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Memorandum

The Constitutionality of the False Claims Act *Qui Tam* Provisions Remains Uncertain

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The United States recovers in excess of $2 billion annually through False Claims Act enforcement. The Act is among the United States' most powerful anti-fraud tools. Litigation against companies and investors under the Act is growing, in part, because the *qui tam* provisions of the Act allow private individuals to file litigation in the name of the United States and to obtain a percentage of any recovery. After a series of decisions from the lower federal courts, it is becoming increasingly likely that the Supreme Court will review the constitutionality of the *qui tam* provisions of the Act.

In 2023, three Supreme Court justices opened the door to constitutional challenges to the False Claims Act's *qui tam* provisions, which allow private individuals to bring lawsuits on behalf of the United States to recover damages payable to the government. Last week, Judge Ho of the Fifth Circuit became the latest lower court judge to echo the view that courts should revisit the constitutionality of these provisions.

In *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023) ("*Polansky*"), Justice Clarence Thomas, writing in dissent, argued that the False Claims Act ("FCA") *qui tam* provisions violate Article II of the Constitution. Justice Thomas found that the *qui tam* device improperly empowers private individuals to control and conduct litigation to vindicate public rights—a power that Article II vests exclusively in the Executive Branch. Concurring separately, Justices Kavanaugh and Barrett similarly noted "the Court should consider the competing arguments on the Article II issue in an appropriate case." *Polansky*, 599 U.S. at 442.

Following *Polansky*, one judge in the U.S. District Court for the Middle District of Florida has declared the FCA *qui tam* provisions to be unconstitutional in two separate decisions over the past year. Although other district courts to address the question have largely found that constitutional challenges to the *qui tam* mechanism to be foreclosed by long-standing circuit precedent, a recent concurrence in the Fifth Circuit echoes Justice Kavanaugh and Barret's sentiment that this precedent merits reconsideration.

The FCA allows private individuals, known as "relators," to bring lawsuits in the name of the United States against any person who knowingly presents a false claim for payment to the United States. 31 U.S.C. § 3730(b)(1). To encourage relators to bring suit, a prevailing relator is typically awarded 15 to 30 percent of the government's total recovery, 31 U.S.C. § 3730(d). *Qui tam* complaints are first filed under seal, and the Department of Justice has the option to further investigate the allegations through the full suite of investigative tools, including civil

investigative demands for documents and testimony, and can ultimately intervene in the case and litigate on behalf of the United States. However, if DOJ declines to intervene in the case, the relator can continue with the suit and bind the federal government without direct accountability to anyone in the Executive Branch. As a result, absent intervention by the DOJ, a relator has discretion to decide who to investigate, who to charge in the complaint, which claims to pursue, and whether to appeal.

Judge Kathryn Mizelle of the U.S. District Court of the Middle District of Florida held in two separate cases that the FCA *qui tam* provisions violate Article II's Appointments Clause by permitting "unaccountable, unsworn, private actors to exercise core executive power with substantial consequences to members of the public." In *Zafirov ex rel. United States v. Florida Medical Associates, LLC*, the defendants argued that the relator was an "officer" of the United States for purposes of Article II of the Constitution but was not appointed by the executive branch in accordance with the constitutional requirements. To be an "Officer of the United States," one must exercise significant authority pursuant to the laws of the United States and occupy a continuing position established by law. Officers of the United States are subject to the Appointments Clause, which allows Congress by law to vest the appointment of inferior officers in the President, the head of an executive department, or a court. The FCA, however, permits any "person" to appoint themselves by initiating an enforcement action. Because such self-appointment does not satisfy the Appointments Clause, the FCA's *qui tam* provision is unconstitutional if a relator is an officer of the United States.

In finding that a relator constituted an officer of the United States, Judge Mizelle emphasized that FCA relators occupy a continuing position established by law because they have statutorily defined duties, powers, and emoluments. Echoing Justice Thomas's dissent in *Polanksy*, she found that the power to initiate an FCA action to vindicate the United States' interest was not only significant governmental authority, but a "core" executive power. In *United States ex rel. Gose v. Native Am. Servs. Corp*, Judge Mizelle dismissed another FCA complaint on the same grounds. 2025 U.S. Dist. LEXIS 101549, at *6 (M.D. Fla. May 29, 2025). Both decisions are on appeal to the Eleventh Circuit.

Other district courts, including in the Middle District of Florida, have refused to follow suit, largely finding that the "weight of the law is to the contrary at this time." *United States ex rel. Publix Litig. P'ship, LLP v. Publix Super Mkts., Inc.*, 2025 U.S. Dist. LEXIS 166252, at *7 (M.D. Fla. Aug. 27, 2025). As district courts have explained, most circuits have long-standing precedent upholding "the FCA's *qui tam* provisions as constitutional." *United States of Am. ex rel. Relator LLC v. Tennyson*, 2025 U.S. Dist. LEXIS 194153, at *19-20 (C.D. Cal. Sep. 29, 2025) (noting the Ninth Circuit's "32-year old precedent"); *United States ex rel. Adams v. Chattanooga Hamilton Cnty. Hosp. Auth.*, 2024 U.S. Dist. LEXIS 209546, 2024 WL 4784372, at *3 (E.D. Tenn. Nov. 7, 2024) (finding the Middle District of Florida cases to be "outlier[s] … that whistle[ ] past precedent…."). As the U.S. District Court for the District of Rhode Island found last week, "every circuit court to consider the Appointments Clause issue has ruled precisely the opposite." *United States ex rel. Souza v. Embrace Home Loans, Inc.*, 2025 U.S. Dist. LEXIS 217009, at *2 n.1 (D.R.I. Nov. 3, 2025).

These courts have reasoned that the relator's power to control the litigation is "hardly 'unfettered.'" For example, in October, the U.S. District Court for the Eastern District of Wisconsin explained that 1) a relator must notify the DOJ, which is then given the opportunity to investigate and intervene in the suit; 2) by electing to intervene, the government retains authority to take over the prosecution of the case; and 3) the government can dismiss the action over the objection of the relator. *United States ex rel. Heath v. Wis. Bell, Inc.*, 2025 U.S. Dist. LEXIS 217468, at *33 (E.D. Wis. Oct. 29, 2025). Similarly, the court found that the position of relator was not "continuing" because the action "begins with a particular relator and ends with a particular relator."

Recognizing the hurdle presented by pre-*Polanksy* circuit authority, the Firm argued on behalf of a client in an FCA case earlier this year that the constitutionality of the *qui tam* provision should be certified to the Fifth Circuit for reconsideration. Although that case was resolved before the district court decided our motion, two Fifth Circuit judges have since called for the court to reconsider these constitutional challenges. In March, Judge Stuart Kyle Duncan wrote "separately to point out the constitutional flaws in the FCA's *qui tam* device, which our precedent prevents us from addressing." *United States ex rel. Montcrief v. Peripheral Vascular Assocs., P.A.*, 133 F.4th 395, 410 (5th Cir. 2025). Last week, Fifth Circuit also Judge James C. Ho wrote in a concurring opinion that the court "should revisit whether there are serious constitutional problems with the *qui tam* provisions of the False Claims Act." *United States ex rel. Gentry v. Encompass Health Rehab. Hosp. of Pearland, L.L.C.*, No. 25-20093, 2025 U.S. App. LEXIS 28755, at *12 (5th Cir. Nov. 3, 2025.).

Thus, although district courts are adhering to long-standing circuit-level precedent foreclosing constitutional challenges to the FCA's *qui tam* mechanism, defendants facing FCA claims should consider moving to certify the question to the relevant circuit court of appeals. We will continue to monitor decisions from other federal courts addressing the constitutionality of the *qui tam* provisions.

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