling that litigation. Further, the court held relators are in a "continuing position" because the relator is potentially in that position for years and is not removable. As a result, Judge Mizelle dismissed the suit. Zafirov and the government appealed.

The Arguments

The parties have extensively briefed the various aspects of Article II executive power, the functional and legal status of a *qui tam* relator, whether Congress's exercise of its power in Article I to enact the FCA's *qui tam* provision is inconsistent with Article II, and whether the historical practice of *qui tam* relators ameliorates any potential constitutional infirmity.

The government focuses on the legal status of a relator for its argument for constitutionality. The government contends relators are not "officers of the United States" and therefore do not require appointment. In the government's view, relators do not exercise executive power or enforce federal law in a manner inconsistent with the Vesting and Take Care Clauses. They do not hold government jobs, nor do they exercise sovereign authority. The government remains in control during the entire duration of the lawsuit—even when it does not intervene, the government has the authority to monitor filings, pause discovery, veto settlements, and even dismiss the case under the FCA. Rather, to the government, relators' role in a *qui tam* action more similarly mirrors that of a private plaintiff in a civil rights suit than a presidentially

appointed officer. Among other authorities, the government relies on *Vermont Agency of Natural Resources v. United States ex. Rel. Stevens*, 529 U.S. 765 (2000), which considered whether the FCA's *qui tam* provisions were consistent with Article III standing jurisprudence and held that *qui tam* relators had standing to bring suit despite that the injury to be redressed was to the government, not *qui tam* relators. The government argues *Stevens* reinforces that relators act as partial assignees of the government's claim as distinct from "officers of the United States." Therefore, the government contends, *qui tam* relators do not require appointments under Article II's Appointments Clause.

Zafirov relies on precedent and history to argue the FCA's *qui tam* provisions comply with Article II. Zafirov emphasizes that federal appellate courts that have considered the question—including the Fifth, Sixth, Ninth, and Tenth Circuits—have all upheld the FCA against Article II challenges. Further, the Supreme Court has repeatedly described relators as "private persons," not "officers of the United States," and has adjudicated *qui tam* cases for over a century without raising constitutional doubts. Zafirov contends that, from a historical perspective, *qui tam* provisions like the FCA's were ubiquitous in the United States' earliest days. If *qui tam* actions violated Article II, Zafirov argues, such a defect would have surfaced during early legal debates in the history of the United States. The lack of historical debate over the propriety of the *qui tam* mechanism, Zafirov argues, demonstrates its acceptance and consistency with the constitutional framework.

Zafirov also echoes the government's arguments on the Appointments Clause, asserting that relators are not "officers of the United States" because they do not hold continuing positions or exercise significant authority.

The Appellees reiterate their arguments to the district court: the FCA's *qui tam* provisions violate three provisions of Article II: the Appointments Clause, Vesting Clause, and Take Care Clause.

First, Appellees contend the FCA's *qui tam* provisions violate the Appointments Clause because relators exercise core executive power without constitutional appointment. The Appellees counter the government and Zafirov's dismissive characterizations of the power of a *qui tam* relator, nothing relators initiate and conduct litigation in the name of the United States and seek treble damages and civil penalties for injuries. This authority—deciding whether to sue, what claims to pursue, and how to litigate—is a quintessentially executive power, according to the Appellees. Because *qui tam* relators wield this significant authority without appointment under the Appointment Clause,



Appellees argue that the entire *qui tam* scheme is unconstitutional.

Second, Appellees assert that because the *qui tam* provision undermines presidential control, it violates the Vesting and Take Care Clauses. Article II vests all executive power in the President, such that executive power can be exercised only through the President directly or through appropriate delegation. The President may supervise and remove those exercising that power. Appellees argue the FCA's *qui tam* provisions strip that control away, infringing on the constitutional division of power. For example, Appellees contend that relators authorize their own appointment, define their own jurisdiction, and cannot be removed by the President. According to the Appellees, this lack of oversight prevents the President from ensuring faithful execution of the laws and creates an enforcement regime driven by private profit rather than public accountability, violating Article II of the Constitution.

Other Recent Decisions

Courts elsewhere are grappling with the constitutional challenges, too, which may offer potential insight about how the Eleventh Circuit may approach the questions before it:

- ***United States ex. rel. Montcrief v. Peripheral Vascular Associates*, 133 F.4th 395 (5th Cir. 2025).** Writing in a concurrence, Judge Duncan noted that, despite the obstacle of a precedential *en banc* opinion upholding the FCA's constitutionality stands in the way, see *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 751 (5th Cir. 2001) (*en banc*), there is cause to question the constitutionality of the FCA's *qui tam*. Judge Duncan explained that *qui tam* relators exercise "core executive power" because they "appoint themselves" and litigate on behalf of the United States without presidential oversight, which is inconsistent with Article II's structure. Judge Duncan's concurrence is another example of growing judicial willingness to revisit long-standing FCA precedent.
- ***United States ex. rel. Gentry v. Encompass Health Rehab*, No. 25-20093, 2025 U.S. App. LEXIS 28755 (5th Cir. 2025).** Also in the Fifth Circuit, Judge Ho called for the court to reconsider *Riley* in a recent concurrence. Judge Ho likened relators to "unaccountable federal employees" who wield executive power without democratic accountability and "enjoy[ing] a *de facto* form of life tenure, akin to that of Article III judges." Judge Ho believes *qui tam* relators present constitutional concerns by presuming to represent the United States government in federal court and to defend the interests of the United States Treasury against fraud without appointment by or accountability to the President.
- ***United States ex. rel. Gose v. Native American Services Corp.*, No. 8:16-cv-03411-KKM-AEP, 2025 U.S. Dist. LEXIS 101549 (M.D. Fla. May 29, 2025).** Consistent with her order in *Zafirov*, Judge Mizelle granted the defendants' motion for judgment on the pleadings on the ground that the relator lacked a presidential appointment and therefore could not prosecute the case consistent with the Appointments Clause. Judge Mizelle noted that this case presented stronger facts than *Zafirov* because the relator who initiated the case had passed away and the

executor of the estate substituted, which was more evidence that the position of *qui tam* relator was a continuing position.

- ***United States ex. rel. Health v. Wisconsin Bell*, No. 08-CV-724, 2025 U.S. Dist. LEXIS 217468 (E.D. Wis. Oct. 29, 2025).** On remand from the Supreme Court’s recent decision, the defendant sought summary judgment on the basis that the FCA’s *qui tam* provisions are unconstitutional. The court denied summary judgment, concluding that *qui tam* relators were not “officers of the United States” requiring appointment and noting that the historical practice of *qui tam* litigation was persuasive, if not dispositive, evidence that the FCA’s *qui tam* provisions are consistent with the original understanding of Article II.

Conclusion

The Eleventh Circuit panel faces a spectrum of constitutional questions. And, unlike other circuits, there is no binding precedent on these Article II questions that cabins this panel to a particular outcome. See *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1312 (11th Cir. 2021) (“Those [Article II] issues are not before us, so we take no position on our sister circuits’ ultimate conclusions.”). Against the backdrop of Supreme Court Justices telegraphing “substantial” constitutional concerns over the *qui tam* mechanism and multiple appellate and district court judges inveighing against it, the Eleventh Circuit could become the first appellate court to strike down the FCA’s *qui tam* provisions.

Dorsey’s FCA Now Blog will be following the oral arguments closely and will publish post-argument analysis next week.

[1] See, e.g., *United States ex rel. Stone v. Rockwell Int’l Corp.*, 282 F.3d 787 (10th Cir. 2002); *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (en banc); *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993).