No.
SUPREME COURT
OF THE STATE OF WASHINGTON

OLIVE OSHIRO, *et al.*, Petitioners,
v.
WASHINGTON STATE HOUSING FINANCE COMMISSION, *et al.*, Respondents.

PETITIONERS' EMERGENCY MOTION[1] FOR DISCRETIONARY REVIEW AND REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF

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[1] An affidavit pursuant to Rule of Appellate Procedure 17.4(b) will accompany this Motion.

A. IDENTITY OF PETITIONERS

Olive Oshiro, Norma and Eugene Aldredge, Michael Rabang, Michelle and Rubert Roberts, Francisco Rabang Sr., Wilma Rabang, Alex Mills, and Saturnino Javier are a group of mostly elderly individuals facing eviction from their homes beginning April 20, 2022. Petitioners are federal Low-Income Housing Tax Credit ("LIHTC") program homebuyers who have lived in their homes for as many as 24 years, and who are, or soon will be, due to own their homes. Representing households comprised of 23 individuals who imminently face eviction without good cause, Petitioners ask this Court to accept emergency review of the decision designated in Part B of this Motion.

B. DECISION

Petitioners seek emergency review of the Thurston County Superior Court's denial of their Motion for Preliminary Injunction, entered April 13, 2022. Through that motion, Petitioners sought an order enjoining Respondents Nooksack Housing Limited Partnership #2–4 (the "State Partnership

Respondents") from evicting them from their homes. Because that motion was denied, Petitioners will be evicted from their homes beginning April 20, 2022, absent relief from this Court. A copy of the order (hereafter "Order") is in the Appendix at pages A-1019 through A-1023.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court preserve the status quo by preliminarily enjoining Petitioners' evictions under Rule of Appellate Procedure 8.3 when, without that relief, "effective and equitable review" of the Order will be impossible because the evictions will occur?

2. Did the superior court commit probable error by analyzing subject matter jurisdiction under RCW 37.12.060 and *Williams v. Lee*, when Petitioners do not rely on RCW 37.12 as the basis for jurisdiction and *Williams* is inapposite?

3. Did the superior court commit probable error in finding Petitioners are not entitled to injunctive relief because

they did not join the Nooksack Indian Tribe and the United States, when: (1) the Tribe's interest is adequately represented by the State Partnership Respondents; (2) the United States has no interest that is being jeopardized; and (3) Petitioners lack any other judicial forum?

4. Did the superior court commit probable error by *sua sponte* raising the issue of personal jurisdiction over non-parties?

D. STATEMENT OF THE CASE

This case pertains to the administration of the federal Low-Income Housing Tax Credit ("LIHTC") program in the State of Washington. *See* A-1007–A-1009. LIHTC, enacted by Congress and codified in the Internal Revenue Code at 26 U.S.C. § 42, prohibits evictions of residents of program homes except where "good cause" exists. 26 U.S.C. § 42(h)(6)(E)(ii)(I). It also gives those residents the right to enforce that prohibition by contesting evictions "in any State court." *Id.* at § 42(h)(6)(B)(ii).

All Petitioners live in LIHTC homes owned by the State Partnership Respondents. The State Partnership Respondents are

99.99 percent owned by subsidiaries of Raymond James Financial, Inc., a Florida corporation ("Raymond James"), and .01 percent owned by the Nooksack Indian Tribe ("Tribe"). *See* A-1005–A-1006. The partnerships were formed under the laws of the State of Washington. *See* A-0504.

In 2001, the 106th Congress amended 26 U.S.C. § 42 to give tax-credit allocation preference to LIHTC development projects that included a plan by which low-income housing tenancies would be converted into homeownership at the conclusion of a mandatory compliance period. *See* 26 U.S.C.
§ 42(m)(1)(C)(viii).

In 2005, eager to receive an allocation of tax credits, each State Partnership Respondent entered into a contract with Respondent Washington State Housing Finance Commission ("WSHFC"), the State agency tasked with administering, monitoring, and enforcing LIHTC. *See* A-0017–A-0239. Congress required that state housing agencies such as WSHFC and recipients of tax credits such as the State Partnership Respondents enter into these

contracts, known as regulatory agreements, before the award of tax credits. *See* 26 U.S.C. § 42(h)(6)(A).

In the regulatory agreements, the State Partnership Respondents promised WSHFC that they would not evict residents without good cause and agreed—consistent with the LIHTC statute—that residents can enforce that prohibition on evictions "in any State court." A-0033, A-0118, A-0180.

The State Partnership Respondents further promised WSHFC that residents like Petitioners would be conveyed deeds to their homes after fifteen years of successful tenancy. *See* A-0033, A-0118, A-0180. Petitioner Oshiro, age 86, has lived in her LIHTC home for 24 years; Petitioners Aldredges, ages 74 and 84, for 17 years; Petitioner Michael Rabang, age 79, for 16 years; Petitioners Francisco and Wilma Rabang, ages 80 and 71, for 15 years; and Petitioners Michelle and Rupert Roberts, each age 57, for 15 years. *See* A-1002–A-1004. Over those many years, Petitioners have made timely monthly "rent-to-own" payments and impeccably maintained and improved their homes. *See id.*

According to the architect of State Partnership Respondents' LIHTC development deal: "WSHFC awarded application points to each of the Limited Partnerships based on that 15-year home ownership concept, and in turn awarded tax credits to each of the Limited Partnerships." A-0801. State Partnership Respondents—specifically, Raymond James—have since reaped federal income tax benefits of LIHTC participation for fifteen years,[2] but now refuse to honor the accompanying burden because, according to WSHFC, doing so would increase its federal tax liability. *See* A-1010 ("Raymond James has since received annual tax credits [but] decided against certain LIHTC tenant homeownership compliance and reporting measures in order to increase its bottom line."). WSHFC—the steward of the "highly competitive" federal tax credit program and of affordable housing opportunity for low-income families in Washington State—demurs in the face of State Partnership Respondents' bait

[2] The Tribe, as 00.01 percent owner of the State Partnership Respondents, does not pay federal income taxes.

and switch. *See* A-0800, A-1010, A-1014–1015.

After learning that an eviction proceeding against Petitioner Saturnino Javier was scheduled for April 20, 2022, *see* A-0825, Petitioners filed a Motion for Preliminary Injunction in Thurston County Superior Court on March 29, 2022. A-0001–A-0011. Under federal law and the regulatory agreements, that court is the proper forum for challenges by LIHTC residents to their eviction. *See* 26 U.S.C. § 42(h)(6)(B)(ii); A-0033, A-0118, A-0180.

The Tribe's Office of Tribal Attorney filed an opposition to Petitioners' motion, ostensibly on behalf of the State Partnership Respondents. *See* A-0865–A-0880. **The Tribe's opposition failed to address, and therefore conceded, Petitioners' central legal arguments: that Congress conferred jurisdiction on state courts to adjudicate LIHTC eviction disputes, and that there is no good cause to evict Petitioners.** *See generally id*. WSHFC filed a joinder in the State Partnership Respondents' request for dismissal, even though no motion to dismiss has been filed. *See* A-0881–A-0883.

The superior court heard argument on Petitioners' motion on April 8, 2022, and denied their motion in the Order of April 13, 2022.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

To establish that the Order is subject to discretionary review, Petitioners must establish that the "superior court has committed probable error and the decision of the superior court substantially alters the status quo[.]" RAP 2.3(b)(2). "Subsection (b)(2) was intended to apply 'primarily to orders pertaining to injunctions . . . which have formerly been appealable as a matter of right.'" Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1545–46 (1986) (quoting RAP 2.3(b) cmt. b)).

1. This Court should preserve the status quo by enjoining the evictions pending review of the Order.

Eviction proceedings in this case are scheduled for April 20, 2022. *See* A-0825. If any Petitioners are evicted from their homes and their home ownership rights are abrogated before this

Court's review, meaningful review will be impossible as Petitioners will have already suffered irreparable harm through the loss of their homes.

This Court has "authority to issue orders, before or after acceptance of review . . . to insure effective and equitable review, *including authority to grant injunctive or other relief to a party*." RAP 8.3 (emphasis added). "The purpose of [RAP 8.3] is to permit appellate courts to grant preliminary relief in aid of their appellate jurisdiction so as to prevent destruction of the fruits of a successful appeal." *Washington Federation of State Employees, Council 28, AFL-CIO v. State*, 99 Wash. 2d 878, 883 (1983). For instance, in *Washington Federation*, the Chief Justice of this Court preliminarily enjoined implementation of a payroll plan even though the Thurston County Superior Court had denied petitioners' motion for a preliminary injunction. *Id.* at 882. The new payroll plan would have changed payday for State employees "from the last working day of each month to approximately the 10th day of the following month." *Id.* at 880.

The Court in *Washington Federation* "merely preserved the status quo" by enjoining the implementation of the new plan. *Id.* at 883.

The harm faced by Petitioners here—the loss of homes they should already or will soon own—is far more serious than the ten-day delay in pay faced by the *Washington Federation* petitioners. A preliminary injunction of the evictions pending review in this case would simply preserve the status quo—Petitioners residing in their homes as they have for as many as 24 years. *See* A-0851. This Court should enjoin State Partnership Respondents from evicting Petitioners pending its review.

2. The superior court committed probable error by applying RCW 37.12.060 and Williams v. Lee to find a lack of subject-matter jurisdiction.

The superior court found that "[s]ubstantial questions exist as to whether Plaintiffs can ultimately prevail at trial on the merits of their claims because of continuing concerns as to . . . [w]hether the Court has subject matter jurisdiction given restrictions contained in R.C.W. § 37.12.060; as well as other

federal law — *Williams v. Lee*." A-1021. Because this was probable error, this Court should accept review.

First, RCW 37.12.060 does not divest the superior court of jurisdiction because Petitioners do not rely upon RCW 37.12 as the basis for jurisdiction in this case. *See* A-1006. Pursuant to congressional authority found in Public Law 280, "the Washington legislature enacted RCW 37.12, in which the state bound itself to exercise 'criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state.'" *Powell v. Farris*, 94 Wash. 2d 782, 784 (1980). While RCW 37.12.060 contains a limitation on the State's assumption of jurisdiction, that limitation only applies to cases in which jurisdiction is predicated on RCW 37.12. *See Snohomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668, 671 (1967) (noting that the limitation found in RCW 37.12.060 is a limitation on the State's assumption of jurisdiction through RCW 37.12); *see also* RCW 37.12.021 (recognizing that "jurisdiction *assumed pursuant to this section* shall nevertheless be subject to

the limitations set forth in RCW 37.12.060) (emphasis added).

Jurisdiction in this case is not predicated on Public Law 280. Instead, it is based upon the LIHTC statute and the regulatory agreements—both of which give Petitioners a cause of action in a state forum. *See* A-1006, A-1013. The limitation on jurisdiction found in RCW 37.12.060 therefore has no application, and it was probable error for the superior court to apply it.

Second, the superior court also committed probable error by finding *Williams v. Lee* prevented it from exercising jurisdiction. *Williams* is not implicated by this dispute for three reasons: (1) the State Partnership Respondents consented to state court jurisdiction for challenges to evictions; (2) *Williams* applies only in the absence of a federal statute permitting state jurisdiction; and (3) that case applies only to reservation affairs. Each reason is addressed in turn. Each of these reasons independently shows the superior court committed probable error in relying on *Williams*.

In *Outsource Services Management, LLC v. Nooksack*

Business Corp., this Court held that where a tribe consensually enters into a contract whose "plain language" permits suit in state court, there is no infringement on tribal self-rule in subjecting that tribe to suit in state court. *See Outsource Services Management*, 181 Wash. 2d 272, 278–79 (2014). In the regulatory agreements governing their LIHTC participation, the Tribe, as the general partner of the State Partnership Respondents, consented to suit in state court for challenges to evictions, such as this. *See* A-0033, A-0118, A-0180. Thus, the Tribe's right to self-rule is not injured by the exercise of state jurisdiction. *See Outsource Services Management*, 181 Wash. 2d at 278–79.

This Court has also recognized that *Williams* is applicable only where "there is no act of Congress governing the jurisdiction of our state courts in proceedings such as those below." *Matter of Adoption of Buehl*, 87 Wash. 2d 649, 661 (1976). Such an act exists here: the LIHTC statute, which directs that proceedings such as this one—a challenge to evictions by

state partnerships in receipt of tax credits allocated to them by a state housing agency—should be heard in state court. *See* 26 U.S.C. § 42(h)(6)(B)(ii).

Williams is also inapplicable because the homes in dispute are privately owned non-trust property located on allotted trust lands in Whatcom County, not on a reservation. *See Chief Seattle Properties, Inc. v. Kitsap County*, 86 Wash. 2d 7, 16 (1975) (holding *Williams* does not hinder State's ability to regulate personal property, including "improvements," on Tribal trust land).

Even if *Williams* is relevant to this dispute, that case counsels in favor of state court jurisdiction over this lawsuit, which is one "by Indians against outsiders." *Williams*, 358 U.S. at 219. The State Partnership Respondents are Washington State limited partnerships 99.99 percent owned by Raymond James subsidiaries. They are therefore "outsiders," and the superior court committed probable error in concluding it cannot exercise subject-matter jurisdiction over this dispute.

In sum, the superior court's finding that questions concerning subject-matter jurisdiction prevent it from granting Petitioners preliminary injunctive relief was probable error. Neither authority relied upon by the superior court precludes the exercise of jurisdiction.

3. The superior court committed probable error by finding Petitioners might not prevail because they have failed to join potentially necessary and indispensable parties.

The superior court found that "[s]ubstantial questions exist as to whether Plaintiffs can ultimately prevail at trial on the merits of their claims because of continuing concerns as to . . . [w]hether indispensable parties are not present at the current time, and whether those parties can feasibly be joined (Nooksack Indian Tribe; USA)." A-1021. This too was probable error.

"To deserve protection under CR 19(a)(2)," an absentee must claim "an interest relating to the subject of the action" that is "sufficiently weighty." *Automotive Union Trades Organization v. State*, 175 Wash. 2d 214, 233 (2012); *see also* CR 19(a)(2). The Tribe's interest in this dispute over the

possession of LIHTC homes is as the .01 percent general partner of the State Partnership Respondents. *See* A-0549, A-0614, A-0683. That is not a "sufficiently weighty" interest rendering the Tribe necessary. *See Romey v. Shearer*, 139 Wash. 621 (1926) (holding partner is not a necessary party to action pertaining to partnership assets).

Likewise, even where the federal government possesses an interest in land, it is not a necessary party unless that interest is being "diminished" or "condemned." *City of Pullman, Whitman County v. Glover*, 73 Wash. 2d 592, 594 (1968). This is a dispute about possession of the LIHTC homes; no matter who resides in those homes, the United States' interest is not "diminished" or "condemned."

To the extent that the Tribe has an interest that qualifies under Civil Rule 19(a)(2), that interest is adequately protected by the State Partnership Respondents. *See Automotive Union Trades Organization*, 175 Wash. 2d at 225 ("It is established that 'as a practical matter, an absent party's ability to protect its interest

will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit.'") (quoting *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999)). The State Partnership Respondents were represented before the superior court by the Tribe's Office of Tribal Attorney. *See* A-0865–A-0880.

Finally, the superior court committed probable error in finding the Tribe indispensable under Civil Rule 19(b). In making that determination, a court must consider "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." CR 19(b)(4). This factor must be given "great weight" because of Washington courts' "strong aversion to dismissal." *Automotive Union Trades Organization*, 175 Wash. 2d at 233. "Where no other forum is available to the plaintiff," as here, "the balance tips in favor of allowing this suit to proceed without the tribe[]." *Id.* at 233.

Here, no other judicial forum exists to hear Petitioners' claims. Sovereign immunity would bar an identical action in

Nooksack Tribal Court. *See Lundgren v. Upper Skagit Indian Tribe*, 187 Wash. 2d 857, 873 (2017) (tribe not indispensable where it had not waived sovereign immunity in tribal court), *vacated on other grounds*, 138 S. Ct. 1649 (2018)). And the Nooksack Tribal Court rejected a notice of appearance filed by Petitioners' counsel. *See* A-1000.

The superior court committed probable error by failing to give "great weight" to the factor analyzing the availability of adequate remedies in other judicial forums. *Automotive Union Trades Organization*, 175 Wash. 2d at 233.

4. The superior court committed probable error by sua sponte *raising personal jurisdiction and by finding Petitioners might not prevail because of a potential lack of such jurisdiction.*

The superior court found that "[s]ubstantial questions exist as to whether Plaintiffs can ultimately prevail at trial on the merits of their claims because of continuing concerns as to . . . [w]hether the Court has personal jurisdiction over persons not present." A-1021. This was probable error as well, particularly given that the issue was raised *sua sponte*. *See* In re

Tuli, 172 F.3d 707, 712 (9th Cir. 1999) (noting that *sua sponte* analysis of personal jurisdiction is appropriate only when considering whether to enter default judgment).

The superior court prematurely raised the issue of personal jurisdiction over non-parties. Personal jurisdiction is a court's "power over the parties before it." *Lightfoot v. Cendant Mortgage Corp.*, 137 S. Ct. 553, 562 (2017). Because non-parties are not "parties before" the court, it is "premature—not to mention 'novel and surely erroneous'" to adjudicate whether there is personal jurisdiction over them. *Molock v. Whole Foods Market Group, Inc.*, 952 F.3d 293, 298 (D.C. Cir. 2020) (quoting *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011)).

To the extent the superior court's concern about "persons not present" refers to the State Partnership Respondents—limited partnerships formed under Washington State law—or Raymond James—the 99.99 percent owner of those state partnerships—it defies logic to suggest that they are not subject to the court's personal jurisdiction. *See, e.g.*, 14 Orland & Teglund,

Washington Practice 12, at 15 (5th ed. 1996) (noting state personal jurisdiction over that state's business entities "is well established"). The superior court committed probable error by raising the issue of personal jurisdiction.

F. CONCLUSION

Petitioners are vulnerable individuals who are days away from being evicted from their LIHTC homes and having their home ownership rights extinguished even though the "good cause" required by Congress is lacking.

This Court should: (1) preserve the status quo by preliminarily enjoining the State Partnership Respondents under Rule of Appellate Procedure 8.3 from evicting Petitioners pending the Court's review and until further order of the Court; and (2) accept emergency review of the superior court's denial of Petitioners' motion for preliminary injunction.

This document contains 3,206 words, excluding the parts of the document exempted from the word count by RAP 18.17.

April 13, 2022

Respectfully submitted,

/s Matthew J. Slovin

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INDEX TO THE APPENDIX OF PETITIONERS' EMERGENCY MOTION FOR DISCRETIONARY REVIEW AND REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF

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DATE FILED	DOCUMENT	PAGE NO.
3/29/2022	Plaintiffs' Motion for Preliminary Injunction	A-0001-A-0011
3/29/2022	Declaration of Gabriel S. Galanda	A-0012-A-0798
3/29/2022	Declaration of David Bland	A-0799-A-0801
3/29/2022	Declaration of Alex Mills	A-0802-A-0803
3/29/2022	Declaration of Michelle Roberts	A-0804-A-0816
3/29/2022	Declaration of Saturnino Javier, SR.	A-0817-A-0842
3/29/2022	Declaration of Norma Aldredge	A-0843-A-0849
3/29/2022	Declaration of Elizabeth Oshiro	A-0850-A-0857
3/29/2022	Declaration of Francisco Rabang	A-0858-A-0864
4/5/2022	Tribal Opposition to Motion for Preliminary Injunction	A-0865-A-0880
4/7/2022	Joinder in Defendant Partnerships' Request for Dismissal Pursuant to CR 19	A-0881-A-0883
4/6/2022	Plaintiffs' Reply on Motion for Preliminary Injunction	A-0884-A-0891
4/6/2022	Second Declaration of Gabriel S. Galanda	A-0892-A-0894
	Exhibits 1-4 to Second Declaration of Gabriel S. Galanda	A-0895-A-0946
	Exhibits 5-11 to Second Declaration of Gabriel S. Galanda	A-0947-A-0998

4/6/2022	Second Declaration of Saturnino Javier, SR.	A-0999-A-1000
4/11/2022	Plaintiffs' Amended Complaint	A-1001-A-1018
4/12/2022	Order Denying Plaintiffs Motion for Preliminary Injunction	A-1019-A-1023

GALANDA BROADMAN

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Filing Motion for Discretionary Review of Superior Court (RAP 15.2(h))

Transmittal Information

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Trial Court Case Title:	Olive Oshiro Et Al Vs State Housing Finance Commission Et Al
Trial Court Case Number:	22-2-00567-34 (JIS Number: 22-2-00567-7)
Trial Court County:	Thurston Superior Court
Signing Judge:	Dixon
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