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¶ 234 FEATURE COMMENT: Eleventh Circuit Overturns District Court Decision Declaring False Claims Act Qui Tam Provisions Unconstitutional In *U.S. ex rel. Zafirov v. Florida Medical Associates, LLC*

On Sept. 1, 2026, the Eleventh Circuit Court of Appeals issued its long-anticipated decision on the constitutionality of the qui tam provisions of the False Claims Act, overturning the district court and holding that the qui tam provisions of the FCA do not violate Article II's Appointments Clause because relators are not officers of the U.S. who occupy continuing positions established by law. When the district court in *Zafirov* held in September 2024 that the qui tam provisions were unconstitutional, it sent shockwaves through the FCA bar. That decision—if followed widely—could have shut down the engine driving the majority of FCA judgments and recoveries. While the Eleventh Circuit has reversed the lower court decision, the constitutional debate is far from over. The Eleventh Circuit reversed the district court's Appointments Clause analysis, but two other constitutional challenges raised by the *Zafirov* defendants under the Vesting and Take Care Clauses remain unresolved. As of the date of this publication, the defendants have indicated that the district court should proceed with its analysis of the Vesting and Take Care Clauses, that they will not file a petition for certiorari with the Supreme Court at this time, and that they believe the remaining constitutional arguments are fully briefed and ripe for decision at the district court. Whether the relator and the Government agree with those assertions remains to be seen. In either case, we can expect substantial litigation on these issues in the coming years.

The District Court Decision: *U.S. ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 751 F. Supp. 3d 1293 (M.D. Fla. 2024); 66 GC ¶ 273—*Factual and Procedural Background:* In 2019, relator Dr. Clarissa Zafirov sued her employer under the FCA for allegedly misrepresenting patients' medical conditions to Medicare. The Government declined to intervene in the lawsuit, and the relator, Zafirov, litigated the case on behalf of the U.S. for the next five years, driving the litigation in all respects.

In February 2024, the defendants moved for judgment on the pleadings, arguing that the qui tam provisions violated Article II's: (1) Appointments Clause, because relators like Zafirov are unappointed officers of the U.S. that exercise significant federal authority in a continuing position without presidential appointment; (2) Take Care Clause, because the President lacks sufficient supervision and control over relators who wield essentially executive power in litigating on behalf of the U.S.; and (3) Vesting Clause, because relators have the executive power to bring civil enforcement actions on behalf of the U.S. while the Constitution vests that power in the President alone. While the Government had initially declined to intervene in the litigation, it later intervened for the limited purpose of defending the constitutionality of the qui tam provisions.

The Constitutional Arguments: Although defendants made constitutional arguments regarding the Appointments Clause, Take Care Clause, and Vesting Clause, the district court only considered the substance of the Appointments Clause arguments, as once the qui tam provisions were deemed unconstitutional under one clause, the district court did not need to reach the Vesting or Take Care Clause arguments.

With respect to the Appointments Clause, the *Zafirov* defendants argued that the appointment of relators was subject to the requirements under Article II. The argument hinged on Supreme Court precedent that, under the Appointments Clause, "officers of the United States" may be appointed only by the President, the head of an executive department, or a court. *U.S. v. Arthrex, Inc.*, 594 U.S. 1, 10 (2021). Because Zafirov was not appointed by any of these means, she was—according to the defendants—unconstitutionally appointed, and the lawsuit she brought had to be dismissed with prejudice. In analyzing whether relators are unconstitutionally appointed officers of the U.S., the district court relied on the test set forth in *Lucia v. SEC*, 585 U.S. 237 (2018). Under the Supreme Court's *Lucia* test, an individual is an officer of the U.S. if she "exercises significant authority pursuant to the laws of the United States" and "occupies a 'continuing' position established by law." The critical question, then, was whether FCA relators qualify as "officers" under both prongs of the *Lucia* test.

Prong 1: Relators Exercise "Significant Authority": First, the district court found that relators' power to initiate an enforcement action in the name of the U.S. to vindicate a public right constitutes "significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1 (1976). Further, it held that authority exists without prior Government oversight, allowing a relator to initiate an enforcement action for treble damages and substantial statutory penalties. That bars all others except the Attorney General from bringing a related action based on the same facts, and the 60-day seal period effectively "forces the Executive Branch to align its investigative priorities with those of a self-interested third party." Then, a relator "exercises core executive power" by deciding "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law." *Zafirov*, 751 F. Supp. 3d at 1309 (M.D. Fla. 2024) (citing *U.S. v. Texas*, 599 U.S. 670, 678 (2023)). The court found these abilities indistinguishable from the executive branch's "exclusive authority and absolute discretion to decide whether to prosecute a case." *U.S. v. Nixon*, 418 U.S. 683, 693 (1974).

The court specifically pointed to the "daunting monetary penalties" of the FCA. Many courts have recognized that the penalties under the FCA are essentially punitive in nature. E.g., *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784 (2000); 42 GC ¶ 204. Indeed, the district court in *Zafirov* noted that Government counsel conceded at oral argument that the Attorney General's enforcement of the FCA is "significant," "substantial," and "definitely a core executive power"—making it difficult to argue that a relator exercising the same powers under the same statute is not an officer. *Zafirov*, 751 F. Supp. 3d at 1309 (M.D. Fla. 2024).

Prong 2: Relators Occupy a "Continuing Position Established by Law": Next, the district court found that relators occupy a "continuing" position established by law. Beginning with the text of the FCA, the court reasoned that the statute defines duties, powers, and emoluments for the relator's role. This includes the duty to file the initial complaint under seal, to serve the complaint and disclosure on the Government, and to wait 60 days. It also includes the powers to conduct the action to final judgment and entitlement to up to 30 percent of any recovery through settlement or judgment. And, relying largely on the Supreme Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), the district court held that the fact that relators only hold the position for one matter was not enough to prevent the office from being "continuous." In that case, the Supreme Court concluded that an independent

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counsel that was authorized "to exercise all investigative and prosecutorial functions and powers of the Department of Justice" for purposes of a single investigation was an inferior officer. *Morrison*, 487 U.S. at 660–63, 670–73. The district court cited other precedent as well. For example, it pointed to bank receivers, who were officials charged with winding up a specific insolvent bank and entrusted with "statutory authority to bring suit." Even though bank receivers' duties were tied to a specific bank and discharged on completion of the project, "it was the uniform view of the federal courts" in the nineteenth and early twentieth centuries that these officials were "officers of the United States" under a statute conferring federal jurisdiction for certain lawsuits. *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 110–11 (2007) (collecting cases); see, e.g., *U.S. v. Weitzel*, 246 U.S. 533, 541 (1918). Based on this precedent, the district court concluded that "the office of an FCA relator is continuous even if it is not continually filled" because the office exists by operation of the statute regardless of whether any particular person occupies it at a given time.

The court also turned to the Second Circuit's *Donziger* framework to analyze whether temporary positions qualify as a continuing office, which evaluates whether (1) the position is not personal to a particular individual; (2) the position is not transient or fleeting; and (3) the duties of the position are more than incidental. *U.S. v. Donziger*, 38 F.4th 290, 297 (2d Cir. 2022), cert. denied 143 S. Ct. 868 (2023). Applying these factors, the court held that relators were temporary-yet-continuing officers because the qui tam provisions were not personal, the positions were held for years, and relators exercise a core executive function in litigating on behalf of the U.S. Based on these analogous cases and the application of the *Donziger* framework, the district court held relator fulfilled the second prong to be an officer of the U.S.

The Conclusion: A Relator Is an Unappointed Officer of the U.S. in Violation of the Appointments Clause: Flowing from the district court's analysis that relators fulfill both prongs to be considered an "Officer of the United States" under the Appointments Clause, the district court held that the qui tam provisions of the FCA are unconstitutional. While the *Zafirov* decision affected only those parties directly and immediately, other litigants and courts across the country took notice, with many other defendants attempting to make similar arguments as the *Zafirov* defendants did. However, even as other courts analyzed arguments under the Appointments Clause, no other courts followed the *Zafirov* analysis or declared the qui tam provisions unconstitutional. Some courts refused to evaluate such arguments in depth at all, deeming the FCA's constitutionality to be a settled issue.

Following the district court's decision, Zafirov filed an appeal at the Eleventh Circuit in January 2025. Now, a year and a half later, the Eleventh Circuit has issued its decision.

The Eleventh Circuit's Decision: *U.S. ex rel. Zafirov v. Fla. Med. Assocs., LLC*, —— F.4th ——, 2026 WL 2581886 (11th Cir. Sept. 1, 2026)— The Eleventh Circuit reviewed the district court's decision de novo. The panel consisted of Circuit Judges Elizabeth L. Branch and Robert Luck, and Senior District Judge Federico A. Moreno of the Southern District of Florida, sitting by designation. Analyzing the same questions as the district court, the Eleventh Circuit came to the opposite conclusion: FCA relators are not officers of the U.S. because they do not occupy a continuing position established by law under the first prong of the Appointments Clause test. The Eleventh Circuit noted that its decision joins its sister appellate courts in the Fifth, Sixth, Ninth, and Tenth Circuits on the issue. The Court vacated the lower court's dismissal of the qui tam action and remanded for further evaluation at the district court of the Take Care and Vesting Clause arguments, which had not previously been reached. The Eleventh Circuit found it unnecessary to reach the question of whether relators exercise "significant authority," as both prongs were necessary to establish that a relator was an officer.

Unlike the lower court, the Eleventh Circuit declined to adopt the Second Circuit's *Donziger* three-part test, noting it was "not binding" and "reflect[ed] [the Second Circuit's] own distillation of Supreme Court caselaw." Instead, the Eleventh Circuit established its own four-part framework for determining whether a relator holds a continuing position: (1) whether the tenure is permanent as opposed to occasional or temporary; (2) the duration of the role; (3) whether she received a "continuing emolument"; and (4) whether the duties of the role were personal. *Zafirov*, 2026 WL 2581886 at *4–*5.

Tenure: Occasional and Temporary, Not Permanent: First, the Eleventh Circuit rejected the defendants' notion that the FCA created a continuous "office of the relator" that could be occupied by an individual for years at a time while a single case was pending. The Court pointed out that the term "office of the relator" appeared neither in the FCA nor in any other law. The Court added that even if the position itself was continuous, the proper inquiry was regarding whether an individual occupied a continuing position. Drawing on Supreme Court precedent, the Court noted that a relator's tenure was more analogous to a temporary position because each acted only when a specific situation arose, the relator's position lasted only the length of one case, and the position had no requirement to maintain a place of business. The Court also noted that a relator could bring multiple cases or no cases in a given year, meaning the position is not static.

Duration: Measured by Permanence, Not Clock-Time: Unlike the district court's evaluation of duration, which depended on the number of years an FCA case can be pending, the Eleventh Circuit considered the Supreme Court's focus in historical cases like *U.S. v. Germaine*, 99 U.S. 508, 511 (1879) and *Auffmordt v. Hedden*, 137 U.S. 310 (1890), to be on permanence rather than length of time. Accordingly, the Court held that a relator's tenure was not permanent or continuing because, under the qui tam provisions, a relator's duties do not "extend over any case further than as he is selected to act" when the Government declines to intervene.

Emolument: Contingent and Non-Continuing: Examining the nature of the emolument, the Eleventh Circuit was not moved by the fact that a relator is entitled to a share of a recovery as a factor showing the role to be "continuing," because that is a one-time, "contingent on the success of his case" payment. The Court also held that the relator did not receive compensation through any regular appropriation, the role was "occasional and intermittent," and there was no penalty for a relator's absence from duty or refusal to perform, except loss of the fee in the given case.

Duties: Personal and Non-Transferable: The Eleventh Circuit looked to Chief Justice John Marshall, who provided the first judicial interpretation of the term "officers of the United States" in 1823, to conclude that there is no office of the relator that is not personal to an individual. To determine the nature of "an officer of the United States," Chief Justice Marshall asked whether the "duties continue, though the person be changed." *U.S. v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, C.J.). The *Zafirov* defendants alternatively had cited to *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, for the proposition that the "office of the relator" is not personal and exists independent of the person bringing a qui tam action because "if a relator's complaint is dismissed on procedural grounds, another relator may step into the role and raise the same claims." 575 U.S. 650 (2015); 57 GC ¶ 169. But the Eleventh Circuit reasoned that the relator's duties were personal to an individual relator, despite the arguments of the defendants that others were able to step into the shoes of the relator. The Court noted that, except by the Attorney General upon intervention, if a relator dies or goes bankrupt, the relator is not replaced, but rather the estate or a trustee carries forward the claim on the relator's behalf, and thus, the Eleventh Circuit determined that the duties were effectively non-transferable.

Based on those four factors, the Eleventh Circuit concluded that, while the length of any given FCA case is uncertain and variable, relators have temporary tenure and duration, no continuing emolument, and personal duties, and, accordingly, do not occupy a continuing position. And, as relators do not occupy a continuing position under law, they cannot fulfill the two prongs under the Appointments Clause to be considered "an Officer of the United States." Therefore, the Court concluded, relators are not unconstitutionally appointed in violation of the Appointments Clause, and, in turn, the qui tam provisions of the FCA do not violate Article II.

What Happens Now? The Road Ahead—The

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Eleventh Circuit has spoken in *Zafirov*, but that is hardly the end of the road for the *Zafirov* litigation and the constitutionality question. While the *Zafirov* decision is consistent with other Circuit court opinions that have addressed the constitutionality of the qui tam provisions under the Appointments Clause to date, it is limited to only the Appointments Clause, remanding to the district court the still-pending constitutional arguments under the Take Care and Vesting Clauses. And while the *Zafirov* defendants have signaled a willingness to proceed first at the district court on the Vesting and Take Care Clauses, *Zafirov* is not the only such challenge making its way up to the appellate level and perhaps beyond.

Remand to the District Court to Analyze the Vesting and Take Care Clause Challenges: The parties (and multiple amici) have already filed significant briefing on the surviving constitutional arguments regarding the Vesting and Take Care Clauses, so those arguments could advance quickly. A new, favorable ruling for defendants in front of the district court could create even broader grounds for challenging qui tam suits than invalidation based on the Appointments Clause. For that reason, while it is not guaranteed that the parties will reassert the exact same positions on remand, it is worth examining key past arguments asserted by the parties to understand what may come next.

The defendants' initial arguments that the qui tam provisions violate the Vesting and Take Care Clauses are based on the text of those Clauses, as interpreted in the Supreme Court's *Seila Law* decision, which stated that "[t]he executive Power shall be vested in a President," and that the President must "take Care that the Laws be faithfully executed." *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 213 (2020) (quoting U.S. Const. art. II, § 1, cl. 1; id. § 3.). Building off that language and Supreme Court cases regarding executive powers, the *Zafirov* defendants argued that the qui tam provisions represent an impermissible vesting of executive power in relators, impermissibly limit the President's removal authority, and do not provide the level of supervisory control required under the Take Care Clause. Among the specific arguments made, the defendants argued that it is a long-established principle that the authority to bring—or not bring—suit is central to executive power. In the defendants' view, the qui tam provisions unconstitutionally allow private citizens to exercise that authority.

The relator responded with a series of broad constitutional arguments, including an examination of the FCA as a Congressional exercise of power under the Property Clause. Regarding the Vesting and Take Care Clauses in particular, the relator focused on past appellate decisions that she argued considered and rejected similar constitutional challenges. Zafirov also argued that, contrary to the defendants' separation of powers claims, the FCA was consistent with the principle that "[w]here the functions of two coordinate branches of Government overlap without intrusion, there is no constitutional violation." *Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 772 (E.D. Pa. 2001) (citing *Mistretta v. U.S.*, 488 U.S. 361, 380 (1989)).

Although it did not initially intervene in the case, the Government submitted a Statement of Interest to respond to many of the defendants' arguments and later intervened to defend the FCA, "a statute that has been the United States' primary fraud-fighting tool for 160 years." In its initial Statement, the Government raised many of the same arguments as Zafirov—including by examination of the nature of executive power and mechanisms of control over FCA relators—with different emphasis on certain angles and some additional points. For example, the Government cited to the history of the FCA and the qui tam mechanism, emphasizing the chain of appellate decisions finding the statute to be constitutional under Article II. The Government also contested the defendants' claim that the qui tam provisions infringe on Executive power by assuming the role of an "agent of the United States[,]" arguing that qui tam relators maintain their status as "private litigants" pursuing a private interest ("partial assignment of the Government's damages claim") despite also "vindicat[ing] a federal interest" through their suits, citing the Supreme Court's *Stevens* decision in support.

Notably, the defendants dedicated more of their reply briefing to the Vesting and Take Care Clauses than the Appointments Clause. They dismissed arguments made by the Government and an amicus regarding the alleged acceptability of relators' exercise of executive power. And the defendants emphasized that Zafirov and the Government failed to engage with how post-*Morrison* case law has clarified the appropriate analysis of "whether the President has retained sufficient removal authority[,]" noting also the inapplicability of cited appellate opinions from other jurisdictions. Finally, the defendants provided additional arguments distinguishing the qui tam provisions from other private rights of action granted by federal statute.

Future Supreme Court Petition: It is unlikely that the constitutionality question will stall at the district court, and will likely lead to a petition to the Supreme Court to resolve a question that may be less settled than it seems.

The Fifth, Sixth, Ninth, and Tenth Circuits have previously held the qui tam provisions to be constitutional under the Appointments Clause. See *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (en banc); *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). However, these decisions all predate the *Lucia*, *Arthrex*, and *Seila Law* Supreme Court rulings that have expanded the Appointments Clause analysis. While all Circuits that have ruled on this question have agreed that the qui tam provisions do not run afoul of the Appointments Clause, they have applied different reasoning.

The Court has already signaled that it may be willing to consider a constitutional challenge to the qui tam provisions. Three years ago, in a dissent in the landmark *Polansky* case, Justice Thomas wrote "[t]here are substantial arguments that the qui tam device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation." *U.S. ex rel. Polansky v. Exec. Health Res.*, 599 U.S. 419, 449 (2023); 65 GC ¶ 181. Justices Kavanaugh and Barrett separately concurred to state that "the Court should consider the competing arguments on the Article II issue in an appropriate case." A petition now may have a more significant chance of being taken up by the Court than in years past, considering the volume of constitutional challenges to the qui tam provisions since *Polansky*, including *Zafirov*, and at least three justices indicating their willingness to consider the issue.

That said, no appellate court has yet ruled on the merits of the outstanding Vesting and Take Care Clause arguments. As indicated in oral arguments at the Eleventh Circuit, the parties seem to agree that the Eleventh Circuit could have decided the *Zafirov* appeal on the Vesting and Take Care Clause arguments, even without those arguments being reached by the district court. The Eleventh Circuit chose not to do so. Now, however, there may be an opportunity to seek review by the Supreme Court, not only on the Appointments Clause arguments, but all arguments raised by the *Zafirov* defendants. However it gets there, it seems likely that the qui tam provisions will come before the Court in the next few years, if not sooner.

Other Pending Cases: Zafirov is not the Supreme Court's only opportunity to take up a constitutional challenge to the qui tam provisions. Since the *Zafirov* district court decision two years ago, several other cases have worked their way through the lower courts and could be ripe for Supreme Court consideration in the next few years. And other challenges are being made by defendants with some regularity in district courts in various qui tam actions.

In *U.S. v. Janssen Prods., LP*, No. 25-1818, (3d Cir.), the Third Circuit is poised to rule on multiple FCA issues, including Appointments, Vesting, and Take Care Clause arguments that overlap with the *Zafirov* case. And in some ways, *Janssen Products* may present an even more compelling and salient case because it involves the largest-ever FCA judgment in a non-intervened case, totaling over $1.6 billion.

In the Southern District of Ohio, the *U.S. v. TriHealth Inc.* case has similarly raised constitutional challenges to the qui tam provisions under the Appointments and Take Care Clauses. No. 1:19-cv-00168, 2025 WL 2104279 (S.D. Ohio July 28, 2025). At the district court level, while the judge noted that the court was bound by the Sixth Circuit's *Taxpayers Against Fraud*, 41 F.3d at 1041

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(6th Cir. 1994) decision, he encouraged the parties to go before the Sixth Circuit so that it could reconsider the arguments. While the Sixth Circuit ultimately declined to hear these issues on interlocutory appeal, the appellate court may end up considering them after a final judgment at the district court. From there is yet another Supreme Court avenue.

Finally, less than two weeks after the Eleventh Circuit's *Zafirov* opinion, the Western District of New York found that the defendants in *Barnes et al. v. HealthNow N.Y. Inc.* "raise[d] strong arguments that the FCA's qui tam device indeed violates the Constitution's Vesting Clause and Take-Care Clause, as well as—possibly—the Appointments Clause." No. 1:16-cv-00088, 2026 WL 2666843 (W.D.N.Y. Sept. 10, 2026). The district court certified that the order on the issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." As of the date of this publication, a petition for leave to appeal is pending with the Second Circuit.

Conclusion—The constitutional challenge working its way through the courts strikes at the engine driving the overwhelming majority of modern FCA enforcement: upwards of 80 percent of filed qui tam suits are ultimately litigated by a relator because the Government declines to intervene. A successful challenge would turn the current system on its head. Even a middle-ground outcome—one in which relators could initiate suits but cannot advance them without DOJ intervention—would demand a substantial reallocation of Government resources, and realistically, a substantial increase in available resources, to sustain anything close to the current case load.

In the meantime, while the constitutional questions remain live, defendants litigating FCA qui tam suits will continue to consider motions to dismiss or for judgment on the pleadings on constitutional grounds, if only to preserve the issue on appeal. And, given the positions already expressed by multiple justices of the Supreme Court, it seems likely that one way or another, the FCA's qui tam provisions will see the Court's attention within the next several years. For practitioners, the only safe assumption is that this debate has plenty of gas left in the tank.

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