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OF THE STATE OF WASHINGTON

No. 37179-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ALEX MAY,
Petitioner,
v.
COUNTY OF SPOKANE, VICKI DALTON,
Respondents.

AMICUS CURIAE BRIEF OF PROFESSORS KAREN BOXX AND GREGORY HICKS

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TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 2

A. The newly enacted statute provides an inadequate remedy for the Petitioner because the offending covenant remains discoverable in the property records. 2

IV. CONCLUSION 15

PROOF OF SERVICE

TABLE OF AUTHORITIES

Federal Cases

Shelley v. Kraemer,
334 U.S. 1 (1948) 5, 11

Federal Statutes

18 U.S.C. § 1521 (2021) 5

42 U.S.C. §§ 3601-3631 (2021) 5

Washington State Statutes

RCW 49.60.224 (2021) 5

RCW 49.60.224 (2018) 2

RCW 49.60.227 .... 2, 14

RCW 49.60.227(1) 14

RCW 49.60.227(2) 14

RCW 65.12 4

Other State Statutes

Connecticut Public Act No. 21-173 § 1(c) (2021) 7

Fla. Stat. § 712.065 (2020) 7

Md. Code Real Property Ann. § 3-112 (2019) 6

Md. Code Real Property Ann. § 3-601 6

Minn. Stat. Ann. § 507.18 (2021) 7, 13

Or. Rev. Stat. Ann. § 93.272 (2021) 13

Va. Code Ann. § 55.1-300.1 (2020) 6

Books and Treatises

Jesse Dukeminier *et al*., Property 661-62 (9 ed. 2018).............. 3

Robert Rothstein, The Color of the Law: A Forgotten History of How Our Government Segregated America (2017) 9, 11

Thomas E. Atkinson, *et al.*, American Law of Property: A Treatise of the Law of Property in the United States 527-29 (A. James Casner ed. 1952)............................... 3, 5

William B. Stoebuck & Dale A. Whitman, The Law of Property, 870 (3d ed. 2000) 3

Articles

Catherine Silva, Racial Restrictive Covenants History, Seattle Civil Rights & Labor History Projects 11

Clara Howell, Removing Racist Language from Oregon Property Deeds Not Easy, Portland Tribune (08.25.20) .. 13

Mercury News, "Whites only" no more: California bill would remove racist real estate language" (08.07.20) 8-9

Motoko Rich, Restrictive Covenants Stubbornly Stay on the Books, New York Times (04.21.05) 11-12

N. Watt & J. Hannah, Racist language is still woven into home deeds across America. Erasing it isn't easy, and some don't want to, CNN (02.15.20) 9, 10

Washington Times, Black house-hunter wins $4,500 in fair-housing lawsuit (12.09.05) 12

I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Karen E. Boxx is a Professor at the University of Washington School Law. Gregory A. Hicks is Professor Emeritus at the University of Washington School of Law. Their interest is set forth in the accompanying Motion of Professors for Leave to File *Amicus* Brief.

Professor Boxx and Professor Emeritus Hicks (hereinafter "the professors") appear in this court as *amicus curiae* on a pro bono basis and in their individual capacities. The professors do not appear as the representative of their employer or of either the petitioner or respondent.[1]

II. STATEMENT OF THE CASE

The professors adopt the facts as set out in the petition for review.

[1] Todd Maybrown is counsel for Professor Boxx and Professor Emeritus Hicks. The professors and their counsel would also like to thank Perry Maybrown, a student at the University of Washington School of Law, for her invaluable assistance on this brief.

III. ARGUMENT

A. The newly enacted statute provides an inadequate remedy for the Petitioner because the offending covenant remains discoverable in the property records.

This case raises the difficult question of how to deal with the stain of racial restrictive covenants that have long been rendered unenforceable and illegal but remain in the property records. Petitioner is seeking to have such an offending covenant physically removed from the public records relating to his real property under authority of former Washington statute RCW 49.60.227 (2018). Since Petitioner has begun this quest, the legislature amended RCW 49.60.227 to provide a more detailed procedure to address the remnants of racism in property records, but this new procedure does not afford Petitioner the remedy that he sought under the former statute. The goal of this brief is not to set forth the shameful history of these covenants or their lasting and devastating effects, but rather to assist the Court by providing information about the role of property records and the

feasibility and advantages of Petitioner's request for physical removal.

Ownership of real property in the United States is protected primarily through a system of tracing documents recorded in the public record. This system is peculiarly American and dates back to the Plymouth and Massachusetts Bay Colonies. *See* 4 THOMAS E. ATKINSON ET AL., AMERICAN LAW OF PROPERTY: A TREATISE OF THE LAW OF PROPERTY IN THE UNITED STATES 527-29 (A. James Casner ed., 1952); JESSE DUKEMINIER ET AL, PROPERTY 661-62 (9 ed. 2018). To establish title, the current owner must trace title documents through the public records using indexes. *See* DUKEMINIER, *supra,* at 663. This system is cumbersome and deficient, *see* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 870 (3d ed. 2000), but it is the one most predominately used in this country. Registered land, or the Torrens system, is also authorized in Washington and eight other states as well as Guam and Puerto Rico, *see* STOEBUCK & WHITMAN, *supra,* at 923;

RCW ch. 65.12, and gives the property owner a certificate of title that does not require a search of the historical records to show title. Under the predominant system, which is the one used for Petitioner's title, claim of current ownership is therefore established through the entire history of the property contained in the property records. These documents are not just history; they have current relevance in that they show the current state of an owner's title and are a necessary part of an owner's claim of title. Retaining the offensive, illegal covenants in any part of the property records therefore retains them as part of Petitioner's current proof of ownership. It is incorrect to state that the original documents with the offending covenant are preserved in the property records just for historical interest. As long as those documents remain discoverable in the records linked to the parcel, they are part of the present owner's title.

There is an additional issue that applies to this particular covenant. At the time it was added to the title to Petitioner's property in 1953, the United States Supreme Court had declared

such covenants unenforceable in *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Court did not, however, hold that such covenants were illegal. That did not come until federal and state legislation passed after recording of the covenants on Petitioner's property. *See* Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (2021); RCW 49.60.224 (2021). However, because such covenants were not illegal at the time of recordation, they were eligible for recordation in the public records even though they might be legally unenforceable. Acceptance for recordation applies to classes of documents and does not imply a governmental judgment that a document is either effective or enforceable. *See* ATKINSON ET AL. *supra* at 614. The practice of disgruntled litigants filing bogus liens against judges' property has become common enough for legislation to be passed making it a federal crime. *See* 18 U.S.C. § 1521 (2021). Such liens, though fraudulent and harassing, are nonetheless eligible for filing and recordation. The fact that such documents, and indeed any document that falls within the class of recordable instruments,

can be recorded dilutes the argument that recorded documents do no harm, even when erroneous or unenforceable, and that all of them deserve a permanent place in the official record of property ownership and of interests in property.

A number of states have recently addressed the issue of these lingering reminders of racism. In 2020, Virginia added a statutory procedure allowing property owners to file a Certificate of Release of Certain Prohibited Covenants. *See* Va. Code Ann. § 55.1-300.1 (2020). In 2019, Maryland enacted a provision allowing property owners to record a restrictive covenant modification, and in 2020 the legislature eliminated fees for doing so and added a requirement that homeowners associations delete such discriminatory covenants. *See* Md. Code Real Property Ann. § 3-112 (2019); Md. Code Real Property Ann. § 3-601. Connecticut passed legislation that was signed by the governor this past July that allows a property owner to file a form with the town clerk identifying an invalid discriminatory covenant. The town clerk shall then, "to the extent practicable,

notate (sic) the indices to the land records accordingly to reflect the invalidity of the unlawful restrictive covenant." Connecticut Public Act No. 21-173 § 1(c) (2021).[2] In 2019, Minnesota passed legislation authorizing landowners to file a form to discharge and release unlawful restrictive covenants. *See* Minn. Stat. Ann. § 507.18 (2021). Florida added a statute in 2020 that declares discriminatory covenants are "extinguished and severed," and property owner associations may remove such covenants by a majority vote. *See* Fla. Stat. § 712.065 (2020).

California has had legislation dealing with the issue since 1999, and currently has a bill pending, *see* AB-1466 Real property: discriminatory restrictions (2021-2022), that would protect buyers from seeing offensive language in deeds and recorded covenants for homes they are in the process of purchasing. Existing law requires redaction of the unlawful

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[2] The Maryland enactment was originally described as "AN ACT CONCERNING THE REMOVAL OF RESTRICTIONS ON OWNERSHIP OR OCCUPANCY OF REAL PROPERTY BASED ON RACE AND ELIMINATION OF THE RACE DESIGNATION ON MARRIAGE LICENSES." *See* 2021 Ct. HB 6665.

restrictive language. "Redaction" is defined in the bill as "the process of rerecording of a document that originally contained unlawful restrictive language, but when presented to the recorder for rerecording, no longer contains the unlawful language or the unlawful language is masked so that it is not readable or visible." The bill would require title companies to search records and take the necessary steps to remove the offending language before the buyer sees the title documents. This legislation is based on a 2009 bill, AB-985, introduced by Assemblyman Hector de la Torre, son of Mexican immigrants, who endured the pain of seeing such language in the title documents of a home he was purchasing for his family. That bill passed the legislature but was vetoed by then Governor Schwarzenegger, who said that the bill was of negligible effect because the covenants were already void, and the bill may have increased costs. *See* Marisa Kendall, "'Whites only' no more: California bill would remove racist real estate language," The Mercury News, Aug. 7, 2020, at *https://www.mercurynews.com/2020/08/07/whites-only-no-*

more-california-bill-would-remove-racist-real-estate-language/.

There are divergent views as to whether the offensive language should be physically removed, or simply marked as unenforceable and revoked. *See* N. Watt & J. Hannah, "Racist language is still woven into home deeds across America. Erasing it isn't easy, and some don't want to," CNN, Feb. 15, 2020, at *Racist language is still woven into home deeds across America. Erasing it isn't easy, and some don't want to - CNN*. Some want the language preserved as evidence of the discrimination in housing whose effects are still felt acutely today. *See id.*, *see generally* ROBERT ROTHSTEIN, THE COLOR OF THE LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017). On the other hand, many whose own families were affected want the language removed. Professor Nikole Hannah-Brown of Howard University, McArthur Fellowship recipient and creator of the 1619 Project, has stated: "We don't need to maintain that language in a document to understand the

history of where we've come from . . . . Absolutely, the language should be removed . . . . No one should have to procure housing and spend your money on a house and have in the deed." N. Watt & J. Hannah, "Racist language is still woven into home deeds across America. Erasing it isn't easy, and some don't want to," CNN, Feb. 15, 2020, at *Racist language is still woven into home deeds across America. Erasing it isn't easy, and some don't want to - CNN*. Hector De La Torre, the former California legislator who fought to pass legislation to remove covenants, stated, "It is akin to leaving up in the South, where you had Jim Crow laws, keeping up the 'no coloreds' or the 'white only' signs at water fountains, bathrooms, other facilities and saying, 'Oh, just ignore the sign. You can drink out of either one. Just ignore it."

At a time when hard-won civil rights are again being challenged, homeowners deserve to know that these vestiges of racism are fully removed and could not be revived. Particularly considering the federal government's role in the spread of these covenants and the corresponding, devastating effect on

homeownership in communities of color, *see* ROTHSTEIN, *supra,* at 77-85, fear of leaving this language in place is understandable. The response that "they're not enforceable" is cold comfort. In fact, as documented in the Seattle Civil Rights & Labor History Project, social enforcement of the offensive covenants has been as damaging as legal enforcement. The Project tells the story of the Ornsteins, who contracted to purchase a home in Sand Point Country Club in 1952, after *Shelley v. Kraemer* declared racial restrictive covenants unenforceable, but who never took up residence there after threats from neighbors as to how they might "respond" to their presence. *See* Catherine Silva, "Racial Restrictive Covenants History," Seattle Civil Rights & Labor History Project, at *https://depts.washington.edu/civilr/covenants_report.htm*.

A more recent story was told in a 2005 New York Times article. *See* Motoko Rich, "Restrictive Covenants Stubbornly Stay on the Books," New York Times Apr. 21, 2005, at *https://www.nytimes.com/2005/04/21/garden/restrictive-*

covenants-stubbornly-stay-on-the-books.html?searchResultPosition=1. Ms. Nealie Pitts was looking for a home for her son in Virginia and inquired about a house for sale. The owner, Rufus Matthews, told Ms. Pitts, who is Black, that "this house is going to be sold to whites only." Mr. Matthews was investigated by the Fair Housing Board and he testified that he believed his deed prohibited him from selling to a Black buyer. Ms. Pitts reported significant distress from the encounter and eventually was awarded $4,500 in damages against Mr. Matthews. "Black house-hunter wins $4,500 in fair-housing lawsuit," Wash. Times Dec. 9, 2005, at *https://www.washingtontimes.com/news/2005/dec/9/20051209-101930-4708r/*. This tale illustrates that as long as the offensive covenants remain in the records, they can cause damage.

As described above, most states addressing the issue have so far provided only a process where a subsequent document is filed noting the invalidity and illegality of the racially restrictive covenant but where the original document remains in the chain

of title. *See, e.g.,* Minn. Stat. Ann. § 507.18 (2021); *https://notarize.com/windermere* (Notarize.com and the Windermere website provide online assistance for residents of California, Colorado, Idaho, Nevada and Washington to file Restrictive Covenant Modification forms). The Oregon statute provides a procedure for a property owner to obtain a court order that the covenant be "removed," but it is not clear how the removal is carried out and property owners have complained that the court proceeding process is cumbersome. *See* Or. Rev. Stat. Ann. §93.272 (2021); Clara Howell, "Removing Racist Language from Oregon Property Deeds Not Easy," Portland Tribune, Aug. 25, 2020, at *https://pamplinmedia.com/pt/9-news/477920-386292-removing-racist-language-from-oregon-property-deeds-not-easy* State legislatures have therefore shown laudable intentions but inconsistent approaches in the processes available to remove the racist language from property titles.

The 2021 amendment to the Washington statute attempts to straddle this debate in a manner similar to California's

proposed statutory scheme. California and Washington go farther than the states that provide only for an additional filing that declares the prior document is invalid but does not redact or remove the offensive covenant language from public records. These procedures provide for recording of a physical redacted document but still retain the original filing in the public records. *See, e.g.,* RCW 49.60.227(1). Further, in Washington, in order to achieve physical redaction, the property owner must file a declaratory judgment action. The alternative procedure of recording a restrictive covenant modification document, which has the advantage of avoiding the cost and trouble of filing a court action, does not provide for physical redaction or removal of the document from the chain of title. *See* RCW 49.60.227(2).

The 2021 legislation supports a different approach to that of the original version of RCW 49.60.227, stating in its preamble that:

> [S]triking racist, religious and ethnic restrictions or covenants from the chain of title is no different than having an offensive statutory monument which the

> owner may entirely remove. So too should the owner be able to entirely remove the offensive written monument to racism or other unconstitutional discrimination.

2021 Wash. Leg. Serv. Ch. 256 § 1 (S.S.H.B. 1335) (West). However, in spite of its alertness to the harm of such language, the statute does not "entirely remove" the offensive written monument because in our system of recorded instruments as the foundation of establishing property ownership, the original document remains embedded in the property records and is discoverable in the property records.

IV. CONCLUSION

Petitioner May is in the unusual position of requesting relief under a statute that has since been revised by the legislature in such a way to (at least partially) address his claims. This case originally concerned the extent to which a property owner can remove from the property's title illegal, racist language. The professors' purpose in filing this document is to provide information about our system of property title and perspective on

the national debate over how best to address these damaging reminders of racism and its continuing damage to the American dream of home ownership for communities of color.

RESPECTFULLY SUBMITTED this 2nd day of September, 2021.

This brief contains 2527 words and complies with RAP 18.17.

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Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 2nd day of September, 2021, I filed the above document via the Appellate Court E-File Portal through which counsel for all parties will be served.

DATED at Seattle, Washington this 2nd day of September, 2021.

/s/ Sarah Conger
Sarah Conger, Legal Assistant

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