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How 11th Circ.'s Zafirov Decision Could Upend Qui Tam Cases

By **Kayla Stachniak Kaplan, Meredith Auten and Douglas Baruch** (January 8, 2026, 4:56 PM EST)


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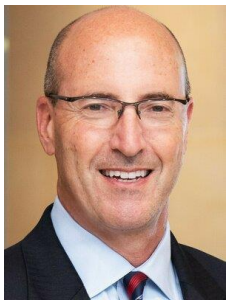
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On Dec. 12, a panel of the U.S. Court of Appeals for the Eleventh Circuit heard oral argument in U.S. ex rel. Zafirov v. Florida Medical Associates LLC. The case is a closely watched appeal of a 2024 opinion from the U.S. District Court for the Middle District of Florida.

The original decision found the qui tam provisions of the False Claims Act unconstitutional under the appointments clause of Article II of the U.S. Constitution.

An Eleventh Circuit affirmance almost certainly would fast-track consideration by the U.S. Supreme Court — particularly in light of three Supreme Court justices recently inviting FCA defendants to raise this constitutional question, as well as activity in the Third, Fifth and Sixth Circuits over the last year.

In the district court proceeding, U.S. District Judge Kathryn Kimball Mizelle found that relators are "officers," whose self-appointment through the unrestricted filing of FCA qui tam actions in the name of the U.S. violates Article II.[1]

Judge Mizelle is a former law clerk to Supreme Court Justice Clarence Thomas, and her reasoning closely tracks the Thomas dissent in U.S. ex rel. Polansky v. Executive Health Resources. That 2023 case reignited this constitutional question, two decades after several federal circuit courts had reasoned that the qui tam provisions do not violate Article II.[2]

In their appellate briefing, the U.S. Department of Justice and the relator, Clarissa Zafirov, challenged the notion that a relator is an unappointed officer for appointments clause purposes, as Judge Mizelle concluded.

They also challenged the contention — which Judge Mizelle did not reach — that the qui tam provisions violate Article II's vesting and take care clauses, because they do not allow for adequate executive supervision of relators necessary to ensure that the laws are faithfully executed.

Reflecting the significance of these questions, more than a dozen individuals and organizations filed amicus briefs, including Sen. Chuck Grassley, R-Iowa, advocating constitutionality, and the U.S. Chamber

of Commerce supporting the defendant and the district court's decision.

Holdings of Other District and Circuit Courts

Following her decision in Zafirov, Judge Mizelle also dismissed another qui tam action as unconstitutional in her May 2025 ruling in Gose v. Native American Services Corp.[3] But the rationale for those two Middle District of Florida decisions has not been adopted by any other court to date.

To the contrary, every other district court to consider the question on the merits post-Polansky has rejected the Article II challenge. This includes rulings from other district courts within the Middle District of Florida — for example, U.S. Magistrate Judge Daniel Irick's May 2025 ruling in U.S. v. North Brevard County Hospital District.

Now two other circuit courts are poised to address the constitutional question. The issue has been briefed before the U.S. Court of Appeals for the Third Circuit in U.S. ex rel. Penelow v. Janssen Products LP — notable because the Third Circuit has not previously considered the question.[4]

And an interlocutory appeal request is pending before the U.S. Court of Appeals for the Sixth Circuit after a district court judge certified the Article II question in two cases — U.S. ex rel. Shahbabian v. TriHealth Inc. and U.S. ex rel. Murphy v. TriHealth Inc.[5] — in July, notwithstanding the Justice Department's argument that the issue already is settled in that circuit.[6]

A 2001 en banc decision by the U.S. Court of Appeals for the Fifth Circuit, Riley v. St. Luke's Episcopal Hospital, previously rejected an Article II challenge to the qui tam provisions.[7] But two Fifth Circuit judges in separate 2025 cases have raised the issue again.

Judge James C. Ho, in a concurring opinion in U.S. ex rel. Gentry v. Encompass Health Rehabilitation Hospital of Pearland LLC, and Judge Stuart Kyle Duncan, in a concurring opinion in U.S. ex rel. Montcrief v. Peripheral Vascular Associates PA, signaled that they would likely find the qui tam provisions unconstitutional, and encouraged reevaluation of the question.[8]

Similarly, in In re: Novartis Pharmaceuticals Corp., two Texas Supreme Court justices, Justices Evan Young and James Sullivan, signaled in October that the state constitutionality of the qui tam provisions of the Texas false claims law, which are analogous to those in the federal FCA, should be considered in a future case.[9]

Takeaways From the Zafirov Oral Argument

While there is no way to predict the outcome in the Eleventh Circuit based on oral argument alone, questioning by U.S. Circuit Judges Elizabeth Branch and Robert Luck, and U.S. District Judge Federico Moreno of the U.S. District Court for the Southern District of Florida, sitting by designation, generally reflected an openness to taking a fresh look at this constitutional challenge, as opposed to deeming it a settled question.

Indeed, the first question from the bench, by Judge Branch, rebuffed the Justice Department's emphasis on the fact that qui tam provisions have historical precedent and that other circuit courts have rejected Article II challenges.

Judge Branch quickly observed that none of those decisions was recent, and that several Supreme Court

justices — aware of those decisions — think the Article II questions should be revisited.

The panel members came back to Justice Thomas' dissent in Polansky again and again in seeking to understand how attorneys for the U.S., the relator Zafirov, the defendant Florida Medical Associates and the U.S. Chamber of Commerce, arguing as amicus, could square their positions with his analysis, or with what he left out of his analysis.

Overall, the panel questions focused equally on the appointments clause and the vesting and take care clauses. Judges Branch and Luck appeared to have concerns with whether relators occupy "continuing" positions, the second prong necessary for officer status under the appointments clause.

They also expressed concerns about the lack of prior case law addressing the appointments clause in the context of private parties, rather than employees or independent contractors of the government — concerns that could support a finding of no appointments clause violation.

However, they appeared equally concerned with indicators that a relator exercises core executive power, which would implicate potential violations of the vesting and take care clauses without the need to address the "continuing" question under the appointments clause.

The focus by the Justice Department and relator's counsel on the government's ability to intervene in a qui tam action did not appear to assuage the judges' executive power concerns, with Judge Luck focusing instead on a relator's initial filing of suit without preapproval, thereby triggering mandatory government investigation.

The lengthy history of qui tam laws at the time of founding also was given a fair amount of argument time. The panel probed whether that history was meaningful, noting that early qui tam statutes allowed for private parties to bring criminal prosecutions, which cannot be defended as constitutional.

Neither the panel nor the parties focused on the implications of striking the qui tam provisions as unconstitutional, including whether any constitutional defect could be remedied — for instance, by requiring presuit approval from the Justice Department, or some other legislative fix. Judge Moreno did observe, however, that upholding the Constitution sometimes creates "chaos."

Future Implications

If not stayed pending Supreme Court review or an opportunity for a legislative fix, an Eleventh Circuit finding that the qui tam provisions are unconstitutional would wreak havoc on pending and future qui tam cases, which comprise the vast majority of the FCA docket.

Such a finding would have an immediate impact on cases within the Eleventh Circuit, and lead to a renewed focus on this question in other jurisdictions.

However, this outcome would not affect the Justice Department's affirmative filing of FCA actions. And there are several different paths forward that the Justice Department could take with qui tam cases.

If the Eleventh Circuit's decision allows for it, the Justice Department could attempt to salvage ongoing qui tam cases through intervention. Yet another option for the Justice Department is to create a more traditional whistleblower program that provides monetary incentives for the provision of information that then allows the U.S. to bring suit, similar to other such programs already in place.[10]

Whatever the outcome in the Eleventh Circuit, the question seems destined for Supreme Court review in the near future. As Judge Branch noted in oral argument, three justices have already raised "substantial questions" about the qui tam provisions' compliance with Article II.[11]

In the long term — either to counter an adverse decision, or in anticipation of one — Congress will likely consider adjustments to the statutory provisions to continue to incentivize and empower whistleblowers within the bounds of any constitutional constraints. For example, Congress could implement mechanisms for preapproval from the Justice Department before a relator is permitted to actually file suit.

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[1] U.S. ex rel. Zafirov v. Fla. Med. Assocs. LLC, No. 8:19-cv-01236 (M.D. Fla. Sept. 30, 2024).

[2] U.S. ex rel. Polansky v. Exec. Health Res. Inc., 599 U.S. 419, 442-52 (2023) (Thomas, J., dissenting).

[3] Gose v. Native Am. Serv. Corp., No. 8:16-cv-03411 (M.D. Fla. May 29, 2025), appeal pending, No. 25-12009 (11th Cir.).

[4] Penelow v. Janssen Prods. LP, No. 25-01818 (3d Cir.).

[5] In re: Trihealth Inc., No. 25-0307 (6th Cir.).

[6] U.S. ex rel. Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1040-42 (6th Cir. 1994).

[7] Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 753-58 (5th Cir. 2001) (en banc).

[8] U.S. of Am. ex rel. Gentry v. Encompass Health Rehab. Hosp. of Pearland LLC, No. 25-20093, 2025 WL 3063921, at *5 (5th Cir. Nov. 3, 2025) (Ho, J., concurring); U.S. ex rel. Montcrief v. Peripheral Vascular Assocs. PA, 133 F.4th 395, 410 (5th Cir. 2025) (Duncan, J., concurring).

[9] In re: Novartis Pharms. Corp., No. 24-0239, 722 S.W.3d 720 (Tex. Oct. 24, 2025).

[10] See, e.g., Dep't of Justice Corporate Whistleblower Awards Pilot Program (rev. May 12, 2025).

[11] Wis. Bell Inc. v. U.S. ex rel. Heath, 145 S. Ct. 498, 515 (2025) (Kavanaugh, J., concurring) (joined by Thomas, J.); Polansky, 599 U.S. at 442 (Kavanaugh, J., concurring) (joined by Barrett, J.); id. at 442-52 (Thomas, J., dissenting).