Blog Post

Control Was the Question, Continuity Was the Answer: The Eleventh Circuit's *Zafirov* Decision Upholds the FCA's *Qui Tam* Provisions

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When the three-judge panel of the Eleventh Circuit Court of Appeals heard oral argument last December, the word repeated through the courtroom was control. On September 1, 2026 the panel handed down a decision in which control plays almost no part at all. In *United States ex rel. Zafirov v. Florida Medical Associates, LLC* (*Zafirov*),[1] the appellate court vacated the first-ever district court ruling that the whistleblower (or *qui tam*) provisions of the federal False Claims Act (FCA) are unconstitutional because they violate the Appointments Clause of the U.S. Constitution. But the court's opinion did not address whether the executive branch retains sufficient control over relators. Instead, the court concluded that relators never hold anything that looks enough like a continuing office to require an appointment in the first place. So continuity (or the lack thereof), not control, carried the day.

Writing for a unanimous panel, Circuit Judge Elizabeth L. Branch concluded that FCA relators (private whistleblowers who bring fraud suits on the government's behalf) "are not officers of the United States because they do not occupy a continuing position established by law."[2] The decision vacates a September 2024 order by U.S. District Judge

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Kathryn Kimball Mizelle of the Middle District of Florida,[3] which had been the first federal court decision to find the FCA's *qui tam* provisions to be unconstitutional.

The opinion's route to that result leaves the broader Article II fight unresolved. The district court addressed only the Appointments Clause even though the defendants also challenged the *qui tam* provisions under the Take Care Clause and the Vesting Clause below. Because those arguments did not appear in the district court's order granting the defendants' judgment on the pleadings motion, the Eleventh Circuit remanded them to the district court for its consideration.

How We Got Here

Zafirov arose from a 2019 *qui tam* case filed by Dr. Clarissa Zafirov, a physician who claimed that her former employer (and related entities) knowingly submitted false Medicare diagnosis codes to inflate government reimbursements. The government initially declined to intervene and later entered the case solely to defend the constitutionality of the *qui tam* provisions after the defendants moved for dismissal on Article II grounds.

The Appointments Clause of Article II governs how "Officers of the United States" must be appointed. Principal officers require appointment by the president with the advice and consent of the Senate, while Congress may permit inferior officers to be appointed by the president alone, the courts, or department heads.[4]

Under the two-part test from *Lucia v. SEC*, an individual qualifies as such an officer if they (1) exercise significant authority pursuant to the laws of the United States and (2) occupy a continuing position established by law.[5] The district court found both prongs satisfied, reasoning that relators exercise enforcement authority comparable to that of FEC commissioners and special prosecutors and that the FCA creates a permanent "office of relator" that exists irrespective of whether any individual occupies it.[6] Because relators are not presidentially appointed, the district court concluded that the *qui tam* provisions of the FCA violate the Appointments Clause and dismissed the case. As we discussed in our October 2024 coverage of the district court's decision, that analysis set the stage for the appellate challenge.

The Eleventh Circuit's Decision

Reviewing the constitutionality of the statute de novo, the Eleventh Circuit disagreed with the district court. The Eleventh Circuit found that a relator did not occupy a "continuing position," finding it unnecessary to reach the "significant authority" question.[7]

Applying Supreme Court guidance,[8] the panel evaluated three characteristics of a relator's role: tenure, emolument, and the nature of the relator's duties. With regard to tenure, the court found that a relator's role is "occasional and temporary" rather than "permanent" because it lasts only for the length of a single case.[9] The court reasoned that a relator may bring multiple cases in a year or none at all, that a relator need not maintain a place of business, and that a dismissal of a relator's case (by the government, a court, or by settlement) means the relator has no remaining duties.

On emoluments, the court held that a relator's entitlement to an award fee (in the form of a one-time share of any recovery when successful) does not constitute a "continuing emolument" sufficient to trigger Article II. The court also explained that a relator does not occupy a funded position necessitating a regular appropriation and works only intermittently when there is an active claim.[10] Furthermore, the court emphasized that a relator's pay, if any, is entirely contingent on success.

Finally, with regard to the nature of a relator's duties, the court reasoned that a relator occupies a personal role that cannot be assumed by another person. If a relator dies or enters bankruptcy, the claim continues through the relator's estate, not by a successor.[11]

From Control to Continuity

After listening to the Eleventh Circuit oral argument, we wrote in our January 2026 blog that the key point for all who listened was control. The panel pressed both sides on how much authority the Department of Justice really retains over a declined case, on what the liberal dismissal power confirmed in *United States ex rel. Polansky v. Executive Health Resources, Inc.* means in practice, and whether a relator can fairly be described as supervised at all. The argument and the opinion are less at odds than they may first appear. In hindsight, after dispensing with the Appointments Clause issue, the court's attention to the question of control may be a hint from the Eleventh Circuit of the road the constitutionality question needs to travel next.

Defendants' Take Care Clause and Vesting Clause Arguments Remain

Although significant, the ruling is narrow in that the Eleventh Circuit only resolved the Appointments Clause argument. Two additional Article II arguments remain on remand.

First, the Take Care Clause requires the president to "take Care that the Laws be faithfully executed" and vests supervisory authority over law enforcement in the executive branch alone.[12] The defendants argue that *qui tam* relators wield executive enforcement power by bringing civil suits in the government's name, seeking treble damages for the public fisc, and binding the government through judgments without meaningful executive oversight.

The second is the Vesting Clause, which provides that "[t]he executive Power shall be vested in a

President of the United States of America."[13] Defendants argued that permitting private relators to initiate and control civil enforcement actions on behalf of the United States unconstitutionally transfers a core executive function to unaccountable private actors.

These arguments strike at the heart of whether Article II can be reconciled with the *qui tam* provisions of the FCA. The relator will likely counter, as she did in her appellate briefing, that the *qui tam* provisions actually *enhance* executive power rather than diminish it by giving the executive branch a third enforcement option: permitting a knowledgeable private plaintiff to pursue an action using private resources, subject to continuing government oversight, when the government itself lacks the resources to do so.

Notably, the government itself acknowledged in its reply brief that if Congress' use of the *qui tam* mechanism "were a recent development," the differences between *qui tam* suits and ordinary private enforcement actions "would give rise to substantial questions" about whether the provisions are consistent with the Vesting and Take Care Clauses. Put another way, the government's perspective appears to be that *stare decisis* militates in favor of upholding the *qui tam* provisions even if Article II does not.

What's Next?

The *Zafirov* saga is not over yet. The defendants retain two constitutional theories to pursue before the district court on remand, and a second appeal following a final judgment could present the full package of Article II issues to either the full Eleventh Circuit or the Supreme Court.

The Eleventh Circuit's decision does not create a circuit split for now as it aligns with every other circuit to have considered the question, but signals of the Supreme Court's interest in this issue have been building steadily. As we discussed in our June 2023 blog coverage, Justice Thomas' dissent in *Polansky* expressly questioned whether the FCA's *qui tam* provisions survive Article II scrutiny.[14] Justices Kavanaugh and Barrett wrote separately to acknowledge that the *qui tam* provisions raise substantial constitutional questions under Article II.[15] In February 2025, Justice Kavanaugh reiterated that view in a concurrence joined by Justice Thomas in *Wisconsin Bell, Inc. v. United States ex rel. Heath*, urging the Court to "consider the competing arguments on the Article II issue" in "an appropriate case," even though constitutional questions were not then before the Court.[16]

Qui Tam Enforcement Is Safe, For Now

For healthcare organizations and other entities subject to FCA exposure, the Eleventh Circuit's decision means near-term confirmation that the *qui tam* enforcement framework remains intact. Even if a future court were to find the *qui tam* provisions inconsistent with the Vesting or Take Care Clauses, the government has argued that the appropriate remedy would be to sever the statutory constraints on government control over *qui tam* litigation — not to invalidate the provisions altogether — potentially preserving private enforcement in a restructured form with greater executive oversight.

The stakes of this constitutional debate are underscored by the scale of FCA enforcement: according to DOJ statistics released in January 2026, total FCA recoveries now exceed $85 billion since 1986, with fiscal year 2025 alone producing a record $6.8 billion in settlements and judgments and a record 1,297 new *qui tam* suits filed — the highest single-year totals in the statute's history. That enforcement activity will continue unimpeded in its current form for the foreseeable future. Organizations in active litigation should ensure that *qui tam* defense strategies account for the evolving constitutional landscape.

We will continue to monitor this case and related developments closely, including the remand proceedings where the Take Care and Vesting Clause arguments could generate a new round of constitutional uncertainty.

[1] *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, No. 24-13581 (11th Cir. Sept. 1, 2026).

[2] *Zafirov*, No. 24-13581, slip op. at 3.

[3] *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 751 F. Supp. 3d 1293 (M.D. Fla. 2024).

[4] U.S. Const. art. II, § 2, cl. 2.

[5] *Lucia v. SEC*, 585 U.S. 237, 245 (2018).

[6] *Zafirov*, 751 F. Supp. 3d 1293, 1313-17 (M.D. Fla. 2024).

[7] *Zafirov*, No. 24-13581, slip op. at 8.

[8] *Auffmordt v. Hedden*, 137 U.S. 310 (1890).

[9] *Zafirov*, No. 24-13581, slip op. at 10.

[10] *Zafirov*, No. 24-13581, slip op. at 11-12.

[11] *Zafirov*, No. 24-13581, slip op. at 12-13.

[12] U.S. Const. art. II, § 3.

[13] U.S. Const. art. II, § 1, cl. 1.

[14] *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419, 449 (2023) (Thomas, J., dissenting).

[15] *Id.* at 442 (Kavanaugh, J., joined by Barrett, J., concurring).

[16] *Wisconsin Bell, Inc. v. United States ex rel. Heath*, 604 U.S. 140, 167 (2025) (Kavanaugh, J., joined

by Thomas, J., concurring).
