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United States District Court in Florida Holds False Claims Act Qui Tam Provision Unconstitutional

On September 30, 2024, a federal district court in Florida held the *qui tam* enforcement provision of the False Claims Act ("FCA"), which permits private citizens to pursue actions in the name of and on behalf of the government, is unconstitutional under Article II's Appointments Clause. Order

Granting a motion for judgment on the pleadings, Judge Kathryn Kimball Mizelle of the Middle District of Florida dismissed the case concluding that the relator was not a proper party to the lawsuit because she was not properly appointed to bring claims on behalf of the United States. The holding closely follows Justice Clarence Thomas's dissent in *United States ex rel. Polansky v. Executive Health Resources,* which discussed why there might be "good reason to suspect that Article II does not permit private relators to represent the United States' interests in FCA suits." 599 U.S. 419, 451 (2023) (Thomas, J., dissenting). Justice Brett Kavanaugh and Justice Amy Coney Barrett also expressed agreement with Justice Thomas's view in a concurrence.

Clarissa Zafirov brought an FCA *qui tam* action on behalf of the United States against her former employer, Florida Medical Associates, LLC. *United States ex rel. Zafirov* v. *Florida Medical Associates, LLC et al.*, No. 8:19-cv-01236 (M.D. Fla.). Zafirov alleged the defendants violated the FCA by misrepresenting patients' medical conditions when submitting claims for payment to Medicare. The government declined to intervene, and Zafirov continued to pursue the lawsuit in her capacity as a relator under the *qui tam* provision of the FCA, which allows relators to obtain up to 30% of the recovery for injuries to the government. After more than five years of litigation, the defendants filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), arguing in part that the FCA's *qui tam* provision violates: (1) the Appointments Clause of

Article II, "because a relator is an improperly appointed officer of the United States;" and (2) the Take Care Clause and Vesting Clause of Article II, because the FCA "den[ies] the President necessary removal authority and sufficient supervisory control over" a relator. The court addressed the defendants' Appointments Clause argument and did not reach the other arguments.

ARTICLE II, SECTION II, THE APPOINTMENTS CLAUSE

Article II of the Constitution requires that all "Officers of the United States" must be appointed consistent with the Appointments Clause. A principal Officer must be nominated by the President and confirmed by the Senate, whereas Congress may vest an inferior Officer's appointment "in the President alone, in the Courts of Law, or in the Heads of Departments." A person is acting as an Officer of the United States, and must be appointed under the Appointments Clause, if: (1) they exercise significant authority pursuant to the laws of the United States; and (2) they occupy a continuing position established by law. Applying the test, Judge Mizelle found that Zafirov was acting as an Officer of the United States in her role as a relator. Because Zafirov was not appointed in accordance with the Appointments Clause, her *qui tam* action was unconstitutional.

WHETHER A RELATOR "EXERCISES SIGNIFICANT AUTHORITY"

Under the first prong of the test for whether a person is acting as an Officer of the United States, a person "exercises significant authority" when they have "the power to initiate an enforcement action in the name of the United States to vindicate a public right." The court concluded that FCA relators fit this definition, comparing them to members of the Federal Election Commission, administrative patent authorities, and SEC administrative law judges. The court also noted that Executive Branch practice confirms this conclusion, because the "United States regularly asserts that presidential exercise of similar authority is core executive power when litigation involves the President's ability to prosecute and exercise enforcement discretion."

The court distinguished cases that Zafirov relied upon and rejected distinctions Zafirov drew between a relator's power and an exercise of significant authority, which included: "(1) a categorical line between civil and criminal law enforcement, (2) a relator's lack of rulemaking or other administrative powers, (3) the fact that a relator pursues ordinarily only one enforcement action rather than many, (4) the Attorney General's ability to intervene or pursue a parallel action and dismiss a relator's suit over objection, and (5) a relator's lack of pre-suit investigatory resources from the government."

Notably, when addressing Zafirov's fourth proposed distinction, Judge Mizelle emphasized the relator's "front-end power" to bring an enforcement action and downplayed the government's ability to control such actions on the back-end. The court noted that:

> …the government's ability to pursue a parallel action and to exert limited control after intervening does not lessen a relator's unchecked civil enforcement authority to initiate an enforcement action. Whether the President exercises sufficient control over a relator is a question better suited to the defendants' other Article II argument [under the Take Care Clause], which I need not reach. But back-end executive supervision—exercised by the government in only a fifth of cases—does not diminish the significance of an FCA relator's front-end power to bring an enforcement action against a private party in federal court on behalf of the United States.

The court concluded that Zafirov was exercising significant authority in her capacity as a relator, and "none of Zafirov's arguments overcome the reality that an FCA relator initiates a lawsuit that 'seek[s] daunting monetary penalties against private parties on behalf of the United States in federal court.'"

WHETHER A RELATOR HAS A "CONTINUING POSITION" ESTABLISHED BY LAW

The second prong of the test for whether a person is acting as an Officer of the United States, the "continuing position" inquiry, "stresses ideas of tenure and duration" and asks whether the individual's statutory duties are "'occasional or temporary' rather than 'continuing and permanent,'" looking at whether the office has "statutorily defined duties, power, and emoluments." The court explained that relators must comply with several statutory duties, enjoy unfettered discretion, and receive monetary compensation if the action succeeds. The court further reasoned that a relator occupies a continuing position, despite the term expiring at the end of a single matter, by analogizing relators to special prosecutors and bank receivers, who are temporary officials wielding core executive power. Moreover, the court acknowledged Second Circuit precedent that recognized officials occupy "a continuing position when 'they wield federal prosecutorial power and hold a position that is not personal to a specific individual and may last for years.'"

HISTORICAL PRACTICE DOES NOT OVERRIDE THE CONSTITUTION'S TEXT

Lastly, the court determined that the Appointments Clause does not contain an exception for the FCA *qui tam* provision and rejected Zafirov's historical arguments to support the *qui tam* provision's constitutionality. The court held that the text of the Constitution controls over contrary historical practices and found that Zafirov "failed to articulate a coherent way for the FCA's qui tam provision to comport with the Appointments Clause."

CONCLUSION

The *Zafirov* decision is the first to strike down the *qui tam* provision of the FCA as unconstitutional, and it breaks from several earlier decisions that have upheld the *qui tam* provision's constitutionality. Indeed, earlier in September, the Southern District of Florida declined to conclude that FCA's *qui tam* provision violated Article II in a similar challenge. *United States ex rel. Butler v. Shikara, et al.,* No. 9:20-cv-80483, slip op. at 25-26 (S.D. Fla. Sept. 6, 2024). Accordingly, an appeal to the Eleventh Circuit in the *Zafirov* case is almost certain.

In addition, Judge Mizelle's decision focused on the Appointments Clause and whether Zafirov was acting as an Officer of the United States, and did not address the Take Care Clause question, which involves whether the FCA gives the President "necessary removal authority and sufficient supervisory control" over a relator. Under Judge Mizelle's Appointments Clause holding, the *qui tam* provisions are unconstitutional because of the relator's role in initiating the lawsuit, so the constitutional defect appears to exist at all stages of the lawsuit. Under the Take Care Clause, in contrast, the government's differing degrees and methods of control over a *qui tam* lawsuit at different stages—while the suit is under seal, for example, compared to after the government has declined to intervene—could be more relevant. The defendants will likely raise the Take Care Clause as an alternative ground for affirmance, so it is possible that the Eleventh Circuit will address that issue as well.

Judge Mizelle's decision follows a recent trend of judicial decisions, including those by the Supreme Court, further defining executive power. While the *Zafirov* decision applies directly only to the parties in that case, it lays the groundwork for similar challenges by defendants in *qui tam* actions around the country. As more courts consider constitutional challenges to *qui tam* actions, it will be important for FCA defendants to keep informed about these potentially far-reaching developments to determine whether a challenge to the *qui tam* provision of the FCA may be strategically advisable in their cases.

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