

US Supreme Court Justices Continue to Question Constitutionality of FCA Qui Tam Provision

Justice Kavanaugh issued a concurring opinion in *Wisconsin Bell*, which Justice Thomas joined, to question again whether the False Claims Act qui tam provision violates Article II of the US Constitution.

On February 21, 2025, the US Supreme Court issued a unanimous decision in *Wisconsin Bell, Inc. v. United States ex rel. Heath*,¹ holding that telecommunications providers participating in the federal Education Rate (E-Rate) program, which supports school and library connectivity, can be subject to liability under the False Claims Act (FCA) for excess payouts. Perhaps the most notable aspect of the decision is that Justice Brett Kavanaugh wrote a concurrence, joined by Justice Clarence Thomas, for the singular purpose of reiterating that the FCA “*qui tam* provisions raise substantial constitutional questions under Article II.”² Justice Kavanaugh recognized these constitutionality questions were not before the Court in *Wisconsin Bell*, but concluded by noting that “in an appropriate case, the Court should consider the competing arguments on the Article II issue.”³

Justices Thomas, Kavanaugh, and Barrett previously questioned the constitutionality of the FCA’s qui tam provision in 2023 in *United States ex rel. Polansky v. Executive Health Resources, Inc.*⁴ (See Latham’s Client Alert, [US Supreme Court Upholds Broad, but Not Unfettered, Government Authority to Dismiss FCA Cases.](#))

In *Polansky*, Justice Thomas issued a dissent, joined by Justices Kavanaugh and Barrett, suggesting that the FCA’s qui tam provisions might violate Article II.⁵ He noted that the President alone holds “executive Power” and questioned whether Congress can permit a private whistleblower to “wield executive authority to represent the United States’ interests in civil litigation.”⁶ Justice Thomas did not answer this question but stated that the case should be vacated and remanded for the Third Circuit to consider the disposition of the matter “in light of any applicable constitutional requirements.”⁷ Justice Kavanaugh wrote a separate concurrence in *Polansky*, which Justice Amy Coney Barrett joined, in which he noted agreement with Justice Thomas that there are “substantial arguments” the qui tam provision violates Article II.⁸

Takeaways for FCA Defendants

Justice Kavanaugh’s concurrence in *Wisconsin Bell* reinforces the possibility that the qui tam provision of the FCA could be declared unconstitutional. Below are key strategic considerations for FCA defendants, in light of the Supreme Court’s potential future interest in this issue:

- Defendants in qui tam actions should consider challenging — or at least preserving — a challenge to the constitutionality of the FCA’s qui tam provision, particularly when the government declines to intervene. Notably, in 2024, qui tam actions vastly outnumbered government-initiated FCA actions 979 to 423, setting a new record for qui tam actions.⁹
- Defendants in FCA cases took Justice Thomas’s dissent in *Polansky* as an invitation to challenge the constitutionality of qui tam actions. Several such challenges were unsuccessful.¹⁰ However, in October 2024, Judge Kathryn Kimball Mizelle in the Middle District of Florida issued a first-of-its-kind opinion in *United States ex rel. Zafirov v. Florida Medical Associates LLC*, dismissing a declined qui tam action under the FCA on the basis that its qui tam provision is unconstitutional. (See Latham’s Client Alert, [Middle District of Florida Accepts Justice Thomas’s Invitation: FCA Qui Tam Provision Unconstitutional](#).) The United States and the relator, Zafirov, appealed this decision to the US Court of Appeals for the Eleventh Circuit. The appeal remains pending.
- The Fifth, Sixth, Ninth, and Tenth Circuits previously rejected the Article II challenge to the FCA’s qui tam provision,¹¹ but the First, Second, Third, Fourth, Seventh, Eighth, Eleventh, and D.C. Circuits have yet to address this issue. Preserving arguments regarding the constitutionality of the FCA’s qui tam provision — regardless of circuit — will be particularly important if the Eleventh Circuit affirms Judge Mizelle’s decision. Such an affirmance would create a circuit split and set the stage for a petition for certiorari to the Supreme Court, with the potential for the Supreme Court to grant review and establish a nationwide rule either approving or striking down the qui tam provision.
- FCA defendants opting to bring constitutional challenges should consider the timing for doing so and raise such challenges as early as possible in litigation. In *Zafirov*, the defendants successfully raised their challenge in a motion for judgment on the pleadings while discovery was underway. However, other courts have ruled that such a constitutional challenge is an affirmative defense that defendants must raise in the answer or earlier to avoid forfeiting the defense.¹²
- The government appears to remain committed to defending the constitutionality of the FCA’s qui tam provision. During her confirmation hearing, in response to questions from Senator Chuck Grassley, Attorney General Pam Bondi indicated she would “defend the constitutionality, of course, of the False Claims Act” and said she understands the importance of whistleblowers, the FCA’s protections, and the “money it brings back to our country.”¹³ We expect the US Department of Justice will intervene in more actions to defend the constitutionality of the FCA’s qui tam provision. Latham is watching this space closely for any developments.

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Endnotes

¹ *Wisconsin Bell, Inc. v. United States ex rel. Heath*, No. 23-1127, 2025 U.S. LEXIS 551, 604 U.S. ____ (Feb. 21, 2025).

² *Id.* at *31 (Kavanaugh, J., concurring).

³ *Wisconsin Bell*, 2025 U.S. LEXIS 551 at *31.

⁴ *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419, 442 (2023) (Kavanaugh, J., concurring); *id.* at 449-452 (Thomas, J., dissenting).

⁵ *Polansky*, 599 U.S. at 449 (Thomas, J., dissenting).

⁶ *Id.* at 450.

⁷ *Id.* at 452.

⁸ *Polansky*, 599 U.S. at 442 (Kavanaugh, J., concurring). Notably, Justice Kavanaugh's concurrence in *Polansky* is substantially similar to his concurrence in *Wisconsin Bell*, including the concluding sentence that the Court should consider the competing arguments on the Article II issue in an appropriate case.

⁹ DOJ Fraud Statistics Overview, Oct. 1, 1986 – Sept. 30, 2024, <https://www.justice.gov/archives/opa/media/1384546/dl>.

¹⁰ Since *Polansky*, unsuccessful challenges to the qui tam provision include *United States ex rel. Butler v. Shikara*, No. 9:20-cv-80483, slip op. at 25-26 (S.D. Fla. Sept. 6, 2024); *United States ex rel. Bolinger v. 24th Street, Inc.*, No. 18-cv-15446, 2024 WL 3272828, at *9 n.3 (D.N.J. June 30, 2024); *United States ex rel. Wallace v. Exactech, Inc.*, 703 F. Supp. 3d 1356, 1363-64 (N.D. Ala. 2023); *United States ex rel. Miller v. ManPow, LLC*, No. 2:21-cv-05418, 2023 WL 8290402, at *5 (C.D. Cal. Aug. 30, 2023); *United States ex rel. Thomas v. Care*, No. 22-cv-00512, 2023 WL 7413669, at *4 (D. Ariz. Nov. 9, 2023); *United States ex rel. Shepherd v. Fluor Corporation*, No. 13-cv-02428 (D.S.C. Sept. 13, 2024).

¹¹ See *Riley v. St Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001); *U.S. ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994); *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993); *U.S. ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787 (10th Cir. 2002). These decisions were issued prior to Justice Thomas's dissent last year that called into question the constitutionality of the qui tam provision.

¹² See Order, *Fluor*, No. 13-cv-02428, Dkt. No. 461 (requiring defendants to raise constitutional challenges to the FCA's qui tam provision in their answer).

¹³ Pam Bondi Confirmation Hearing Day 1 Transcript at 42:40 (2025), <https://www.rev.com/transcripts/pam-bondi-confirmation-hearing-day-1>.