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THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

Testimony for SB 57
Evidence – Wiretapping and Electronic Surveillance –
Fair Housing Testing
Before the Judicial Proceedings Committee
January 30, 2024

Good afternoon, Chair Smith, members of the Judicial Proceedings Committee,

Senate Bill 57 (“SB 57”) provides for the use of electronic surveillance as an evidentiary gathering technique to protect against housing discrimination. This testimony will provide why SB 57 is necessary for the protection and security of our constituents’ civil rights. Senate Bill 57 adds an additional, limited exception where the interest of justice requires the interception of wire, oral, and electronic communication.

As reported by the National Fair Housing Alliance in its 2023 Fair Housing Trends Report,

- There were 33,007 fair housing complaints received in 2022 – the highest number of complaints ever reported in a single year;
- Overall complaints were 5.74 percent higher than the previous year;
- Complaints based on source of income and domestic violence increased;
- Even with this record-setting number of complaints, most incidents of housing discrimination go undetected or unreported.

To help address these unfortunate trends, SB 57 is intended to strengthen Federal and State enforcement of fair housing laws by exempting from the scope of the State’s wiretapping statute work performed by authorized fair housing testers. “Fair housing testing refers to the use of testers who, without any bona fide intent to rent, sell or purchase a property, pose as prospective renters, sellers, or buyers of residential real estate for the purpose of determining whether housing providers and others are complying with the Fair Housing Act”¹ and similar state laws like those within Maryland civil rights provisions in Md. Code Ann., State Gov’t § 20-101, *et seq.* In 2021,

¹ [Fair Housing Initiative Program - Education and Outreach Initiative - Test Coordinator Training | HUD.gov / U.S. Department of Housing and Urban Development \(HUD\)](#).

the United States Department of Housing and Urban Development (“HUD”) built upon existing law through the Affirmatively Furthering Fair Housing Act (“AFFH”), which amended the prior Fair Housing Act of 1968, requiring “program participants to proactively take meaningful actions to overcome patterns of segregation, promote fair housing choice, eliminate disparities in opportunities, and foster inclusive communities free from discrimination.”² While Maryland has very stringent housing discrimination laws in place, documenting discrimination and gathering evidence in action has its barriers. One of those barriers is our current limits of the Maryland Wiretap Act, Md. Code Ann., CTS. & JUD. PROC. § 10-401, *et seq.* While federal and state law in many states allow a single party to a communication to record the communication without the knowledge or consent of other parties; Maryland is in a minority of states who do not.³

Senate Bill 57 does two things. First, SB 57 introduces and defines the term “nonprofit civil rights organization” but limits the kinds of organizations that may qualify as a nonprofit civil rights organization under the Maryland Wiretap Act to either:

1. a qualified fair housing enforcement organization⁴ or a fair housing organization⁵ as defined under 24 C.F.R. §125.103; or
2. an organization incorporated under Maryland law as a private, tax-exempt civil rights organization that has at least 2 years’ experience in:
 - a. complaint intake;
 - b. complaint investigation; and
 - c. testing for fair housing violations or enforcement of meritorious claims.

The federal regulation which is used to help define what a “nonprofit civil rights organization.” Comes from Part 125 of HUD’s regulations; it establishes the rules around its Fair Housing Initiatives Program.⁶ Under this regulation testers must be trained in testing procedures and

² <https://www.hud.gov/AFFH>. Last visited 1/22/2024.

³ *See, e.g.*, Recording Phone Calls and Conversations: 50-State Survey, available at <https://www.justia.com/50-state-surveys/recording-phone-calls-and-conversations/> (a majority of 36 states permit one-party consent to record including the District of Columbia, West Virginia, Virginia, and Delaware(although there is a conflict between statutes)).

⁴ A qualified fair housing enforcement organization means “any organization, whether or not it is solely engaged in fair housing enforcement activities, that (1) Is organized as a private, tax-exempt, nonprofit, charitable organization; (2) Has at least 2 years experience in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims; and (3) Is engaged in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims at the time of application for Fair Housing Initiative Program assistance.

For the purpose of meeting the 2-year qualification period for the activities included in paragraph (2) of this definition, it is not necessary that the activities were conducted simultaneously, as long as each activity was conducted for 2 years. It is also not necessary for the activities to have been conducted for 2 consecutive or continuous years. An organization may aggregate its experience in each activity over the 3-year period preceding its application to meet the 2-year qualification period requirement.” 24 C.F.R. §125.103.

⁵ A fair housing organization means “any organization, whether or not it is solely engaged in fair housing enforcement activities, that: (1) Is organized as a private, tax-exempt, nonprofit, charitable organization; (2) Is currently engaged in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims; and (3) Upon the receipt of Fair Housing Initiative Program funds will continue to be engaged in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims.” 24 C.F.R. §125.103.

⁶ While noting each of these requirements, one requirement, 24 CFR 125.107(a) is currently under review by HUD.

techniques.⁷ Testers are barred from having “an economic interest in the outcome of the test”;⁸ “be a relative of any party in [the] case”;⁹ “have had any employment history or other affiliation, within one year, with the person or organization to be tested”;¹⁰ or “be a licensed competitor of the person or organization to be tested.”¹¹

Second, under the proposed §10-402(c)(12), SB 57 creates a narrow, limited the exception to the Maryland Wiretap Act for specially defined fair housing testers. In sum, SB 57 would create the 12th narrow, limited exception to the scope of the Maryland Wiretap Act which already exempts other specialized persons for specific public policy purpose. This amendment and narrow addition of actors except from the scope of the Maryland Wiretap Statute is extremely important in helping to enforce our fair housing laws not other for residents of Maryland but also honest landlords and real estate professionals who do not discriminate but are put at a competitive disadvantage by those who do discriminate.

There are some qualified organizations that provide testing to root out fair housing violators including the Economic Action Maryland (“EAM”). EAM’s mission is to champion “economic rights, equal opportunity, and housing justice through advocacy, research, and direct service.” It addresses unlawful and unfair discrimination in housing through its fair housing program in an effort to root out discrimination in housing and ensure everyone has the right to fair housing. To accomplish the aforementioned, the EAM relies on fair housing testing to conduct its fair housing work. During these tests, fair housing testers present themselves as potential renters to landlords where there is a concern or there has been report of unfair or deceptive treatment. The testers report what experiences they encountered and EAM will review the results to determine if there is probably cause for unlawful housing discrimination. If discrimination is found, further investigation and evaluation may be needed to ensure compliance with AFFH.

Senate Bill 57 would give nonprofit civil rights organization the reliable evidence needed to successfully help uphold our fair housing laws. Due to the nature of our all-party consent laws fair housing testers are prohibited from recording their conversations during their testing and using the recordings as evidence. This presents a tremendous hurdle in effective enforcement of discrimination cases, making fair housing laws nearly unenforceable. To help cure such deficiencies, SB 57 incorporates the use of audio recording in fair housing (civil rights) testing, providing the documentation needed to prosecute discrimination cases and ensure Maryland’s housing marketplace is free from discrimination and residents and honest merchants alike are not harmed by those who seek to discriminate without review.

According to the HUD and based on its experience investigating fair housing complaints:

testers today generally audio and/or video record their testing experiences, meaning that the recordings—not the testers’ testimony—are of utmost importance in most fact-finding

⁷ 24 CFR 125.107(b).

⁸ 24 CFR 125.107(c)(1).

⁹ 24 CFR 125.107(c)(2).

¹⁰ 24 CFR 125.107(c)(3).

¹¹ 24 CFR 125.107(c)(4).

hearings. Recording fair housing tests has become ubiquitous as cost of devices and technology has gone down and the utility of such recordings has become evident... In many cases, sharing recorded evidence of fair housing testing facilitates early resolution and settlement, negating the need to interrogate tester credibility. And in housing discrimination cases that go to trial, the main role of testers as witnesses is to introduce the recorded evidence of the interaction, not to recount their experience in detail. In short, testing evidence often speaks for itself and a tester merely needs to be credible enough for the judge or jury to believe their testimony that the recording being presented is an authentic recording of the events at issue in the case.¹²

In closing, at the end of last year, Frederick County pledged to help 28 households work with the Maryland Commission on Civil Rights to investigate claims that housing voucher recipients were charged more than other tenants in the same complex.¹³ One can only imagine the strength this case would have if a nonprofit civil rights organization's testers, equipped with the tool provided under this legislation, would have experienced such an act the apartment complex is accused. This legislation is needed here in Maryland and the time was yesterday.

For the aforementioned reasons I have provided, implore you to vote favorably for SB 57.

¹² The Federal Register, *Removing Criminal Conviction Restrictions for Testers in FHIP – and FHAP-Funded Testing Programs*, Office of Fair Housing and Equal Opportunity, HUD <https://www.federalregister.gov/documents/2023/10/31/2023-23678/removing-criminal-conviction-restrictions-for-testers-in-fhip--and-fhap-funded-testing-programs>.

¹³ https://www.fredericknewspost.com/news/crime_and_justice/county-helping-households-pursue-discrimination-claims/article_07e29b57-b501-5a46-8fcc-7861b56cdb67.html

Sample Cases of Rental and Sales Discrimination based on Race, Color, National Origin, Familial Status and Religion and Rental and Sales Discrimination based on Disability resolved with Testing:¹⁴

On December 29, 2021, the court entered a [consent decree](#) in *United States v. Lone Wolf Housing Authority* (W.D. Okla.). The [complaint](#), filed on December 15, 2020, alleged that the defendants discriminated on the basis of race in violation of the Fair Housing Act and Title VI of the of the Civil Rights Act of 1964 when they rejected a housing application from complainant and her minor child on the pretext of lack of available housing and when they further misrepresented the availability of housing to a [Black tester](#) after showing numerous available units to the white companion tester. The consent decree requires defendants to pay \$75,000 in monetary damages to the complainant, her child, and the fair housing organization that conducted testing. The Housing Authority must also implement nondiscriminatory procedures, train all employees and board members on fair housing, maintain records of applications and availability, and report to the United States on their compliance with the terms of the Consent Decree. The case was referred to the Division after the Department of Housing and Urban Development received a complaint, conducted an investigation, and issued a charge of discrimination.

On April 5, 2021, the court entered a [consent decree](#) resolving *United States v. Village Realty of Staten Island Ltd.* (E.D.N.Y.). The [complaint](#), filed on September 30, 2020, alleged that the defendants violated the Fair Housing Act (FHA) on the basis of race when Defendant Denis Donovan, a sales and rental agent at Village Realty, treated African-Americans who inquired about available rental units differently and less favorably than similarly-situated white persons. The complaint also alleged that Defendant Village Realty is vicariously liable for Donovan's discriminatory conduct. The consent decree requires the defendants to adopt nondiscriminatory standards and procedures, undergo fair housing training, contribute \$15,000 to a victim fund, and pay a civil penalty. The complaint was based on testing evidence developed by the Section's Fair Housing Testing Program.

On January 3, 2023, the court entered a [consent order](#) in *United States v. Perry Homes, Inc.* (W.D. Pa.). The [amended complaint](#), which was filed on October 8, 2021, alleged that defendants Perry Homes Inc., Robert Whittington and Allyson Whittington discriminated on the basis of disability in violation of the Fair Housing Act by implementing a policy of excluding emotional support animals from rental properties they owned or operated in Cranberry, Zelienople, and Harmony, Pennsylvania. The original complaint was filed on July 23, 2021. The case is based on a HUD complaint that was filed by Southwestern Pennsylvania Legal Services ("SWPLS"), a non-profit legal aid organization whose mission includes combating housing discrimination, after the organization conducted fair housing testing. The consent order requires the defendants to pay SWPLS \$15,000 in damages, to comply with the Fair Housing Act, adopt a reasonable accommodation policy, publicize the policy in applications, leases, tenant renewals, and in its rental office, provide training for its employees, and comply with other equitable terms. The case

¹⁴ <https://www.justice.gov/crt/recent-accomplishments-housing-and-civil-enforcement-section#ip%20rental%20and%20sales%20race%20and%20color>. Last visited 1/22/2024.

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