Written Testimony of Sara Pratt
HB 392
Supporting Passage of the Legislation

I am testifying in my capacity as someone who has worked on fair housing issues, and on testing specifically, for over 45 years. I am testifying on my own behalf and not on behalf of my employer or any organization.

In 1977, I participated in the first national fair housing testing audit funded by HUD. I was working with the Kentucky Commission on Human Rights, and we used audit-based testing to identify whether there was discrimination based on race or national origin in rental and sales transactions. I went on to work as Director of Fair Housing Enforcement at HUD, and while at HUD, part of my job was overseeing the Fair Housing Initiatives Program (FHIP), which funds private fair housing organizations nationally, as well as the Fair Housing Assistance Program (FHAP), which supports fair housing enforcement by state and local governments. I retired from HUD in 2015 as Deputy Assistant Secretary for Fair Housing Enforcement and Programs. I am currently Counsel with the law firm of Relman Colfax PLLC in Washington, D.C. and I evaluate and litigate cases based on testing evidence.

I have reviewed over 5000 tests for discrimination in fair housing cases over my career, including tests of real estate sales and rental practices, as well as lending and homeowners insurance practices. I was an expert witness on testing in the case of *NFHA v. Prudential Insurance Company,* 208 F. Supp. 2d 46 (D.D.C. 2002).

I also authored *Discrimination Against Persons with Disabilities: Testing Guidance for Practitioners* (https://www.hud.gov/sites/documents/dss-guidebook.pdf) for a national Housing Discrimination Study project conducted by the Urban Institute under contract for HUD. I have overseen testing in circumstances where testers' experiences were recorded and those where they were not recorded.

Testing to determine whether or not housing discrimination is occurring is a long-standing and powerful fair housing enforcement and education tool.

HUD has supported fair housing testing as an investigative tool for many years. It initiated an enforcement demonstration project beginning on January 1, 1980, over 44 years ago, to identify what role fair housing organizations could play in working with HUD. Through the project, HUD funded nine groups over a two-year period to receive complaints, conduct testing related to complaints, and develop testing-based studies of discrimination in their communities.[1] The project demonstrated the critical role of testing—with funding to conduct testing, every organization increased its volume of complaints and supported enforcement, while producing a large number of studies of discrimination in local communities. HUD concluded, "The principal result of the experimental 'fair housing study' activity was that it demonstrated that testing can be a

[1] HUDUSER, The Fair Housing Demonstration Project, 1983, available at https://www.huduser.gov/portal//Publications/pdf/HUD%20-%203093.pdf.

highly productive device for identifying and developing hard evidence concerning the more blatant and pervasive forms of unlawful discrimination."

In 1984, HUD sponsored a national conference—in which I participated--directed at discussion and expansion of fair housing testing.[2] With over 250 attendees including fair housing organization representatives, FHAP agencies, researchers and government officials, the topics included individual and systemic testing strategies, standing of fair housing organizations, and testing-based enforcement strategies. Reports from that conference confirmed an elevated level of effective use of testing to support enforcement and identified typical defenses raised against testing.

Defenses that testing was entrapment,[3] claims that testers violated an agent's right to be free from unreasonable searches[4], arguments that tester activity constituted interference with economic relations, trespass, unjust enrichment, and libel have been rejected by courts over the years.

Courts have also increasingly recognized the role fair housing organizations and their testers play in fair housing enforcement. The Supreme Court has recognized the importance of testers in identifying discrimination and has recognized that testers have standing to sue for fair housing act violations. *See Havens Realty Corp., v. Coleman*, 455 U.S. 363, 373 (1982).

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[2] HUD Conference on Fair Housing Testing, *available at* https://www.huduser.gov/portal/sites/default/files/pdf/HUD-Conference-on-Fair-Housing-Final-Summary-Report.pdf

[3] Testing is not entrapment because the concept of entrapment is not applicable because all that a tester does is to offer "a favorable opportunity" for a violation to occur. *Newbern v. Lake Lorelei, Inc*., 308 F. Supp. 407, 415 (S.D. Ohio 1968) (in addressing fair housing claims brought under 42 U.S.C. §§ 1981-1982, the court, analogizing to the use of informants in criminal cases, but found that entrapment did not arise because informers merely provide "a favorable opportunity" for discrimination to occur); *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975) (rejecting entrapment defense and holding "[t]he evidence resulting from the experience of testers is admissible to show discriminatory conduct on the part of the defendants. The Fair Housing Act of 1968 was intended to make unlawful simpleminded as well as sophisticated and subtle modes of discrimination. It is the rare case today where the defendant either admits his illegal conduct or where he sufficiently publicizes it so as to make testers unnecessary. For this reason, evidence gathered by a tester may, in many cases, be the only competent evidence available to prove that the defendant has engaged in unlawful conduct.")

[4] There is no reasonable expectation of privacy when a tester participates in an application process that is open to members of the public. In effect, the landlord has consented to showing the tester the property and discussing it with the tester. *See U.S. v. Wisconsin*, 395 F. Supp. 732 (D. WI. 1975), state government effort to restrict testing activity inconsistent with the Fair Housing Act and prohibited under the Supremacy Clause, holds that a prohibition on testing "chills the exercise of the right to equal housing opportunity" and is "an obstacle to the accomplishment of the principal objective of Congress in passing the Fair Housing Act, that is, to provide fair housing throughout the United States."

Indeed, by 1983, courts were increasingly likely to consider, and rely upon, evidence collected by testers. As the Federal Court of Appeals for the Seventh Circuit recognized in *Richardson v. Howard*, 712 F.2d 319, 321-22 (7th Cir. 1983) (citations and footnote omitted), "This court and others have repeatedly approved and sanctioned the role of 'testers' in racial discrimination cases. It is frequently difficult to develop proof in discrimination cases and *the evidence provided by testers is frequently valuable, if not indispensable . . . The evidence provided by testers both benefits unbiased landlords by quickly dispelling false claims of discrimination and is a major resource in society's continuing struggle to eliminate the subtle but deadly poison of racial discrimination*."

My personal review of the reported cases where courts and administrative law judges relied on testing evidence showed that in virtually all cases with testing evidence, judges credited the evidence and relied on that evidence in making decisions.

Testers are routinely trained to be objective observers of the experiences they encounter during a test; they are trained to present themselves as bona fide applicants for housing, they are given particular assignments by a test coordinator and provided with test-appropriate income and employment information and instructed about what type of unit they are interested in and what their qualifications. In effect, they are indistinguishable from other applicants for housing whether they communicate via email, telephone, on-line or in-person. Testers must record their interactions, and new technology has made it easier to record testing evidence through telephone calls and in person.

There are significant advantages to recording testing transactions that strengthen fair housing enforcement and increase the efficacy of testing evidence:

First, recording assures that details of a transaction are accurately captured. It is impossible for a tester to recall and write down everything that happens during the course of a test. A recording assures that all of the details are documented and that any concern that discrimination has occurred can be verified.

Second, recording assures that testers are operating as they are trained to operate, as if they were real applicants, following the background they were assigned and asking the appropriate questions for the test. Reviewing a recording of a test is one way to provide quality assurance in the testing process.

Third, when a recording is admissible in court proceedings, it is valuable and reliable evidence about discrimination, and it may be available when a tester has moved out of town or is otherwise no longer available to testify.

Finally, such credible evidence helps to encourage parties to resolve complaints outside of court, because parties are more readily able to come to an agreement on the underlying facts.

In short, the evidence that courts have already found to be reliable and usable in fair housing cases is even more reliable and helpful to cases when it has been recorded.

Forty states[5] have single person consent laws that permit recording of communications relating to testing. Fair housing groups in those jurisdictions routinely use various electronic recording strategies to document telephone and in person tests. I have seen time and again the crucial role that such recordings play in helping defendants, judges, and juries identify, understand, and respond to housing discrimination.

I support the authority that would be given in HB 392 to permit single party consent for recording fair housing testing communications. The bill would align Maryland with positions taken by 40 other states and make its position consistent with their position. It would allow recorded tests to be used and relied on in judicial and administrative proceedings in Maryland. It would encourage earlier settlements and more clear understandings about how discrimination may be occurring. And it would contribute to stronger enforcement of fair housing laws across Maryland.

[5] Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.