

CHARLES E. SYDNOR III, ESQ.
Legislative District 44
Baltimore County

DEPUTY MAJORITY WHIP

Judicial Proceedings Committee
Executive Nominations Committee

Joint Committees

Administrative, Executive, and
Legislative Review

Children, Youth, and Families

Senate Chair, Legislative Ethics

Chair

Baltimore County Senate Delegation



James Senate Office Building
11 Bladen Street, Room 216
Annapolis, Maryland 21401
410-841-3612 · 301-858-3612
800-492-7122 Ext. 3612
Charles.Sydnor@senate.state.md.us

THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

Testimony for SB 107
Evidence – Interception of Oral Communications –
Fair Housing Testing
Before the Judicial Proceedings Committee
January 15, 2025

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

Senate Bill 107 (“SB 107”) provides for the interception of oral communications as an evidentiary gathering technique to protect against housing discrimination. This testimony will provide why SB 107 is necessary for the protection and security of our constituents’ civil rights. Senate Bill 107 adds an additional, limited exception where the interest of justice requires the interception of wire, oral, and electronic communication. The Judicial Proceedings Committee voted nine to two in favor of this bill last session.

Senate Bill 107 is intended to strengthen the 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, 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,

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

² <https://www.hud.gov/AFFH>. Last visited 1/10/2025.

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 107 does two things. First, SB 107 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” is 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 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

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.

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).

Second, under the proposed §10-402(c)(12), SB 107 creates a narrow, limited exception to the Maryland Wiretap Act for specially defined fair housing testers. In sum, SB 107 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 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 just 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.

Senate Bill 107 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 107 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 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

For the aforementioned reasons I have provided, implore you to vote favorably for SB 107.

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>.

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:¹³

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

¹³ <https://www.justice.gov/crt/recent-accomplishments-housing-and-civil-enforcement-section#jp%20rental%20and%20sales%20race%20and%20color>. Last visited 1/22/2024.

rental office, provide training for its employees, and comply with other equitable terms. The case was referred to the Division after the Department of Housing and Urban Development (HUD) received the complaint, conducted an investigation, and issued a charge of discrimination.