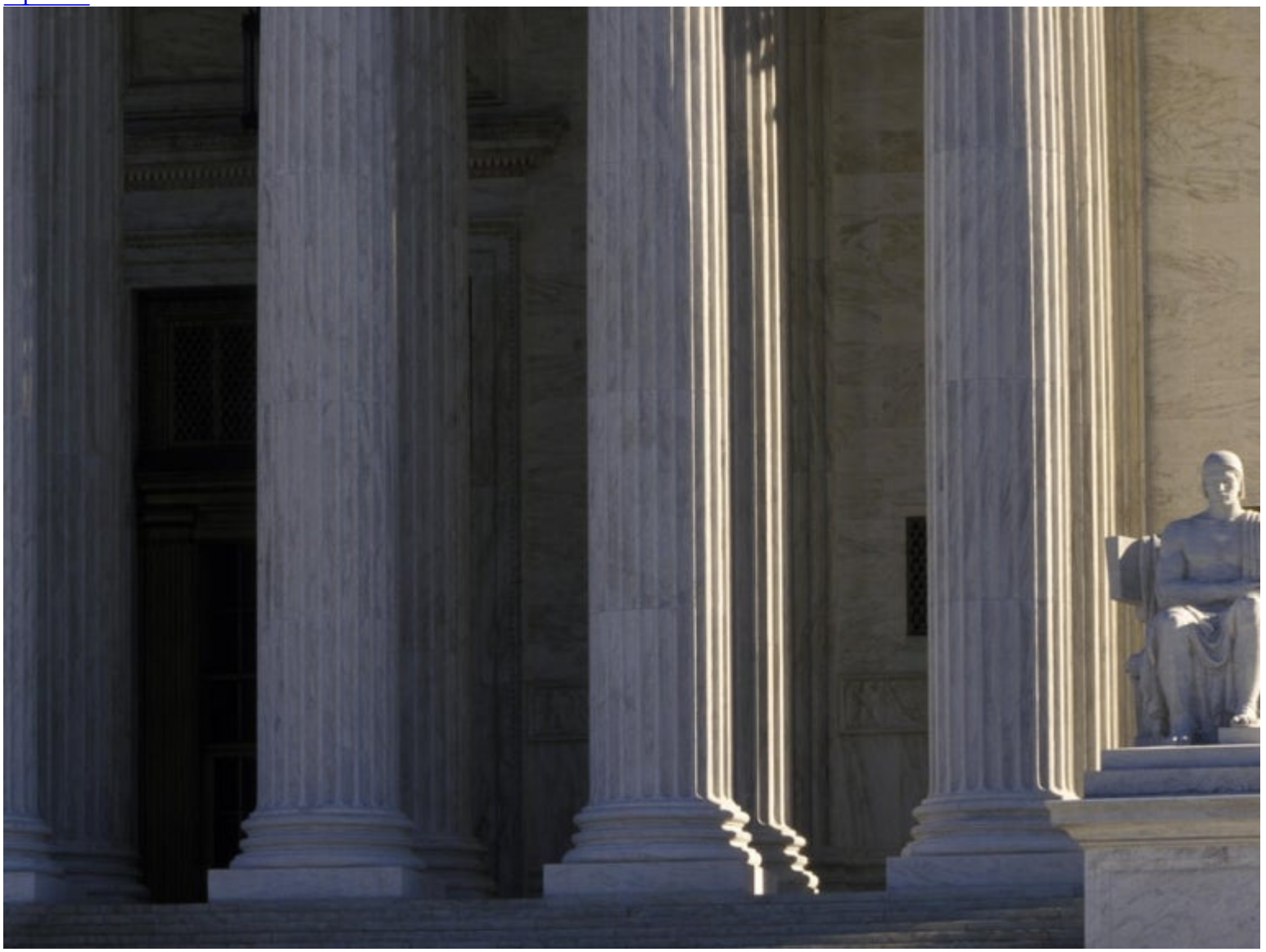
Updates



A recent Florida district court decision declared that the False Claims Act's (FCA) *qui tam* provision violates the Constitution by vesting executive power in private whistleblowers (relators) that have not been appointed by the president.

It is the first decision of its kind and a sharp break from past precedent, and it signals that litigation over the constitutionality of *qui tam* lawsuits is likely to continue in FCA cases.

In its September 30, 2024, opinion in *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, the U.S. District Court for the Middle District of Florida held that the FCA's *qui tam* provision allowing relators to bring lawsuits against defendants violates the Appointments Clause in Article II of the Constitution. Judge Kathryn Kimball Mizelle wrote for the court that relators pursuing FCA actions against defendants act as officers of the

United States that therefore must be appointed by the president. According to her decision, allowing relators to bring FCA actions alleging that defendants have submitted false claims to the government "directly defies the appointments clause by permitting unaccountable, unsworn, private actors to exercise core executive power with substantial consequences to members of the public."

Litigation over the constitutionality of *qui tam* suits has increased since the Supreme Court of the United States' decision in *United States ex rel. Polansky v. Executive Health Resources, Inc.* (No. 21-1052), in which Justice Clarence Thomas, joined by two other justices, issued a dissenting opinion suggesting that the *qui tam* statute may violate Article II of the Constitution and encouraging the Supreme Court to review the issue in the future. Until now, each district court that addressed the question had reaffirmed the statute's constitutionality. *Zafirov* will likely give rise to more litigation and arguments about the viability of the *qui tam* device.

In this Update, we examine the *Zafirov* decision and its implications in future cases.

Background: The *Qui Tam* Provision and the Constitutional Issue

A Civil War-era civil statute to combat fraud against the government, the FCA allows *qui tam* relators to bring a lawsuit in the name of the United States against defendants alleging that a defendant presented or caused to be presented a false or fraudulent claim for payment to the government. The U.S. Department of Justice (DOJ) can initiate FCA actions on behalf of the government, but *qui tam* suits are the source of the majority of lawsuits under the FCA and produce billions of dollars in recoveries every year. Relators are eligible to recover between 15% and 30% of any recovery to the government in any settlement or judgment under the FCA.

Justice Thomas' dissenting opinion in *Polansky* revived arguments challenging the FCA's *qui tam* provisions. In *Polansky*, the majority opinion written by Justice Elena Kagan held that the government may intervene in a *qui tam* action at any time and move to dismiss under a deferential standard. In his dissenting opinion, Justice Thomas expressed his disagreement with the majority's position and suggested that the *qui tam* provisions in the FCA are inconsistent with Article II of the Constitution. Justice Thomas wrote that relators may not represent the interests of the United States in litigation and that allowing a private citizen to bring a lawsuit "for vindicating public rights" is an executive function that may only be carried out by an officer of the United States under the Appointments Clause. Justice Thomas reasoned that since a relator is not an officer of the United States, they should not have authority to "represent the United States' interests in civil litigation." Justice Brett Kavanaugh wrote a brief concurring opinion, joined by Justice Amy Coney Barrett, stating that he agreed with Justice Thomas that there are "substantial arguments" that the *qui tam* provisions are inconsistent with Article II of the Constitution and that the Court should consider the issue "in an appropriate case." The remaining six justices did not address the constitutional issue.

Since *Polansky*, defendants have raised the constitutional issue in several cases. However, apart from *Zafirov*, these arguments have been unsuccessful so far. They are not writing on a clean slate. In decisions that pre-date *Polansky*, the U.S. Courts of Appeals for the Fifth, Sixth, Ninth, and Tenth Circuits all rejected constitutional challenges to the FCA's *qui tam* provisions. The cases emphasize that the government retains significant authority in *qui tam* cases even when it does not intervene in the action and take it over. The Fifth Circuit in *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (*en banc*) held that the *qui tam* statute does not violate the Appointments Clause because, even in declined cases, the government has "a number of control mechanisms," such as the power to veto settlements and dismiss the suit over the relator's objections. Ruling similarly, the Ninth Circuit explained that a relator, who litigates "only a single case," does not have "primary responsibility" for enforcing the FCA and does not exercise authority so "significant" that the Constitution only permits an officer of the United States to exercise it. *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 758–59 (9th Cir. 1993).

Other than *Zafirov*, there have been five district court decisions since *Polansky* addressing the Appointments Clause issue, and in each of those cases, the court rejected the argument that the *qui tam* statute was unconstitutional.[1] In these cases, the courts distinguished relators from executive officers subject to the Appointments Clause. They explained that relators do not hold unchecked power, they hold temporary positions limited to one lawsuit, and the government exercises significant control over all aspects of the lawsuit.

The *Zafirov* Case—Background and Holding

Like most FCA cases, *Zarifov* is a healthcare case. In 2019, plaintiff Clarissa Zafirov filed a *qui tam* suit against several defendants, including her employer, a healthcare provider, alleging that it had misrepresented patients' medical conditions to Medicare in violation of the FCA. The government declined to intervene in the suit, and Zafirov proceeded to litigate the case on her own (the DOJ monitors cases in which it declines to intervene).

The defendants moved to dismiss her lawsuit, arguing that the *qui tam* provision is unconstitutional. The court agreed. In its decision, the court first noted that to be considered an officer of the United States, an individual must "exercise significant authority pursuant to the laws of the United States" and "occupy a continuing position established by law." Applying this test, the court found that a relator (1) exercises significant authority because the *qui tam* provisions give relators "[t]he power to initiate an enforcement action in the name of the United States to vindicate a public right" and (2) occupies a continuing position because "the office of relator exists whether a person is appointed to that office or not, making that office 'continuous and permanent.'" The court concluded that relators are officers of the United States who must be appointed by the president. Because the FCA does not require any such appointment, the court held, the *qui tam* provisions (31 U.S.C. § 3730(b)) are unconstitutional. In addressing the four circuit courts that had held otherwise, Judge Mizelle noted that these decisions are "non-binding" and, in any event, failed to examine precedent that established enforcement authority as a core executive power. The court rejected arguments citing historical examples of *qui tam* provisions, reasoning that the "historical pedigree of the *qui tam* provisions does not save" the relator from qualifying as an "officer" of the United States. The court dismissed the lawsuit.

The Road Ahead

The *Zafirov* decision is the first case to hold that the FCA's *qui tam* provisions are unconstitutional, departing from decades of precedent holding otherwise.

As of this writing, Zafirov has not appealed the district court's decision to the Eleventh Circuit Court of Appeals. For now, *Zafirov* is an outlier. Nevertheless, the decision is likely to invite FCA defendants to raise constitutional challenges in future cases, pressing the issue in motions to dismiss before district courts and ultimately before the U.S. Courts of Appeals. The prospects of the Supreme Court taking up the issue are far from clear. Granting a writ of *certiorari* in the Supreme Court requires the votes of at least four justices, and the Court's willingness to grant *certiorari* in a given case often depends on multiple factors, including the extent to which lower courts are split.

For now, companies that receive government funds should be aware of the emerging caselaw and its implications for enforcement of the FCA. Among the issues that may arise in future cases is the extent to which the constitutional analysis differs depending on whether the government has decided to intervene in a case or declines to do so.

Endnote

[1] *See United States ex rel. Butler v. Shikara*, No. 20-80483-CV, 2024 WL 4354807 (S.D. Fla. Sept. 6, 2024); *United States v. Riverside Med. Grp., P.C.*, No. CV 22-04165 (SDW) (LDW), 2024 WL 4100372 (D.N.J. Sept. 6, 2024); *United States ex rel. Wallace v. Exactech, Inc.*, 703 F. Supp. 3d 1356 (N.D. Ala. 2023); *United States ex rel. Thomas v. Care*, No. CV-22-00512-PHX-JAT, 2023 WL 7413669 (D. Ariz. Nov. 9, 2023); *United States ex rel. Miller v. ManPow, LLC*, No. 221CV05418VAPADSX, 2023 WL 8290402 (C.D. Cal. Aug. 30, 2023).

Authors

Alexander O. Canizares

Partner
ACanizares@perkinscoie.com 202.654.1769

Dozier Gardner Jr.

Associate
DGardner@perkinscoie.com

Explore more in

Government Contracts White Collar & Investigations Litigation

Related insights

Update

Wrapping Paper Series: Issues and Trends Facing the Retail Industry During the Holiday Season

Update

New Statutory Requirements for Commercial Leases: SB 1103 Updates California Laws for Landlords and Commercial Tenants