

The Eleventh Circuit Hears Oral Argument in Zafirov: The Case that Could Upend Qui Tam Litigation

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On December 12, 2025, the Eleventh Circuit heard oral arguments in *United States ex rel. Zafirov v. Florida Medical Associates*, an appeal challenging relators' authority to bring claims under the *qui tam* provisions of the False Claims Act and the Vesting, Take Care, and Appointments Clauses (see [here](#) for a summary of the arguments made at briefing). While drawing conclusions from oral argument is fraught with uncertainty, one thing was unmistakably clear: the panel (comprised of Judges Branch, Luck, and Moreno) is taking the constitutional challenge to the False Claims Act's *qui tam* provisions very seriously.

SCOTUS's Questioning of Historical Precedent and the So-Called "Long Pedigree"

First, the panel reflected on the recent opinions from Justice Thomas and Justice Kavanaugh raising the constitutional challenges anew. The panel repeatedly asked: What do Justice Thomas' and Justice Kavanaugh's recent opinions questioning relators' authority mean? How should the lower courts interpret these comments in the context of the *qui tam*'s "long pedigree"? And why has the Supreme Court raised fresh separation-of-powers concerns after decades of lower-court stability?

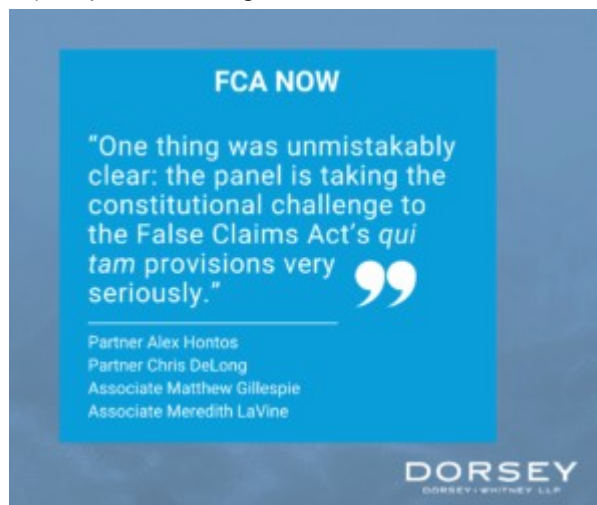
The government conceded that it had been a while since a court addressed this issue, but leaned on the *qui tam*'s history in rebuttal, emphasizing that the Supreme Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) recognized the country's long tradition of *qui tams*, that multiple circuits (Fifth, Sixth, Ninth, Tenth) upheld the FCA's architecture while repeatedly describing relators as

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“private persons,” and the existence of similar provisions dating back to America’s founding.

Appellees called for a different interpretation of the same history. They argued that the question is not whether informer statutes existed at the founding—conceding they did—but whether the Framers contemplated this precise arrangement of private initiation, executive supervision, and the power to expose defendants to punitive civil penalties. According to Appellees, early records lack clear deliberation on this precise question.

The Article II Officer Test: Significant Authority and Continuing Position

The panel then turned to the Supreme Court’s two-part test established by *Lucia v. SEC*, 585 U.S. 237, 245 (2018), to determine if an individual is an “officer of the United States” for purposes of the Appointments Clause: whether an individual has (i) “significant authority” pursuant to federal law and (ii) a “continuing position.” The panel questioned whether the Supreme Court or any circuit applied the Appointments Clause to someone who was not paid or employed by the government. Both parties conceded that they were unaware of such a case. The judges appeared to nevertheless press both sides, noting that there is a difference between someone who has a connection to the government and someone who has no connection at all.

Addressing the substance of the *Lucia* test, the government argued that under the False Claims Act’s *qui tam* mechanism, the only unilateral power relators have is to file the complaint. Filing, it argued, is insufficient to be “significant authority,” especially when the government may “take the wheel” at any moment. Conversely, Appellees pressed the panel to see initiation not as a clerical act but an Executive one, arguing that filing in the government’s name compels an investigation and forces resource allocation by the Executive. Even if the government remains “in the passenger seat,” the accelerator is pressed by a private party, which is precisely what the Appointments Clause is designed to regulate.

The “continuing position” prong also received pointed treatment – the panel asked why Justice Thomas left out discussion of continuity and whether that omission matters. To demonstrate that *qui tam* relators continue their positions, Appellees pointed to several examples: substitution of a personal representative when the relator dies; assignment of portions of recovery; and alienability in bankruptcy. They argued that because the same duties continue even when the relator changes, the *qui tam* scheme operates like the impersonal, statutorily defined office that Article II regulates. In response, the government argued that continuity here is illusory: there is no independent power once DOJ intervenes; intervention can happen “at any point;” and any constitutional concern terminates when the Executive exercises its prerogatives.

The Vesting and Take Care Clauses: Do They Change the Analysis—or Simply Restate It?

When discussing the Vesting and Take Care Clauses, the panel’s questions suggested a view that the issues raised by these clauses overlap with the *Lucia* inquiry.

Appellees framed the problem as a structural mismatch: relators authorize their own appointment, define their own jurisdiction, and cannot be removed by the Executive. In other words, the *qui tam* scheme is privately driven and not publicly accountable. According to Appellees, the Vesting Clause is the safeguard that prevents Congress from exporting core enforcement decisions to outsiders, the Take Care Clause is the mechanism that keeps those decisions answerable to the President, and the *qui tam* provisions of the FCA violate both.

Both Zafirov's and the government's responses tracked back to supervision. They argued that DOJ's front-end control (filing under seal; exclusive initial investigation; decision to intervene) and back-end control (dismissal; settlement; discovery stays; veto on voluntary dismissal) preserve Executive authority. To the panel's question about "significant power" in the context of pardon and criminal prosecution—and whether those extra pardon controls were constitutional—both the Appellant-relator's (Zafirov) and Appellant-intervenor's (the government) theme remained consistent: the FCA is civil, and its built-in supervisory tools keep the Executive in charge.

Which Way Could the Eleventh Circuit Go?

The panel repeatedly pressed whether the only unilateral power—filing—counts as "significant authority," and whether government's power to intervene or dismiss neutralizes officer and vesting concerns. The overall tone and lines of questioning suggested the judges are seriously grappling with whether the *qui tam* mechanism violates the Appointments Clause.

Ultimately, the outcome will turn on how the Eleventh Circuit defines power and control in the context of the False Claims Act's *qui tam* scheme. But regardless of whether the panel hinges its decision on the officer test or gives weight to history and DOJ oversight, the question over the constitutionality of *qui tam* is likely destined for Supreme Court review.