No. 22-35784

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

LEXINGTON INSURANCE COMPANY et al.,

*Plaintiffs-Appellants,*

v.

CINDY SMITH et al.,

*Defendants-Appellees*.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 3:21-CV-05930 | The Honorable David G. Estudillo

# APPELLANTS' OPENING BRIEF

Gabriel L. Baker
JENSEN MORSE BAKER PLLC
1809 Seventh Ave., Suite 410
Seattle, WA 98101
Telephone: (206) 682-1550

Richard J. Doren
Matthew A. Hoffman
Bradley J. Hamburger
Daniel R. Adler
Patrick J. Fuster
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000

*Attorneys for Appellant Lexington Insurance Company*

(*Additional counsel listed on following page*)

Michael E. Ricketts
GORDON THOMAS HONEYWELL, LLP
520 Pike Street, Suite 2350
Seattle, WA 98101
Telephone: (206) 676-7500

*Attorneys for Appellant Homeland Insurance Company of New York*

Thomas Lether
Eric J. Neal
Kevin J. Kay
Kasie Kashimoto
LETHER LAW GROUP
1848 Westlake Avenue N, Suite 100
Seattle, WA 98109
Telephone: (206) 467-5444

*Attorneys for Appellants Hallmark Specialty Insurance Company, Aspen Specialty Insurance Company, and Aspen Insurance UK Ltd.*

Robert W. Novasky
FORSBERG & UMLAUF PS
1102 Broadway
Suite 510
Tacoma, WA 98402
Telephone: (253) 572-4200

*Attorneys for Appellants Certain Underwriters at Lloyd's, London and London Market Companies Subscribing to Policy Nos. PJ193647, PJ1900131, PJ1933021, PD-10364-05, PD-11091-00, and PJ1900134-A*

## CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Lexington Insurance Company certifies that it is a wholly owned subsidiary of AIG Property Casualty U.S., Inc., which is a wholly owned subsidiary of AIG Property Casualty Inc., which in turn is a wholly owned subsidiary of American International Group, Inc., a publicly traded company (NYSE: AIG). No parent corporation or other entity owns 10% or more of the stock of American International Group, Inc.

Dated: January 9, 2023

Respectfully submitted,

/s/ *Richard J. Doren*
Richard J. Doren

*Attorneys for Appellant*
*Lexington Insurance Company*

## CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Homeland Insurance Company of New York is an indirect wholly owned subsidiary of Intact Insurance Group USA Holdings, Inc. Intact Insurance Group USA Holdings, Inc. is a wholly owned subsidiary of Intact Financial Corporation, a publicly held company whose stock is traded on the Toronto Stock Exchange. No parent corporation or other entity owns 10% or more of the stock of Intact Financial Corporation.

Dated: January 9, 2023

Respectfully submitted,

/s/ *Michael E. Ricketts*
Michael E. Ricketts

*Attorneys for Appellant Homeland Insurance Company of New York*

## CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Hallmark Specialty Insurance Company certifies that it is a wholly owned subsidiary of American Hallmark Insurance Company of Texas, which is in turn a wholly owned subsidiary of Hallmark Financial Services, Inc., which is a publicly traded company (NYSE: HALL). No parent corporation or other entity owns 10% or more of the stock of Hallmark Financial Services, Inc.

Under Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Aspen Specialty Insurance Company certifies that it is a wholly owned subsidiary of Aspen American Insurance Company. Aspen American Insurance Company is a wholly owned subsidiary of Aspen U.S. Holdings, Inc., a Delaware corporation. Aspen U.S. Holdings, Inc. is a wholly owned subsidiary of Aspen (UK) Holdings Limited, a U.K. corporation. Aspen (UK) Holdings Limited is a wholly owned subsidiary of Aspen Insurance Holdings Limited, a Bermuda exempted company ("AHL"). AHL is a wholly owned subsidiary of Highlands Holdings, Ltd., a Bermuda exempted company. All of the ordinary shares of Highlands Holdings, Ltd. are, directly or indirectly, owned by certain investment

funds managed by subsidiaries of Apollo Global Management, LLC, a Delaware limited liability company ("AGM"). Class A units and certain preferred shares of AGM are publicly traded on the New York Stock Exchange ("APO").

Under Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Aspen Insurance UK Ltd. certifies that it is a wholly owned subsidiary of Aspen European Holdings Limited ("AEHL"), a UK domiciled holding company. AEHL is a wholly owned subsidiary of Aspen Insurance Holdings Limited, a Bermuda exempted company ("AHL"). AHL is a wholly owned subsidiary of Highlands Holdings, Ltd., a Bermuda exempted company. All of the ordinary shares of Highlands Holdings, Ltd. are, directly or indirectly, owned by certain investment funds managed by subsidiaries of Apollo Global Management, LLC, a Delaware limited liability company ("AGM"). Class A units and certain preferred shares of AGM are publicly traded on the New York Stock Exchange ("APO").

Dated: January 9, 2023

Respectfully submitted,

/s/ *Eric J. Neal*
Eric J. Neal

*Attorneys for Appellants Hallmark Specialty Insurance Company, Aspen Specialty Insurance Company, and Aspen Insurance UK Ltd.*

## CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants Certain Underwriters at Lloyd's, London and London Market Companies Subscribing to Policy Nos. PJ193647, PJ1900131, PJ1933021, PD-10364-05, PD-11091-00, and PJ1900134-A make the following corporate disclosure:

Syndicate 1414 is the lead underwriter at Lloyd's, London subscribing to Policy Nos. PJ193647 and PJ1933021. It is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. Ascot Underwriting Group Limited is the parent corporation of Syndicate 1414, and Canada Pension Plan Investment Board is the parent corporation of Ascot Underwriting Group Limited. They are not publicly traded, and no publicly traded corporation or company possesses 10% or more interest in Syndicate 1414.

Syndicate 510 is the second underwriter at Lloyd's, London subscribing to Policy Nos. PJ193647 and PJ1933021. It is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. Syndicate 510 is managed by Tokio Marine Kiln Syndicates Ltd., of which Tokio Marine Underwriting

Limited ("TMUL") is an underwriting member and has a share greater than 50%. TMUL is wholly owned by Tokio Marine & Nichido Fire Insurance Co. Ltd., which is wholly owned by Tokio Marine Holdings, Inc., a company incorporated in Japan and listed on the Tokyo Stock Exchange.

XL Catlin Insurance Company UK Limited (now known as AXA XL Insurance Company UK Limited) is a London market company subscribing to Policy Nos. PJ193647 and PJ1933021. It is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. XL Catlin Insurance Company UK Limited is a direct subsidiary of Catlin Insurance Company (UK) Holdings Limited and an indirect subsidiary of XL Bermuda Limited, EXEL Holdings Limited, XLIT Limited, XL Group Limited and AXA S.A., which is a company domiciled in France and listed on the Paris Stock Exchange. No publicly held company owns 10% or more of AXA S.A.'s stock.

Syndicate 4444 is the lead underwriter at Lloyd's, London subscribing to Policy No. PJ1900131. It is organized and registered under the laws of the United Kingdom with its principal place of business

in the United Kingdom. It is not publicly traded, and no publicly traded corporation or company possesses 10% or more interest in Syndicate 4444.

Syndicate 2987 is the lead underwriter at Lloyd's, London subscribing to Policy Nos. PD-10364-05 and PD-11091-00. Syndicate 2987 is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. Syndicate 2987 is an unincorporated association, the managing agent of which is Brit Syndicates, Ltd. Brit Syndicates, Ltd. is a limited liability company registered in England & Wales. Brit UW Ltd. is the corporate member of Syndicate 2987. Brit Ltd. is the direct parent and whole-owner of Brit Syndicates, Ltd., and Brit UW Ltd. Fairfax Financial Holdings, Ltd. owns more than 10% of Brit Ltd. Ontario Municipal Employees Retirement System ("OMERS") is the owner of more than 10% of Brit Ltd. No publicly held company owns more than 10% of Fairfax Financial Holdings, Ltd., or OMERS.

Endurance Worldwide Insurance Limited (EWIL) is the lead London market company subscribing to Policy No. PJ1900134-A. EWIL is organized and registered under the laws of the United Kingdom with

its principal place of business in the United Kingdom. EWIL is 100% owned by Endurance Worldwide Holdings Ltd (EWHL), which is incorporated in England & Wales. EWHL is 100% owned by Endurance Specialty Insurance Ltd (ESIL), which is incorporated in Bermuda. ESIL is 100% owned by Sompo International Holdings Ltd (SIHL), which is incorporated in Bermuda. SIHL is 100% owned by Sompo Japan Insurance Inc. (SJII), which is incorporated in Japan. SJII is 100% owned by Sompo Holdings, Inc., which is incorporated in Japan and publicly listed on the Tokyo Stock Exchange. No publicly held company owns more than 10% of Sompo Holding, Inc.

Dated: January 9, 2023

Respectfully submitted,

/s/ *Robert W. Novasky*
Robert W. Novasky

*Attorneys for Appellants Certain Underwriters at Lloyd's, London and London Market Companies Subscribing to Policy Nos. PJ193647, PJ1900131, PJ1933021, PD-10364-05, PD-11091-00, and PJ1900134-A*

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page(s)

**Cases**

**Constitutional Provisions**

**Statutes**



**Regulations**



**Other Authorities**

## INTRODUCTION

The district court in this case endorsed a dramatic expansion of the limited jurisdiction of tribal courts over nonmembers of tribes, reaching far beyond the boundaries set by the Supreme Court and this Court. The district court decided the Suquamish Tribe has the right to bring its COVID-19-related insurance claims in its own tribal court against nonmembers that never set foot on tribal land. Businesses have filed hundreds of similar suits against their insurers without success. In fact, ten federal courts of appeals (including this one) and several state supreme courts (including the Washington Supreme Court) have held that property-insurance policies like those bought by the Suquamish Tribe do not cover pandemic-related losses of business income. So if the Tribe had sued its insurers for lost income in federal or state court, that lawsuit would have hit a dead end.

The question in this appeal is whether the Tribe can bring its COVID-19-related insurance claims in its own tribal court rather than in federal or state court. Because the insurers are not members of the Tribe, never entered the reservation, and pose no threat to the Tribe's ability to govern itself or control its internal relations, the district court should

have rejected the Tribe's unprecedented assertion of tribal-court jurisdiction over off-reservation insurers. That conclusion follows from a longstanding and strong presumption against tribal power over nonmembers of a tribe—including the exercise of tribal-court jurisdiction over nonmember defendants. And that presumption is rooted in the limited nature of tribal sovereignty. Tribes are dependent nations within the United States and under the protection of the federal government. They generally retain power over their own affairs, but they have no power over their external relations—with foreign countries, to be sure, but also with businesses and people who are not members of the tribe. Although tribes have every right to regulate (and adjudicate disputes involving) their own members, the Supreme Court has long held that they presumptively lack the right to do that for nonmembers.

The Supreme Court decided in *Montana v. United States*, 450 U.S. 544 (1981), that there are two narrow exceptions to that general rule. Tribes have the power to regulate (1) some consensual relationships between members and nonmembers and (2) nonmember activities on the reservation that endanger a tribe's welfare or its very existence. In the four decades since *Montana*, the Supreme Court has never relied on

either of these exceptions to hold that a tribal court has civil jurisdiction over a nonmember defendant.

Nothing about this case warrants a different result. Both *Montana* exceptions require nonmember conduct on the reservation, and there was no such conduct here. The Tribe's insurers never set foot on the reservation. They simply agreed to insure any qualifying tribe or tribal entity as part of a nationwide insurance program created and administered by a third party, and the Suquamish Tribe happened to buy a policy through that program. In other words, the Tribe looked beyond the reservation's borders for coverage. But the Tribe's decision to buy insurance outside the reservation does not mean the insurers themselves did anything on the reservation that could subject them to tribal-court jurisdiction.

The insurers' lack of any physical presence on the reservation is reason enough to reverse. But the *Montana* exceptions also do not apply here for other reasons. The Supreme Court in *Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 337 (2008), limited the first exception, holding that it requires not just commercial dealings with a tribe or tribal entity, but also a showing that (i) the nonmember

consented to tribal-court authority and (ii) the regulation of nonmember conduct promotes the tribe's inherent authority to preserve its own government or control its internal relations. The district court wrongly concluded the insurers must have consented to tribal jurisdiction because they agreed to insure tribal property, but the insurers would not have reasonably anticipated that Suquamish law would displace state insurance law. That is particularly true given that the Suquamish are one of almost 600 tribes across the country, many of which lack a formal legal code and may borrow, at their discretion, from a mix of federal law, state law, and tribal customs. Yet the district court's reasoning would allow tribes to hale any number of off-reservation businesses into tribal court. And on top of the lack of consent, the Tribe's regulation of its external relations with the insurers is unnecessary to serve any inherent sovereign interest protected by *Montana*.

The second *Montana* exception does not apply here because, as the district court correctly recognized, the fate of the Suquamish Tribe does not hinge on the outcome of the Tribe's suit against its insurers. Nor does the Tribe have an inherent sovereign right to sue nonmembers in tribal court when federal and state courts stand open and ready to resolve

insurance-coverage disputes. The decisions in those courts foreclosing COVID-19-related insurance claims may be disappointing for policyholders like the Tribe, but litigating against nonmembers under the same rules as every other policyholder is not catastrophic for tribal self-government.

Circuit precedent recognizes what appears to be an independent third exception to the general rule against tribal authority over nonmembers. This Court has held that a tribe can exercise power over nonmembers by relying on its right as a landowner to exclude people from its property. The district court concluded that the Tribe has jurisdiction over the insurers under this exception. But this case has nothing to do with the Suquamish Tribe's right to exclude anyone from its property. The insurers never set foot on tribal property. No one doubts a tribe's authority to kick trespassers off tribal land, but attempts to regulate *off-reservation* activity do not fit within that right-to-exclude framework. The district court nonetheless ruled that the general connection between the Tribe's insurance policy and tribal land was enough to implicate the Tribe's right to exclude. If that were correct, the presumption against

tribal jurisdiction would fall away with respect to all disputes with nonmembers that have any arguable connection to tribal land.

The district court incorrectly held that this case falls within the narrow exceptions to the general rule that tribal courts lack jurisdiction over nonmember defendants. This Court should reverse the judgment and remand with instructions to enter an injunction barring further proceedings against the insurers in the Suquamish Tribal Court.

## STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852–53 (1985). The district court entered final judgment on September 12, 2022. 1-ER-23. The insurers timely noticed their appeal on October 4, 2022. 6-ER-1443. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

There is a strong presumption that tribal courts may not exercise jurisdiction over nonmember defendants. Neither the Supreme Court nor this Court has ever held that a tribal court has jurisdiction over a nonmember defendant whose conduct took place outside a reservation. Here, the Suquamish Tribe sued its nonmember insurers in its own tribal

court, even though those insurers never set foot on tribal land and have not threatened the Tribe's ability to govern itself or to control its internal relations on the reservation. Does the tribal court lack subject-matter jurisdiction over the insurers?

## STATEMENT OF FACTS

### I. The Tribe and Its Corporate Arm, Port Madison Enterprises, Buy Insurance Policies Through an Intermediary from Insurers Located off the Reservation.

In 1859, the Senate ratified a treaty with the Suquamish Tribe that established the Port Madison Reservation in what was then Washington Territory. Treaty of Point Elliott, 12 Stat. 927 (1855). The Port Madison Reservation, which lies northwest of Seattle and spans just 12 square miles, "is a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained by Kitsap County." *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 192–93 (1978). On the reservation, the Suquamish Tribe runs several businesses, including a museum and a commercial-seafood concern. 2-ER-253. Its corporate arm, Port Madison Enterprises, operates the Suquamish Clearwater Casino and Resort, a Chevron gas station, a golf club, and various other businesses. 2-ER-253.

The Tribe and Port Madison looked outside the reservation to buy insurance policies for their properties. Their non-Indian insurance broker, Brown & Brown of Washington, Inc., negotiated for coverage with a non-Indian program administrator, Alliant Insurance Services, Inc., through Alliant's Tribal Property Insurance Program. 6-ER-1319; 6-ER-1333; 6-ER-1348–49. From an office in Thousand Oaks, California, the Tribal First division of Alliant handled the entire process, providing quotes, preparing the policies consistent with insurers' underwriting guidelines, collecting premiums, and maintaining policy-related documents. 2-ER-307; 3-ER-317–25; 4-ER-713–22. Tribal First representatives also occasionally visited tribal businesses to perform, for example, "safety inspections and ergonomics assessments." 6-ER-1319–20.

The Tribe and Port Madison ultimately bought property insurance from Lexington Insurance Company and several other insurers through Tribal First. 2-ER-307. In the event of a covered claim, Lexington agreed to pay first, up to a certain limit, and the other insurers agreed to pay more if that limit were exceeded. 6-ER-1415–16. The insurers never dealt directly with the Tribe, Port Madison, or any other tribe or tribal

company they insured through the Tribal Property Insurance Program. 2-ER-307. Instead, the insurers agreed with Alliant to insure the property of any tribe or tribal entity that satisfied the requirements of the Program. 2-ER-307. As with all their tribal policyholders, the insurers learned the identity of the Tribe and Port Madison only after the Tribe and Port Madison signed up with Alliant. 2-ER-307. Because the insurers did not know in advance which tribes and tribal entities would buy property insurance through the Program, they also never set foot on the Port Madison Reservation to market, sell, or issue the policies. 5-ER-1172.

Both the Tribe's policy and Port Madison's policy follow the same master policy form. They cover, among other things, "direct physical loss or damage" to covered tribal property, 3-ER-384–89; 4-ER-844–49; business losses resulting from "direct physical loss or damage" to covered property, but only for a "period of restoration" ending when "the damaged property should have been repaired, rebuilt or replaced," 3-ER-379; 3-ER-383; 4-ER-839; 4-ER-843; and business losses from government orders prohibiting access to covered property due to nearby "damage to

or destruction of property" during that same period of restoration, 3-ER-380; 3-ER-383; 4-ER-840; 4-ER-843.

## II. After the Tribe Temporarily Closes Some Tribal Properties to Slow the Spread of COVID-19, the Tribe and Port Madison File Insurance Claims.

In early 2020, states and other governments across the country ordered businesses to temporarily close their doors or limit their capacity in an effort to slow the spread of COVID-19. Washington and the Suquamish Tribe were no exception. In March 2020, Governor Inslee ordered everyone to stay home unless they had something essential to do. 6-ER-1356–57. The Tribe also issued its own orders suspending or limiting business operations on the Port Madison Reservation. 2-ER-237–38.

After restricting public access to their facilities, the Tribe and Port Madison sought insurance coverage for their business-income losses. The Tribe requested that Brown & Brown submit an insurance claim for the income it lost because of "loss of property use due to the coronavirus/COVID-19 outbreak" and the closure orders of Governor Inslee and the Tribe. 6-ER-1186. Port Madison also sent Brown & Brown an insurance claim for business-income losses from the temporary halt

in operations at its casino and other businesses, which likewise resulted from the Tribe's COVID-19 resolutions. 6-ER-1264–65. Brown & Brown forwarded both claims to Alliant's Tribal First division in San Diego, and Tribal First then contacted Lexington to initiate the claims process. 6-ER-1181–85; 6-ER-1261–64.

## III. The Tribe and Port Madison Sue Their Insurers in Tribal Court.

Before Lexington issued a decision on the insurance claims, the Tribe and Port Madison sued Lexington and the other insurers in their own tribal court. 6-ER-1359–60. They claimed the insurers had breached the property-insurance policies and sought a declaration that those policies cover business income loss resulting from COVID-19-related closure orders. 2-ER-243–46.

The insurers made limited special appearances in the Suquamish Tribal Court to contest the court's subject-matter jurisdiction and personal jurisdiction. 6-ER-1361. They pointed out that they had engaged in no conduct on the reservation and had not consented in the master policy form to regulation by the Tribe, the application of tribal law, or the tribal court's exercise of jurisdiction over them. *See* 3-ER-361–428.

The Suquamish Tribal Court rejected the insurers' jurisdictional arguments on two grounds. First, it ruled the Tribe's right to exclude nonmembers from tribal lands supported tribal-court jurisdiction over insurance claims regarding tribal property even though the insurers were never physically present on the Port Madison Reservation. 2-ER-260–65. Second, the court held the insurers implicitly consented to tribal-court jurisdiction by accepting the Tribe's and Port Madison's requests for insurance coverage under the Tribal Property Insurance Program. 2-ER-265–71.

The insurers received permission to take an interlocutory appeal to the Suquamish Tribal Court of Appeals. 6-ER-1362. The tribal appellate court affirmed on the same two grounds: right to exclude and consent. 2-ER-291–99. As a result, the Suquamish Tribal Court has continued to exercise jurisdiction over the insurers. 6-ER-1364.

## IV. The Insurers Challenge Tribal-Court Jurisdiction in Federal Court, and the Parties File Cross-Motions for Summary Judgment.

Tribal-court defendants can challenge tribal-court jurisdiction in federal court after exhausting available tribal remedies. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987). After they unsuccessfully argued

against tribal-court jurisdiction in the tribal courts, the insurers sued the judges of those courts in federal court under *Ex parte Young*, 209 U.S. 123 (1908). 6-ER-1412–13. This is the traditional method of challenging a tribal court's exercise of jurisdiction. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 796 (2014); *see, e.g.*, *Strate v. A–1 Contractors*, 520 U.S. 438 (1997); *Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) (per curiam). The Suquamish Tribe intervened as the real party in interest. 6-ER-1322. The parties also stipulated in the Suquamish Tribal Court to stay proceedings pending the outcome of this case. 6-ER-1364. The parties then cross-moved for summary judgment on the question whether the tribal courts have jurisdiction over the insurers.

The insurers stressed the presumption that tribal courts lack jurisdiction over defendants who are not tribal members. 2-ER-153 (citing *Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 330 (2008)). The insurers also argued the Tribe could not rebut this presumption under either exception recognized in *Montana v. United States*, 450 U.S. 544 (1981). First, the insurers did not consent to tribal-court jurisdiction through their off-reservation business activities.

2-ER-154–58. Second, the Tribe's political and economic integrity did not require a tribal court to be the forum for the dispute. 2-ER-158–63. Finally, the insurers contended the Tribe's right to exclude also did not push this case outside the general rule that tribal courts lack jurisdiction over nonmembers. The insurers explained that the right to exclude applies only when nonmembers physically enter tribal land—not when the Tribe participates in an off-reservation insurance marketplace to buy policies for tribal property. 2-ER-163–65.

The Tribe, for its part, insisted the insurers' off-reservation conduct was sufficiently "tied" to tribal land to support tribal jurisdiction. 2-ER-190. According to the Tribe, the insurers, by insuring tribal property, had consented to tribal-court jurisdiction under the first of the two *Montana* exceptions. 2-ER-191–94. The Tribe also argued its right to exclude nonmembers from the reservation applied to the insurers, even though they were never on the reservation, because the policies insured tribal property. 2-ER-200–01. Finally, the Tribe suggested that financial losses from COVID-19-related closures were severe enough to satisfy even the second *Montana* exception, which the Supreme Court has limited to nonmember conduct "'within [a] reservation [that] threatens

or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" 2-ER-200 (quoting *Montana*, 450 U.S. at 566).

## V. The District Court Holds That the Suquamish Tribal Court Has Jurisdiction over the Insurers.

The district court decided the insurers had exhausted tribal remedies and therefore had the right to bring an *Ex parte Young* action against tribal-court judges. 1-ER-8. But it concluded that the tribal court had jurisdiction over the insurers for two of the three reasons that the Tribe offered.

The district court first held that the Suquamish Tribal Court has jurisdiction based on the Tribe's right to exclude. Despite acknowledging "the fact that the Insurers and [their] employees never physically stepped onto tribal land," the court grounded right-to-exclude jurisdiction in four facts: (i) the insurance policies relate to "the operation and the management of businesses and property located on tribal land"; (ii) "the tribal business activity occurring on tribal land generates significant economic activity for the Insurers in the form of over $1.5 million in premiums"; (iii) the claimed losses stem from "business activities occurring at businesses and property owned by the Tribe and [Port

Madison] on tribal land"; and (iv) jurisdiction was necessary for the Tribe to "regulate" its "contractual relations" and "business activities on tribal land." 1-ER-15–16. The district court reasoned that these considerations, taken together, established "conduct or activity on tribal land" that the Tribe could regulate under its right to exclude. 1-ER-16.

The district court next relied on the first *Montana* exception for "nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" on the reservation. 450 U.S. at 565. According to the court, the insurers "should have reasonably anticipated" the dispute "would fall within the jurisdiction of the tribal courts" because the insurance policies covered tribal businesses on tribal land and had a service-of-suit provision that submitted the parties' disputes to "'a Court of competent jurisdiction within the United States.'" 1-ER-18–19. The court again disagreed with the insurers' argument that their conduct took place outside the reservation and thus could not be regulated under *Montana*. 1-ER-19.

The district court rejected the Tribe's argument under the second *Montana* exception, which supports tribal jurisdiction only when

"necessary to avert catastrophic consequences." *Plains Commerce Bank*, 554 U.S. at 341. The court could not "clearly conclude the Tribe's economic loss, while undoubtedly significant, imperils the subsistence of the tribal community." 1-ER-21.

## SUMMARY OF ARGUMENT

Tribal courts are not courts of general jurisdiction. To the contrary, their jurisdiction is extremely limited, confined almost exclusively to disputes involving tribal members and territory controlled by a tribe. *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). And there is a strong presumption that tribes and their courts lack authority over nonmembers of the tribe. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 (2001). The question in this appeal is whether that presumption holds where the Suquamish Tribe sued its insurers, all nonmembers of the Tribe who never entered the reservation, in its own tribal court.

This is not the rare case that falls within an exception to the general rule against tribal authority over nonmembers. The Supreme Court has recognized only two such exceptions. In *Montana v. United States*, 450 U.S. 544 (1981), the Court explained that tribes have the power to regulate (1) certain consensual relationships between nonmembers and

members and (2) conduct of nonmembers on reservation land that imperils a tribe's existence, safety, or prosperity. The Supreme Court has never relied on one of these exceptions to conclude that a tribal court has jurisdiction over a nonmember defendant.

Neither *Montana* exception applies in this case. To begin with, both exceptions require something that is missing here: nonmember conduct on the reservation. The insurers sued by the Tribe in its own court never did anything on the reservation. They instead provided insurance coverage from their far-flung offices through an intermediary, under a tribal-insurance program that allowed any qualifying tribe or tribal entity to get property insurance. The Tribe reached beyond its borders to buy coverage from an insurance marketplace over which it has no sovereign power. That a tribe goes beyond its borders to seek and buy a financial service that may have some indirect impact on tribal property is not enough to satisfy the prerequisite for either *Montana* exception to apply; the crucial question is whether the nonmember's activity occurred *on* the reservation. *E.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332–34 (2008); *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 782 n.42 (7th Cir. 2014). If a tribe's decision to do

business with off-reservation nonmembers were enough, the exception would swallow the general rule against jurisdiction; tribes, by reaching out to buy just about any good or service, could make the seller subject to tribal regulation and tribal-court jurisdiction.

Even if the lack of the insurer's presence on the reservation were not dispositive, the *Montana* exceptions would not apply for other reasons. The Supreme Court explained in *Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316 (2008), that the first exception applies only where the nonmember has consented to tribal authority *and* the tribal regulation stems from the tribe's inherent authority to "set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* at 337. Neither of those things is true here. The insurers never consented to tribal authority. There is no evidence that the insurers did expect or should have expected to be dragged into Suquamish Tribal Court—or the court of any of the hundreds of other federally recognized Indian tribes, for that matter. The Tribe does not even regulate insurance in the first place. Nor is tribal jurisdiction over nonmember insurers that have never set foot on the reservation somehow necessary to preserve a tribe's territorial integrity, system of

government, or internal relations. When tribes and tribal members make commercial deals with nonmembers operating outside the reservation's borders, they are, like everyone else in the country, already protected by federal and state law.

The second *Montana* exception also does not apply here. The Suquamish Tribe's future does not depend on the outcome of an insurance-coverage dispute. Although the Tribe wants to remain in its own court to avoid the fate that has almost uniformly befallen plaintiffs in other similar pandemic-coverage suits, its interest in a more favorable forum cannot justify tribal-court jurisdiction under the second *Montana* exception.

This Court has recognized what appears to be an independent third exception premised on a tribe's right to exclude nonmembers from its land. The right to exclude is irrelevant here, however, because a property owner's right to keep people off his land or set conditions on entry has nothing to do with the owner's relationship with financial-services providers, like insurers and banks, that have never come anywhere near the land.

Because this case does not fall within any of the narrow exceptions that could permit tribal-court jurisdiction over nonmembers, the district court erred in holding that the tribal court has jurisdiction. This Court should reverse and remand with instructions to issue an injunction barring further proceedings in the tribal court.

## STANDARD OF REVIEW

This Court reviews "the district court's summary judgment de novo, including its decision on cross-motions for summary judgment." *JL Beverage Co. v. Jim Beam Brands Co.*, 828 F.3d 1098, 1104 (9th Cir. 2016). This Court also reviews the question of tribal-court jurisdiction de novo. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir. 2006) (en banc). Summary judgment on the propriety of tribal-court jurisdiction is appropriate unless the parties genuinely dispute a fact that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

## ARGUMENT

### I. Indian Tribes Have Sovereign Power Only over Their Own Members, and Tribal Courts Presumptively Lack Jurisdiction over Nonmembers.

Indian tribes are "no longer 'possessed of the full attributes of sovereignty'"; that was the price of their "incorporation within the territory of the United States, and their acceptance of its protection." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Tribes occupy a "semi-independent position," acting "not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381–82 (1886).

Tribes generally retain "attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). For example, "unless limited by treaty or statute, a tribe has the power to determine tribe membership, to regulate domestic relations among tribe members, and to prescribe rules for the inheritance of property." *Wheeler*, 435 U.S. at 322 n.18 (citations omitted).

But tribes generally cannot exercise power over nonmembers. For example, Indian tribal courts have no inherent power to try and punish

non-Indians. The Supreme Court reasoned that tribal courts had never enjoyed the power to try non-Indians, and that Congress had never granted it. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197–211 (1978). In *Duro v. Reina*, 495 U.S. 676 (1990), the Court went a step further, holding that tribes lack criminal jurisdiction over anyone (including other Indians) except their own members. Tribes have the power to "restrain those who disturb public order on the reservation, and if necessary, to eject them," but they have no power to prosecute the crimes of nonmembers in their own courts. *Id.* at 697. Congress overruled *Duro* by authorizing tribal criminal jurisdiction over nonmember Indians, underscoring that tribes are dependent nations that lack power over nonmembers unless Congress affirmatively grants it. *Strate v. A–1 Contractors*, 520 U.S. 438, 445 n.5 (1997); *see United States v. Lara*, 541 U.S. 193, 207 (2004) (upholding congressional amendment of *Duro*).

The principle that tribes presumptively lack jurisdiction over nonmembers is as true in civil cases as in criminal ones. The lead case on tribal civil authority over nonmembers is *Montana v. United States*, 450 U.S. 544 (1981). *Montana* presented the question whether tribes

have any power to regulate hunting and fishing on reservation land owned by nonmembers. This Court had decided that the Crow Tribe had "that power as an incident of the inherent sovereignty of the Tribe over the entire Crow Reservation." *Id.* at 563. The Supreme Court reversed, explaining that Indian sovereignty has been completely "divested" as to, among other things, "'the relations between an Indian Tribe and nonmembers of the tribe.'" *Id.* at 564 (emphasis omitted). The Court held that the reasoning of *Oliphant* is not limited to criminal cases, and instead rests on the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565.

*Montana* recognized two narrow exceptions to the strong presumption that tribes lack civil jurisdiction over nonmembers. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has

some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

This Court has recognized what appears to be a third exception to the rule against tribal jurisdiction over nonmembers. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 810–13 (9th Cir. 2011) (per curiam). This exception permits tribes to exercise "adjudicative authority over nonmember conduct on tribal land—land over which the tribe has the right to exclude." *Window Rock Unified School Dist. v. Reeves*, 861 F.3d 894, 898 (9th Cir. 2017).

If tribal regulation of nonmembers is rare, tribal-court jurisdiction over nonmember defendants is rarer still. The Supreme Court has "never held that a tribal court ha[s] jurisdiction over a nonmember defendant." *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001).

## II. The Presumption Against Tribal Jurisdiction over Nonmembers Holds Here Because Neither *Montana* Exception Applies.

This case is no exception to the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. In upholding tribal jurisdiction under the first *Montana* exception, the

district court exceeded the territorial limits on tribal sovereignty, misapplied the requirement that tribal jurisdiction requires consent by nonmembers, and allowed the Tribe to regulate its relationship with the insurers even though that relationship has no connection to the Tribe's inherent sovereign interests. The district court correctly concluded, however, that the Tribe's economic security and political integrity do not hinge on this dispute, and so this case does not satisfy the second *Montana* exception either.

### A. Neither *Montana* Exception Applies Because the Insurers Did Not Engage in Any Conduct on the Reservation.

The district court's approval of tribal-court jurisdiction here contravenes the principle that tribes cannot exercise jurisdiction outside their territorial boundaries. Because the insurers did nothing within the reservation, let alone specifically on tribal land, neither *Montana* exception could possibly support the jurisdiction of the Suquamish Tribal Court. Without nonmember conduct on tribal land, the district court had no reason even to reach either *Montana* exception.

### i. Inherent Tribal Sovereignty Stops at the Reservation's Borders.

From the start, the Supreme Court has cabined tribal jurisdiction to tribal membership and territorial boundaries. The first time the Court heard a case on Indian sovereignty, Justice Johnson observed that the tribes lacked "the right of governing every person within their limits except themselves." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (concurring opinion). Chief Justice Marshall later described tribes "as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). But tribes could not regulate commerce outside these boundaries. Instead, the Indian Commerce Clause empowers the federal government to regulate off-reservation transactions involving tribes and tribal members, as when Congress criminalized the sale of alcohol to Indians "when they are outside of a reservation, as well as within it." *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 416–17 (1865); *see* U.S. CONST. art. I, § 8, cl. 3.

Indian law has changed in some ways. For example, courts now hold that state law applies on reservations and gives states "jurisdiction

over crimes committed in Indian country" by non-Indians. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493–94 (2022). But other things have stayed the same. In particular, the "dependent status of Indian tribes" recognized in *Worcester* remains "necessarily inconsistent with their freedom independently to determine their external relations." *Wheeler*, 435 U.S. at 326. *Montana* reflects this principle, explaining that inherent tribal sovereignty encompasses "their members and their territory," which can justify only limited "forms of civil jurisdiction over non-Indians *on their reservations*." 450 U.S. at 564–65 (emphasis added).

The Supreme Court has never strayed beyond these territorial limits. Every example of tribal regulation of nonmembers identified in *Montana*, 450 U.S. at 565–66, involved conduct by nonmembers within the physical boundaries of a reservation:

- a non-Indian operator of a general store "on the Reservation" could sue a tribal member for a tribal member's nonpayment only in a tribal court, *Williams v. Lee*, 358 U.S. 217, 223 (1959);
- tribes have the power to require non-Indians to pay permit taxes for grazing their livestock on tribal land, *Morris v. Hitchcock*, 194 U.S. 384, 389 (1904);

- a tribe has the "inherent" power to require non-Indians to pay permit taxes for the privilege of "transact[ing] business within its borders," *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905);
- and tribes retain the inherent "power to impose their cigarette taxes on nontribal purchasers" buying cigarettes "on trust lands." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980).

Post-*Montana* decisions state this territorial limitation in unmistakable terms. In *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), a unanimous Supreme Court surveyed the restrictions on inherent tribal sovereignty, beginning with Justice Johnson's *Fletcher* concurrence and continuing through *Montana*. *Id.* at 650–51. Those decisions, the Court held, established that tribal authority "reaches no further than tribal land," which meant the tribe could tax only "transactions occurring on *trust lands* and significantly involving a tribe or its members." *Id.* at 653 (cleaned up). ("Trust land" is land held in trust by the federal government for the benefit of tribes. *Carcieri v. Salazar*, 555 U.S. 379, 387–88 (2009).)

In *Plains Commerce Bank*, the Supreme Court reiterated that tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation" and that "tribes do not, as a general matter, possess authority over non-Indians," even those "who come within their borders." 554 U.S. at 327–28. Both of *Montana*'s exceptions to this no-jurisdiction rule "permit tribal regulation of *nonmember conduct inside the reservation* that implicates the tribe's sovereign interests." *Id.* at 332 (emphasis added).

This Court has recognized the same principle: "'there can be no assertion of civil authority beyond tribal lands.'" *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1132 (9th Cir. 2006) (en banc). In other words, "tribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009).

#### ii. The Tribe Does Not Seek to Regulate Any Conduct by the Insurers Inside the Reservation.

The Tribe has the burden to prove conduct inside the reservation that implicates its sovereign interests. *Plains Commerce Bank*, 554 U.S. at 330. But in this case, all of the insurers' relevant conduct was

undisputedly outside the reservation and therefore outside the Tribe's territorial jurisdiction.

None of the insurers maintain any operations whatsoever inside the reservation. 6-ER-1409–12. They did not negotiate or execute the insurance policies with the Tribe or Port Madison on the reservation. 5-ER-1172. Instead, the insurers negotiated with Alliant, a non-Indian program administrator, on the terms of their participation in the Tribal Property Insurance Program, while the Tribe and Port Madison separately negotiated with Alliant through their own non-Indian insurance broker. 2-ER-307. Nor were the insurers on the reservation when Lexington considered the Tribe's and Port Madison's claims for business losses resulting from COVID-19-related closures, 6-ER-1295–1316, which is the conduct that serves as the basis for their declaratory and breach-of-contract claims, 2-ER-243–45. These undisputed facts establish that the Tribe participated as a commercial actor in an off-reservation insurance marketplace—not that the insurers entered the reservation's borders. The Tribe may have "'general authority, as sovereign, to control economic activity within its jurisdiction,'" *Atkinson*,

532 U.S. at 652, but it lacks the authority to regulate activity *outside* its jurisdiction.

The district court rejected this straightforward conclusion. Instead, the court reasoned that even if "the Insurers and [their] employees never physically stepped onto tribal land," "this litigation involved conduct or activity on tribal land" because the insured property is on tribal land. 1-ER-16. Yet all the activity identified by the court was the *Tribe's* own conduct on tribal land: "the tribal business activity occurring on tribal land" and the purchase of insurance for "businesses and property owned by the Tribe and [its corporate arm] on tribal land." 1-ER-16.

The insurers engaged in no conduct on tribal land, even if they entered into a commercial arrangement with the Tribe related to tribal property. After all, property insurance is just a risk-shifting commercial transaction: The insurer accepts a stream of payments in exchange for a promise to pay the policyholder if very carefully defined circumstances come to pass. 3-ER-317–23. Entering into a property-insurance contract did not transport the insurers physically onto the reservation to protect tribal property from harm.

*Plains Commerce Bank* illustrates the error in the district court's conclusion that the insurers' conduct was on the reservation. There, the Supreme Court considered whether the Cheyenne River Sioux could regulate the sale of reservation land owned in fee simple by a non-Indian. The answer was no: *Montana* permits tribes to regulate "certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development)" that "intrude on the internal relations of the tribe or threaten tribal self-rule." 554 U.S. at 334–35. But a nonmember's "sale of the land" is different from "conduct on it," which meant that the tribe had not identified "nonmember *conduct* inside the reservation" that could support tribal jurisdiction. *Id.* at 332, 334. It's the same story here: "conduct taking place on the land" and insurance transactions merely related to property on tribal land "are two very different things" for purposes of *Montana*. *Id.* at 340. The district court misapplied *Plains Commerce Bank* in concluding otherwise.

Circuit courts have also consistently held that tribal courts lack authority to adjudicate disputes over commercial transactions between tribes and off-reservation entities even when the transactions relate to

tribal property. In *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015), for example, an investment vehicle bought tribal bonds that were secured by the revenues and assets of a reservation casino. *Id.* at 189. The accompanying trust indenture gave the bondholder and the trustee (Wells Fargo) the power to oversee casino revenues. *Id.* When the tribe was unable to meet its obligations, newly elected tribal leaders repudiated the bonds and sued the bondholder, the brokerage firm, and Wells Fargo in tribal court, seeking a declaration voiding the bond-related documents. *Id.* at 191–92. The Seventh Circuit rejected the tribe's attempt to regulate off-reservation commercial activity, even though the bonds were secured by tribal property. Under *Montana*, "actions of nonmembers outside of the reservation do not implicate the Tribe's sovereignty" and cannot support tribal jurisdiction. *Id.* at 207.

*Stifel* came on the heels of *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), which concerned off-reservation borrowers who sued on-reservation tribal payday lenders for deceptive business practices. *Id.* at 768–69. The Seventh Circuit allowed the dispute to proceed in federal court because the tribal court would have lacked

jurisdiction over the borrowers' claims. Even though the tribal lenders had executed the contracts on the reservation, that was beside the point because *Montana* focuses on "the *nonmember's* actions, specifically the *nonmember's actions on the tribal land*." *Id.* at 782 n.42. The mere existence of a commercial relationship with a tribal entity was not enough to support tribal jurisdiction because the borrowers had "not engaged in *any* activities inside the reservation. They did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents." *Id.* at 782.

The Eighth Circuit has likewise held that *Montana* does not "allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*." *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091–92 (8th Cir. 1998). Take, for instance, *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe*, 609 F.3d 927 (8th Cir. 2010). There, a tribe's chairman attempted to end an intratribal dispute over control of a casino by hiring an off-reservation security firm, which sent armed employees to force their way into the casino and seize financial and operational information. *Id.* at 932. The rival faction prevailed in tribal elections and sued the

security firm in tribal court for (i) conversion of the tribal funds paid by the erstwhile chairman under the security contract and (ii) various intentional torts committed on tribal land, including assault and property damage. *Id.* The Eighth Circuit held that although the tribal court had jurisdiction under *Montana* over the torts occurring during the casino raid, the tribe had no power to regulate the allegedly "unauthorized receipt and retention of tribal funds" because that conduct did not "occur[] within the Meskwaki Settlement." *Id.* at 939–41 (no jurisdiction under second *Montana* exception); *see Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe*, 809 F. Supp. 2d 916, 928 (N.D. Iowa 2011) (holding on remand that tribe lacked jurisdiction under first *Montana* exception for same reason).

Tenth Circuit precedent is much the same. In *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007), a Navajo tribal court entered an injunction against nonmember defendants. The Tenth Circuit refused to enforce that injunction because the tribal court lacked jurisdiction over nonmember defendants. *Id.* at 1077. The court explained that "Supreme Court precedent clearly limits the regulatory authority of tribes . . . to the reservation's borders," and general

connections between a nonmember defendant and a tribe or its members are not enough to support tribal-court jurisdiction. *Id.* at 1071–72.

The district court sought refuge in *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1074 (9th Cir. 1999), as support for its conclusion that the insurers' conduct occurred on tribal land. 1-ER-16–17. But the court misunderstood the distinct issue presented in that case. *Allstate* addressed only the requirement that those challenging tribal-court jurisdiction must present that argument in the tribal court first before suing for an injunction in federal court.

In *Allstate*, a tribal member crashed his car on a tribal road, killing both passengers. 191 F.3d at 1072. The driver's insurer, Allstate, denied coverage to the victims' estates, which sued Allstate in tribal court for insurance bad faith. *Id.* at 1072–73. Rather than challenging the tribal court's exercise of jurisdiction in the tribal court itself, Allstate went immediately to federal court, arguing that the lawsuit sought to regulate conduct "at Allstate's off-reservation offices, where it allegedly committed insurance bad faith." *Id.* at 1074. This Court rejected Allstate's attempt to bypass its obligation to exhaust its jurisdictional argument before the tribal court because the facts were "on all fours" with the Supreme

Court's decision in *Iowa Mutual*, which had required exhaustion of tribal-court remedies by "an off-reservation [insurer] that sold a policy to a tribal member." *Id.* at 1074–75; *see Iowa Mut.*, 480 U.S. at 11–12. Because Allstate had "mailed monthly premium statements to an Indian resident of the reservation" and "communicated with the Indians and their counsel" after the accident, it was "impossible" for this Court "to say that the claim plainly arose off the reservation," so the insurer needed to exhaust its remedies in tribal court before suing in federal court. 191 F.3d at 1075.

The Supreme Court has warned against conflating the tribal-court exhaustion requirement with the ultimate question of tribal jurisdiction. In *Strate*, a tribal court exercised jurisdiction over claims arising from a car accident on a state highway within the reservation. 520 U.S. at 442–43. The Three Affiliated Tribes defended their jurisdiction by pointing to *Iowa Mutual* and another exhaustion case. *Id.* at 447. The Court identified the obvious flaw in this logic: "Both decisions describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction; neither establishes tribal-court adjudicatory authority, even over the lawsuits involved in those cases."

*Id.* at 448. Because the question in *Strate* was jurisdiction rather than exhaustion, the Court evaluated the issue anew under *Montana* and held that the tribal court lacked jurisdiction. *Id.* at 456–59.

There is another reason *Allstate* does not stand for the proposition that providing insurance to a tribe or tribal member, by itself, confers tribal jurisdiction over the insurer: *Allstate* predates Supreme Court decisions that remove any doubt that tribal authority stops at the reservation's borders. This Court has understood *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), to confirm that tribal-court jurisdiction is "cabined by geography" and "does not extend beyond tribal boundaries." *Philip Morris*, 569 F.3d at 938 (citing *Atkinson*, 532 U.S. at 658 n.12). And although *Allstate* asked only whether the tribal members' claims had "arisen on the reservation," 191 F.3d at 1075, the Supreme Court has since clarified that *Montana* depends on "nonmember *conduct* inside the reservation" that threatens sovereign interests, *Plains Commerce Bank*, 554 U.S. at 332. The district court's analysis should have been guided by these bona fide *Montana* decisions, not a dated exhaustion case.

The district court also cited *State Farm Insurance Cos. v. Turtle Mountain Fleet Farm LLC*, 2015 WL 1883633 (D.N.D. May 12, 2014), for

the proposition that conduct by off-reservation insurers can fall within a *Montana* exception. 1-ER-19. But the district court in *Turtle* relied heavily on exhaustion cases. 2015 WL 1883633, at *11 & n.6. Those cases do not answer the question presented here because there is a significant difference between (a) saying jurisdiction *might* exist, and the court will answer that question in due course if and when it is presented after exhaustion in the tribal court, and (b) saying jurisdiction *actually* exists. *Strate*, 520 U.S. at 448.

In addition to being unprecedented, the district court's reasoning would have far-ranging consequences. If the insurers are "on" tribal land here, anyone else who engages in off-reservation transactions with tribal members could be subject to tribal regulation. Any bank, for example, that offers mortgages to a tribal member would be "on" tribal land because of the loan paperwork. Or whenever a tribal member buys a share of stock on a stock exchange, a tribal court could deem the seller (and perhaps even the exchange itself) to have been transported onto tribal land for jurisdictional purposes. This is a recipe for tribal jurisdiction without limit.

All of these outcomes violate the principle that tribes, "by virtue of their dependent status," do not possess "freedom independently to determine their external relations." *Wheeler*, 435 U.S. at 326. Because inherent tribal sovereignty does not reach beyond the reservation's borders, the Suquamish Tribe cannot regulate how the insurers process claims outside the Port Madison Reservation under *Montana*.

### B. The Tribal Court Lacks Jurisdiction Under the First *Montana* Exception.

Nonmember conduct on tribal land is a prerequisite for the application of either *Montana* exception. Here, the lack of conduct by the insurers on the reservation should have been the beginning and end of the district court's analysis. But its decision should be reversed for other independent reasons. This case does not implicate the first *Montana* exception because the Tribe has not invoked its limited authority to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. This exception permits tribes to regulate (1) "only if the nonmember has consented, either expressly or by his actions," to tribal jurisdiction and (2) only when the regulation

"stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 554 U.S. at 337. The district court misapplied the first limitation and ignored the second one.

**1. Consent.** *Plains Commerce Bank* made clear that consent is necessary—albeit insufficient by itself—to justify tribal jurisdiction. Because nonmembers "have no say in the laws and regulations that govern tribal territory," tribal law "may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." 554 U.S. at 337. The first *Montana* exception therefore applies only to "private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction." *Hicks*, 533 U.S. at 372.

This Court has formulated the test under the first *Montana* exception as "whether under the circumstances the non-Indian defendant should have reasonably anticipated that its interactions might trigger tribal authority." *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 932 (9th Cir. 2019) (cleaned up). The consensual relationship in this case formed as a result of the Tribe reaching outside its borders, through a non-Indian broker, to negotiate with a non-Indian program

administrator for property insurance policies from non-Indian insurers. 2-ER-307; 6-ER-1319. The insurers, all of which operate outside the Port Madison Reservation, would not have reasonably anticipated that the Suquamish Tribe would attempt to regulate the business of insurance.

Two background rules show why. First, state law has long "enjoyed a virtually exclusive domain over the insurance industry," subject only to limited federal preemption. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978). Congress has declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. So the insurance marketplace, by and large, takes its cues only from state laws and state regulators. Second, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973). The Tribe may have sought insurance for businesses located on tribal property, but it reached beyond reservation boundaries—into land governed by state law—to buy coverage. For this reason, the insurers

registered the contracts "under the insurance code of the state of Washington." 3-ER-342; 4-ER-739.

The Tribe has pointed to nothing that could overcome these presumptions and demonstrate that the insurers were on reasonable notice that the Tribe would assert sovereign authority over any insurance transactions that happen to have a connection to tribal property. Nor could it, for two reasons. First, the Suquamish Tribe does not regulate insurance at all. Its tribal code has eighteen chapters, none of which addresses insurance or contracts. Suquamish Tribal Code chs. 1–18, https://tinyurl.com/ys44yd2y. Second, the number of tribes and the great variety in their laws make it unlikely that a nonmember would automatically consent to the jurisdiction of any tribe with which it happens to do business. There are almost 600 federally recognized tribes. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (2022). While some larger tribes have formal courts with well-developed bodies of law, many tribal courts rely on unwritten "'values, mores, and norms of a tribe.'" *Hicks*, 533 U.S. at 384 (Souter, J., concurring); *see, e.g.*,

*Plains Commerce Bank*, 554 U.S. at 338 (discussing "novel" antidiscrimination claim accepted by tribal jury).

The district court's ruling means that in negotiating master policy forms with Alliant, the insurers also consented to potentially hundreds of tribal courts interpreting standardized language according to different tribal customs. If any commercial contract could satisfy the consent requirement of *Montana*, the parties' obligations would be unknowable in advance. Uncertainty in the insurance business benefits neither insurers nor policyholders; instead, it generally makes it impossible to price and sell insurance. *See, e.g.*, *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 407 (6th Cir. 2021) (insurers cannot fairly price insurance if courts "push coverage beyond its terms" and create "an insurance product that covers something no one paid for").

Contrast this case with this Court's decisions since *Plains Commerce Bank* that have upheld jurisdiction based on consent to tribal law under the first *Montana* exception:

- In *FMC*, a non-Indian mining corporation had "operated on the Reservation for over 50 years," had enjoyed "an extensive relationship with the Tribes for 70 years," and had "consented to

tribal jurisdiction" inside the reservation for its land-use permits. 942 F.3d at 921, 933–34.

- In *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892 (9th Cir. 2019), a non-Indian should have reasonably anticipated that a tribal court could hear a workplace-misconduct claim after serving as "an employee of the Tribe for approximately sixteen years" during which time she, "as Tribal Administrator, was responsible for the overall supervision and management of tribal operations and carrying out tribal projects consistent with the Tribal Constitution." *Id.* at 904.
- In *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013), a non-Indian company that had agreed by contract to comply with tribal law reasonably anticipated tribal jurisdiction over its continued operation of a tourist attraction on tribal land. *Id.* at 1206.
- And in *Water Wheel*, a non-Indian that had operated a resort on tribal land for two decades reasonably anticipated tribal jurisdiction over eviction proceedings for unpaid rent under

leases that expressly provided that tribal law would apply to his activities on tribal property. 642 F.3d at 818.

In these four cases, the nonmembers either expressly consented to the application of tribal law to disputes arising from their activities on the reservation or at least reasonably anticipated being subject to tribal law. The insurers here lacked similar notice that the Tribe would attempt to switch hats from mere commercial counterparty to sovereign regulator for the property-insurance policies.

The district court did not engage with this Court's "reasonable anticipation" precedents and instead relied principally on the insurance policies' service-of-suit clause, which provides that "in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Named Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States." 3-ER-399. The district court believed the insurers should have reasonably anticipated tribal-court jurisdiction because the service-of-suit clause does not expressly preclude that possibility. 1-ER-18.

That reasoning puts the cart before the horse. The service-of-suit clause does not establish jurisdiction. By referring to a "court of competent jurisdiction," the clause merely states that the insurers will submit to "a court with an existing source of subject-matter jurisdiction." *Lightfoot v. Cendant Mortgage Corp.*, 580 U.S. 82, 92 (2017). But that is the very question at the heart of this case: whether the Suquamish Tribal Court has subject-matter jurisdiction in the first place. And as *Hicks* explained, "[t]ribal courts, it should be clear, cannot be courts of general jurisdiction" because a tribe's "inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction." 533 U.S. at 367. So a tribal court is presumptively *not* a court of competent jurisdiction for claims against non-Indians. *Plains Commerce Bank*, 554 U.S. at 330. In construing the service-of-suit clause as implicit consent to the exception (tribal court) rather than the rule (federal or state court), the district court flipped this presumption against tribal-court jurisdiction on its head.

The Tribe no doubt prefers to litigate its claims in its own courts given the fate of similar insurance-coverage claims elsewhere. The Washington Supreme Court recently held that COVID-19 closures did

not cause direct physical loss or damage to property within the meaning of materially identical property-insurance policies. *Hill & Stout, PLLC v. Mutual of Enumclaw Ins. Co.*, 515 P.3d 525, 534–35 (Wash. 2022). And nearly every federal appellate and state supreme court to consider the issue—including this Court, *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021)—has joined this overwhelming consensus.*

The possibility of a different outcome here is a vice, not a virtue, of tribal-court jurisdiction. As the Supreme Court has observed, "[t]ribal

---

* *E.g.*, *SAS Int'l, Ltd. v. Gen. Star Indem. Co.*, 36 F.4th 23 (1st Cir. 2022); *10012 Holdings, Inc. v. Sentinel Ins. Co.*, 21 F.4th 216 (2d Cir. 2021); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022); *Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co.*, 29 F.4th 252 (5th Cir. 2022); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021); *Goodwill Indus. of Cent. Okla. Inc. v. Philadelphia Indem. Ins. Co.*, 21 F.4th 704 (10th Cir. 2021); *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347 (11th Cir. 2022); *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545 (Iowa 2022); *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266 (Mass. 2022); *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974 N.W.2d 442 (Wis. 2022); *Tapestry, Inc. v. Factory Mut. Ins. Co.*, — A.3d —, 2022 WL 17685594 (Md. Dec. 15, 2022); *Neuro-Communication Servs., Inc. v. Cincinnati Ins. Co.*, — N.E.3d —, 2022 WL 17573883 (Ohio Dec. 12, 2022); *Sullivan Mgm't, LLC v. Fireman's Fund Ins. Co.*, 879 S.E.2d 742 (S.C. 2022).

courts are often 'subordinate to the political branches of tribal governments.'" *Duro*, 495 U.S. at 693. The Suquamish Tribal Council appoints judges to serve short three-year terms on the Suquamish Tribal Court and Court of Appeals. Suquamish Tribal Code §§ 3.3.2, 3.4.3. And since the 1970s, the Tribe has chosen to exclude nonmembers from the jury pool, limiting participation to the relatively small number of enrolled Suquamish living on or near the reservation. *Id.* § 4.4.3(a); *see Oliphant*, 435 U.S. at 194 n.4. Yet removal to federal court—the typical check on home-field advantage when a defendant is "in an unfamiliar court"—is not available in tribal court. *Strate*, 520 U.S. at 459 & n.13.

The insurers also do not possess their standard constitutional rights in tribal court because tribal sovereignty is "'outside the basic structure of the Constitution.'" *Plains Commerce Bank*, 554 U.S. at 337 (citing *Talton v. Mayes*, 163 U.S. 376, 382–85 (1896)); *see, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 (1978) (no right to civil jury trial). Although the Indian Civil Rights Act requires tribes to provide "due process" generally, 25 U.S.C. § 1302(a)(8), this Court reviews due-process challenges to tribal-court judgments "with deference to tribal customs and practices," *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136,

1143 (9th Cir. 2001). This latitude threatens the insurers' right to due process before the judges and juries selected by the Tribe to rule on its own claims.

**2. Inherent sovereign authority.** *Plains Commerce Bank* clarified a second limitation on tribal-court jurisdiction under *Montana*. Not only must the nonmember consent to the application of tribal law, but "[e]ven then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." 554 U.S. at 337. The district court ignored this second limitation, which forecloses tribal-court jurisdiction here.

Tribal jurisdiction over the property-insurance policies is not necessary to serve any of these interests. The insurers have never set foot on the Port Madison Reservation, and the Tribe does not seek to enforce any right to control entry onto tribal property. Nor is authority to regulate the Tribe's "freely negotiated commercial transactions" with nonmembers necessary to preserve tribal self-government. *Stifel*, 807 F.3d at 209. On the contrary, this Court has recognized that there is "no reason why commercial agreements between tribes and private citizens

cannot be adequately protected by well-developed state contract laws." *Gila River Indian Community v. Hennington, Durham & Richardson*, 626 F.2d 708, 715 (9th Cir. 1980). And no one questions that state insurance law has adequately developed precedent on coverage issues. *See supra*, at 49 n.*. Finally, this dispute is about the Tribe's external relations with the insurers, not its internal relations with tribal members. *Cf. Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 387–88 (1976) (per curiam) (tribal courts have exclusive jurisdiction over custody proceedings for tribal members arising on tribal land).

The district court upheld tribal jurisdiction under the first *Montana* exception without addressing this requirement, which the insurers pressed below. 1-ER-17–20; *see* 2-ER-159–63. In refusing to apply *Plains Commerce Bank*, the district court defied the Supreme Court's repeated direction that the *Montana* "exceptions are 'limited' ones and cannot be construed in a manner that would 'swallow the rule'" against tribal jurisdiction over nonmembers "or 'severely shrink' it." *Plains Commerce Bank*, 554 U.S. at 330 (quoting first *Atkinson*, 532 U.S. at 654, 655, and then *Strate*, 520 U.S. at 458).

Other courts of appeals have agreed with the insurers that "a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court" under *Plains Commerce Bank* unless the tribal regulation flows from conditions on entry into tribal land, tribal self-government, or internal affairs on the reservation. *Jackson*, 764 F.3d at 783; *accord NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 546, 554 (6th Cir. 2015). In *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019), for example, the Eighth Circuit held that "[a] consensual relationship alone is not enough" under the first *Montana* exception even though a dispute arose on tribal land leased by tribal members to non-Indian oil and gas companies. *Id.* at 1138. There was no need for tribal law to regulate the disputed royalty payments there because federal law comprehensively did so. *Id.* The same reasoning applies here because state law already regulates the insurance policies bought by the Tribe and Port Madison. *See supra*, at 43–44.

Only a Fifth Circuit decision has disputed that *Plains Commerce Bank* really means what it says. *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 176–77 n.6 (5th Cir. 2014). In any event, the facts of *Dolgencorp* arguably satisfied the *Plains Commerce Bank*

standard. *See Jackson*, 764 F.3d at 783 n.43. The case for tribal-court jurisdiction was much more compelling than it is here: The defendant had leased land from the Mississippi Band of Choctaw Indians, and the defendant's manager had sexually assaulted a member of the Choctaw tribe in the on-reservation store. *Dolgencorp*, 746 F.3d at 173–74. Despite those significant connections to the reservation, the Supreme Court nonetheless granted certiorari to review that decision but affirmed by a 4–4 vote without opinion. *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. 545 (2016) (per curiam). If *Dolgencorp* was a close call, there can be no doubt that the Tribe lacks a similar sovereign interest in self-protection here.

* * *

The first *Montana* exception does not apply here. Not only have the insurers never set foot on tribal land, but they also never "consented, either expressly or by [their] actions," to regulation in tribal court. *Plains Commerce Bank*, 554 U.S. at 337. And because the Tribe does not need to regulate insurance to protect its ability to govern itself or to control its internal relations, there is no inherent sovereign interest in this case that could sustain tribal-court jurisdiction. This Court should reverse.

### C. The Tribal Court Lacks Jurisdiction Under the Second *Montana* Exception.

*Montana*'s "second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' 'conduct' menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Plains Commerce Bank*, 554 U.S. at 341. This exception is extremely narrow. The Suquamish Tribal Court lacks jurisdiction unless the ability to hear this dispute is "'necessary to avert catastrophic consequences'" that "'imperil the subsistence' of the tribal community." *Id.*

The district court correctly ruled in the insurers' favor on this issue, reasoning that the Tribe had not proved that its economic losses from COVID-19 closures "imperil[ed] the subsistence of the tribal community." 1-ER-21. True, that is reason alone for rejecting the second *Montana* exception. But the Tribe's arguments are wrong for a more fundamental reason: Allowing federal and state courts to resolve claims against non-Indians does not threaten tribal self-government.

*Strate* establishes that, when another forum is available, tribes do not have an overriding interest in subjecting nonmember defendants to a tribal forum. There, a plaintiff injured in a car accident on a state highway within a reservation sued a non-Indian defendant in tribal

court. 520 U.S. at 442–43. The Supreme Court held that the second *Montana* exception did not permit the tribal court to adjudicate the tort claims. Although the Court did not "question the authority of tribal police to patrol roads within a reservation" to ensure highway safety, the power to adjudicate claims arising from highway accidents was "not necessary to protect tribal self-government" because a "state forum" was "open to all who sustain injuries on North Dakota's highway." *Id.* at 456 n.11, 459; *see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 880 (1986) (state-court jurisdiction over claims by Indians against non-Indians does "not interfere with the right of tribal Indians to govern themselves").

The Supreme Court's recent decision in *United States v. Cooley*, 141 S. Ct. 1638 (2021), reinforces the role of an alternative forum under *Montana*. *Cooley* held that tribal officers can "search and detain for a reasonable time any person he or she believes may commit or has committed a crime" on the reservation, before handing the detainee over to federal or state custody. *Id.* at 1643. But in allowing the Crow Tribe to maintain order and safety on the reservation under the second *Montana* exception, the Court emphasized that its decision did not

authorize "full tribal jurisdiction" involving "the application of tribal laws to non-Indians who do not belong to the tribe and consequently had no say in creating the laws that would be applied to them." *Id.* at 1644. The detainee would not be subject to "tribal law, but rather only to state and federal laws," which alleviated concerns that typically foreclose tribal authority over non-Indians. *Id.* at 1645.

The Tribe's very existence does not hinge on "full tribal jurisdiction" over an insurance dispute that would ordinarily be decided in federal or state court under state law. *Cooley*, 141 S. Ct. at 1644; *see supra*, at 43–44. Requiring the Tribe and Port Madison to litigate claims against the insurers in federal or state court "cannot fairly be called 'catastrophic' for tribal self-government." *Plains Commerce Bank*, 554 U.S. at 341. Because a catastrophe is what *Montana* requires for its second exception to apply, this case remains well within the scope of the general presumption that tribal courts have no power over nonmembers.

## III. The Tribe Cannot Regulate Off-Reservation Conduct Based on Its Right to Exclude Nonmembers from Tribal Land.

This Court has recognized a third exception outside the *Montana* framework based on the right to exclude nonmembers who have entered tribal lands. In *Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642

F.3d 802 (9th Cir. 2011) (per curiam), the Court held that "*Montana* limited the tribe's ability to exercise its power to exclude only as applied to the regulation of non-Indians on non-Indian land, not on tribal land." *Id.* at 810; *accord Window Rock Unified School Dist. v. Reeves*, 861 F.3d 894, 902–03 (9th Cir. 2017).

This exception to the presumption against tribal-court jurisdiction is irrelevant here because a tribe's right to exclude cannot possibly reach nonmembers who are not on tribal land. The district court here nevertheless held that the Suquamish Tribe could somehow "exclude" the nonmember insurers who were not and have never been on the reservation because the insurance policies merely related to tribal property. 1-ER-16.

Tribes have an inherent right to exclude nonmembers from tribal land. *Duro*, 495 U.S. at 696. In its treaty with the Suquamish, the United States reaffirmed this right in warranting that no "white man" shall "be permitted to reside upon [the reservation] without permission of the said tribes or bands." Treaty of Point Elliott art. II, 12 Stat. at 928. But this right, as the treaty language reinforces, governs only physical entry onto tribal land.

From its earliest cases, the Supreme Court has always linked the right to exclude to non-Indians who are physically present on tribal land. Chief Justice Marshall explained that the Cherokee Nation "occup[ied] its own territory, with boundaries accurately described," where "the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves" or as permitted by federal law. *Worcester*, 31 U.S. (6 Pet.) at 561. The Court described the right the same way when non-Indians who had contracted for the right to graze livestock on tribal land challenged the Chickasaw Nation's right to impose a per-head tax on cattle. *Morris*, 194 U.S. at 385 & n.†. The tribe's right to exclude implied the lesser "power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory." *Id.* at 389. By refusing to pay the tax, the ranchers were "wrongfully within the territory," and the tribe could forcibly remove their cattle from its lands. *Id.* at 393.

The Supreme Court has carried forward this understanding to this day. Unless Congress says otherwise, tribes may "exclude outsiders from entering tribal land." *Plains Commerce Bank*, 554 U.S. at 328. This power to exclude also "includes the lesser power to place conditions on

entry, on continued presence, or on reservation conduct" because "[w]hen a tribe grants a non-Indian the right to be *on Indian land*, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (first emphasis added). But this is not a free-ranging tribal power to regulate off-reservation conduct that happens to have some impact on tribal land or property. Instead, it is an "incidental" component of the "right of absolute and exclusive use and occupation" of tribal land. *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). Any regulation must flow from the "landowner's right to occupy and exclude," which tribes have retained, rather than some inherent sovereign power over nonmembers, which tribes have never had. *Strate*, 520 U.S. at 456; *see Fletcher*, 10 U.S. (6 Cranch) at 147 (Johnson, J., concurring).

This Court has also treated physical entry onto tribal lands as a requirement for right-to-exclude jurisdiction. In *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (en banc), for example, the Court reasoned that "[i]f the power to exclude implies the power to regulate those who enter tribal lands, the jurisdiction that results is a

consequence of the deliberate actions of those who would enter tribal lands to engage in commerce with the Indians." *Id.* at 1139. Put another way, the nonmember agrees not to violate conditions on "entry or continued presence on tribal land" in exchange for access. *Knighton*, 922 F.3d at 902. But here is the catch: "this inherent power does not permit the Tribe to impose new regulation upon [a nonmember's] conduct retroactively when she is no longer present on tribal land." *Id.* Regulation *after* the nonmember has left does not fly because the right to exclude regulates only presence on tribal land.

Following the reasoning of the Supreme Court and its own earlier decisions, this Court has applied the right to exclude only in cases where a tribe seeks to remove nonmembers from tribal land or to set conditions on nonmembers present on tribal land—not where nonmembers were never on tribal land, as is the case here. Consider the following examples:

- tribal courts can hear eviction proceedings against nonmembers that operate businesses on tribal land, *Water Wheel*, 642 F.3d at 812–13;
- tribal courts plausibly have jurisdiction over condemnation proceedings to exclude non-Indian developers with contractual

rights to manage a tourist attraction on tribal land, *Grand Canyon Skywalk Development*, 715 F.3d at 1204;

- tribes can "condition entry" onto the reservation by repo men upon "permission of the Tribe or the individual car owner," *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 594 (9th Cir. 1983);
- tribes can prohibit trespass, setting a fire without a permit, and destroying natural resources, all as part of their "'landowner's right to occupy and exclude'" non-Indians from tribal land, *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 850 (9th Cir. 2009);
- tribal courts can adjudicate claims that non-Indian tribal employees committed workplace misconduct on tribal lands, *Knighton*, 922 F.3d at 906;
- and tribes plausibly have the authority to regulate conduct by state school districts on leased tribal land based on their "authority to exclude state officials." *Window Rock*, 861 F.3d at 904–05.

This case does not fit under that right-to-exclude framework for nonmembers who physically enter tribal land. All of the insurers' relevant conduct occurred off the reservation, and the insurers did not even directly interact with the Tribe or Port Madison. 2-ER-307; 5-ER-1172. The only whiff of physical entry in this case is a statement from the Tribe's non-Indian insurance broker that Alliant representatives visited tribal businesses a few times for "safety inspections and ergonomics assessments." 6-ER-1319–20. But these visits were by Alliant, not the insurers. And at any rate, the Tribe does not seek to keep Alliant off tribal land. Routine inspections that form no part of the Tribe's claims cannot serve as a beachhead for tribal jurisdiction, which "is not 'in for a penny, in for a Pound.'" *Plains Commerce Bank*, 554 U.S. at 338.

Nevertheless, the district court incorrectly held that the Tribe had right-to-exclude authority over the insurers because the insurance policies relate to tribal property. 1-ER-16. The court acknowledged that Circuit precedent on the right to exclude has "involved some type of physical action on tribal land." 1-ER-13. But the court discarded that unifying feature as a mere coincidence because no case "[e]xplicitly

state[d] the right to exclude is triggered only through physical presence on tribal land." 1-ER-13.

Tribal courts gain jurisdiction over nonmembers *on tribal land* because "a nonmember who enters the jurisdiction of the tribe" agrees to "compl[y] with the initial conditions of entry" and any later "conditions on the non-Indian's conduct or continued presence on the reservation." *Merrion*, 455 U.S. at 144–45. Because the tribe always has the option of forbidding entry to or forcing exit from tribal land, jurisdiction rests on "the deliberate actions of those who would enter tribal lands." *Smith*, 434 F.3d at 1139. That is why right-to-exclude cases all involve an effort by the tribe either to remove non-Indians from tribal land, *e.g.*, *Water Wheel*, 642 F.3d at 812–13 (eviction), or to impose conditions on non-Indians entering or remaining on tribal land, *e.g.*, *Knighton*, 922 F.3d at 906 (workplace misconduct).

Here, though, the Tribe does not want to exclude the insurers from tribal land. There is no one to exclude because the insurers have never been *on* tribal land. 5-ER-1172. Instead, the Tribe wants a ruling on the scope of an insurance policy that it bought outside the reservation. This

case simply has nothing to do with the Tribe's right to physically exclude anyone from its land, or the corollary right to set conditions on entry.

That makes this case like *Employers Mutual Casualty Co. v. McPaul*, 804 F. App'x 756 (9th Cir. 2020). There, an off-reservation insurance company had insured businesses working on tribal land, and the tribe sued the insurer in tribal court after the insurer's policyholders "caused a gasoline leak on tribal lands." *Id.* at 756. The right to exclude was not a hook for tribal jurisdiction, this Court held, because the "relevant conduct" of "negotiating and issuing" the insurance policies "occurred entirely outside of tribal land." *Id.* at 757. The district court put it more bluntly: "it's difficult to fathom how the right-to-exclude framework could be construed to confer tribal jurisdiction over a lawsuit against" an insurer that had "never set foot" on tribal land. *Employers Mut. Cas. Co. v. Branch*, 381 F. Supp. 3d 1144, 1149 (D. Ariz. 2019).

The court below, by contrast, took the opposite approach: equating the insurers' off-reservation commercial activities with physical presence on tribal land. According to the district court, the insurers were constructively "on tribal land" because (i) "the coverage provided, and premiums charged, are based on the operation and the management of

businesses and property located on tribal land," (ii) the Tribe paid for the insurance with revenues generated on tribal land, (iii) the Tribe has claimed losses "based on business activities occurring" on tribal land, and (iv) the absence of jurisdiction would affect the Tribe's ability to regulate "contractual relations" and "business activities on tribal land." 1-ER-15–16.

That mistaken reasoning provides a roadmap to circumvent the guardrails on tribal jurisdiction over nonmembers with respect to many commercial activities that courts have for decades placed outside tribal-court jurisdiction. If the district court's analysis were right, then tribes could easily get around *Montana*'s requirement that tribal regulations must "stem from the tribe's inherent sovereign authority." *Plains Commerce Bank*, 554 U.S. at 337. They could simply point to this supposed right to exclude nonmembers from off-reservation transactions that happen to have some connection to tribal land.

At the end of the day, the Tribe is on the reservation. Its property is too. But the insurers are not and never were. The Tribe instead looked outside the reservation to buy insurance for its property—a commercial transaction that has nothing to do with who can enter tribal land.

Because the parties' dispute over the scope of that insurance does not implicate any power to exclude the insurers from tribal land that they were never on, the district court erred in upholding the jurisdiction of the Suquamish Tribal Court under a right-to-exclude theory.

## CONCLUSION

The Court should reverse the district court's decision on cross-motions for summary judgment and remand with instructions for the district court to enter judgment in the insurers' favor and to issue an injunction against further proceedings in tribal court.

Dated: January 9, 2023

Respectfully submitted,

/s/ *Richard J. Doren*
Richard J. Doren

*Attorneys for Appellant*
*Lexington Insurance Company*

/s/ *Michael E. Ricketts*
Michael E. Ricketts

*Attorneys for Appellant Homeland*
*Insurance Company of New York*

/s/ *Eric J. Neal*
Eric J. Neal

*Attorneys for Appellants Hallmark Specialty Insurance Company, Aspen Specialty Insurance Company, and Aspen Insurance UK Ltd.*

/s/ *Robert W. Novasky*
Robert W. Novasky

*Attorneys for Appellants Certain Underwriters at Lloyd's, London and London Market Companies Subscribing to Policy Nos. PJ193647, PJ1900131, PJ1933021, PD-10364-05, PD-11091-00, and PJ1900134-A*

## CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Circuit Rule 32-1(a) because it contains 12,903 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point New Century Schoolbook font.

Dated: January 9, 2023 Respectfully submitted,

/s/ *Richard J. Doren*
Richard J. Doren