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The Zafirov Appellate Argument — Panel Steers Parties to Address Whistleblower Control

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The much-anticipated appellate showdown regarding the constitutionality of the whistleblower (or *qui tam*) provision of the federal False Claims Act (FCA) took place before a three-judge panel of the Eleventh Circuit Court of Appeals (Judge Elizabeth L. Branch, Judge Robert J. Luck, and Senior District Court Judge Federico A. Moreno, sitting by designation). The panel heard oral argument on December 13, 2025, in *U.S. ex rel. Zafirov v. Florida Medical Associates, LLC, et al.* (*Zafirov*), the first case to hold that the FCA's *qui tam* provision is unconstitutional. The key point for all who listened was control.

As discussed in our previous blogs, the lower court in *Zafirov* held that the *qui tam* provision of the federal FCA violates the Appointments Clause of the U.S. Constitution (Art. II, § 2, cl. 2, Appointments Clause). To recap, on September 30, 2024, the United States District Court for the Middle District of Florida concluded that *qui tam* relators, as whistleblowers, assume the federal government's role and exercise government authority when litigating FCA claims on the government's behalf. Consequently, the court ruled that relators were "officers of the United States" who, pursuant to the Constitution's Appointments Clause, must be appointed by the president, an executive agency department head, or

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a court. The trial court dismissed the *qui tam* FCA complaint because the relator was not so appointed.

If the Eleventh Circuit and, ultimately, SCOTUS uphold the *Zafirov* ruling, all relators would fall under the umbrella of the Article II's Appointments Clause. As such, each relator would need to be appointed as officers of the United States to litigate FCA claims.

During oral argument before the Eleventh Circuit panel, the Appointments Clause argument focused on the two-part test that SCOTUS articulated in 1976 to determine whether a government official is an officer of the United States: whether the position (1) exercises significant authority pursuant to federal law and (2) is a continuing position established by law. Both prongs of this test must be fulfilled for a relator to be considered an officer of the United States.

Continuing Position Established by Law

The government urged the appellate court to focus on the "continuing position" prong of the test and argued that the court need not reach the significant authority prong because relators do not hold a continuing position. Unlike an executive office like Secretary of State, the government argued, a *qui tam* relator's duties are tied to their individual identity. In contrast, the Secretary of State's role is a continuing position because it exists irrespective of who warms that seat at any moment in time. The whistleblower's role, the government argued, is personal and does not constitute a continuing office.

In contrast, the appellee argued that the FCA essentially creates an office of relator, akin to an independent counsel or special prosecutor. Therefore, a relator's role is continuing in nature and requires appointment under Article II of the Constitution.

Control: Significant Authority Pursuant to Federal Law

The *Polansky* Effect

To determine whether an FCA whistleblower is an officer of the United States who must be appointed pursuant to Article II, the Eleventh Circuit panel seemed much more interested in a whistleblower's control over the litigation of an FCA lawsuit. Such control must be considered in light of the Supreme Court's 2023 decision in *U.S. ex rel. Polansky v. Executive Health Resources Inc.* (*Polansky*), where SCOTUS clarified the degree of the control that the government exercises over *qui tam* cases.

The majority opinion in *Polansky* held that pursuant to the FCA, the DOJ may intervene in a whistleblower's suit ***at any point in the litigation***, independent of the seal period, by merely showing "good cause." The DOJ can then dismiss a *qui tam* case over the relator's objections "whenever it has intervened" by meeting Federal Rule of Civil Procedure 41(a)'s lenient voluntary dismissal standard, which only requires "a court order, on terms that the court considers proper."
The *Polansky* decision noted that Rule 41's dismissal standard "will be readily satisfied" by the DOJ's motion "in all but the most exceptional cases" and "[a]bsent some extraordinary circumstance." Accordingly, a relator's power in FCA litigation is always limited by the DOJ's discretion to intervene and dismiss a *qui tam* lawsuit at any point in the case even over the whistleblower's objection.

The trial court's order in *Zafirov* cited Justice Clarence Thomas' dissent in *Polansky*. There, Thomas concluded, among other things, that a lawsuit that vindicates the nation's public rights is an executive function that only the president or "those acting under him" can exercise, so *qui tam* relators must be appointed as officers of the United States before they can "wield executive authority to represent the United States' interests in civil

ligation." For further analysis of the *Polansky* decision, please see our previous blog.

The Control Arguments

The Eleventh Circuit panel repeatedly returned the focus of the argument to the control prong by asking such questions as "[H]ow is Justice Thomas wrong in his dissenting opinion in *Polansky* as to the significant authority prong of the test?"

The government conceded that relators' status as private people not otherwise affiliated with the government does not categorically prohibit the application of the Appointments Clause. Instead, the government argued that whistleblowers do not wield such significant authority to render them officers of the United States.

For example, the Appointments Clause is not triggered because "given the control mechanisms, nothing a relator has the power to do is something only the government can constitutionally do." The government further noted that the relator's sole unilateral power pursuant to the FCA is to file a complaint under seal and then wait for the government to determine whether the case can continue. Merely bringing a lawsuit under seal, the government argued, does not constitute a function that is constitutionally reserved for the government.

The relator, who appealed the *Zafirov* decision alongside the government, emphasized that the government "solely" decides how to proceed after a *qui tam* plaintiff files an FCA case under seal. Although the statute requires the government to investigate FCA claims, the government has complete discretion regarding how to conduct the investigation and what resources to devote to it. Responding to the panel's question as to whether the relator controls the FCA litigation when the government declines to intervene (which the panel noted occurs in approximately 80 percent of FCA

cases), the relator explained that the whistleblower "is in the driver's seat, but the government is still in the passenger seat and able to grab the wheel at any time."

The appellant relator also characterized non-intervened FCA cases as proceeding like any other private lawsuit, as whistleblowers do not gain access to government resources and "[n]o one's handing [relators] a windbreaker and a gun and letting them go investigate and carry this out like the government could." Instead, relators litigate FCA cases just as any private fraud litigant would, so they do not have any significant government authority. The relator argued that a non-intervened FCA case is essentially a private lawsuit in which "the government will benefit as a byproduct. It doesn't become a government enforcement action led by a private person."

As expected, the appellee medical provider that the relator accused of fraud characterized relators as having significant control over FCA litigation:

The False Claims Act violates Article II of the Constitution by authorizing private parties to bring suit on behalf of the United States. Private parties acting as realtors may initiate enforcement actions in the government's name, conduct those actions as they wish, seek treble damages and statutory penalties, and bind the government through judgments. There can be no doubt that relators exercise significant executive authority in each of those respects. And yet, they are not properly controlled by, appointed by, or accountable to the executive branch.

The appellee further argued that FCA whistleblowers have more power than an appointed independent counsel because the relators self-appoint, decide which parties to sue, and determine the scope of the investigation. In the independent counsel context, the Attorney General makes those decisions.

The Chamber of Commerce, who submitted an amicus brief in support of the appellee, argued that "[t]he *qui tam* provisions of the [FCA] violate Article II by taking the enforcement of the laws out of the hands of the President and permitting self-appointed and unaccountable bounty hunters who have suffered no injury of their own to enforce the laws on behalf of the United States."

On rebuttal, the government finally argued that the government exercises "extensive" control over FCA suits because it can intervene at any point in the litigation by meeting the "very flexible good cause standard" and can dismiss the relator's lawsuit pursuant to Rule 41's "very flexible" standard, so relators do not exercise independent control over the litigation. *See Polansky*. The relator also argued that the FCA's 1986 Amendments gave the government "extra controls" over whistleblower lawsuits that since then are "extensively controlled by the government throughout."

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Like all interested parties, we eagerly await the Eleventh Circuit's decision and whether the majority decision in *Polansky* will support a conclusion that relators do not exercise significant control over FCA cases in the context of the Appointments Clause challenge to the FCA's *qui tam* provision. Regardless of the appellate court's ruling, the losing side is likely to petition SCOTUS for a writ of certiorari because a ruling that whistleblowers must be appointed would fundamentally change FCA litigation. Stay tuned.

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