Supreme Court No. 99598-2

Court of Appeals No. 37179-4-III

SUPREME COURT OF THE STATE OF WASHINGTON

ALEX MAY,

Petitioner,

v.

COUNTY OF SPOKANE, VICKI DALTON,

Respondents.

BRIEF OF AMICUS CURIAE THE CARL MAXEY CENTER IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae is The Carl Maxey Center. The Carl Maxey Center's interest is set forth in the Motion for Leave to File Amicus Curiae Memorandum in Support of Review.

II. ISSUE ADDRESSED BY AMICUS CURIAE

> Whether the Court of Appeals' majority opinion in *May v. Spokane County*, 16 Wn. App. 2d 505, 481 P. 3d 1098 (2021) perpetuates discrimination of African Americans and Communities of Color and if so, what should this Court do?

III. STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case.

IV. ARGUMENT

The issue before this Court is supported by a session law enacted on May 12, 2021. *See* LAWS OF 2021, ch. 256 (effective July 25, 2021). The new statute provides a removal process for discriminatory covenants in a chain of title applicable to real estate transactions entered into on or after January 1, 2022. However, the new statute does not go far enough, and the issue requires judicial action. Indeed, it is important this Court addresses past errors in race-based cases. As Chief Justice Gonzales recently observed:

> We take this opportunity to overrule ... *Price v. Evergreen Cemetery Co. of Seattle*, 57 Wn.2d 352, 357 P.2d 702 (1960). …*Price* considered the constitutionality of a 1953 law[.] …[T]he case is harmful because Justice Mallery's

> concurrence, condemns civil rights and integration. *Id.*, at 355-58. 'As judges we must recognize the role we have played in devaluing Black lives.'... The *Price* concurrence is an example of the unfortunate role we have played.

Garfield County Transp. Auth. v. State 196 Wn.2d 378, n.1, 473 P.3d 1205 (2020) (citations omitted). *See also State v. Saintcalle*, 178 Wn.2d 34, 47, 309 P. 3d 326 (2013).

As Justice Wiggins in *Saintcalle* teaches:

> [T]he problem is that racism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. Racism now lives not in the open but beneath the surface--in our institutions and our subconscious thought processes[.]

178 Wn.2d at 47 (fn. omitted).

As Justice Wiggins observed, "[a] new framework should give trial courts the necessary latitude to weed out unconscious bias where it exists[.]" *Saintcalle*, 178 Wn.2d at 54.

In 1948, as a testament to the longevity of implicit racism in the judicial system, *Shelley v. Kraemer* abdicated judicial duty by simply rendering racially restrictive covenants unenforceable in court. 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). Consequently, *Shelley* allowed the odious practice of racial covenants, including in the title to Mr. May's property. Notably, *Shelley did not outlaw restrictive covenants* but simply found the covenants unenforceable. *Shelley*, 334 U.S. at 16-22. In

essence, *Shelley* concluded restrictive covenants are constitutionally impermissible and the interposition of judicial coercive power to enforce racially discriminatory private agreements equated to governmental discrimination on the basis of race. *Shelley*, 334 U.S. at 20-21.

As a matter of judicial duty this Court should take the last step: erase the discriminatory odium from the legislative and societal records by formally overruling the appellate court's majority opinion in *May v. Spokane County*, 16 Wn. App. 2d 505, 481 P. 3d 1098 (2021) and explicitly provide relief to persons with affected property whose real property transactions occurred prior to January 1, 2022. Amicus contends it is a unique judicial duty to correct an *implicit judicial sanction* of discriminatory covenants by judicially removing and erasing forever the historical stain maintained by allowing these odious vestiges in the public record.

This Court most recently recognized this duty last year when it recalled a century-old mandate in *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916). *See* Washington Supreme Court Order, Number 13083-3, 1 (dated July 10, 2020). There, this Court reversed and repudiated, as one of many "historical injustices", its 1916 ruling in a case involving tribal fishing rights. This Court excoriated wording in the 1916 opinion that "characterized the Native people of this nation as 'a dangerous child,' who

'squander[ed] vast areas of fertile land before our eyes.' " *Id*. at 4. The Court declared that opinion "an example of … racial injustice." *Id*. at 3. The Order proclaimed, "We cannot forget our own history, and we cannot change it. We can, however, forge a new path forward, committing to justice as we do so." *Id*. at 4. The issue before this Court demands the same commitment.

The discriminatory restrictions chronicled in Spokane's newspapers are reminders of odious discrimination endured during the lives of many community leaders and their families.

For example, in 1961 the *Spokesman-Review* reported Frank Hopkins' account that before he was able to move into a home he purchased outside of an established black area of Spokane, one night someone broke out 28 windows.[1] " 'I just had to let it go' ", he said.[2] That same year the Reverend J.C. Brooks of Bethel African Methodist Episcopal church in Spokane told the *Spokesman-Review* a black person looking for a house would be steered to the "area for Negroes", which he identified as bounded by Division on the west, Altamont on the east, Ninth on the south and Sprague on the north.[3] Today that area is known as Spokane's East Central Neighborhood.

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[1] Don R. Baumgart, *Negroes Review Conditions Here*, SPOKESMAN-REVIEW, March 5, 1961, at 6.
[2] *Id*.
[3] *Id.*

Amicus' namesake Carl Maxey debated the Washington Association of Realtors' President four times on housing segregation, including in the 1950's, about the sometimes subtle, sometimes explicit, issue of redlining. "Restrictive Covenants didn't go out until 1946 in a Supreme Court ruling," said Maxey, "And that gave us a foothold to blast their legal foundations out from under them."[4]

Yet, it cannot be gainsaid Spokane Communities of Color have struggled with racial covenants in real estate for a long time. As reflected in a 1946 newspaper article, the Spokane Council of Racial Relations addressed housing discrimination in Spokane among Japanese American, Native American, and African American community members. Joe Okamato, "a native of Spokane and a graduate of Lewis and Clark High School" was quoted as stating, "in prewar days where there were houses available to buy or rent none was available for my people . . . imagine what the problem is today"[.][5]

Similarly, Reverend Emmett B. Reed of Spokane's Calvary Baptist Church was quoted as sharing:

> ,,,various instances where Negroes had paid 'good faith money' on the purchase of homes only to have the money refunded after an investigation in the neighborhood. In Spokane, like everywhere else there is a desire on the part

[4] Jim Kershner, *Segregation*, SPOKESMAN-REVIEW, May 18, 1997, Sec. E at 1, 5, 6.
[5] *Racial Groups May Find Lack of Democracy,* SPOKANE DAILY CHRONICLE, May 3, 1946 at 5.

> of real estate men to group the negroes in some poor part of town[.][6]

Shortly thereafter, both the *Spokesman-Review* and the *Spokane Daily Chronicle* reported three justices of the United States Supreme Court disqualified themselves from the "covenants case ban on house sales to Negroes issue before the court."[7] Justices, Rutledge, Reed, and Jackson, "shunned" the case.[8] Such covenants were rebranded as "protective covenants"[9] that could still be made.[10] And, in 1953, the United States Supreme Court "[d]ecided 6 to 1 that a house owner may not be sued for violating a racial covenant in selling his house[.]" *Barrows v. Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953). The Court abdicated its judicial duty.

In 1984 the Justice Department filed its first-ever suit challenging racially restrictive covenants.[11] *Spokesman-Review* staff writer Michael Guilfoil presciently wrote in 1988, "covenants on housing push a look that can lead to a lawsuit."[12]

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[6] *Id.*
[7] Associated Press, *3 Justices Shun Covenants Case: House Sales to Negroes Before the Court*, SPOKESMAN-REVIEW, Jan. 16, 1948 at 1; Associated Press, *6 Justices Hear Covenants Case*, SPOKANE DAILY CHRONICLE, Jan. 16, 1948 at 2.
[8] *Id.*
[9] Appendix
[10] *Protective Covenants May Aid: Discrimination Illegal*, SPOKESMAN-REVIEW, May 15, 1949 at 5.
[11] Associated Press, *Racial Covenants Challenged*", SPOKANE DAILY CHRONICLE, Dec. 7, 1984 at 7.
[12] Michael Guilfoil, *Built to Conform*, SPOKESMAN REVIEW, Nov. 27, 1988, Sec. E at 1, 2.

In 1966, Carl Maxey raised before the Washington State Board Against Discrimination the very issue before this Court.

> Maxey said… 'We have an area here where 70 percent of Negroes live and can't get out…we haven't scratched the surface in answering the Negro's problems…Negroes stationed at Fairchild Air Force Base have trouble finding housing in Spokane.[13]

Indeed, this article was published not long after a City Manager in Kennewick was quoted by the *Review* stating that "he knows of no discrimination against Negroes in Kennewick. …" 'We have no racial discrimination here (in Kennewick).' "[14] Yet, as the article noted "many real estate covenants in both cities [Pasco and Kennewick] restrict the property from being sold or rented to any person other than a member of the Caucasian race."[15] In 1965 the Spokane Realty Board was reported as holding the position realtors "individually and collectively in performance of their agency functions have no responsibility to determine the racial or ethnic composition of any neighborhood or any part thereof."[16]

In a 2001 *Spokesman-Review* supplement, former Spokane NAACP President Florrie Brassier shared the "reluctance" of lending institutions "to make the loan because the property is in a certain part of

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[13] *Spokane Race Relations Discussed*, SPOKESMAN -REVIEW, Nov. 18, 1966 at 6.
[14] *Tri-City Report Called Unfounded*, SPOKESMAN-REVIEW, May 13, 1959 at 6.
[15] *Id*.
[16] *Realtor's Adopt Practice Code*, SPOKANE DAILY CHRONICLE, April 24, 1965 at 3.

town."[17] This education from Ms. Brassier followed several *Review* articles over a long-time span chronicling the practice of "redlining" discrimination in lending.[18]

Indeed, the 1890 United Labor Party of Spokane County platform stated, "we demand the passage of laws prohibiting alien ownership of land."[19]

As noted by journalist Dan Hansen,

> Washington's Alien Land Law of 1923 really wasn't necessary to prevent Asians from owning or leasing land. Discriminatory real estate practices already were common. … [T]he Washington legislature repealed the Alien Land Law in 1965 after three years of JACL [Japanese American citizen League] lobbying.[20]

Equally, the history of "nonwhites" not of "African descent or nativity", owning real property in Washington State, is illustrated in *DeCano v. State*, 7 Wn.2d 613, 110 P.2d 627 (1941) (addressing the validity and effect of "anti alien laws".). Mr. DeCano, a "Filipino", sought to own real property in Washington State. Certain "nonwhite" folk, other

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[17] Florrie Brassier for the Northwest Housing Alliance, *If You're Buying a Home,* SPOKESMAN -REVIEW, April 22, 2001, Ad. Supp. at 8.

[18] *E.g.*, G.G. LaBelle, *Banks Battle Mortgage Information Moves*, SPOKANE DAILY CHRONICLE, July 16, 1975 at 44.; Associated Press, *Seattle Mayor's Task Force on Redlining In Certain Neighborhoods*, SPOKANE DAILY CHRONICLE, April 7, 1976 at 6.; Associated Press, *House Approves Anti-Red Lining Bill 60-31*, SPOKESMAN-REVIEW, Feb. 19, 1977 at 8.; *Study To Probe Insurance Practices*, SPOKESMAN- REVIEW, Sept. 21, 1993, Sec. B at 6.

[19] *Three Tickets Now*, SPOKANE FALLS REVIEW, Oct. 7, 1890 at 3.

[20] Dan Hansen, *Continental Divide*, SPOKESMAN- REVIEW, Jan. 5, 2003, Sec. F at 1,8.

than "persons of African descent or nativity", could not always be citizens. And, non-citizens could not own real property.

This sentiment was once shared by this Court. In 1902, Takuji Yamashita filed with this Court after being denied the ability to practice law. The Court ruled unanimously against him. *In re Takuji Yamashita*, 30 Wash. 234, 70 P. 482 (1902).

Alien land laws were held unconstitutional by the California Supreme Court in 1952 and highly questioned by Justice Vinson:

> There remains the question of whether discrimination between citizens on the basis of their racial descent . . . is justifiable. . . [d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon a doctrine of equality.

Oyama v. California, 332 U.S. 633, 616, 68 S. Ct. 269, 92 L. Ed. 249 (1948).

Arguably, Washington's alien land laws were analogous to redlining with a uniquely Asian focus. Indeed, it took until 1960 for Washington state to repeal its alien land laws passed in 1891, 1892 and 1921.

Denying a homeowner the ability to eliminate racist language from their property's record turns a home that should be a symbol of accomplishment and achievement into a symbol of America's bigotry and discrimination. For this to be justified in order to preserve the "living history" and "historical evidence" of racism is equivalent to forcing a Black person

who enters a public restroom today to walk past a sign, "For Whites Only", with a sticky note on top that says the sign is no longer enforceable. Racism has no place in a civilized society and the struggle to end it should have been over long ago by judicial duty. Racially restrictive covenants are overtly racist. If this Court fails to address the Court of Appeals' majority opinion as wrong, this Court will engage in express judicial approval of rank racism and, despite the newly enacted legislation, S*ee* LAWS OF 2021, ch. 256, the Court of Appeals' majority opinion, much like *Shelly*, will be a decision for "whites only" with a legislative sticky note that says "No Longer Enforceable". This Court must reverse the Court of Appeals' majority opinion in the strongest terms and affirm Judge Fearing's eloquent dissent.

VI. CONCLUSION

This Court has a judicial duty to repudiate and repudiate the Court of Appeals' majority opinion. Review is thus proper under RAP 13.4(b)(4).

Respectfully submitted this 24th day of May 2021.

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APPENDIX

189339 B

DECLARATION OF PROTECTIVE COVENANTS

KNOW ALL MEN BY THESE PRESENTS that William H. Cowles, Jr. and John McKinley, Executors of the Estate of William Hutchinson Cowles, being the owners of all lots in Comstock Park Second Addition to the City of Spokane in the City of Spokane, County of Spokane, State of Washington, as per map thereof recorded in the office of the County Auditor of said county on August 6, 1953, except Lots 1 to 10, inclusive, of Block 2, Comstock Park Second Addition, which lots have already been improved with residences, do hereby declare the following protective covenants and conditions for the use and benefit of all of said property which they own and for the use and benefit of each and every purchaser of any of said property:

(a) LAND USE AND BUILDING TYPE. No lot shall be used except for residential purposes. No building shall be erected, altered, placed, or permitted to remain on any lot other than one detached single-family dwelling not to exceed two and one-half stories in height and a private garage for not more than three cars.

(b) No detached garage shall be built closer to the front set back line than forty feet nor closer to the side set back line than twenty feet. No garage shall be built under any dwelling with the door or opening facing directly toward the front or side line of the lot unless approved by the architectural committee.

(c) No race or nationality other than the white race shall use or occupy any building on any lot, except that this covenant shall not prevent occupancy by domestic servants of a different race or nationality employed by an owner or tenant.

(d) NUISANCES. No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood.

(e) TEMPORARY STRUCTURES. No structure of a temporary character, trailer, basement, tent, shack, garage, barn, or other outbuilding shall be used on any lot at any time as a residence either temporarily or permanently.

(f) BUILDING LOCATION. No building shall be located on any lot nearer to the front lot line or nearer to the side street line than the minimum building set back lines shown on the recorded plat.

(g) EASEMENTS. Easements for installation and maintenance of utilities are reserved over the rear seven and one-half feet of each lot.

(h) ARCHITECTURAL CONTROL. No building shall be erected, altered, placed or permitted to remain on any building plot in this subdivision until the external design, elevation, and location thereof on the site have been approved in writing by an architectural committee appointed by the subdividers, or at the option of the subdividers, elected by a majority of the owners of lots in said subdivision. In the election of such committee each owner shall be entitled to a number of votes equal to the number of front feet, not including side line frontage, owned by him. However, in the event that such committee is not in existence or fails to approve or disapprove such design or location within thirty (30) days after such plans have been submitted to it, then such approval will not be required provided the design and location on the lot conform to and are in harmony with the existing structures in the Addition.

(i) The ground floor area of the main structure, exclusive of one-story open porches and garages shall not be less than one thousand five hundred (1,500) square feet in the case of a one-story structure nor less than nine hundred eighty (980) square feet in the case of a one and one-half, or two, or two and one-half story structure.

(j) TERM. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five years from the date these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of ten years unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part.

(k) ENFORCEMENT. If the parties hereto or any of them or their heirs, executors, or assigns, shall violate or attempt to violate any of the covenants or restrictions herein while they are in effect, it shall be lawful

for any other person or persons owning any other lots in said subdivision to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such covenant or restrictions and either to prevent him or them from so doing or to recover damages or other dues for such violation.

(1) Invalidation of any one of these covenants by judgment or court order shall in no wise affect any of the other provisions which shall remain in full force and effect.

IN WITNESS WHEREOF, William H. Cowles, Jr. and John McKinley, Executors of the Estate of William Hutchinson Cowles, have hereunto set their hand and seal this 12th day of August 1953.

William H. Cowles Jr. (SEAL)
William H. Cowles, Jr.

John McKinley (SEAL)
John McKinley
Executors of the Estate of
William Hutchinson Cowles,
Deceased.

STATE OF WASHINGTON)
County of Spokane) ss.

I, the undersigned, a Notary Public in and for the State of Washington, do hereby certify that on this 12th day of August 1953, personally appeared before me WILLIAM H. COWLES, JR. and JOHN McKINLEY, to me known to be the Executors of the Estate of William Hutchinson Cowles, deceased, and acknowledged to me that they executed the foregoing instrument as their free and voluntary act and deed, for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate above written.

Notary Public in and for the State
of Washington, residing at Spokane

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FRANK J. GLOVER, SPOKANE COUNTY AUDITOR

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021 I caused to be served the foregoing *BRIEF OF AMICUS CURIAE THE CARL MAXEY CENTER IN SUPPORT OF PETITION FOR REVIEW* to the parties below, in the manner noted:

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Respectfully submitted this 24th day of May 2021.

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