

Written Testimony of Taxpayers Against Fraud in Support of Senate Bill SB666 to Expand the Maryland False Claims Act and Maryland False Health Claims Act

Chairman Smith, Vice Chairman Waldstreicher, and distinguished members of the Senate Judicial Proceedings Committee, thank you for the opportunity to submit written testimony on Senate Bill SB666, *Maryland False Claims Act and Maryland False Health Claims Act – Revisions*.

We write in support of Senate Bill SB666 to expand the Maryland False Claims Act and the Maryland False Health Claims Act (the “Maryland False Claims Acts”) and permit relators to litigate declined *qui tam* actions. The proposed amendments effectuate the statutes’ remedial purposes to recover taxpayer funds and thwart and deter fraud against the State of Maryland and governmental entities while supplementing the government’s limited resources in fighting fraud (collectively “the State”).

Although the State has recouped tens of millions of taxpayer dollars under the Maryland False Claims Acts, the State is forgoing millions of additional dollars in recoveries by preventing relators from continuing to pursue cases after the government declines to intervene. Under Md. Code §§ 8-104(a)(7) and 2-604(a)(7), a relator cannot litigate their case if the State declines to intervene, regardless of its reasons underlying that decision or the amount of taxpayer funds allegedly at issue. Maryland is the only state False Claims Act to prohibit relators from proceeding if the government declines to intervene, putting our state at a significant disadvantage in the fight against fraud. The current prohibitions in the Maryland False Claims Acts create barriers to effectuating the very purpose of the statutes and hinder the State’s ability to root out fraud effectively and efficiently, rendering the proposed amendments critical to successful anti-fraud enforcement.

The Maryland False Claims Acts should be expanded for three reasons. First, declined cases have become an increasingly important avenue to recoup misspent funds, a fact underscored by the United States Department of Justice’s (DOJ) recent announcement that declined *qui tam* cases helped the government recover more federal funds than did intervened cases this past fiscal year. Second, the relator’s inability to advance their case absent government intervention reduces incentives for relators to come forward in the first place. Third, permitting relators to shoulder the litigation costs on behalf of the State promotes efficiencies in the fight against fraud. The Maryland legislature has an important opportunity to align the Maryland False Claims Acts with those of the federal government and other states by recognizing the tremendous contributions relators can make throughout the course of False Claims Act litigation, resulting in more successful resolutions on behalf of the State.

(1) The Proposed Amendments Allow the State to Recover Significant Taxpayer Funds

Relators bring fraud to the attention of the government at great risk to themselves and their careers in the hopes that they will protect the public fisc and further deter fraud. But for various reasons, governments may not be in a position to initially take on those cases themselves, including resource constraints and a court’s unwillingness to extend the seal period. Courts and parties on all sides of *qui tam* litigation recognize that a government’s declination decision does not speak to the underlying merits of the action. This fact is underscored by DOJ’s acknowledgment that, in fiscal year 2022, more than half of the federal funds recovered under the federal False Claims Act were the result

of declined *qui tam* actions.¹ In other words, relators who advanced their own cases helped the government recoup more funds than the government did when it intervened, with both paths to resolution enforcing a public-private partnership in the common goal to thwart fraud and recoup taxpayer funds. Without relators litigating declined *qui tam* cases, the federal government would have missed out on nearly \$1.2 billion recovered this past fiscal year alone, and over \$4.7 billion since 1986.²

Not only do the current Maryland False Claims Acts prohibit relators from proceeding with their *qui tam* actions if the government does not intervene, but it also binds the State. In many federal and state False Claims Act cases, the government initially declines to intervene for various reasons but later moves to intervene in order to pursue or settle the case, including when the government discovers new evidence in the course of its continued investigation.³ This later intervention often occurs after a relator has expended substantial resources to pursue the case on their own. If the *qui tam* complaint must be dismissed after an initial declination, as required under Md. Code §§ 8-104(a)(7) and 2-604(a)(7), the government loses this opportunity to later intervene in and resolve meritorious *qui tam* actions, or for the relator to resolve those actions on their own.

The proposed amendments come at a time of increased government spending, new fraud schemes, and heightened attention to anti-fraud enforcement efforts. The State has expended significant funds to protect health, safety, lives, and livelihoods in response to the COVID-19 pandemic,⁴ but opportunistic corporations and individuals have knowingly misappropriated those funds to line their pockets. These fraudsters also continue to game the Medicaid system and other state-funded programs at the expense of Maryland taxpayers. For example, former Maryland Comptroller Peter Franchott described the volume of fraudulent claims on the State’s unemployment insurance program as “the single greatest highway robbery” of state and federal funds.⁵ Fraud is not new but has only grown as government expenditures increased during the COVID-19 pandemic. It is increasingly important that the State can recover funds paid to corporations and individuals that knowingly defraud the State and its vital programs. The proposed amendments address these concerns by permitting a relator to pursue a declined *qui tam* case and permitting intervention at a later time, allowing for the recovery of significant taxpayer funds that have been paid to fraudulent corporations and individuals.

(2) The Proposed Amendments Incentivize More Relators to Come Forward

While DOJ’s statistics for Fiscal Year 2022 demonstrate the value of declined *qui tam* cases to the public fisc, those trends leave out cases where an individual with knowledge about fraud chose not to file a *qui tam* complaint in the first place, representing an even larger pool of misspent taxpayer funds currently out of reach. The proposed amendments encourage more would-be relators to come

¹ <https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022>.

² <https://www.justice.gov/opa/press-release/file/1567691/download>.

³ See, e.g., *U.S. ex rel. Grob v. Precision Cable Assembles Inc.*, No. 22-CV-570-JPS, 2023 WL 1865338, at *2 (E.D. Wis. Feb. 9, 2023) (granting government’s motion to intervene for good cause after obtaining additional evidence in support of relator’s allegations).

⁴ <https://www.marylandtaxes.gov/media/2021/Comptroller-Workgroup-Probes-Unemployment-Insurance-Delays-Customer-Service-Woes-Fraudulent-Filings.pdf>, at 3 (“it is likely the State has paid out fraudulent [unemployment insurance] claims”).

⁵ <https://www.marylandtaxes.gov/media/2021/Comptroller-Workgroup-Probes-Unemployment-Insurance-Delays-Customer-Service-Woes-Fraudulent-Filings.pdf>, at 3.

forward with allegations of fraud. Without the possibility of pursuing their cases in the event that the government declines to intervene, individuals with otherwise credible information about fraud against the State may decide not to file a *qui tam* complaint. Those individuals must weigh the time, resources, and damage to their personal and professional lives required to develop their allegations with the very real possibility that their cases may be dismissed if the State does not intervene due to a host of considerations separate from the merits of the case. In those situations, the risk sometimes outweighs the reward, allowing the fraud to continue unabated.

Taxpayers Against Fraud's sister organization, Taxpayers Against Fraud Education Fund (TAFEF), represents 400+ attorneys who represent whistleblowers under federal and state False Claims Acts and other whistleblower statutes. Several TAFEF members recall specific cases in which a relator would have alleged violations of the Maryland False Claims Act if not for current language that requires dismissal if the State declines to intervene. In at least one of these cases, a relator brought *qui tam* allegations on behalf of nearly every other state with a False Claims Act, totaling 21 states and cities, but chose not to include claims under the Maryland False Claims Act because of its prohibition against litigating declined cases.

The proposed amendments address this concern by providing relators greater opportunities to advance their cases, with the possibility of relator's shares and attorneys' fees upon successful resolution. By providing a higher range for relator's shares in declined cases, the proposed amendments recognize that relators take on significant burdens to advance their cases—an onerous process that requires fulsome vetting and consideration of risks both personal and professional. By removing the State's declination as a barrier to advancement, the proposed amendments incentivize relators to come forward with more assuredness that they can pursue meritorious cases, resulting in greater recoveries of taxpayer funds for the State.

(3) The Proposed Amendments Promote Efficiencies in the Fight Against Fraud

While opponents to the proposed amendments may argue the State will be required to expend resources on meritless cases, such arguments ignore the practical considerations underlying a decision to initially file and to pursue *qui tam* litigation. *Qui tam* litigation in particular poses unique risks and considerations that necessitate relators and their counsel to attempt to assess the likelihood of success when deciding whether to proceed. Relator's counsel almost exclusively represent clients on a contingency fee basis; if the case is unsuccessful, the hours and costs spent to pursue the case are not reimbursed, which is compounded by the long duration of most *qui tam* actions. That consideration alone provides a disincentive for relator's counsel to pursue cases with a low likelihood of success. Further, relators face potential reputational harm and must also expend time and effort to advance their cases. When relators and relator's counsel choose to do so, it is because the balance of risks and rewards favors a likelihood of success on behalf of the State.

Permitting relators to shoulder the burden of advancing their cases when the State is unwilling or unable to expend the resources promotes efficiencies in the fight against fraud, with the common goal to recoup taxpayer funds for the State. Courts are well-positioned to protect the State from irrelevant discovery requests that would impose unnecessary costs on the government.⁶ The costs necessitated by *qui tam* litigation are often justified by the potential to recoup misspent taxpayer funds,

⁶ Md. Rule 2-402(a).

and, under the proposed amendments, the State still has the option to seek dismissal in the few cases where continued litigation could cause more harm than good.

Consistent with the overwhelming trend across the country, many states and localities bordering the Maryland—Delaware (6 Del. C. § 1204(d)), the District of Columbia (D.C. Code § 2-381.03(b)(4)(B)), Virginia (Va. Code § 8.01-216.5(D)), and Allegheny County, Pennsylvania (County Code § 485-3(B)(3)(b))—grant relators the right to conduct *qui tam* actions if the government declines to intervene. At this critical time for anti-fraud enforcement efforts, Maryland should not stand as an anomaly in the fight against fraud and miss opportunities to recover taxpayer funds. The proposed amendments strengthen the public-private partnership between the State and relators, freeing state resources to prioritize additional enforcement actions, further investigate allegations, or take a back seat as the relator frontloads resources to effectuate the policy goals of the Maryland False Claims Acts. The proposed amendments remove some of the practical consequences hindering anti-fraud enforcement under the current statutes, and the alternative—significant financial losses from unchecked and undeterred fraud—is too great a risk to sideline relators.

Accordingly, we urge the distinguished members of the Senate Judicial Proceedings Committee to strengthen the Maryland False Claims Acts by passing Senate Bill SB666.