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July 16, 2021

Committee on Equal Justice
Rules Review Subcommittee – Landlord-Tenant Matters
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Dear Rules Review Subcommittee Members:

This testimony is submitted on behalf of the Public Justice Center with respect to the Committee on Equal Justice's examination of rules and practices relevant to landlord-tenant law. Public Justice Center is a statewide public interest advocacy and legal services organization. Public Justice Center's Human Right to Housing Team focuses on representing tenants in eviction cases while advocating for changes to policies that have a detrimental effect on tenants' access to safe, fair, affordable housing.

I. Racism's Effects on Landlord-Tenant Practice.

This Committee's exploration of the discriminatory effects of its rules and practices with respect to landlord-tenant law is vital because of the very real, racially discriminatory impact of current rules and practices: Namely, by refusing to set standards and protections for the due process rights of tenants in landlord-tenant matters, the Court's lack of process reinforces systemic racism and contributes to the race and gender disparities in evictions.

The exploration must begin with the understanding that there are few rules directly governing landlord/tenant proceedings. Unlike other special legal proceedings, only one rule references landlord/tenant matters, MD Rule 3-711, which bars discovery and states that the rules apply "unless inconsistent with the applicable laws, the rules of this Title." As described below, because many rules may or may not be inconsistent with applicable laws, it is unclear which rules are applicable to protect the due process rights of tenants. This gap in procedural guidelines, rules and guardrails leaves tenants subject to arbitrary standards based on implicit biases and the historically racist foundations of many property laws. In particular, the lack of clarity on the application of many procedural rules allows uneven and biased application of purely procedural mechanisms to the disproportionate detriment of people of color and women appearing in eviction courts.

It is well known that Maryland promulgated race-based housing policies for decades, including redlining, gentrification, segregation, exclusionary zoning and even demolishing entire Black communities. As a result, Black persons have been disproportionately denied access to homeownership and confined more

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often to disinvested, segregated communities. As of 2018, the Black homeownership rate in the U.S. stood exactly where it had in 1968 when the Fair Housing Act was enacted.[1] In the Baltimore-Columbia-Towson metro-area, the Black homeownership rate was 44.4% in 2018, compared to 76% for whites.[2]

Consequently, while Black residents comprise only 31% of Maryland's population, they are 42% of Maryland's renters.[3] Black individuals are also more likely to be subject to eviction. According to analysis by Timothy Thomas, Ph.D., based on data from 2018 and 2019, the number of evictions of Black women in Baltimore City is 296% greater than the number of evictions of white men.[2] Additionally, Dr. Thomas' study revealed that the highest risk of eviction in Baltimore City geographically lies in historically redlined neighborhoods.[4] As detailed in a number of publications, just as our criminal justice system has had a negative, disparate impact on Black men, our housing justice system has had a similarly destructive impact on Black women, i.e., "Poor black men are locked up while poor black women are locked out."[5] And, while these negative outcomes are not limited to Maryland, Maryland is among the worst perpetrators of eviction, and its Black- and female-headed households are acutely aware of it.[6] An incredible 79% of Md households facing a rent-based eviction in the wake of COVID are persons of color.[7]

In the context of this data, the failure of the judiciary to apply fundamental procedural protections to landlord/tenant proceedings is a denial of due process to Black and Brown women and children regarding the basic human necessity of shelter. This manifestation of structural racism is self-evident to anyone who walks into Baltimore City's rent court in which the vast majority of tenant-defendants are Black, and the majority of landlord professional agents and attorneys are white. Standardless discretion in place of actual legal rules leaves space for race-based interpretations of facts, prejudiced assumptions, and even the devaluing of the life, health

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[1] Brakkton Booker, "In Baltimore, The Gap Between White And Black Homeownership Persists," NPR: ALL THINGS CONSIDERED (Aug. 7, 2018), https://www.npr.org/2018/08/07/632497683/in-baltimore-the-gap-between-white-and-black-homeownership-persists.
[2] "Mapping the black homeownership gap," URBAN INSTITUTE: URBAN WIRE (Feb. 26, 2018), https://www.urban.org/urban-wire/mapping-black-homeownership-gap.
[3] National Center for Smart Growth and Enterprise Community Partners, Inc., "Maryland Housing Needs Assessment and 10-Year Strategic Plan" 23 (Dec. 2020), https://dhcd.maryland.gov/Documents/Other%20Publications/Report.pdf.
[4] Tim Thomas, Ian Kennedy, Alex Ramiller, Ott Toomet, & Jose Hernandez, Baltimore Eviction Map, May 8, 2020, https://evictions.study/maryland/report/baltimore.html.
[5] Matthew Desmond, *Evictions: a hidden scourge for black women*, WASH. POST, (June 16, 2014), https://www.washingtonpost.com/posteverything/wp/2014/06/16/evictions-hurt-black-women-as-much-as-incarceration-hurts-black-men/.
[6] COVID-19 Housing Policy Score Card: Maryland, EVICTION LAB, https://evictionlab.org/covid-policy-scorecard/md/ (last visited July 2, 2021).
[7] Rent Debt Dashboard, NATIONAL EQUITY ATLAS, https://nationalequityatlas.org/rent-debt (last visited June 15, 2021).

and safety of Black and Brown tenants, including children. Such standardless discretion gives free rein for implicit bias by refusing to set up guardrails to cabin such discretion.[8]

II. Proposed Rules Amendments

A. Allow for limited pre-trial discovery at the request of either party.

Pre-trial discovery is the only way by which a tenant can adequately prepare for a trial that may result in the loss of their home. Denial of all discovery is arbitrary and works to subject tenants to trial by surprise. For example, the landlord has a duty to keep a ledger of charges and payments under Maryland law. Md. Code, Real Prop. § 8-208.3. At the moment, a tenant does not even have the ability to obtain such a ledger that is foundational to the landlord's claim in summary ejectment. Rule 3-711 should be revised as follows:

> Landlord-tenant and grantee actions shall be governed by (1) the procedural provisions of all applicable general statutes, public local laws, and municipal and county ordinances, and (2) unless inconsistent with the applicable laws, the rules of this Title~~, except that no pretrial discovery under Chapter 400 of this Title shall be permitted in a grantee action, or an action for summary ejectment, wrongful detainer, or distress for rent, or an action involving tenants holding over~~. IN ACTIONS INVOLVING SUMMARY EJECTMENT, DISTRESS FOR RENT, OR TENANT HOLDING OVER, EITHER PARTY MAY REQUEST THAT THE COURT ALLOW FOR PRE-TRIAL DISCOVERY UNDER CHAPTER 400 OF THIS TITLE, TOGETHER WITH A POSTPONEMENT TO CONDUCT SUCH DISCOVERY. THE COURT SHALL GRANT SUCH A REQUEST ABSENT A COMPELLING REASON SHOWN BY THE OTHER PARTY TO DENY THE REQUEST.

B. Clarify that the rules of evidence apply in landlord-tenant cases.

There is ongoing confusion in the District Court about application of the rules of evidence in landlord-tenant matters. A committee note should be added to Rule 3-701(a) to clarify that "small claims actions" within that subtitle do not include landlord-tenant actions. Note that while Md. Code, Courts and Jud Proc. § 4-405 (CJP) provides that the District Court has exclusive original jurisdiction over a "small claims action" as well as, separately, any "landlord

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[8] *Cf.* Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 New Eng. L. Rev. 417, 421-424 (2011) ("The informality of immigration court— where the rules of evidence do not apply, forty percent of respondents are unrepresented by counsel, and overloaded, burned out judges are allowed to play an inquisitorial role—creates a setting with weak normative structures and vague guidelines for appropriate behavior, leading to discrimination." Among "aversive racist" individuals, who hold "egalitarian (conscious) explicit attitudes but negative implicit (unconscious) attitudes," their "non-conscious feelings and beliefs... will produce discrimination in situations in which normative structure is weak, when the guidelines for appropriate behavior are unclear, when the basis for social judgment is vague, or when one's actions can be justified or rationalized based on some factor other than race."); *see State v. Veal*, 930 N.W.2d 319, 340 (Iowa 2019), reh'g denied (July 15, 2019) (Cady, Chief Justice, concurring specially, "Thus, I am not in favor of trying to modify our governing rules to better detect bias in discretionary decision-making so much as I am in eliminating discretionary practices altogether that allow implicit bias to exist undetected.").

tenant action under §§ 8-401 and 8-402 of the Real Property Article, in which the amount of rent claimed does not exceed $ 5,000 exclusive of interest and costs[,]" the statute does not equate such landlord-tenant actions with small claims. Such landlord-tenant actions should be governed by the rules of evidence to protect the due process rights of both parties. This is especially urgent for disproportionately Black tenants who face the loss of their homes if the landlord is allowed to present evidence that does not comply with the applicable rules.

C. Provide that each case on the docket must be called by the names of the parties to the case – rather than calling the case solely by the name of the landlord's agent, which is currently the practice in some jurisdictions.

In some jurisdictions the Court will call summary ejectment cases only by the name of the landlord's "rent court agent" or attorney and will not name the tenant-defendant or property address, *e.g.*, "calling all tenants for Maryland Rent Court.com." Tenants who may only be familiar with their landlord or the property manager will at times miss their cases being called, resulting in default judgments. Calling the names of each of the parties is a minimum standard of due process, especially for the party that is at-risk of losing their home. We propose the following rule:

> EACH SUMMARY EJECTMENT CASE SHALL BE CALLED ON THE DOCKET BY THE NAME OF EACH PARTY TO THE CASE.

D. Clarify that counterclaims may be filed in landlord-tenant matters

The statutory prohibition on filing a counterclaim or cross-claim applies only to actions for wrongful detainer under Rule 14-132(e). Yet, district court judges often strike tenants' counterclaims without basis. Given the limited time periods and "nail and mail" service involved in landlord-tenant matters, the Court should clarify that counterclaims are permitted subject to reasonable limitations. We propose the following rule:

> IN AN ACTION INVOLVING SUMMARY EJECTMENT, TENANT HOLDING OVER, OR BREACH OF LEASE, THE DEFENDANT MAY FILE A COUNTERCLAIM PRIOR TO TRIAL, AND THE COURT SHALL POSTPONE ANY TRIAL FOR A REASONABLE PERIOD OF TIME AT THE REQUEST OF EITHER PARTY IN ORDER TO LITIGATE ALL MATTERS BEFORE THE COURT.

E. Clarify the application of rules regarding post-judgment motions and appeals periods.

Because of the shortened appeal periods for summary ejectment, tenant holding over, and breach of lease cases, there is significant confusion and inconsistency regarding the time periods for filing post-trial motions under Rules 3-533, 3-534, and 3-535. The Court should clarify that when a post-trial motion is filed within the appeal period applicable to the given action (*e.g.* four business days for summary ejectment and 10 days for tenant holding over), the appeal period is tolled by the filing of such a motion. This could be done by including a committee note to Rule 3-711 or by amending the rules themselves.

F. Provide for a new trial when tenant does not receive adequate service of process.

In our experience, tenants frequently do not receive service of process in failure to pay rent, tenant holding over, and breach of lease cases. The governing statutes provide for the bare constitutional minimum of service by first-class mail and posting by the sheriff only. Because many FTPR, THO, and BOL cases proceed on an expedited basis with a trial as soon as one week after service, timely service is essential. In our experience systemic, increased delays from the U.S. Postal Service and inconsistent practices across sheriffs' offices mean that tenants frequently do not receive timely service of process in these cases. For example, despite clear guidance from the Attorney General of Maryland that constitutional due process requires the sheriff to post a summary ejectment complaint on the door to the apartment unit subject to repossession,[9] the Baltimore City Sheriff continues to post such complaints on the outside doors to large multi-family buildings or in the mail room. This failure to secure due process in the service of eviction complaints already at the constitutional "nail and mail" floor is unacceptable.

At the same time, the post-judgment motion rules are oriented toward defects in *personal* service only. Accordingly, we urge the Committee to recommend creating a new Rule 3-532 to address this issue as follows:

> Rule 3-532 – Motion for New Trial in Landlord-Tenant Action
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> (a) Time for filing. In addition to any motion filed under Rules 3-533, 3-534, or 3-535, any party to an action involving summary judgment, tenant holding over, or breach of lease may file a motion for new trial within ten days after first discovering that a default judgment was entered in the matter.
>
> (b) Grounds. The movant must specify under oath (1) that the movant did not receive service of process or was unable to attend the scheduled trial for good cause, and (2) the nature of a good faith defense that the tenant would have presented at trial.
>
> (c) Disposition. Upon filing of a motion under this rule, the Court shall immediately stay execution of any warrant of restitution until final disposition of the motion. Upon a finding that the motion complies with this rule, the court shall set aside any judgment entered against the tenant and grant a new trial on all of the issues.

G. Revise and clarify Rule 3-612 involving consent judgments.

In summary ejectment matters it is a common practice for the court to enter a "consent judgment" upon the tenant's admission that certain amounts of rent were not yet paid– even when tenants have meritorious defenses, including defenses based on lack of essential services and threats to life, health and safety. The Court of Appeals recently reinforced the well-established rule that, a consent judgment involves a "bargained for" agreement of the parties "endorsed by the court" that the court "enters at the request of the parties."[10] The entry of a

[9] 86 Op. Atty Gen. Md. 42 (2001).

[10] *Pettiford v. Next Generation Trust Serv.,* 467 Md. 624, 644-45 (2020).

consent judgment usually bars an appeal. The practice of entering a "consent judgment" without the requisite elements and in contradiction to legal authority is erroneous and denies tenants meritorious appeals; yet it remains commonplace in landlord/tenant court even after the *Pettiford v. Next Generation Trust Serv.* decision. The Court should memorialize the standard articulated in *Pettiford* within Rule 3-612 as follows:

> AT THE REQUEST OF THE PARTIES, the court may enter a CONSENT judgment ~~at any time by consent of the parties~~ ONLY UPON FINDING, CONFIRMED BY THE PARTIES ON THE RECORD, THAT THE PARTIES HAVE ENTERED INTO AN AGREEMENT TO SEEK A CONSENT JUDGMENT IN EXCHANGE FOR CONSIDERATION AND TO AVOID FURTHER LITIGATION.

Such guidance will restrict the court's ability to enter a consent judgment that does not comply with applicable caselaw and that would otherwise deny a party the right to an appeal.

H. Greater Access to Precedent-Setting Appeals in Landlord-Tenant Matters.

There is little accountability for judges in landlord-tenant matters by way of appeal because so few cases reach the stage of a precedent-setting appeal by a successful petition for certiorari to the Court of Appeals. Current rules provide that appeals from the District Court must first be heard by the circuit court, many of which are de novo and none of which result in precedential caselaw and resulting judicial accountability. In each fiscal year from 2018 through 2020, fewer than 1,000 appeals were brought from the District Courts in all civil matters combined. Landlord-tenant appeals are even rarer because of prohibitively expensive appeal bond requirements and the Court's persistent misapplication of consent judgments, among numerous other obstacles. For example, of those tenants who might try to appeal, many cannot afford to post the appeal bond—which can be as high as three times the rent in dispute—to forestall eviction. And, even when an appeal is noted, counsel is available, and a bond is paid, the landlord and tenant are clearly in a rapidly deteriorating relationship and possibly in a rapidly deteriorating property, making it exceedingly likely that the tenant will move out or be evicted for some other reason before the matter has time to wend its way through the appellate process, rendering the case potentially moot.

Because of the importance of precedent-setting appeals in creating consistency in landlord-tenant matters through caselaw, the important function of judicial accountability served by appeals, and the difficulty of pursuing appeals in the landlord-tenant context, we propose to amend the rules to provide that all appeals on the record (as opposed to de novo appeals) in FTPR, THO, or BOL cases either 1) be heard as a matter of right in the Court of Special Appeals, or, in the alternative, 2) allow either party to seek to bypass of the circuit court with a petition for writ of certiorari to the Court of Appeals as is currently permitted in cases pending in the Court of Special Appeals.

III. Proposed Revisions to Practices That Perpetuate Structural Racism.

With respect to common judicial practices, here too the lack of guidelines and training allows implicit bias and unrestricted discretion to disadvantage disproportionately Black tenants. To

address these issues, we suggest that the Judiciary issue a series of administrative orders or guidelines as detailed below. Such administrative orders should be part of a mandatory training for all judges. To ensure compliance and accountability, the Judiciary should engage in periodic, unannounced monitoring of judges on the bench. Additionally, the Judiciary should support legislative initiatives that make it easier for the parties to appeal, including a modification or elimination of the appeal bond requirement as detailed below.

A. **Provide tenants, upon request, a meaningful opportunity to consult with at-court eviction prevention services providers, including rental assistance programs, pro bono attorneys, and mediators.** Whereas Maryland courts recognize the need for diversion procedures that mitigate particular harms among veterans, youth, and even drivers, the disproportionate harm of eviction on Black and female-headed households has yet to garner the judiciary's support for systematic eviction diversion. The Maryland Judiciary actively opposed legislation in 2021 (House Bill 52/Senate Bill 454) to establish a modest, volunteer-run eviction diversion program in eight District Courts. The legislation proposed procedural changes to allow tenants an effective pre-trial opportunity or continuance to engage with rental assistance programs, legal service providers, or mediation at court.

   Despite the judiciary's expansion of Help Centers and its partnership with the Pro Bono Resource Center to provide "Volunteer Lawyer of the Day" services at court (Baltimore City, Prince George's County, Montgomery County), the District Court has stopped short of creating procedures (by administrative order or otherwise) to maximize pro bono legal assistance and mediation as tools for diverting cases from entry of judgments for eviction. Unlike other types of cases such as debt collection matters, the courts are inconsistent in providing tenants an opportunity as brief as 30 minutes during the eviction docket to engage with legal services providers whom they may have met for the first time at court – often because there was little opportunity to obtain counsel between service and the expedited trial. Reluctance to alter procedures has continued even amid the need for state courts to participate in the deployment of emergency rental assistance to avoid evictions.

   Absent clear procedures and flexibility for use of diversion services, such services become far less effective, wasting the resources expended on them. Landlords and tenants are reluctant to leave the courtroom even momentarily to engage a service provider because there is no certainty about whether the court will call their case and proceed to judgment in their absence. The Court should remove uncertainties and standardize a process of docket management, recesses, and/or continuances, for allowing litigants to engage pre-trial, at-court services or to have additional time to utilize services outside the court.

B. **Credit oral testimony.** The Court often refuses to credit any oral testimony regarding payment of the rent or notice to the landlord of conditions of disrepair unless the tenant has written confirmation. Written confirmation is not required by law, and the systemic bias against crediting oral testimony has a disparate impact on tenants who do not have access to the business accounting and software systems that are available to and used by

landlords. Essentially, the Court will only accept documentary evidence from the tenant, which is only created by and in possession of the landlord, but with no mechanism to compel the landlord to provide that documentation to the tenant.

C. **Emphasize that the landlord has the burden of proof.** In part because of the court's overreliance on documentary evidence, the court often has the tendency to accept the landlord's complaint as fact – effectively placing the burden of proof on the tenant to disprove the complaint allegations. For example, landlords often rely in rent court on contractor agents who have no personal knowledge of the ledger or business practices of the landlord. Yet, the court often credits the rent court agent's hearsay testimony or submission of unauthenticated, hearsay documents as sufficient evidence over the first-hand account of the tenant regarding issues in dispute. Judicial training should emphasize that the landlord always has the burden of proof on its claims and that authenticated, non-hearsay evidence must support the landlord's assertions.

D. **End deferential treatment of agents and attorneys for landlords.** For example, agents and attorneys for landlords frequently, as a matter of policy or practice, do not arrive at court with competent evidence to support their claim, *e.g.,* they do not have an admissible ledger of charges and payments to support their claim. And yet they are readily granted a continuance to obtain such evidence. They are so accustomed to the entry of default judgments that even the mere appearance of the tenant to defend the case can occasion a landlord's request for continuance that will usually be granted. Tenants, however, are often not accorded such deference when they do not have all their evidence at hand and even when the landlord's evidence suggests an unanticipated need for a corroborating witness. Self-represented tenants who request a postponement or continuance may be met with a response as perfunctory as: "You knew your trial was today, so you should have come prepared to present your case." This differential treatment may occur despite the tenant's proffer of having only a few days' notice of their trial, experiencing health complications that impeded trial preparation, or even having been refused documents in the possession of the landlord such as an account statement or lease agreement, and the aforementioned lack of access to discovery, etc.

E. **Revise summary ejectment complaint form.** The complaint form should be revised to make it much clearer as to when and where the hearing will take place. The type on these complaints regarding the trial date, time and location is difficult to read, particularly for tenants who are visually impaired. This information should be placed in larger, bold font that is easily accessible to any tenant on all the multiple duplicates of the form.

F. **Stop requiring tenants to remove their hat or head covering.** The implementation of this rule often humiliates tenants, especially women, who may not have the economic means to pay for the hair salon and/or may be living in properties that do not have hot running water or even electricity in order to properly groom themselves. Due to cultural norms, the practice of demanding removal of head coverings disproportionately affects

people of color, especially Black women. Also, there is often inconsistency from the court in determining who is wearing a head covering for religious purposes and who is not, raising First Amendment concerns in addition to discriminatory treatment. To provide further details on the importance of cultural competency and judicial training, we have attached PJC testimony on HB 950 (2021) – Judges – Community and Cultural Awareness Training.

G. Revise the summary ejectment complaint form regarding consent judgments. The form should provide space for the court to make the required findings of fact specified above in order to enter a consent judgment.

H. Provide extensive judicial education on rent escrow proceedings. Courts routinely disregard the law relevant to rent escrow cases to the detriment of predominantly Black and Brown tenants. Examples of common erroneous practices include:

1. **Requiring the parties to waive the right to appeal in order to initiate disbursement of the money held in escrow.** There is no such requirement in law, and yet many courts impose this requirement.

2. **Refusing to hear an escrow case if the landlord is not licensed.** In other words, if the landlord has failed to meet the minimum standard of habitability in the jurisdiction and thus has failed to obtain a rental license, many judges will not allow a tenant to move forward with a claim under RP § 8-211 based on the landlord's failure to keep the property in a condition that meets the minimum standards for habitability. There is no basis in law for such a holding. While the tenant may not owe the landlord rent for the period in which the landlord is not licensed and thus the tenant need not pay rent into escrow, there is no basis for a policy or practice that prohibits the tenant from seeking other relief available in these proceedings, such as an order requiring the landlord to repair significant defects, RP § 8-211(m)(4), or "any order that the justice of the case may require." RP § 8-211. See also immediately below.

3. **Refusing to hear or elicit evidence related to claims for reduction of rent already paid under implied warranty of habitability or breach of covenant of quiet enjoyment, among others.** Before the Court orders the tenant to pay all back-due rent into escrow, the Court should assess and consider any abatement of such rent under a tenant's claim or defense under the implied warranty of habitability or similar theories. The tenant may not owe the back rent if they have a claim to abatement under those theories. Requiring such disputed back rent to be escrowed up front effectively conditions the court's hearing of the tenant's claim on the tenant's ability to pay the disputed rent, which is not required by law, and which the tenant may be unable to do as a result of the very hazards and

defects in the property at issue in the proceeding,[11] and is a violation of the tenant's due process right to have the claim/defense heard. *Williams v. Housing Auth.*, 361 Md. 143 (2000).

4. **Refusing to recognize instances of "actual notice" prior to an inspector's report.** In Baltimore City, judges often refuse to take into consideration any testimony regarding the tenant's provision of notice to the landlord prior to the City inspector's notice of violation to the landlord. Other judges require that the notice be in writing. These practices violate the clear language of applicable law that allows for notice to the landlord by certified mail, a violation notice from a government agency or "actual notice," i.e., verbal or written communication that places the landlord on notice of the conditions of disrepair. The date of actual notice is important to the determination of whether the landlord has been given a reasonable opportunity to cure the dangerous defects before the tenant initiated the proceeding, and most tenants complain to their landlords multiple times about dangerous conditions before invoking the government inspection process. The refusal to hear evidence of prior actual notice denies tenants the prompt remedy intended by the legislature in these proceedings.

I. **Effective training, monitoring and accountability for judges who refuse to follow established caselaw.** In addition to accountability through an easier path to appeals that will result in precedential caselaw as described above, the Court must institute training and monitoring to confront the instances in which decisions are guided by predilections and implicit bias rather than rules and law. For example, some district court judges in Baltimore City have taken the position that any tenant who defends against the landlord's summary ejectment complaint based on the landlord's lack of licensing will be subjected immediately to eviction by the court – despite clear precedent that the correct ruling is for the court to dismiss the landlord's complaint.[12] These judges are effectively punishing tenants who assert their rights and giving landlords exactly what they want yet are barred by law from obtaining, because the judges clearly do not like or agree with the Court of Appeals's rulings. Yet, there is little accountability for such practices due to the obstacles to appeal. The Court must establish more effective training, monitoring, and accountability mechanisms, including periodic unannounced and unidentified monitors, to address these systemic problems that foster implicit bias and ignore explicit bias.

J. **Place racial equity and equal access to justice for impoverished persons at the center of legislative advocacy.** In determining what position to take on legislation pending in the General Assembly, the Judiciary should prioritize considerations of racial equity and equal access to justice in determining its position on bills. For example, as detailed above, strict appeal bond requirements pose an inordinate barrier to equal access to justice for

[11] For example, tenants may need to pay for urgent repairs to a furnace in winter if the landlord refuses to make the repair or may need to pay for a hotel stay if the property is uninhabitable.
[12] *See McDaniel v. Baranowski*, 419 Md. 560, 585-87 (2011); *Pettiford,* 467 Md. at 642.

tenants, particularly for Maryland's disproportionately Black and Brown communities. The Judiciary should at a minimum propose and advocate for legislation to amend the appeal bond requirements in landlord/tenant proceedings to explicitly require waiver of the appeal bond for indigent tenants in residential tenancies. The Judiciary should always include a racial impact analysis in determining its position on pending legislation.

Thank you very much for your consideration. We are available to discuss these suggestions further at your convenience and to support their adoption before the Rules Committee, the Court of Appeals, and the General Assembly.

Regards,

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HB 950 – Judges – Community and Cultural Awareness Training

Hearing before the House Judiciary Committee, February 24, 2021

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. Our Race Equity Team works to demonstrate to people in power the impact of their decisions on communities of color and low-income communities. The PJC **SUPPORTS HB 950** and requests a **FAVORABLE** report.

HB 950 Addresses the Stark Lack of Diversity Within the Judiciary in Proportionality with the Demographics of Individuals with Whom Courts Interact. The legal profession only boasts a limited 14.1% of lawyers of color.[1] 5% are Black (a percentage which has not increased in the past decade), 5% are Latino, and 0.4% are Indigenous.[2] At the same time, 86% of lawyers are white.[3] Within the judiciary, the numbers are even worse.

The gavel gap is defined as a "disparity in race and gender between those who hold judicial power and the public they serve."[4] According to the most recent available statistics, 90% of U.S. cases are tried in state courts.[5] Maryland's population is 48% people of color; yet only 32% of state court judges are.[6] Meanwhile, 53% of Maryland's population is white and 67% of state court judges are.[7] The lack of diversity within the judiciary means that decision-makers are not representative of the populations they are impacting and interacting with. Because decision-makers are more often not members of the communities whose lives are impacted most, an updated baseline understanding of

[1] American Bar Association National Lawyer Population Survey (2020).
[2] *Id.*
[3] *Id.*
[4] American Constitution Society, The Gavel Gap Study. Available at: https://gavelgap.org/.
[5] American Constitution Society, The Gavel Gap Report. Available at: https://gavelgap.org/pdf/gavel-gap-report.pdf.
[6] American Constitution Society, The Gavel Gap Study. Available at: https://gavelgap.org/.
[7] *Id.*

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these communities through minimum cultural competency requirements will help the judiciary confront biases that exist within themselves.[8]

HB 950 Implements Training That Will Combat Institutional Racism. Systemic racism functions through various mechanisms, including institutional racism. Institutional racism occurs when entities operate through racist or discriminatory policies (formal or informal) and actors enforce those policies within the entity.[9] The judicial system can and has been demonstrated to perpetuate institutional racism.[10] These instances add up and decrease trust in the judiciary's value. Nationally, only 52% of Black communities trust state courts whereas 70% of white communities do.[11]

A 2004 Maryland report, conducted by the Commission on Racial and Ethnic Fairness in the Judicial Process ("Fairness Commission"), found that more white people believed court processes were fair than people of color, and the more affluent the responder, the more fair they believed court processes were.[12] The report also concluded that significant numbers of citizens, divided by race, ethnicity, and economic status, question the degree of fairness received.[13] Some of the report's recommendations included: "continuing to stress training for the improvement of multicultural competence and the recognition of differences for judges and the personnel of the courts, and of the clerks of courts and register of wills' offices…"[14] and also "expanded education and training programs should be developed for court personnel regarding unique cultural issues relating to specific racial or ethnic groups, as such groups achieve significant percentages of population in the relevant court jurisdictions."[15] HB 950 finally follows through on recommendations from this designated committee within the Maryland judiciary to combat elements of institutional racism and can help increase judicial awareness and understanding in how courtroom attendees are treated.

HB 950 Reinforces the Judiciary's Commitment to Uphold Values of Fairness, Impartiality, and Equity, and Benefit the Judiciary's Functionality in Resolution of Issues.

Unexamined and unaddressed biases push judges to make decisions that are not as balanced as they strive to be.[16] Although a standing pillar of courts is equity and equal justice under law[17], unfortunately there are numerous instances of racism and other discrimination towards court

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[8] U.S. Circuit Judge Bernice Donald, Judges on Race: Reducing Implicit Bias in Courtrooms (Dec. 6, 2020). Available at: https://www.law360.com/articles/1309550/judges-on-race-reducing-implicit-bias-in-courtrooms
[9] Racial Equity Tools Core Concepts. Available at: https://www.racialequitytools.org/resources/fundamentals/core-concepts/racism
[10] Jason Wu, *Pervasive Racial Bias in Courts Requires Transformative Social Change* (Nov. 9, 2020). Available at https://truthout.org/articles/pervasive-racial-bias-in-courts-requires-transformative-social-change/. *See also* Lawyering While Black: Examining the Practice of Law through the Prism of the Black Experience (Oct. 2020). Available at: https://issuu.com/leosur/docs/thl_sepoct20/s/11154623.
[11] American Constitution Society, The Gavel Gap Study. Available at: https://gavelgap.org/.
[12] Report of Racial and Ethnic Fairness in Maryland's Judicial Process (June 2004).
[13] *Id.* at 2.
[14] *Id.* at 43.
[15] *Id.* at 44.
[16] Kang et. al., *Implicit Bias in the Courtroom* at 1129 (Mar. 2012). See also Terry Carter, *Implicit Bias is a Challenge Even for Judges* (Aug. 5, 2016). Available at: https://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges
[17] Court of Appeals of Maryland, Statement on Equal Justice under Law (Jun. 9, 2020). Available at: https://mdcourts.gov/sites/default/files/import/coappeals/pdfs/statementonequaljustice060920.pdf

participants of all kinds (parties, attorneys, and paralegals alike). The earlier referenced study by the Fairness Commission compiled various instances of racism and discrimination towards court participants in Maryland.[18] The Public Justice Center's staff similarly observe how bias and discrimination continue to permeate through courts they engage with.

Here are but some examples:

Common behaviors of non-Black judges:

- Rolling their eyes when addressing Black women, both tenants and tenants' lawyers
- When discussing postponement, not asking Black women tenants about their work schedule or availability before selecting a date
- Referring to a Black lawyer by their first name and never referring to them as counsel or counselor, while always doing so with white lawyers
- Refusing to allow a Black attorney to enter their appearance on the record while routinely allowing white attorneys to do so
- Referring to Black tenants as "you people," "those people," or "these people"
- Virtually daily, interrupting, dismissing and discrediting testimony from Black and Latine[19] tenants, especially women, e.g., with "Did you pay the rent?," "We're not here to discuss the conditions [of the property]," "We're not here to discuss the landlord's behavior," "You can't live there for free," or "You should have picked a better place to live," while listening without interruption to most white tenants
- Devaluing and dismissing the seriousness of dangerous conditions in the property and refusing relief in rent escrow/habitability for Black or Latine families, while providing relief to white families for the same conditions, e.g., lack of heat in winter, lack of running water, lack of electricity
- Criticizing tenants of color on the record, including openly criticizing their parenting, for moving into dangerous properties and not moving out of them, while ignoring the landlord's culpability for the conditions, and not subjecting white tenants to the same
- Disregarding the testimony of women tenants of color concerning conditions in the property, no matter how obvious, e.g., not allowing tenants to testify about lack of a functioning furnace resulting in lack of heat, requiring instead the testimony of a housing inspector, but accepting testimony from white landlords/agents

Extreme incidents:

[18] Report of Racial and Ethnic Fairness in Maryland's Judicial Process at 46-51 (June 2004).

[19] In order to be inclusive in the language and due to concerns of linguistic imperialism, The Public Justice Center decided to use Latine instead of Latinx.

- Entering judgment for possession of the property against a tenant of color, after finding her habitability claim valid and the landlord's dereliction severe, based on her "attitude" in court
- Allowing a bailiff to refuse entry to the courtroom to a Black tenant because she wore a head-wrap, forcing the woman to choose between a default judgment against her and removing the covering to reveal tangled and unkempt hair, the result of months of inability to visit a hairdresser due to the pandemic; the tenant was visibly humiliated and her Black attorney was subjected to the painful choice between confronting the racism and pursuing her client's immediate interests in the case
- Denying a tenant's motion for postponement, where the grounds were that the tenant had COVID-19 and could not come to court (and would have been prevented from entering the courthouse per court protocol), finding the claim of illness not credible based solely on the amount of rent claimed by the landlord
- Forcing an attorney of color to stand in front of the courtroom for the entire docket, preventing them from representing clients, as discipline for walking in and out of the courtroom during the docket in order to interview clients and prepare for trials, behavior that is common and constant, and which white lawyers, landlords, and agents continued to engage in throughout that very docket, giving as the reason for this sanction, "Because I said so"

Systemic disparate treatment of landlords and their representatives, the vast majority of whom are white, compared with tenants, the vast majority of whom are people of color:

- Solicitous questioning on the record of white landlords who are unfamiliar with how to prove their case, ready offers of postponements, while tenants' explicit requests for postponements routinely denied and questions posed to them generally adversarial
- Routinely allowing landlords to call the court if they're running late and have their cases held until they arrive, while entering default judgments against tenants who are not present when their case is called and frequently denying motions for new trial, even when tenant was in the corridor preparing for trial when judgment was entered, or had to visit the restroom after waiting hours for their case, while providing no way for a tenant who has had to step out to know when their case is called
- Bundling cases for landlords at the beginning of the docket for their convenience while regularly denying explicit requests from tenants to be heard quickly so as not to miss work or lose their job

HB 950 is therefore a meaningful step acting on an identified urgent and necessary change to continuously progress towards a more equitable judiciary.

For the foregoing reasons, the PJC **SUPPORTS HB 950** and urges a **FAVORABLE** report. Should you have any questions, please call John Nethercut at 410-400-6952 or Tyra Robinson at 410-625-9409 ext. 223.

The Public Justice Center is a 501(c)(3) charitable organization and as such does not endorse or oppose any political party or candidate for elected office.