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Testimony of Jonathan M. Smith, Chief of the Civil Rights Division
Before the House Judiciary Committee
In Support of House Bill 392
February 7, 2024

House Bill 392, if enacted, will provide an important tool to address housing discrimination in Maryland. The bill will allow a very limited exception to the two-party consent requirement to record a conversation for the purposes of testing in aid of the enforcement of fair housing laws. In some cases, the recording of a fair housing test will be the best evidence admissible in court that discrimination is occurring and will facilitate effective remediation. On behalf of the Civil Rights Division of the Office of the Attorney General of Maryland, I offer support for the Bill.

Marylanders are protected from discrimination in housing by state, local, and federal law. It is illegal to deny someone equal access to housing based on a broad range of demographic characteristics, including race, gender, sexuality, gender identity, disability, or familial status. Just last year, the General Assembly extended protections against discrimination to include persons who use a government voucher to pay rent when it enacted the Housing Opportunities Made Equal or "HOME" Act.

Nevertheless, housing discrimination in Maryland continues to persist. Maryland is amongst the most diverse state in the nation,¹ yet it remains highly segregated.² Segregation has

¹ <https://www.census.gov/library/visualizations/interactive/racial-and-ethnic-diversity-in-the-united-states-2010-and-2020-census.html>

² Maryland Segregation Map, https://hdpulse.nimhd.nih.gov/data-portal/physical/map?race=00&race_options=raceall_1&sex=0&sex_options=sexboth_1&age=001&age_options=ag

an impact on every aspect of life. The ability to live where one chooses affects access to nutrition or health care,³ defines what school a student can attend, limits access to work or transportation, and impacts recreational and cultural opportunities. Housing discrimination also impacts the value of a home based on the race of the owner, which has a serious impact on wealth inequality and the creation of generational wealth.⁴

Fair housing testing has long been used to root out discrimination. Testing involves the use of trained individuals who apply for housing to measure whether persons with a particular protected characteristic are treated differently than a person without the characteristic. Often, this will involve matched pairs – persons who are similarly situated except for the tested demographic characteristics – to measure whether they receive the same information or opportunity.

Testing was a strategy pioneered by Dr. Martin Luther King in Chicago. In 1966, before the enactment of the Fair Housing Act, Dr. King helped found the Chicago Open Housing Movement which recruited Black volunteers to apply for housing in real estate offices only to be told that the listed properties in white neighborhoods were unavailable and steered to Black areas of the City.⁵ The evidence from these tests were an important part of the record that led to the passage of the Fair Housing Act after Dr. King's assassination.

Tester evidence has long been accepted in Court. It was first recognized by the United States Supreme Court in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and has been admitted in thousands of cases since. In states that permit one-party consent, recorded evidence is routinely used in legal proceedings.⁶ In all-party consent states, the evidence of testing is still available. The difference is that it comes in through the testimony of a tester as opposed to the recording of the conversation. The United States Department of Housing and Urban Development concluded as part of its testing program that recording of a test is the best evidence of what was said and facilitates accurate and efficient resolution of disputes.⁷

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³ Huang SJ, Sehgal NJ (2022) Association of historic redlining and present-day health in Baltimore. PLoS ONE 17(1): e0261028. <https://doi.org/10.1371/journal.pone.0261028> (last visited January 24, 2024).

⁴ D. Kamin, Home Appraised With a Black Owner: \$472,000. With A White Owner: \$750,000, New York Times (August 18, 2022); <https://www.nytimes.com/2022/08/18/realestate/housing-discrimination-maryland.html> (last visited January 28, 2024)

⁵ N. Moore, The Test Used to Expose Housing Discrimination and Its Chicago Roots, WBEZ (December 19, 2018); <https://www.wbez.org/stories/the-test-used-to-expose-housing-discrimination-and-its-chicago-roots/5c44b3ac-562c-455f-946d-0453098555ed> (last visited January 28, 2024).

⁶ Thirty-nine states and the District of Columbia permit one-party consent to recording. <https://www.regulations.gov/document/HUD-2023-0091-0001>.

⁷ "Based on HUD's 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 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. Such recording is not only relatively inexpensive, it is also explicitly legal: Federal law and state law in many states allow a party to a communication like a telephone call to record without the knowledge or consent of

Discrimination has become more subtle. No longer are there signs posted on the lawn of an apartment building that Blacks or Jews or other racial groups are not welcome and restrictive covenants have long been outlawed. Landlords, persons selling real estate, and homeowner associations have found other ways to exclude persons with demographic characteristics that they deem “undesirable.” People in protected classes are not told that they are not welcome because of their race gender, family status, sexuality, gender identity, or disability. Instead, they are told that the property is no longer available, that they must pass an onerous background check, or that the cost is higher than advertised. Without testing, an applicant or prospective purchaser does not know that the next white person who walks through the door will be told something very different.

Testing can be performed without a recording. The testimony of the tester is important evidence. However, a recording of the conversation is much stronger. The judge or jury can hear directly what is said, conflicts in testimony can be resolved, and lapses in memory avoided. The existence of recorded evidence will reduce the need for litigation and promote the early and effective resolution of disputes.

One-party consent does not implicate the Fourth Amendment and is permitted in the overwhelming majority of states. The Court of Appeals of Maryland (now the Supreme Court) more than 25 years ago recognized that the two-party consent requirement in Maryland law was broader than, and not mandated by, either the Constitution or federal law. *Miles v. State*, 781 A.2d 787, 798 (Ct. App. 1998).⁸ One-party consent has repeatedly survived constitutional scrutiny. *See, United States v. Keen*, 508 F. 2d 986, 989 (9th Cir. 1974) (“Wire taps obtained with the consent of one party to a conversation do not violate the fourth amendment.”); *United States v. Gervasi*, 562 F. Supp. 632, 647 (N.D. Ill. 1983) (“Where there is one party consent, the constitutional guarantees have not been abridged” (citing *United States v. White*, 401 U.S. 745 (1971))).

During the last legislative session, the General Assembly gave the Attorney General the power to enforce all State and federal civil rights laws. To implement this authority, the Attorney General has created the Civil Rights Division and we are in the process of setting up the office.

other parties. 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.” (italics in original), Id.

⁸Title III of the Omnibus Crime Control and Safe Streets Act of 1968 protects individuals from the intentional interception of wire, oral, or electronic communication and regulates the use of surveillance technology by private citizens as well as law enforcement. *See* 18 U.S.C. § 2510 *et seq.* Under those provisions, it is generally unlawful to intentionally intercept, endeavor to intercept, or procure another person to intercept or endeavor to intercept, any wire, oral, or electronic communication. 18 U.S.C. § 2511(1)(a). However, federal law expressly exempts from its restrictions, if “one of the parties to the communication has given prior consent to such interception.” 18 U.S.C. § 2511(2)(c) and (d)

The elimination of housing discrimination will be one of our key priorities. Fair housing testing will be an important approach in the development of the docket. The enactment of House Bill 392 will facilitate our work and allow us to be more efficient and effective.