



Dena Robinson, Attorney
robinsond@publicjustice.org
Tyra Robinson, Attorney
robinsont@publicjustice.org
Public Justice Center
1 North Charles Street, Suite 200
Baltimore, Maryland 21201
410-625-9409, ext. 222

HB 1561

Discriminatory Housing Practices - Intent

Hearing before the Health and Government Operations Committee, March 6, 2020

Position: SUPPORT

The Public Justice Center (PJC) is a not-for-profit civil rights and anti-poverty legal services organization which seeks to advance social justice, economic and racial equity, and fundamental human rights in Maryland. The PJC strongly **SUPPORTS HB 1561**, which will memorialize the disparate impact standard that the Department of Housing and Urban Development (HUD) adopted in 2013 under the Obama Administration.¹ HUD's adoption of the disparate impact standard confirmed the Department's long-held reading of the Fair Housing Act (FHA). HB 1561 will ensure that this standard will be available to Maryland residents if or when the federal government rescinds the standard. Therefore, PJC requests a **FAVORABLE** report.

HB 1561 Acknowledges the Role Local Governments Can Play in Perpetuating or Remediating Housing Discrimination. Throughout this Nation's history, local governments have played a critical role in controlling the racial makeup of neighborhoods.² In fact, race-neutral local laws have been a main driver of racial exclusion, particularly in housing. For example, in 1911, the Baltimore City Council became the first in the nation to codify racially restrictive covenants in Baltimore's neighborhoods.³ Given this history, local governments are best situated to remedy the ill effects of racial segregation and housing discrimination.

HB 1561 Acknowledges the Insidious Nature that Implicit Bias Plays in Housing Discrimination Today. During the period leading up to the passage of the 1968 Fair Housing Act, overt and explicit discrimination plagued Black communities. Over the years since the passing of the FHA, this overt type of discrimination has decreased, in large part because it was easy to detect. Nevertheless, discrimination still lurks and impedes the advancement of

¹ Disparate Impact Standard, 83 Fed. Reg. 28, 560 (June 20, 2018).

² Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 Harv. L. Rev. 1841, 1860-85 (1994) (discussing how local laws and policies have been used to control the makeup of neighborhoods).

³ Garrett Power, *Apartheid Baltimore Style: the Residential Segregation Ordinances of 1910-1913*, 42 Md. L. Rev. 289, 289 (1983).

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many Black, Latinx, and other oppressed people in this country. "Housing discrimination has declined only slightly since the passage of the FHA in 1968⁴. Housing discrimination continues through redlining⁵, unfair lending practices⁶, and gentrification⁷. Still, laws addressing housing discrimination often focus on intent, not impact.⁸ Intent is incredibly difficult for litigants to prove because landlords have become savvy at hiding discriminatory intent.⁹ However, in practice, discrimination is often the result of unconscious discrimination, or implicit bias.¹⁰ Implicit biases pervade rational decision-making, resulting in "even well-intentioned people unknowingly act[ing] on racist attitudes."¹¹ HB 1561 acknowledges the existing state of discriminatory acts and includes an updated framework to enact anti-discrimination legislation that meets the needs of the modern day.

HB 1561 Safeguards the Foundational Strength of the Fair Housing Act of 1968. The FHA was enacted to address the ongoing problems of segregation and inequality burdening the United States¹² broadly by building "integrated and balanced communities."¹³ The United States Supreme Court recently affirmed the Fifth Circuit Court of Appeals in a case addressing whether the FHA could be read to prohibit policies adversely affecting marginalized groups even when that is not the stated goal of the policy.¹⁴ The Court held that disparate impact is recognizable as a category of racial discrimination under the law. HB 1561 aligns with the Supreme Court's reading of the Fair Housing Act in the above-mentioned case and provides a means of addressing current forms of discrimination for injured citizens.

HB 1561 Protects the Most Vulnerable Populations Susceptible to Housing Discrimination, Namely Low-Income Women, Black, and Latinx People. Women in the United States live in poverty at rates higher than men

⁴ William H. Fuller, What's HUD Got to Do With It?: How HUD's Disparate Impact Rule May Save the Fair Housing Act's Disparate Impact Standard, 83 Fordham L. Rev. 2047 (2015) (citing Robert G. Schwemm, Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate).

⁵ Terry Gross, A Forgotten History of How the U.S. Government Segregated America, available at:

<https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>.

⁶ *Id.*

⁷ Urban Displacement Project, The Legacy of Redlining, available at: <https://www.urbandisplacement.org/redlining>.

⁸ Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 Mo. L. Rev. 83, 107 (2008) ("Currently, laws, rules and policies aimed at preventing discrimination assume that discrimination is the result of a conscious decision made at the point of the decision. Such laws, rules and policies do not work if much discrimination is unconscious, i.e., the decisionmaker is not aware of it at the point of decision.").

⁹ *Id.* at 96 ("Proving intentional discrimination is difficult, at least in part because decisionmakers have become quite sophisticated in masking their discriminatory intent.")

¹⁰ Melvin J. IV Kelley, Testing One, Two Three: Detecting and Proving Intersectional Discrimination in Housing Transactions, Harvard Journal of Law and Gender, Vol. 42 (2019).

¹¹ *Woods v. City of Greensboro*, 855 F.3d 639, 641 (4th Cir. 2017) (quoting Harry T. Edwards, *Reflections on Racial Stigmas and Stereotyping*, 8 (unpublished paper, University of Michigan Law School, March 25, 2017) (on file with the Clerk of Court as ECF opinion attachment) (footnote omitted) (citing Mahzarin R. Banaji & Anthony G. Greenwald, *Blindspot: Hidden Biases of Good People* (2013)).

¹² Kerri Thompson, *Fair Housing's Trap Door: Fixing the Disparate Impact Doctrine under the FHA*, 25 J. Affordable Hous. & Cmty. Dev. L. 435, 441, 443 (2017).

¹³ *Id.* at 454 (quoting Jean Eberhardt Dubofsky, *Fair Housing: A Legislative History and Perspective*, 8 Washburn L.J. 149 (1968)).

¹⁴ *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, 135 S. Ct. 2507 (2015).

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due to a segregated labor market that forces many women into low-wage work.¹⁵ "The question [of racial discrimination] is only further compounded for a person with multiple [marginalized] identities as the disparate treatment may have been sparked by one of their identity traits either individually or in any number of combinations thereof."¹⁶ As discrimination becomes more institutionalized and invisible, anti-discrimination laws must change with it to ensure that the rights for which the FHA was developed are extended to communities which are most exposed to discrimination.

For the foregoing reasons, the PJC **SUPPORTS HB 1561** and urges a **FAVORABLE** report. Should you have any questions, please call Dena Robinson at 410-625-9409 ext. 222.

¹⁵ Gail Quets, et al., *A Gender Lens on Affordable Housing* 7 (2016), available at: https://www.icrw.org/wp-content/uploads/2016/11/gender_lens_on_affordable_housing_by_regender_final-1.pdf.

¹⁶ Melvin J. IV Kelley, *supra* n.7 at 42.