STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

THE MELVIN R. BERLIN REVOCABLE TRUST, THE RANDY LAMM BERLIN REVOCABLE TRUST, THE JANIS HEHMEYER TRUST, THE CAROLE J. NEWTON REVOCABLE TRUST, THE JEAN I. SMITH REVOCABLE TRUST and THE STEPHEN L. SMITH REVOCABLE TRUST,

Plaintiffs/Counter- Defendants/Appellees,

v

THOMAS C. RUBIN, NINA D. RUSSELL and 14288 LAKESHORE ROAD, LLC,

Defendants/Counter- Plaintiffs/Appellants,

and

14288 LAKESHORE ROAD, LLC, THOMAS C. RUBIN, and NINA D. RUSSELL,

Third-Party Plaintiffs-Appellants,

v

SWIFT ESTATES ASSOCIATION, INC., STEPHEN L. SMITH, in his capacity as President of Swift Estates Association, Inc., and CHRISTOPHER HEHMEYER, in his capacity as Secretary of Swift Estates Association, Inc.,

Third-Party Defendants-Appellees.
_____/

MSC No. 166228

COA No. 359300

Berrien County Circuit Court
Case No. 19-0034-CH

BRIEF of *AMICUS CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

National Association for the Advancement of Colored People ("NAACP") is the oldest and largest civil rights organization in the United States. NAACP has units and volunteer members throughout the country, including in Michigan. The NAACP Michigan State Conference was chartered in 1935 and is the supervising unit that is directly responsible for approximately 25,000 members comprised within approximately 30 adult branches and 20 youth councils and college chapters located in Michigan. NAACP has worked tirelessly to fight against housing discrimination.

INTRODUCTION

Although the Court of Appeals articulated that "the right to live in a district free from stores, garages, businesses, and apartment buildings is a valuable right," (Op 4), the court's interpretation of the covenant permits one's neighbor to choose, not only what is allowed near their house, but who. (See, *e.g.*, *id.* at 10 n.8 (permitting "long-term rentals to a clientele premised on a referral system that apparently did not disrupt the nature and character of the Swift Estates community"); *id.* at 8 (indicating that the community (built in 1977) "attracted a clientele desirous of a private community environment"); Appellees' Br 12 (concern about those with "no long-term relationship with anyone in the neighborhood").) It is with this interpretation that NAACP takes issue.

Rather than being interpreted as a limitation on the use of real property, at its heart, the Appellees' position is that the restrictive covenant at issue should be interpreted as a limitation

[1] Pursuant to MCR 7.312(H)(5), this Brief was not authored in whole or in part by any counsel for a party, and no party or their counsel made a monetary contribution intended to fund the preparation or submission of this Brief. Further, no person other than Amicus made any monetary contribution to the preparation of this Brief.

on who may reside at the property. Wealthy property owners are fine, renters are not. Servants are fine, families who foster children are not. Indeed, the Appellees' position could be summed up as, "We want to keep *those* people out of *our* neighborhood." There is no basis to believe that the persons residing in the relevant housing are enjoying their occupancy in any way different than their neighboring occupants. Thus, the "single family residence purposes" use restriction is not truly at issue. Instead, under the interpretation urged by Appellees, only those who can afford to purchase property in the posh neighborhood should be permitted to reside there even temporarily. Pursuant to the express language of the restrictive covenant, the only exception under this elitist and discriminatory interpretation is for "servants" of those who can afford to buy houses. In other words, persons of more limited financial means are permitted to reside in these houses, but only if they are there to clean them.

ANALYSIS

I. A Short History of Restrictive Covenants.

The attempt to keep certain people from residing in certain neighborhoods through restrictive covenants is nothing new. The Federal Housing Administration ("FHA"), which was established during the New Deal undertook a course of action to ensure racial segregation in housing.

> For the first 16 years of its life, FHA itself actually encouraged the use of racially restrictive covenants. It not only acquiesced in their use but in fact contributed to perfecting them. The 1938 FHA Underwriting Manual, which contained the criteria used in determining eligibility for receipt of FHA benefits, warned against insuring property that would be used by "inharmonious racial groups," and declared that for stability of a neighborhood, "properties shall continue to be occupied by the same social and racial classes." The Manual contained a model restrictive covenant which FHA strongly recommended for inclusion in all sales contracts. Furthermore, FHA instructed land valuators that among their considerations should be a determination as to whether "effective restrictive covenants are

> recorded against the entire tract, since these provide the surest protection against undesirable encroachment and inharmonious use. To be most effective, deed restrictions should be imposed upon all land in the immediate environment of the subject location."[2]

Restrictive covenants were not limited to the FHA, they were also promoted by the National Association of Real Estate Boards.[3] These typically prohibited the buyers of a house from thereafter selling the house to a Black person or allowing a Black person to occupy the home.[4] Similar to the single-family restriction here, exceptions were typically made for domestic servants.[5]

Unfortunately, these sorts of restrictions were approved in Michigan and even by this Court as recently as 1947. In *Sipes v McGhee*, this Court affirmed a state trial court judgment enjoining violation of a private agreement that restricted the use or occupancy of certain real estate to persons of the Caucasian race. See 316 Mich 614; 25 NW2d 638 (1947). The following year, the U.S. Supreme Court reversed that decision, holding that Michigan had acted to deny the petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment of the U.S. Constitution. *Shelley v Kraemer*, 334 US 1 (1948).

In part because of the perverse historic use of restrictive covenants, Michigan courts construe covenants limiting free property use "strictly against grantors," with "all doubts . . . resolved in favor of the free use of property." *O'Connor v Resort Custom Builders, Inc.*, 459 Mich 335; 591 NW2d 216 (1999) (citation omitted). Moreover, a court "cannot read words into

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[2] Rothstein, Richard, *The Making of Ferguson, Public Policies at the Root of its Troubles*, Economic Policy Institute (Oct 15, 2014), https://www.epi.org/publication/making-ferguson/ (last checked 1/8/2025).

[3] *Id.*

[4] *Id.*

[5] See *id.*

the plain language of a contract." *Northline Excavating, Inc. v Livingston Co.*, 302 Mich App 621, 628; 839 NW2d 693 (2013). But the Court of Appeals did not apply strict construction to the restrictive covenant at issue here,[6] and its decision has discriminatory effects that the Court should consider in resolving this case.

II. The Use of Property Is Not Determined Solely by Who Owns It.

Interpreting the term "residential purpose" to require that the resident have a fee simple/ownership interest in the real property or some undefined temporal length of residence would result in a racially disproportionate exclusion of certain communities from desirable residential neighborhoods. NAACP notes that "[n]ationwide, about 58% of households headed by Black or African American adults rent their homes, as do nearly 52% of Hispanic- or Latino-led households, according to Pew Research Center's analysis of census data. By contrast, roughly a quarter of households led by non-Hispanic White adults (27.9%) are rentals . . . . White, non-Hispanic householders account for three-quarters of *all* owner-occupied housing units in the United States, but just over half of all renter-occupied units."[7] According to the

[6] For example, the Court of Appeals interpreted the restrictive covenant to prohibit all rentals even though the restrictive covenant does not use the terms "rent," "renter," "rental," "lease," "leasehold," "tenant," "landlord," or "short-term." Rental properties obviously existed in 1977, when the restrictive covenant was drafted. Presumably, the real estate developer who drafted the restrictive covenant (as was everyone else) was aware of the fact that some Michiganders rented residences. But the developer excluded any explicit ban on rentals from the restrictive covenant. And the members of the Association later adopted bylaws providing that property owners may "delete his rights of enjoyment in the Common Properties . . . to *any of his tenants* who reside [upon the properties] under a *leaseholder interest*." (Op 7 (emphasis added).) Because the plain language of the covenant fails to mention rentals and the Bylaws show that the Association members believed that rentals were allowed, strict construction would dictate that the Court of Appeals should not have read a rental restriction into the restrictive covenant.

[7] DeSilver, Drew, *As national eviction ban expires, a look at who rents and who owns in the U.S.*, Pew Research Center, Aug 2, 2021, https://www.pewresearch.org/short-reads/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-u-

University of Michigan and the Michigan State Housing Development Authority, in Michigan, there is "a 34 percentage-point gap in homeownership among white and Black households."[8] In short, Black Michiganders are far more likely than their white counterparts to rent, rather than own, their residences. Based in part on a flawed and over-expansive reading of *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002), the Court of Appeals ruled that restrictive covenants requiring residential use prohibit an owner from renting the residence to a tenant. In other words, the Court of Appeals reasoned that the commonly used single-family residence restriction in deeds and zoning ordinances may exclude residents from living in a neighborhood, not because of the nature of how the *actual* occupants actually use the house, but because of the mere fact that those occupants are renting. This Court should reject that discriminatory analysis.

The Court of Appeals' opinion has perverse results. Tract housing undeniably exists in Michigan. Renters, who are far more likely to be Black, undoubtedly wake up, prepare meals, help their children with their homework, eat family dinners, pray, and lay their heads to rest, etc. in their houses, just the same as their neighbors who have the financial resources to own. The Opinion offers no reasonable explanation as to how the nature of identical behavior in identical housing is somehow different based solely upon whether the resident is renting.[9]

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s/#:~:text=One%20big%20disparity%20among%20renters,to%2054%2Dyear%2Dolds (last checked 12/3/2024).

[8] Bethaj, Melika, et al., *Michigan Statewide Housing Needs Assessment*, 2024, https://www.urbanh3.com/mi-statewide-housing-needs-assessment (last checked 1/7/2025).

[9] The song *Little Boxes* speaks to the concept of nearly identical houses built by developers to house homogenous groups of residents. See Reynolds, Malvina, *Little Boxes* (1962). In such communities, houses and their residents "all look just the same." Indeed, this concept is echoed in the Court of Appeals Opinion, which makes multiple references, not to the type of use of the property, but to the type of the residents, *i.e.*, "clientele". (See Op 8, 10.) The NAACP maintains that homeowners may not through a restrictive covenant choose who is permitted to live near them.

Under the Court of Appeals interpretation, racial wealth disparities all but guarantee that Black Michiganders may be excluded from living in certain areas based solely upon restrictive covenants. As the Federal Reserve has noted, "White families have the highest level of both median and mean family wealth: $188,200 and $983,400, respectively …. Black and Hispanic families have considerably less wealth than White families. Black families' median and mean wealth is less than 15 percent that of White families, at $24,100 and $142,500, respectively. Hispanic families' median and mean wealth is $36,100 and $165,500, respectively."[10] Because of this fact, Black and Brown families are less likely to have the down payment needed to purchase homes in these exclusive areas. If, however, these families find desired rental living space in these areas at a rental rate they can afford, pursuant to the Appellees, such families still would be excluded. This exclusion would not be because such families could not afford the rent or would do anything other than live peacefully at the property. Instead, it would be because, under Appellees' position and the Court of Appeals Opinion, these families are not the type of people Appellees want to make residential use of the property. Put plainly, the law cannot and should not support such a result.

III. The "Single Family" Restriction Cannot be Enforced Because it Operates in a Discriminatory Manner.

Michigan law provides that a restrictive covenant that purports to restrict occupancy of property on the basis of a protected status is void and has no legal effect. Here, the restriction limits the real property to use as a "single-family residence." (Op 6.) And "single family" is

[10] Bhutta, Neil, et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDS NOTES, Sept 28, 2020, https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html (last checked 1/8/2025).

limited to persons related "by blood, marriage, or adoption," no more than three persons not related by blood, marriage or adoption, and the servants of such persons. (*See id.* (quoting the covenant's definition of "single family").) Of note, the court performed no analysis of whether the 1977 definition contained in the covenant is legally enforceable in light of current Michigan civil rights laws.

Section 102 of the Elliott-Larsen Civil Rights Act provides that "[t]he opportunity to obtain employment, *housing and other real estate*, and the full and equal utilization of public accommodations, public service, and educational facilities *without discrimination* because of religion, race, color, national origin, age, sex, height, weight, *familial status*, or marital status as prohibited by this act, is recognized and declared to be a civil right." MCL 37.2102 (emphasis added). Section 501(b) provides: "'Real estate transaction' means the sale, exchange, *rental, or lease of real property*, or an interest therein." MCL 37.2501 (emphasis added).

Section 502 of ELCRA protects this civil right by providing, in relevant part:

> (1) A person engaging in a real estate transaction, or a real estate broker or salesman, shall not on the basis of religion, race, color, national origin, age, sex, *familial status*, or marital status *of a person or a person residing with that person*:
>
> (a) Refuse to engage in a real estate transaction with a person.
>
> (b) Discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection with a real estate transaction.
>
> (c) Refuse to receive from a person or transmit to a person a bona fide offer to engage in a real estate transaction.
>
> (d) Refuse to negotiate for a real estate transaction with a person.

MCL 37.2502 (emphasis added).

ELCRA is not the sole source of protection against discrimination under Michigan law. While this case was pending in the Michigan Court of Appeals, Michigan enacted the Discharge of Prohibited Restrictive Covenants Act, Public Act 234 of 2022. MCL 565.861-565.872. It makes prohibited restrictions unenforceable. " 'Prohibited restriction' means a restriction, covenant, or condition, including a right of entry or possibility of reverter, *that purports to restrict occupancy* or ownership of property on the basis of race, color, religion, sex, *familial status*, national origin, or other class protected by the fair housing act, title VIII of the civil rights act of 1968, Public Law 90-284, in a deed or other instrument." MCL 565.862 (emphasis added). The Act provides that "[a] prohibited restriction is void and has no legal effect," and that "[a] court or other person shall not enforce a prohibited restriction." MCL 565.864. Accordingly, if the restrictive covenant here purports to restrict occupancy on the basis of familial status (and it does), the Michigan courts cannot enforce it regardless of the covenants possibly lawful applications.

Both the Elliott-Larsen Civil Rights Act and Title VIII of the Civil Rights Act of 1968, *i.e.*, the Fair Housing Act, prohibit discrimination on the basis of familial status. Under the Fair Housing Act, "familial status" means:

> one or more individuals (who have not attained the age of 18 years) being domiciled with—
>
> (1) a parent or another person having legal custody of such individual or individuals; or
>
> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.
>
> The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years. [42 USC 3602(k).]

Similarly, under ELCRA, "familial status" means the following:

> 1 or more individuals under the age of 18 residing with a parent or other person having custody or in the process of securing legal custody of the individual or individuals or residing with the designee of the parent or other person having or securing custody, with the written permission of the parent or other person. For purposes of this definition, "parent" includes a person who is pregnant." [MCL 372.103(e).]

Thus, both definitions prohibit discrimination against individuals with foster children over whom the individual has legal custody and against individuals who are caring for another's children the parent's written authorization. The latter situation arises where, for example, a family hosts a foreign exchange student, a minor stays with an unrelated friend's family to complete high school when their family moves away, or a family experiences hardship such as a military deployment, mental illness, or marital disputes and an unrelated family welcomes their children during the period of adversity. In each instance, the Fair Housing Act and ELCRA prohibit discrimination.

In each of these instances, if the family hosting the minor is comprised of more than two people, the occupancy by the foster children or other children is prohibited by the restrictive covenant. Thus, the Court of Appeals was prohibited from enforcing the restrictive covenant which is void. See MCL 565.864. The same prohibition applies here. Accordingly, the Court should vacate the lower courts' decisions.

IV. Appellees' Interpretation Violates Public Policy.

Finally, the fact that, for many reasons, families may need temporary housing is undeniable. For example, in January 2025, wildfires raged through areas of Southern California, displacing thousands of residents. In response to this disaster Airbnb offered temporary housing

to those impacted by the fires.[11] The same was true in 2024 in the wakes of Hurricanes Milton and Helene.[12] Furthermore, the need for temporary housing is not limited to survivors of natural disasters and extends to those fleeing unsafe conditions and in need of humanitarian relief.[13]

As explained by the Michigan Department of Health and Human Services: "Foster Care identifies and places children in safe homes when they cannot remain with their families because of safety concerns. Foster families provide these children with the consistency and support they need to grow. Our main goal is to return children back to their homes when it is safe."[14] Put simply, these children need temporary housing. Furthermore, it is no secret that foster parents receive some payments from the state for opening their homes and taking in children in need. Despite this fact, during their hopefully short lengths of stay, these children undoubtedly are making "residential use" of these homes.

Under Appellees' view, disaster victims, refugees, neglected or abused children, and other vulnerable populations of displaced persons in need of temporary housing would be barred from staying in any neighborhood having similar restrictive covenants or zoning. According to the Michigan Department of Health and Human Services' Children's Services Agency: "While

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[11] Radel, Felecia Wellington, *Airbnb offers temporary housing for residents impacted by Southern California wildfires*, USA Today (Jan 8, 2025) (last checked 1/9/2025).

[12] Brown, Jo-Lynn, *Airbnb.org responds to Hurricanes Helene and Milton, offering free temporary housing*, Tampa BAY BUSINESS & WEALTH (Oct 17, 2024), https://www.tallahassee.com/story/news/hurricane/2024/10/04/airbnb-offering-free-temporary-housing-for-hurricane-helene-survivors/75473395007/ (last checked 1/9/2025).

[13] Franklin, Jonathan, *Airbnb Will Provide Housing To 20,000 Afghan Refugees Around The World For Free*, NPR, https://www.michiganpublic.org/2021-08-24/airbnb-will-give-20-000-afghan-refugees-temporary-housing (August 24, 2021).

[14] Michigan Department of Health & Human Services, Foster Care, https://www.michigan.gov/mdhhs/adult-child-serv/foster-care (last checked 1/9/2025).

16% of children in Michigan are Black, children who are Black make up 29% of the state's foster care population. While 31% of children in Michigan are children of color, they make up 51% of the foster care population."[15] Thus, again Black and Brown Michiganders are more likely to be negatively affected by the Court of Appeals Opinion.

Refusing housing to those in need because the neighbors do not want to live near such populations is the definition of being against public policy.

CONCLUSION

Restrictive covenants have a long history of being abused to permit race discrimination. After the Supreme Court's *Shelley* decision, restrictive covenants prohibiting a property owner from selling to or allowing occupancy by a person because of their race were no longer enforceable. But the same result is readily achievable if property owners, who are disproportionately white, are allowed to impose restrictive covenants on properties preventing the rental use of those properties to persons other than by their friends and those who are already in their community. For that reason, the Court should be aware that restrictions such as the one Plaintiffs endorse should be construed to avoid allowing them to be used to limit who uses a property rather than how the property is used. Indeed, the restrictive covenant here cannot be enforced under Michigan law because it unlawfully prohibits occupancy of properties based on familial status. Accordingly, the Court should vacate the lower courts' rulings.

[15] Michigan Department of Health and Human Services' Children's Services Agency, *Child Welfare Improvement Taskforce Report* (2021), https://michigancwtf.org/wp-content/uploads/Child-Welfare-Task-Force-Report-v6.pdf (last checked 1/21/2025).

Respectfully submitted,

Dated: January 24, 2025

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