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Zafirov Joins the Qui Tam Consensus: What Now for Supreme Court Review?

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In a much-anticipated decision, the Eleventh Circuit has now joined four other circuit courts in upholding the qui tam provisions of the False Claims Act (FCA). In *Zafirov v. Florida Medical Associates, LLC*, the Eleventh Circuit reversed the district court's holding that the qui tam provisions of the FCA violate the Appointments Clause of the United States Constitution.^[1] The court held that relators do not occupy a continuing position established by law, joining the Fifth, Sixth, Ninth, and Tenth Circuits. Many commentators had viewed the district court's bold ruling as a potential vehicle for Supreme Court review. But, as discussed below, the five-circuit consensus may make that prospect less likely rather than more, and the constitutional story is far from over, with the Take Care Clause and Vesting Clause challenges still to be resolved on remand.

Background: The FCA's Qui Tam Framework

The FCA's qui tam provisions have long generated constitutional debate because of the tension at their core: a private relator initiates and may litigate an enforcement action in the government's name, yet the relator is not appointed by the President or subject to direct executive supervision. The government has tools through which it can exercise substantial control over these actions, including the ability to seek dismissal of relators' cases. Indeed, just weeks after the *Zafirov* decision, the Department of Justice (DOJ) revised the Justice Manual on September 18, 2026, to instruct government attorneys to consider seeking dismissal of qui tam actions whenever DOJ declines to intervene, which is a signal that the government intends to exercise its gatekeeping authority more assertively.

But the government has historically been reluctant to use that authority, and relators are increasingly prosecuting FCA cases on their own. In 2025, relators filed a record 1,297 qui tam suits, and for the first time in the health care sector, recoveries in cases where the government declined to intervene (\$2.27 billion) exceeded recoveries in cases where it joined (\$2.23 billion). The relator's compensation in those

cases is contingent on success, not drawn from any public appropriation. It is this combination of private initiation, relatively limited government oversight, and contingent compensation that has made the qui tam framework a recurring target of Article II challenges.

The District Court's Decision

In 2019, Dr. Clarissa Zafirov sued her employer, Florida Medical Associates, known as VIPcare, and related entities, alleging that they submitted false diagnosis codes to obtain excessive Medicare reimbursement. In 2024, the defendants moved for judgment on the pleadings or dismissal, raising three Article II challenges: the Appointments Clause, the Take Care Clause, and the Vesting Clause.

District Judge Mizelle, a former clerk to Justice Clarence Thomas, dismissed the action on Appointments Clause grounds, holding that a relator is an officer of the United States who must be presidentially appointed. The opinion drew heavily on the separation-of-powers reasoning Justice Thomas articulated in his dissent in *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023), a case in which the Supreme Court addressed the government's authority to dismiss qui tam actions over a relator's objection. The district court did not, however, reach the Take Care or Vesting Clause arguments.

The Eleventh Circuit's Appointments Clause Analysis

The court assumed without deciding that *Lucia v. SEC*^[2] supplies the applicable framework, under which an officer must occupy a continuing position established by law and exercise significant authority under federal law. The court held that the first requirement was dispositive and, as such, did not decide whether relators exercise significant authority, exercise executive power, or act for private rather than public interests.

The court examined the characteristics that distinguish a public office from a temporary, private role: tenure, duration, emolument, and duties. On each factor, the court concluded that relators fell short. A relator's involvement is tied to a single case and ends when it does. The relator receives no government salary or regular appropriation, only a contingent share of any recovery. And the relator's duties are personal: if the relator walks away, no one steps into the role.

The court also rejected the notion of a permanent "office of relator" that exists in the statute waiting to be filled. The proper inquiry, the court held, is whether the individual occupies a continuing position, not whether Congress created an abstract opportunity that someone could theoretically step into. The Eleventh Circuit therefore held that relators do not occupy a continuing position and are not officers subject to the Appointments Clause.

Next Stop, Supreme Court?

Five circuits—the Fifth, Sixth, Ninth, Tenth, and now the Eleventh—have now upheld the FCA's qui tam provisions against the Appointments Clause challenge. That unanimity does not make Supreme Court review impossible, but it eliminates the most well-traveled path to certiorari. Supreme Court Rule 10 identifies a conflict among the circuits as a principal reason for granting review. After *Zafirov*, no such conflict exists on the Appointments Clause question.

The lack of a split is especially noteworthy because the Supreme Court has already signaled interest in the broader constitutional issues. In his dissent in *Polansky*, Justice Thomas argued that allowing private relators to exercise executive litigation authority on behalf of the United States is inconsistent with Article II's separation of powers. Justice Kavanaugh, in a concurrence joined by Justice Barrett, wrote that there are "substantial arguments" that qui tam actions are inconsistent with Article II and suggested that the Court should address those arguments in a future case. Those opinions preserve the issue's constitutional importance, but they are not a holding that the FCA is unconstitutional.

For now, however, *Zafirov* may make Supreme Court review less likely, not more. The Court could grant review to resolve an important constitutional question even without a circuit conflict, particularly if the Eleventh Circuit's remand produces a developed ruling on the Take Care or Vesting Clause theories. But the absence of a split means that a petition would ask the Court to displace a consistent five-circuit consensus on the Appointments Clause. The more immediate path to Supreme Court review may therefore run through the unresolved Article II questions rather than through the Appointments Clause issue that *Zafirov* decided.

The pending Third Circuit appeal in *United States ex rel. Penelow v. Janssen Products, LP*^[3] could change that calculus. That case involves an appeal from a \$1.64 billion jury verdict in a non-intervened qui tam action and presents all three Article II challenges. The Third Circuit heard oral argument in March of this year, before a panel consisting of one Trump and two Biden appointees. A decision striking down or limiting the qui tam provisions would create a circuit split that does not currently exist and would likely accelerate the path to the Supreme Court. A decision upholding them would add a sixth circuit to the consensus.

Unresolved Constitutional Questions

The qui tam provisions are not out of the woods yet. The Eleventh Circuit remanded the Take Care Clause and Vesting Clause arguments to the district court. The Take Care Clause argument asks whether the President can faithfully execute the laws when a private relator may initiate and litigate an enforcement action without direct presidential supervision or control. The Vesting Clause argument asks whether the executive power to enforce federal law may be exercised by a private party when Article II vests that power in the President. These are not merely alternative formulations of the Appointments Clause question. They focus on the allocation and supervision of executive power, even if a relator is not an officer.

The remand also means that *Zafirov* should not be read as a complete constitutional endorsement of qui tam litigation. The Eleventh Circuit held only that the relator in this framework does not occupy a continuing position for Appointments Clause purposes. The remaining constitutional questions are now back with Judge Mizelle to consider on remand.

^[1] No. 24-13581, 2026WL2581886 (11th Cir. Sept. 1, 2026).

^[2] 585 U.S. 237 (2018).

[3] No. 25-1818.

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