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ALERT MEMORANDUM

Eleventh Circuit Upholds Constitutionality of FCA's *Qui Tam* Provisions, But Their Future Remains Uncertain

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Eleventh Circuit Rejects Appointments Clause Challenge

On September 1, 2026, the United States Court of Appeals for the Eleventh Circuit published a highly anticipated opinion in *United States ex rel. Zafirov v. Florida Medical Associates, LLC, et al.*,[1] concluding that the False Claims Act's (FCA) *qui tam* provisions did not violate the Constitution's Appointments Clause. In so holding, the court declined to address the remaining constitutional challenges at issue and instead remanded for the district court to decide in the first instance whether the same provisions violated the Vesting and Take Care Clauses.

The case began in 2019, when a private individual (relator) brought suit on behalf of the United States against her employer and related entities for allegedly engaging in Medicare fraud. The defendants moved to dismiss, arguing that the FCA's *qui tam* provisions are unconstitutional under (1) the Appointments Clause, (2) the Take Care Clause, and (3) the Vesting Clause.

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[1] *United States ex rel. Zafirov v. Florida Medical Associates LLC, et al.*, No. 24-13581 (11th Cir.) (Sep. 2, 2026).

The district court held that the *qui tam* provisions violate the Appointments Clause, and are therefore unconstitutional, without addressing the Take Care or Vesting Clause arguments. The relator appealed, arguing that the Appointments Clause does not require *qui tam* plaintiffs to be presidentially appointed because (1) relators are private parties pursuing a private interest and do not exercise executive power; (2) relators do not exercise significant authority; and (3) relators do not occupy a continuing position.

The Eleventh Circuit agreed in part, holding that relators "do not hold a continuing position, which is sufficient to determine that relators are not officers who must be presidentially appointed."[2] The court considered four factors, which all supported the holding: (1) *permanence* – the relator's tenure is temporary, lasting only the duration of the case; (2) *duration* – the role does not extend past case conclusion; (3) *emoluments* – relators receive at most a one-time payment upon successful judgment; and (4) *duties* – the relator's role is personal and cannot be assumed by anybody else.[3]

The Eleventh Circuit therefore reversed, holding that the FCA's *qui tam* provisions do not violate the Appointments Clause, and remanded for the district court to address the Take Care Clause and Vesting Clause arguments. Notably, the Eleventh Circuit did not address whether the relator exercised significant executive authority, whereas the district court had already determined that the relator exercised "core executive power"—leaving the law's challengers with some potential hope for success on remand.

In reaching this result, the Eleventh Circuit joined every other circuit to have addressed challenges to the FCA's *qui tam* provisions' constitutionality in rejecting such challenges.

Context and Other Litigation Challenging FCA's *Qui Tam* Provisions

In 2023, the Supreme Court issued a ruling regarding the government's ability to file a motion to dismiss in a *qui tam* FCA lawsuit. In his dissent in that case, Justice Thomas argued that "[t]here are substantial arguments that the qui tam device is inconsistent with Article II… [which appear to demonstrate] that Congress cannot authorize a private relator to wield executive authority to represent the United States' interests in civil litigation."[4] In a concurrence, Justices Kavanaugh and Barrett agreed with Justice Thomas, noting that "the Court should consider the competing arguments on the Article II issue in an appropriate case."[5]

While *Zafirov* will remain a closely watched case as the district court considers the Take Care Clause and Vesting Clause arguments on remand, the encouragement by three Supreme Court justices to invite challenges to the constitutionality of the FCA's *qui tam* provisions means that *Zafirov* is unlikely to be the last or only word on the subject. Although the Eleventh Circuit's decision likely delays the Supreme Court's opportunity to address the issue—assuming the law's challengers do not successfully seek certiorari on the Appointments Clause holding—a few other developments at the circuit level merit following:

Third Circuit

On March 18, 2026, the Third Circuit heard oral arguments in the appeal of a $1.64 billion *qui tam* jury award.[6] The defendant argued that the *qui tam* provisions violate the Appointments Clause, Take Care Clause, and Vesting Clause. The matter has since been referred to mediation, with an uncertain timeline and outcome.

Fifth Circuit

Several judges of the Fifth Circuit have indicated a willingness to reconsider the circuit's precedent affirming the *qui tam* provisions' constitutionality. For

[2] *Id.*
[3] *Id.*
[4] *United States ex rel. Polansky v. Exec. Health Resources, Inc.*, 599 U.S. 419, 449–50 (2023) (Thomas, J., dissenting).
[5] *Id.* at 442 (Kavanaugh, J., concurring).
[6] *United States v. Janssen Prods.*, No. 25-1818 (3d Cir. 2025).

example, in a June 2025 concurrence, Judge Stuart Kyle Duncan noted the "constitutional flaws in the FCA's *qui tam* device," citing Justice Thomas's stance that "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."[7] Then, in a November 2025 concurrence, Judge James Ho stated that he wanted the court to "revisit whether there are serious constitutional problems with the *qui tam* provisions of the False Claims Act" when an appropriate case arises. These invitations will likely lead to the circuit facing renewed constitutional challenges in the near term.

Sixth Circuit

In January 2026, the Sixth Circuit denied a petition for interlocutory appeal in *United States ex rel. Murphy v. TriHealth, Inc.*, reasoning that the circuit had previously held that the *qui tam* provisions of the FCA were constitutional and that revisiting the issue was unwarranted.[8]

Takeaways

For now, the FCA's *qui tam* provisions remain intact, but the separate writings of several sitting Supreme Court justices indicating an openness to review in this area, as well as several circuit judges' writings positing skepticism of the constitutionality of the statutory scheme, mean that uncertainty will prevail for the time being. Going forward, government contractors facing *qui tam* FCA claims—particularly in cases where the government has declined to intervene—should be sure to preserve arguments that the *qui tam* provisions are unconstitutional under the Appointments Clause, Take Care Clause, and Vesting Clause.

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[7] *United States ex rel. Montcrief v. Peripheral Vascular Associates, P.A.*, 133 F.4th 395, 410 (5th Cir. 2025) (citing *Polansky*, 599 U.S. at 449 (Thomas, J., dissenting)).

[8] *United States ex rel. Murphy v. TriHealth, Inc. et al.*, 2025 WL 2104279 (S.D. Ohio July 28, 2025), *appeal denied*, No. 25-0306 (6th Cir. 2026).