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.

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

BRIEF OF APPELLEE THE SUQUAMISH TRIBE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee the Suquamish Tribe states that it is a sovereign government and federally recognized Indian tribe. The Suquamish Tribe has issued no shares of stock to the public and has no parent company, subsidiary, or affiliate that has done so.

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JURISDICTIONAL STATEMENT

The Suquamish Tribe agrees with Appellants' jurisdictional statement.

STATEMENT OF THE ISSUE

Did the district court err in concluding that the Suquamish Tribal Court possesses subject matter jurisdiction over claims asserted against Appellants by the Suquamish Tribe and its tribally-chartered economic development arm, Port Madison Enterprises, seeking insurance coverage pursuant to "all risk" property insurance policies in which Appellants consensually contracted to bear the risk of physical and other damage to Tribal property and businesses on Tribal Land (as defined herein), caused by "carefully defined circumstances" occurring on that Tribal Land, Appellants' Opening Brief ("Aplt. Br.") 32, in exchange for millions of dollars in premiums generated by Tribal business activities on that Tribal Land?

STATEMENT OF THE CASE

I. THE PARTIES AND THE POLICIES

The Suquamish Indian Tribe of the Port Madison Reservation (the "Tribe") is a federally-recognized Indian tribe located on the Puget Sound, where the Tribe and its members have resided since time immemorial. 6-ER-1347 ¶ 35; 87 Fed. Reg. 4363 (Jan. 28, 2022); Treaty of Point Elliott, 12 Stat. 927 (1855). The Tribe operates several businesses on the Port Madison Reservation (the "Reservation"), both directly and through its economic development arm, Port Madison Enterprises ("PME"). PME is a tribally chartered entity headquartered on the Tribe's trust lands within the Reservation. 1-ER-4; 2-ER-253. The purpose of PME is to develop community resources "while promoting the economic and social welfare of the Tribe through commercial activities." 1-ER-5; 2-ER-253.

The Tribe operates the Suquamish Museum and Suquamish Seafood Enterprises. 2-ER-253. PME operates numerous tribal businesses, including the Suquamish Clearwater Casino Resort, Kiana Lodge, White Horse Golf Club, Masi Shop, Longhouse Texaco, and Suquamish Village Chevron. 2-ER-253. PME also develops and manages commercial and residential property. 2-ER-253. All of these Tribal businesses are located on land owned by or held in trust for the Tribe and within the boundaries of the Reservation (hereinafter "Tribal Land"). 1-ER-5; 2-ER-253. The revenues, including tax revenues, derived from these business activities are vital sources of funding used to support the Tribe's governmental operations

and provide essential services on the Reservation. 6-ER-1327.

Appellants (the "Insurers") are all insurers of the Tribe and PME under "All Risk" property insurance policies in effect from July 1, 2019, to July 1, 2020 (collectively, the "Policies"). 2-ER-287. Most of the Insurers on the Policies have been contracting to provide the Tribe and PME with insurance since 2015 at the latest, and all of the Insurers have insured the Tribe since the 2018-2019 policy year, as reflected in the Schedule of Carriers found in each of the Policies. 2-ER-287.

The "All Risk" Policies are meant to provide broad insurance coverage for losses to the Tribe's and PME's businesses and property. 2-ER-287; 6-ER-1348. Coverage under the Policies includes "all risk of direct physical loss or damage" to "property of every description both real and personal," as well as coverage for Business Interruption losses, Interruption by Civil Authority, Contingent Time Element Coverage, and Tax Revenue Interruption. 3-ER-369, 384; 4-ER-829, 844; 6-ER-1297, 1302; 6-ER-1308, 1313. For the July 1, 2019 to July 1, 2020 period alone, the Tribe paid $231,963 in premiums for coverage, while PME paid $1,336,007 under the Policies. 2-ER-287.

The Tribe worked with insurance broker Brown & Brown Insurance to enter into the Policies with the Insurers through a program called the Tribal Property Insurance Program ("TPIP"). *Id.* The TPIP is a specialized insurance program administered by Tribal First, a division of Alliant Specialty Services, Inc., a specialty insurance broker. 6-ER-1318-19, 1348-49;

2-ER-215. As the name indicates, TPIP is a program specifically marketed to Indian tribes for coverage of tribal property. *Id.* Tribal First promotes itself as a specialized program that "has focused exclusively on meeting the insurance and risk management needs of tribal governments and enterprises since 1993," and as "the largest provider of insurance solutions to Native America and a leader in the specialty areas of tribal business enterprises, including gaming, alternative energy, construction, and housing authorities." 1-ER-5; 2-ER-215. On multiple occasions over the past decade, Tribal First/Alliant representatives visited the Reservation to conduct activities related to their insurance programs, including safety inspections and ergonomics assessments. 2-ER-215; 6-ER-1319. The Insurers worked directly with Tribal First to issue the Policies to both the Tribe and PME. 2-ER-307-08 ¶¶ 4, 8-9; 3-ER-359-60. According to the Insurers, the Policies were prepared "consistent with [the Insurers'] underwriting guidelines." Aplt. Br. 8.

There is no dispute that the Policies are contracts directly between the Tribe, PME, and the Insurers. 2-ER-262-63; 3-ER-317, 343, 522, 574; 4-ER-642, 713, 740; 5-ER-984, 1036, 1102; 6-ER-1188, 1195, 1197, 1203, 1212, 1261, 1296, 1307. Further, the Insurers admit they fully understood they were contracting with and insuring the Tribe and PME. 2-ER-258; 2-ER-299 (Insurers "knew they were contracting with the Tribe"); *see also* 1-ER-13, 16; 2-ER-263, 288. The named insureds on the Tribe's Policies included the Suquamish Tribal Council, Totten Housing Development Limited

Partnership c/o Suquamish Tribe, the Department of Community Development, and Suquamish Seafood Enterprises, all under the mailing address of the Suquamish Tribal Council on the Reservation in Suquamish, Washington. 1-ER-6; 3-ER-326. The named insureds on PME's Policies included PME—expressly identified as "an agency of the Suquamish Tribe, a federally recognized Indian Tribe"—and all its operating entities and divisions, including Suquamish Clearwater Casino Resort, Retail Division (including Masi shop and Suquamish Village Shell), Kiana Lodge, Property Management Division (including Agate Pass Business Park and all other rental properties), White Horse Golf Course, and PME's 401(k) plan—all under the address of Suquamish Clearwater Casino Resort on the Reservation. 4-ER-723.

Both the Tribe's and PME's Policies include a broad "Service of Suit" clause providing that in the event of a dispute between the parties, the Insurers "will submit to the jurisdiction of a Court of competent jurisdiction within the United States." 3-ER-399; 4-ER-634; 4-ER-859; 5-ER-1094. The Policies do not include any other forum-selection clause, nor do they designate the substantive law of any particular jurisdiction to govern their interpretation and enforcement.

Defendants below, Cindy Smith, Eric Nielson, Bruce Didesch, and Steve Aycock, are Judges of the Suquamish Tribal Court and the Suquamish Tribal Court of Appeals (collectively, the "Tribal Court"). 1-ER-5.

II. THE TRIBE AND PME SUBMIT INSURANCE CLAIMS TO THE INSURERS IN RESPONSE TO CLOSURES REQUIRED BY THE COVID-19 PANDEMIC

In March 2020, the Tribe and PME suspended tribal businesses operations on the Reservation because of the spread COVID-19, consistent with tribal, local, state, and national declarations regarding the dangers of COVID-19. 2-ER-236-37. As a result of the necessary suspension of business operations and closure of facilities, the Tribe and PME lost millions of dollars in business and tax revenue, and they incurred other expenses from these closures on the Reservation. 6-ER-1356.

The Tribe and PME tendered claims to the Insurers in accordance with the Policies. 2-ER-257; 6-ER-1356-58. In response, Appellant Lexington Insurance Company ("Lexington"), acting as the lead insurer, issued reservation-of-rights letters to the Tribe and PME in May 2020, warning that the "All Risk" insurance policies may not cover the millions of dollars in losses caused by the suspension of business operations on the Reservation. 2-ER-257-58; 6-ER-1296-305; 6-ER-1307-16.

III. THE SUQUAMISH TRIBAL COURT AFFIRMS TRIBAL JURISDICTION OVER THE TRIBE AND PME'S CLAIMS AGAINST THE INSURERS

Given the Insurers' refusal to confirm coverage, the Tribe and PME filed an action in the Tribal Court seeking to enforce the Insurers' coverage obligations under the Policies. The Tribe and PME asserted claims for breach of contract and declaratory judgment. 6-ER-1360-61.

The Insurers, led by Lexington, moved to dismiss the lawsuit,

challenging both the Tribal Court's subject matter jurisdiction over the claims and its personal jurisdiction over the Insurers. 2-ER-288. The Tribal Trial Court denied the Insurers' motion. *Id.* The Insurers then appealed to the Tribal Court of Appeals. *Id.*

The Tribal Court of Appeals relied on Supreme Court and Ninth Circuit precedent to identify two independent bases for subject matter jurisdiction—the consensual relationship "exception" under *Montana v. United States*, 450 U.S. 544 (1981), and the Tribe's inherent sovereign power to exclude nonmembers from Tribal land, as recognized in this Court's precedents. 2-ER-291-99. The Tribal Court of Appeals concluded the Insurers entered into a consensual relationship supporting tribal jurisdiction under *Montana*, explaining:

> [The] Insurers targeted the Tribe to sell their product and voluntarily and knowingly contracted with the Tribe for insurance coverage of the Tribe's businesses and its reservation trust property. [The] Insurers collected the premiums for that coverage from the Tribe. The Tribe's claim is breach of the insurance contracts issued to the Tribe by [the] Insurers. The contracts between the Tribe and [the] Insurers and the Tribe's claim concerns activity directly related to the Tribe's reservation trust property. Because these facts establish the Tribe's claim is directly related to the consensual business dealings between the Tribe and [the] Insurers there is a nexus between the claim and that consensual relationship. And by purposely, voluntarily, and knowingly contracting with the Tribe to issue insurance policies covering loss and damage to the Tribe's reservation trust property and businesses, [the] Insurers should have anticipated that a dispute with the Tribe arising from the policies could result in tribal court subject matter jurisdiction over a dispute

alleging a breach of the contracts.

2-ER-294-95.

The Tribal Court of Appeals also concluded that the Tribe's "inherent sovereign power" to exclude nonmembers from tribal land established an independent basis for the Tribal Court's jurisdiction. 2-ER-298-99. In accordance with this Court's precedents, the Tribal Court of Appeals explained that the Tribe's inherent "right to exclude non-tribal members from its land imparts regulatory and adjudicative jurisdiction over the [non-member's] 'conduct on that land.'" 2-ER-298 (quoting *Emplyrs Mut. Cas. Co. v. Branch,* 381 F. Supp. 3d 1144, 1148-49 (D. Ariz. 2019), aff'd, *Emplyrs. Mut. Cas. Co. v. McPaul*, 804 Fed App'x 756 (9th Cir. 2020)). While the Insurers contended the Tribe lacked jurisdiction because they "never physically entered on the Tribe's land," the Tribal Court of Appeals explained that a nonmember's physical presence on the land is not a prerequisite to tribal jurisdiction; rather, the "jurisdictional inquiry under the right to exclude doctrine … is whether the claim bears some direct connection to tribal lands." 2-ER 299 (citing *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 900 (9th Cir. 2019)). Here, the Tribe and PME's claims bore a direct connection to Tribal Land because the Insurers "knew they were contracting with the Tribe," the relevant Policies "were expressly directed and tied to the Tribe's trust lands and businesses located on the Suquamish Tribe's reservation," and the lawsuit "asserts [the] insurers failed to cover those losses." *Id.* Accordingly, the Tribe's right to

exclude meant it also had the authority to regulate and adjudicate the Insurers' conduct within the scope of that commercial relationship directly connected to Tribal Land. *Id*.

Finally, the Tribal Court of Appeals rejected the Insurers' challenge to the Tribal Court's personal jurisdiction, finding both that the "service of suit" clause included in the Policies waived any challenge to personal jurisdiction, and that in any event personal jurisdiction was appropriate under tribal and federal law because the Insurers "purposely availed themselves of the privilege of conducting activities" on the Reservation by contracting with the Tribe and PME to provide coverage to Tribal property and businesses within the Reservation. 2-ER-301-02.

IV. THE FEDERAL DISTRICT COURT CONFIRMS TRIBAL JURISDICTION

After the Tribal Court of Appeals affirmed its jurisdiction, the Insurers filed the instant lawsuit in the district court, naming as defendants the Judges of the Suquamish Tribal Court in their official capacities pursuant to *Ex parte Young*, 209 U.S. 123 (1908), and seeking to enjoin the Tribal Court and its Judges from asserting jurisdiction over the Insurers and the Tribe's claims. 6-ER-1412-13. The Tribe intervened as the real party in interest to defend the jurisdiction of the Tribal Court. 6-ER-1321-22.[1] The

[1] The parties agreed below that the Judges of the Tribal Court would join in the Answer of the Tribe but would not otherwise actively participate in the litigation; the Tribe would litigate the jurisdictional dispute as the real party in interest; and the Judges would abide by the federal courts' rulings. 6-ER-1399-1400. Likewise on appeal, the parties have agreed that the Judges of the Tribal Court need not file any briefs or otherwise actively participate in the appeal, and that they will abide by this Court's judgment.

parties stipulated to stay the Tribe's action in the Tribal Court pending resolution of the Insurers' suit in federal court, 6-ER-1364, and filed cross-motions for summary judgment in the district court on the issue of the Tribal Court's jurisdiction. 1-ER-8-10.

The district court denied the Insurers' motion and granted the Tribe's motion for summary judgment. 1-ER-22-23. Like the Tribal Court of Appeals, the district court addressed tribal court jurisdiction under both the "right to exclude" doctrine and *Montana*. It rejected the Insurers' central argument that tribal jurisdiction over nonmembers is necessarily limited to those who physically enter tribal land, concluding instead that "providing insurance to businesses and property owned by the Tribe (or its tribal members), operated by the Tribe (or its tribal members), and located on tribal land involves conduct or activity on tribal land that concerns tribal sovereignty and otherwise provides tribal adjudicative jurisdiction based on the right to exclude." 1-ER-15.

The district court likewise found the Tribal Court's jurisdiction well supported under the first *Montana* exception, as the Insurers entered into a "consensual relationship" with the Tribe through the Policies, the Insurers "were aware they were contracting with, and receiving payments from, the Tribe and PME," and there "is a sufficient nexus between the Tribe and PME's claims and the consensual relationship to establish tribal jurisdiction

under the first *Montana* exception."[2] 1-ER-19.

The district court also held the Tribal Court may assert personal jurisdiction over the Insurers pursuant to federal law, based on the service-of-suit clause in the Policies and because the Insurers' issuance of the Policies to the Tribe plainly constituted "purposeful availment" of Tribal jurisdiction under well-established principles. 1-ER-21.

The district court entered judgment on September 12, 2022. 1-ER-23. The Insurers appealed. On appeal the Insurers challenge only the district court's ruling that the Tribal Court has subject matter jurisdiction over the Tribe's and PME's claims against the Insurers. *See* Aplt. Br. 6-7.

[2] The district court concluded the second *Montana* exception was not a basis for tribal subject-matter jurisdiction. 1-ER-20-21. As the first *Montana* exception and the right-to-exclude doctrine both provide clear grounds for tribal jurisdiction here, the Tribe does not challenge the district court's ruling regarding the second *Montana* exception on appeal.

SUMMARY OF ARGUMENT

This Court should affirm the judgment of the district court. While the Insurers characterize the assertion of Tribal Court jurisdiction in this case as "unprecedented" because they did not physically enter the Reservation, Aplt. Br. 2, the reality is just the opposite: In multiple cases this Court has affirmed tribal adjudicatory jurisdiction over a dispute with a nonmember engaged in a consensual contractual relationship with a tribe that "bears some direct connection to tribal lands," *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1135 (9th Cir. 2006), or that "centers on [tribal] land," *Grand Canyon Skywalk Dev., LLC v. 'SA' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013), *cert. denied sub nom. Grand Canyon Skywalk Dev., LLC v. Grand Canyon Resort Corp.*, 571 U.S. 1110 (2013). That standard is satisfied here, where the Insurers—acting through a specialized insurance program directly targeting Indian tribes—contracted for the central and express purpose of insuring the Tribe, PME, and their businesses against damage and loss occurring on Tribal Land.

The case law does not require physical entry on Tribal Land as a prerequisite to tribal jurisdiction. Indeed, in *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1075 (9th Cir. 1999), this Court recognized valid grounds for tribal court jurisdiction over a nonmember insurer that insured tribal members' on-reservation property, without regard to whether the insurer ever physically entered Tribal Land. This case is on all fours with *Allstate*.

The district court's judgment is far from "unprecedented"—in reality this Court's precedents virtually command affirmance.

The Insurers strive to portray themselves as passive victims of tribal overreach, unwittingly entangled in a contractual relationship that merely "happen[ed] to have some connection to tribal land." Aplt. Br. 66. Even though the Insurers sold on-Reservation property insurance policies to the Tribe for years through Tribal First and its Tribal Property Insurance Program, in the Insurers' retelling of the story, it was actually the Tribe that "reached beyond its borders to buy coverage," then "dragged [the Insurers] into Suquamish Tribal Court" after they repudiated their contractual obligations. Aplt. Br. 18-19.

Try as they might, the Insurers cannot escape the record evidence or the governing law. In reality, the Insurers knowingly and voluntarily contracted directly with the Tribe and PME to insure tribal property and businesses on Tribal Land—including businesses like Clearwater Casino Resort, which could *only* be operated on Tribal Land, given state and federal gaming laws. The Insurers entered that relationship through a specialized program that targets Indian tribal governments—the TPIP—operated by a specialized broker called Tribal First, the self-declared "largest provider of insurance solutions to Native America." 2-ER-207-09, 215. For years the Insurers gladly received millions of dollars in premiums from the Tribe and PME—funds generated by Tribal businesses operating on Tribal Land—and in exchange they agreed to insure the Tribe and PME

against loss and damage to those businesses and property on Tribal Land. The Insurers unquestionably engaged in a consensual relationship "direct[ly] connect[ed] to" and "center[ed] on" Tribal Land. *Smith*, 434 F.3d at 1135; *Grand Canyon Skywalk Dev.*, 715 F.3d at 1205.

This Court's precedents establish two distinct bases for tribal jurisdiction over the Insurers, either of which independently commands affirmance here. Under *Montana v. United States*, the Tribal Court may exercise jurisdiction over the Tribe and PME's claims against the Insurers because they arise directly out of the Policies, which embody a consensual relationship "center[ed] on" the Tribal Land, into which the Insurers knowingly and voluntarily entered. *Id.* Separately and independently, the Tribe may exercise jurisdiction pursuant to its inherent sovereign right to exclude the Insurers from its lands—which entails the lesser rights to exclude them from insuring Tribal property on Tribal Land, and to regulate and adjudicate the Insurers' conduct related to the Policies.

In their effort to avoid tribal jurisdiction, the Insurers offer a welter of arguments beyond their unavailing effort to invent a "physical entry" requirement that does not exist in the case law. None has merit. The Insurers resort to a supposed "presumption" against tribal jurisdiction over nonmembers, but this Court's precedents make clear that such presumption only applies to "nonmember activity on non-Indian fee land." *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 932 (9th Cir. 2019). Contrary to the Insurers' suggestion, "Tribal authority over the activities of

non-Indians *on reservation lands* is an important part of tribal sovereignty," *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (emphasis added), and thus this Court continues to hold that "'civil jurisdiction over activities of non-Indians on tribal land presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.'" *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 900 (9th Cir. 2017) (quoting *id.*) (cleaned up).

The Insurers contend the Supreme Court's decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), introduced new limitations on tribal jurisdiction, requiring that nonmember conduct meeting the *Montana* exceptions does not trigger trial jurisdiction unless it also implicates the tribe's "inherent sovereign authority." Aplt. Br. 41-42. But this Court has not embraced that reading of *Montana*. And the Supreme Court itself not only denied a petition for certiorari seeking to establish the exact position the Insurers advocate, it also affirmed a Fifth Circuit decision that expressly rejected the very same argument the Insurers make. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *aff'd by an equally divided Court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 579 U.S. 545 (2016).

The Insurers next argue that they could not reasonably have anticipated tribal jurisdiction because the Tribe has not enacted ordinances regulating the insurance industry. But no authority suggests tribal adjudicatory jurisdiction turns on the existence of positive tribal law

governing the nonmember conduct at issue. On the contrary, this Court and others have recognized that tribal jurisdiction may be exercised in various forms, through tribal ordinances, tort law, or—as here—claims for breach of contract.

Finally, the Insurers offer a strained "floodgates" argument, contending the "district court's reasoning would allow tribes to hail any number of off-reservation businesses into tribal court," because "[i]f a tribe's decision to do business with off-reservation nonmembers were enough," to support tribal 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." Aplt. Br. 4, 18-19. This manufactured concern is based on mischaracterization of the district court's reasoning, the record, and the Tribe's position. The district court did not rely on a simplistic notion that a tribe's mere "decision to do business with off-reservation nonmembers" triggers tribal jurisdiction. And the relationship between the Insurers and the Tribe here is not about "any good or service." *Id.* The Insurers knowingly agreed to insure the Tribe, its property, and its businesses on Tribal Land. The circumstances here arise in a specific context among sophisticated commercial actors. Business dealings between the Tribe and other nonmembers unrelated to Tribal Land do not have the same characteristics, and nothing in the district court's analysis would impose tribal jurisdiction upon unwitting nonmembers in different circumstances or otherwise "swallow the rule" of *Montana*. And, of course,

sophisticated parties like the Insurers who engage in consensual dealings with a sovereign government like the Tribe can and often do bargain for forum-selection and choice-of-law provisions in their contracts. But the Insurers here did not.

The district court's decision was fully supported by the controlling precedents of this Court and the Supreme Court. The Insurers are subject to Tribal adjudicatory jurisdiction, and should have foreseen that possibility because they entered into a consensual relationship with the Tribe directly connected to and centered on Tribal Land, property, and businesses on the Reservation. This Court should affirm.

ARGUMENT

I. STANDARD OF REVIEW

The issue of tribal civil jurisdiction over a nonmember of the Tribe presents a question of federal law, which this Court reviews *de novo*. *Knighton*, 922 F.3d at 899. The Court reviews the factual findings of the Tribal Court for clear error, *id.*, although the parties here agreed there are no genuine issues of fact material to the jurisdictional issue. 1-ER-10. This Court also has "recognized that because tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to 'some deference'" on appellate review. *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802, 808 (9th Cir. 2011) (per curiam) (quoting *FMC Corp. v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1311-14 (9th Cir. 1990) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978))).

II. THE INSURERS ARE SUBJECT TO TRIBAL JURISDICTION BECAUSE THE TRIBE'S CLAIMS ARISE OUT OF THE INSURERS' CONSENSUAL CONDUCT DIRECTLY CONNECTED TO AND CENTERED ON TRIBAL LAND

A. The Analytic Frameworks Governing Tribal Civil Jurisdiction Over Nonmembers

The "outer boundaries of tribal court jurisdiction are a matter of federal common law." *Knighton*, 922 F.3d at 899. The contours of that law have evolved through decades of federal jurisprudence addressing a variety of factual scenarios, and this Court has "observed that there is no simple test for determining whether tribal court jurisdiction exists." *Smith*, 434 F.3d at 1130 (cleaned up). "[Q]uestions of jurisdiction over Indians and Indian country remain a complex patchwork of federal, state, and tribal law, which is better explained by history than by logic." *Id.* (cleaned up).

Nevertheless, this Court "has long recognized two distinct frameworks for determining whether a tribe has jurisdiction over a case involving a non-tribal-member defendant: (1) the right to exclude, which generally applies to nonmember conduct on tribal land; and (2) the exceptions articulated in *Montana v. United States*, which generally apply to nonmember conduct on non-tribal land." *Window Rock*, 861 F.3d at 898.

1. *Montana* and its "Exceptions"

Montana v. United States "is 'the pathmarking case concerning tribal civil authority over nonmembers.'" *Grand Canyon Skywalk*, 715 F.3d at 1204 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997)). *Montana* addressed the "sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation

owned in fee simple by non-Indians." *Montana*, 450 U.S. at 547.[3] The Crow Tribe had sought to prohibit hunting and fishing by any nonmember of the tribe within the outer boundaries of the reservation, including on land "owned in fee by nonmembers of the Tribe." *See id.* at 549, 558. The Supreme Court "readily agree[d]" the tribe retained authority to "prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe," and also that "if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits." *Id.* But the Court held the Tribe did not retain jurisdiction to regulate the conduct of nonmembers on non-Indian fee land, based 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 565-66.

At the same time, the Court articulated two important exceptions to this general rule: 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." *Id.* 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

[3]A "reservation may contain both Indian and non-Indian land, and Indian land may also exist outside of a reservation." *Water Wheel*, 642 F.3d at 809 n.5 (citing 18 U.S.C. § 1151). In many cases the existence of non-Indian fee land within a reservation is the result of historical federal policy leading to allotment and sale in fee simple to non-Indians of individual parcels of formerly Indian land within historical reservation boundaries.

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

Because *Montana* specifically addressed tribal regulation of nonmember conduct on *non-Indian* fee land, this Court applies *Montana* and the two "so-called *Montana* exceptions" to analyze tribal civil jurisdiction over "nonmember conduct on non-Indian-owned fee land within the boundaries of [a] Reservation." *FMC*, 942 F.3d at 931. And while some courts have concluded that the *Montana* framework applies even to nonmember conduct on tribal lands, this Court has consistently reaffirmed that conduct on tribal lands is subject to a different analysis based on a tribe's inherent sovereign right to exclude nonmembers.

2. The Inherent Sovereign Right to Exclude

This Court's precedents establish that, independent of the *Montana* framework, Indian tribes may regulate and adjudicate nonmember conduct directly connected to tribal lands, based on tribes' inherent sovereign authority to exclude nonmembers from their land.

The Supreme Court has long recognized "that Indian tribes have sovereign powers, including the power to exclude non-tribal members from tribal land." *Window Rock*, 861 F.3d at 899 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983)). A tribe's "right to exclude non-tribal members from its land imparts regulatory and adjudicative jurisdiction over conduct on that land." *Id.*; *see also Water Wheel*, 642 F.3d at 811 ("The authority to exclude non-Indians from tribal land necessarily

includes the lesser authority to set conditions on their entry through regulations.").[4]

"Since deciding *Montana*, the Supreme Court has applied [the *Montana*] exceptions almost exclusively to questions of jurisdiction arising on [non-tribal land] or its equivalent." *Water Wheel*, 642 F.3d at 810. The "exception is *Nevada v. Hicks*," 533 U.S. 353 (2001), in which the Supreme Court held that "the tribe's power to exclude nonmembers from tribal land was 'not alone enough to support' the tribe's regulatory jurisdiction" over state law enforcement officers on tribal land, given the important "competing interest" of the state "in executing a warrant for an off-reservation crime." *Knighton*, 922 F.3d at 900 (quoting *Hicks*, 533 U.S. at 360). But the *Hicks* Court explicitly stated that its "holding [was] limited to the question of tribal-court jurisdiction over state officers enforcing state law." *Hicks*, 533 U.S. at 358 n2. The Court expressly left "open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.*

Synthesizing the precedent, this Court has concluded that "*Hicks* is best understood as the narrow decision it explicitly claims to be," such that

[4] Most of the Supreme Court cases regarding tribal civil jurisdiction over nonmembers concerns tribal regulatory, rather than adjudicatory, authority. But the Supreme Court has held that "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." *Knighton*, 922 F.3d at 906 (quoting *Strate*, 520 U.S. at 453) (cleaned up). Precedent makes clear that a tribe's "adjudicative authority over nonmembers may not exceed its regulatory authority," and for practical purposes this Court's precedents have treated the scope of tribal adjudicatory authority as coextensive with its regulatory authority. *Id.*; *see Window Rock*, 861 F.3d at 899 (stating a tribe's "right to exclude non-tribal members from its land imparts regulatory and adjudicative jurisdiction over conduct on that land").

"[i]ts application of *Montana* to a jurisdictional question arising on tribal land should apply only when the specific concerns at issue in that case exist"—i.e., the state's compelling interest in execution of a warrant for an off-reservation crime. *Water Wheel*, 642 F.3d at 813. *Hicks* thus creates "only a narrow exception to the general rule that, absent contrary provisions in treaties or federal statutes, tribes retain adjudicative authority over nonmember conduct on tribal land." *Window Rock*, 861 F.3d at 898; *Grand Canyon Skywalk*, 715 F.3d at 1205 ("Here, as the dispute centers on Hualapai trust land and there are no obvious state interests at play, the *Hicks* exception is unlikely to require *Montana's* application."); [5] *see also Strate*, 520 U.S. at 438 ("[T]ribes retain considerable control over nonmember conduct on tribal land.").

Although this Court continues to apply the right-to-exclude framework to analyze tribal jurisdiction over nonmember conduct directly related to tribal land, "*Water Wheel* and … subsequent cases involving tribal jurisdictional issues on tribal land do not exclude *Montana* as a source of tribal regulatory authority over nonmember conduct on tribal land." *Knighton*, 922 F.3d at 903. "Rather," Ninth Circuit "caselaw states that an Indian tribe has power to regulate nonmember conduct on tribal land

[5]The losing nonmember in *Grand Canyon Skywalk* petitioned for certiorari, seeking Supreme Court review of the question: "Does *Montana* … apply on tribal land, as … suggested in [*Hicks*], or does [the Supreme Court] acquiesce in the Ninth Circuit's contrary decision in *Water Wheel* …?" *Grand Canyon Skywalk Dev., LLC v. Grand Canyon Resort Corp.*, Petition for a Writ of Certiorari at i-ii, *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/11/98287463_v-1_2013.09.05-Petition-for-a-Writ-of-Certiorari.pdf. The Supreme Court denied the writ. 571 U.S. at 1110.

incident to its sovereign power to exclude nonmembers from tribal land, regardless of whether either of the *Montana* exceptions is satisfied." *Id.*

Critically, in interpreting and applying the case law setting the outer boundaries of tribal civil jurisdiction, this Court is mindful of "Congress's clearly stated federal interest in promoting tribal self-government." *Water Wheel*, 642 F.3d 813 (citing *Mescalero Apache Tribe*, 462 U.S. at 335-36); *Knighton*, 922 F.3d at 900. Absent clear federal authority limiting tribal jurisdiction, this Court will not "broaden *Montana's* scope beyond what … precedent requires and restrain tribal authority despite Congress's clearly stated federal interest in promoting tribal self-government." *Water Wheel*, 642 F.3d 813.

B. The Insurers' Issuance of the Policies Constitutes Conduct Directly Connected to and Centered on Tribal Land, Triggering Tribal Jurisdiction

The Insurers' core argument on appeal is that they cannot be subject to tribal civil jurisdiction, under either *Montana* or the right-to-exclude doctrine, because they did not engage in any conduct on the Tribe's Reservation. They base this argument on a single, central false premise—that "conduct on tribal land" in this jurisdictional context necessarily requires the nonmember to physically enter tribal land. *See* Aplt. Br. 3.

As explained below, the Insurers are wrong. There is no such requirement of "physical presence" in the case law. Indeed, as further explained below, this Court and others have specifically recognized valid grounds for tribal civil jurisdiction over nonmember insurers that insured

tribal members and/or their on-reservation property—the exact circumstances of this case—without regard to the insurers' physical presence on tribal land.

While it is true that governing case law discusses relevant "nonmember conduct on tribal land" as part of the jurisdictional analysis, *Plains Commerce Bank*, 554 U.S. at 333 , "conduct on tribal land" in this context does not equate to literal physical presence, *Window Rock*, 861 F.3d at 902. Indeed, throughout this litigation—from the Tribal Court to the district court and now on appeal—the Insurers have failed to identify a single decision by any court holding that a nonmember's *physical* presence on tribal land is a necessary prerequisite to tribal court jurisdiction. On the contrary, this Court has made clear that the operative inquiry for purposes of tribal jurisdiction is "not limited to deciding precisely when and where the claim arose, a concept more appropriate to determining when the statute of limitations runs or to choice-of-law analysis. Rather, [the Court's] inquiry is whether the cause of action … bears some direct connection to tribal lands," *Smith*, 434 F.3d at 1135, or "centers on" tribal lands, *Grand Canyon Skywalk*, 715 F.3d at 1205. *See also Knighton*, 922 F.3d at 901 ("[I]n *Window Rock* … we concluded that *Smith* did not limit a tribe's jurisdiction over civil claims against nonmembers bearing a direct connection to tribal land.").

The Supreme Court itself has recognized that nonmember conduct directed toward a tribe and its lands is conceptually distinct from physical

entry onto tribal lands, and that either form of conduct may provide a basis for tribal jurisdiction: "[A] tribe has no authority over a nonmember until the nonmember enters tribal lands *or conducts business with the tribe*." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982) (emphasis added).

In light of the foregoing precedents, this Court has repeatedly recognized viable grounds (under *Montana* and/or the right-to-exclude doctrine) for tribal court jurisdiction over disputes similar to this one without regard to whether the nonmember defendant physically entered tribal lands. In *Allstate*, the Court found a plausible basis for tribal court jurisdiction over claims against a nonmember insurer of tribal members injured on tribal land. *Allstate*, 191 F.3d at 1074-75. The Court did not mention whether the nonmember insurer had ever physically entered the reservation, and gave no indication that it mattered. On the contrary, the Court rejected the insurer's insistence that it "must look to the off-reservation settlement activities" emphasizing instead that the "insured and injured parties … were tribal members who lived on the reservation; the accident occurred on the reservation; and the insurer [was] an off-reservation entity that sold a policy to a tribal member." *Id.* at 1075. It was for those reasons—not physical presence on tribal lands—that the insurer's conduct was "related to the reservation," distinguishing the case from others that rejected tribal jurisdiction over nonmembers that did not engage in any relevant "activities on the reservation." *Id.*

Grand Canyon Skywalk Development is similarly instructive. There, this

Court found a plausible basis for tribal court jurisdiction over a dispute with a nonmember entity that contracted with the tribe to develop and manage a tourist attraction, the Skywalk, on tribal land. *Grand Canyon Skywalk*, 715 F.3d at 1205. The Court did not consider whether the nonmember established a physical presence on tribal land. Instead, the determinative factor was that the "dispute arose out of an agreement related to the development, operations, and management of the Skywalk, an asset located in Indian country," such that the "dispute center[ed] on Hualapai trust land." *Id.* It was the nonmember's "intangible property right within [the] contract" directly related to tribal land—not any physical entry—that constituted conduct centered on the land sufficient to support tribal jurisdiction. *Id.* at 1204.

The Eighth Circuit also has rejected the suggestion that a nonmember's physical entry onto tribal land is a prerequisite to tribal jurisdiction. In *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877 (8th Cir. 2013), the nonmember, DISH Network Service ("DISH"), entered into a contract with a tribal member to provide satellite television service to his home on the Turtle Mountain Reservation. *Id.* at 880-81. After a dispute arose, DISH pursued litigation against the tribal member in state court; the tribal member then filed an action against DISH in tribal court, alleging abuse of process. *Id.* Seeking to enjoin the tribal court proceeding, DISH argued that "the lack of tribal jurisdiction [was] obvious because [the tribal member's] abuse of process allegation is a tort claim for behavior by DISH

done off tribal lands." *Id.* at 883-84. The Eighth Circuit rejected that argument without examining any potential physical entry by DISH, concluding that "[e]ven if the alleged abuse of process tort occurred off tribal lands, jurisdiction would not clearly be lacking in the tribal court because the tort claim arises out of and is intimately related to DISH's contract with [the tribal member] and that contract relates to activities on tribal land." *Id.* at 884.

Multiple federal district courts have likewise rejected the argument that a nonmember's physical presence on tribal land is necessary to tribal jurisdiction. For example, in *AT&T Corp. v. Oglala Sioux Tribe Util. Comm'n*, No. CIV 14-4150, 2015 U.S. Dist. LEXIS 129071 (D.S.D. Sept. 25, 2015), AT&T challenged the tribe's jurisdiction to enforce regulations on long-distance telephone carriers providing services to the reservation. The court noted that "AT&T has no physical presence on the Tribe's reservation land," but "under *Montana*, physical location is merely relevant, not dispositive." *Id.* at *16. Recognizing the distinction between physical presence and "activity" or "conduct" on tribal land, the court explained that the "focal point of *Montana* analysis is the location of the nonmember's activity or conduct, not the location of the nonmember him or herself," and "[c]ertainly a telecommunications company can enter a consensual relationship with a tribe or a tribal member or engage in an activity on reservation land without being physically present there." *Id.* (citing *DISH Network Service*, 725 F.3d at 884). Other federal district courts have reached

the same conclusion. *See Lexington Ins. Co. v. Mueller*, No. 5:22-cv-00015-JWH-KK, 2023 U.S. Dist. LEXIS 20019 (C.D. Cal. Feb. 3, 2023); Sprint *Communs. Co. L.P. v. Wynne*, 121 F. Supp. 3d 893 (D.S.D. 2015); *Heldt v. Payday Fin., LLC*, 12 F. Supp. 3d 1170 (D.S.D. 2014); *Brown v. Western Sky Fin., LLC*, 84 F. Supp. 3d 467, 479 (M.D.N.C. 2015); *FTC v. Payday Fin., LLC,* 935 F. Supp. 2d 926, 939 (D.S.D. 2013).

There is no dispute that the Insurers knowingly contracted to insure the Tribe, PME and their on-Reservation businesses and property through a program specifically marketed to Indian tribes for this purpose. 1-ER-5-7, 15. The Insurers now strive to recharacterize this arrangement as totally divorced from the Tribe's land, suggesting the parties' relationship just "happen[ed] to have a connection to tribal property." Aplt. Br. 44. They argue that "[a]fter 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. Entering into a property-insurance contract did not transport the insurers physically onto the reservation to protect tribal property from harm." Aplt. Br. 32. But the Insurers' self-serving resort to abstraction cannot elide the reality of the parties' relationship. Their contractual arrangement did not merely "happen to have a connection to tribal property"—its entire purpose was to insure the Tribe's and PME's property *on Tribal Land*. The Insurers agreed to bear the risk of physical and other damage to Tribal businesses and property *on Tribal Land*, and to

compensate the Tribe and PME if "carefully defined circumstances come to pass" *on Tribal Land*, causing damage to property and businesses *on Tribal Land*. And, of course, in exchange for bearing that risk, the Insurers gladly accepted millions of dollars in premiums generated through Tribal business activities *on Tribal Land*, thereby extracting significant economic value from on-Reservation activities. *Cf. Merrion*, 455 U.S. at 137 (recognizing a tribe has "general authority, as sovereign, to control economic activity within its jurisdiction" and to tax "persons or enterprises engaged in economic activities within that jurisdiction").

Under this Court's precedents, the Insurers' lack of physical presence on Tribal Lands does not guide the jurisdictional analysis. There can be no serious question that the Insurers engaged in conduct "center[ed] on" and "direct[ly] connect[ed] to" Tribal Land, *Grand Canyon Skywalk*, 715 F.3d at 1205; *Smith*, 434 F.3d at 1135, bringing them within the Tribe's jurisdiction.

C. There is No Presumption Against Tribal Jurisdiction Over the Insurers' Conduct Directly Connected to and Centered on Tribal Land

In addition to erroneously imposing a non-existent requirement of "physical presence" on Tribal land, the Insurers' arguments are premised on another key error: While the Insurers contend the Court must apply a "strong presumption" against tribal jurisdiction, Aplt. Br. 6; 17; 22-25, the reality is just the opposite. Because the Insurers entered into a contractual relationship with the Tribe that "centers on" Tribal Land, *Grand Canyon Skywalk*, 715 F.3d at 1205, and the Tribe and PME's claims arising out of

that relationship "bear some direct connection to Indian lands," *Smith*, 434 F.3d at 1135, the Tribal Court presumptively has jurisdiction over the claims.

The Insurers cite cases discussing a presumption against tribal jurisdiction over nonmembers, but avoid acknowledging that all of those cases concerned nonmembers whose conduct—unlike the Insurers—was not connected to tribal lands. The Supreme Court has stated that "[c]ivil jurisdiction over [nonmember] activities [on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *LaPlante*, 480 U.S. at 18. While the Court has indicated in some circumstances that assertion of tribal jurisdiction over nonmembers is "presumptively invalid," *Plains Commerce Bank*, 554 U.S. at 330 (cleaned up), it has only applied that principle to cases involving nonmember conduct on *non-Indian fee land*, *see id.*, while continuing to reaffirm that "tribes retain considerable control over nonmember conduct on tribal land." *Strate*, 520 U.S. at 454.

The Insurers emphasize *Plains Commerce Bank*, but as this Court has explained, that case "involved 'a non-Indian's sale of non-Indian fee land,' and thus does not control [a case] in which the conduct at issue occurred on tribal land." *Window Rock*, 861 F.3d 901 n.8. Following *Plains Commerce Bank*, this Court has steadfastly adhered to the traditional rule that civil jurisdiction over nonmember conduct directly connected to or centered on tribal lands presumptively lies in tribal courts. *See Water Wheel*, 642, F.3d at

811-12 & n.6 (citing *LaPlante*, 480 U.S. at 18 and *Merrion*, 455 U.S. at 146); *Grand Canyon Skywalk*, 715 F.3d at 1205 ("[A]lthough the main rule in *Montana v. United States* is that a tribal court lacks regulatory authority over the activities of non-Indians unless one of its two exceptions apply, this case is not *Montana*. *Montana* considered tribal jurisdiction over nonmember activities on *non-Indian* land, *held in fee simple*, within a reservation.") (emphasis in original); *Knighton*, 922 F.3d at 903-04 ("[A]s our caselaw has discussed at length, without evidence of a contrary intent by Congress, a tribe's power to regulate nonmember conduct on tribal land flows from its inherent power to exclude and is circumscribed only to the limited extent the circumstances in *Hicks*—significant state interests—are present.").

The Insurers' resort to a supposed presumption against tribal jurisdiction fails along with their attempt to manufacture a "physical presence" requirement that is nowhere to be found in the governing case law. Where, as here, the relevant nonmember conduct was "center[ed] on" or "direct[ly] connect[ed] to" Tribal Land, the traditional presumption of tribal jurisdiction controls. *Grand Canyon Skywalk*, 715 F.3d at 1205; *Smith*, 434 F.3d at 1135.

As further explained below, the Tribal Court's jurisdiction in this case is fully supported under either the *Montana* framework or the right-to-exclude doctrine.

III. THE TRIBE MAY EXERCISE JURISDICTION UNDER THE FIRST *MONTANA* EXCEPTION BECAUSE THE INSURERS ENTERED INTO A CONSENSUAL RELATIONSHIP WITH THE TRIBE DIRECTLY CONNECTED TO AND CENTERED ON TRIBAL LAND

A. The Insurers Entered Into a Consensual Relationship with the Tribe

The first *Montana* exception recognizes that a tribe may assert civil jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. "For purposes of determining whether a consensual relationship exists under *Montana*'s first exception, consent may be established 'expressly or by the nonmember's actions.'" *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce Bank*, 554 U.S. at 337) (cleaned up). "*Montana*'s consensual relationship exception requires that 'the regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.'" *Knighton*, 922 F.3d at 904 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001)). In the context of tribal court subject matter jurisdiction, the requisite nexus exists where, as here, the claims at issue arise from the contractual relationship between the tribe and the nonmember, and the "claims bear some connection to Indian lands." *Smith*, 434 F.3d at 1135; *see also Grand Canyon Skywalk*, 715 F.3d at 1205.

Ultimately, in assessing tribal jurisdiction under the first *Montana* exception, the Court must "consider the circumstances and whether under those circumstances the non-Indian defendant should have reasonably

anticipated that [its] interactions might 'trigger' tribal authority." *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce Bank*, 554 U.S. at 338). "Nonmembers of a tribe who choose to affiliate with the Indians or their tribes [in a consensual relationship] may anticipate tribal jurisdiction when their contracts affect the tribe or its members." *Smith*, 434 F.3d at 1138.

The relationship between the Insurers and the Tribe plainly satisfies the first *Montana* exception. The Insurers knowingly entered into insurance contracts with the Tribe and PME over multiple years. They issued the Policies pursuant a program, the TPIP, specifically marketed to Indian tribes by Tribal First—"the largest provider of insurance solutions to Native America," 2-ER-215, and the Insurers fully understood they were contracting with the Tribe and PME. 2-ER-263, 288. The Policies were directly and intimately connected to the Tribe's lands and valuable "asset[s] located in Indian country," *Grand Canyon Skywalk*, 715 F.3d at 1205, covering the risk of physical damage and other losses to tribal businesses and property located on Tribal Land. And, of course, for years until the Tribe and PME submitted claims for coverage, the Insurers reaped millions of dollars in premiums paid with funds generated by the Tribe's on-Reservation business activities. In short, the Insurers undisputedly entered a consensual commercial relationship directly with the Tribe, centered on and directly "affect[ing] the tribe" and its lands. *Smith*, 434 F.3d at 1138. Under all the circumstances, there can be no serious question that the Insurers reasonably should have anticipated tribal jurisdiction.

B. Numerous Cases Support Tribal Jurisdiction Over Nonmember Insurers Contracting with Tribes and Tribal Members

This Court and others have readily found plausible grounds for tribal civil jurisdiction over nonmember insurers in circumstances analogous to the facts of this case. While the Insurers characterize the exercise of tribal jurisdiction here as "unprecedented," Aplt. Br. 2, both this Court and the Supreme Court have specifically countenanced the exercise of tribal court jurisdiction over nonmember insurers that insured tribal members or property on tribal lands. This Court discussed two of those seminal Supreme Court cases in *Smith*, noting that "in both cases the Court declined to hold that the tribal courts lacked jurisdiction over [the] nonmember defendants." *Smith*, 434 F.3d at 1139 (citing *LaPlante*, 480 U.S. at 9 and *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)). *LaPlante* arose from a tribal court action by a tribal member against his employer, the Wellman Ranch, which was located on the reservation and owned by tribal members, for injuries caused by an accident on the reservation. *See* 480 U.S. at 11. The plaintiff also asserted claims in tribal court against the Wellman Ranch's insurer, Iowa Mutual. *Id.* Like the Insurers here, there was no indication that Iowa Mutual physically entered the reservation or engaged in any on-reservation conduct other than issuing the insurance policy to the Wellman Ranch. The Court rejected the insurer's contention that federal statutes divested the tribe of jurisdiction, reemphasizing that "[t]ribal authority over the activities of non-Indians on reservation lands is

an important part of tribal sovereignty," and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18. And "'[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence is that the sovereign power remains intact.'" *Id.* (quoting *Merrion*, 455 U.S. at 149 n.14)) (cleaned up).

This Court followed *LaPlante* in *Allstate* to reach a similar outcome on very similar facts. *Allstate* concerned a tribal court coverage action against an off-reservation insurer, commenced after tribal members were killed in an accident on a tribal road. *Allstate*, 191 F.3d at 1072. The parties settled the coverage claim in tribal court, but the insurer contended the tribal court lacked jurisdiction over a remaining claim for bad-faith refusal to settle, asserting that claim "arose … at Allstate's off-reservation offices, where it allegedly committed insurance bad faith." *Id.* at 1074. This Court rejected that argument as "foreclosed by the Supreme Court's holding in" *LaPlante*. *Id.* Emphasizing that "Allstate's conduct"—most centrally its sale of an insurance policy to a tribal member residing on the reservation—"is related to the reservation," the Court concluded that the "authorities … suggest that the estates' bad faith claim should probably be considered to have arisen on the reservation." *Id.* at 1075. Tribal jurisdiction was, accordingly, sufficiently plausible that the insurer was required to exhaust its jurisdictional challenges in tribal court. *Id.* at 1075-76.

The Central District of California recently confirmed the jurisdiction of another tribal court over Lexington and other insurers in a case very similar to this one. *See Lexington Ins. Co.*, 2023 U.S. Dist. LEXIS 20019, at *24-29. That case arose from a similar coverage action involving similar policies Lexington issued through the TPIP. *See id.* at *5. There too, Lexington argued that tribal jurisdiction "requires physical presence on tribal land." *Id.* at *26. The district court rejected that argument, explaining that this Court's precedents "do not require physical presence," and that Lexington "surely conducted activity on tribal land by providing insurance to the Tribe." *Id.* at *26-27 (citing *Water Wheel*, 642 F.3d at 812 and *Grand Canyon Skywalk*, 715 F.3d at 1204).

The decision in *State Farm Ins. Cos. v. Turtle Mt. Fleet Farm LLC*, No. 1:12-cv-00094, 2014 U.S. Dist. LEXIS 65748 (D.N.D. May 12, 2014) is similarly instructive. There, State Farm challenged tribal court jurisdiction over a coverage claim arising from a policy insuring a tribal member's home on the Turtle Mountain Indian Reservation *See id.* at *1-4. State Farm contended that "any acts that might give rise to a claim against it occurred off the reservation." *Id.* at *24. The court rejected that argument, explaining that "the focus for purposes of the first *Montana* exception … is not limited to where the conduct necessary to establish a particular element of a claim for breach of contract or tort took place," but rather on "whether there is a sufficient nexus between the claims being asserted and the consensual relationship." *Id.* at 29. Because "State Farm entered into an agreement to

provide property damage and loss coverage for a residence owned by tribal members located on the Turtle Mountain reservation," the court concluded this "was a sufficient consensual relationship with respect to an activity or matter occurring on the reservation to invoke the first *Montana* exception." *Id.* at *31.

The Insurers contend that *Allstate* and other decisions cited by the Tribe are inapposite because they arose in the context of the requirement for nonmembers to exhaust tribal remedies before challenging tribal jurisdiction in federal court. *See Allstate*, 191 F.3d at 1073; Aplt. Br. 37. But that attempt to distinguish these cases fails. Exhaustion of tribal remedies is required unless it is "plain that the tribal court lacks jurisdiction." *Allstate*, 191 F.3d at 1072. Thus, whenever a nonmember seeks review of tribal jurisdiction in federal court without first exhausting tribal remedies, the doctrine requires the federal court to rule only on the threshold question of whether there is a plausible or "colorable" basis for tribal jurisdiction. *Philip Morris United States v. King Mt. Tobacco Co.*, 569 F.3d 932, 935 (9th Cir. 2009). As a result, many of the leading cases on tribal jurisdiction are "exhaustion" cases simply because of the procedural posture in which they arise. But aside from limiting federal-court review in the exhaustion context to plausible grounds for jurisdiction, the courts have given no indication that the standards for analyzing tribal jurisdiction are any different after exhaustion of tribal remedies is complete. And the Insurers have not cited any case in which a federal court found plausible grounds

for tribal jurisdiction in the exhaustion context, then rejected tribal jurisdiction on subsequent review after exhaustion.

Importantly, exhaustion can be excused where it is "plain" that the tribal court does not "have colorable jurisdiction" over the nonmember, and courts sometimes find a plain lack of jurisdiction before exhaustion has occurred. *Id*. If, as the Insurers contend, assertion of tribal court jurisdiction over a nonmember insurer that issued an insurance policy to a tribe, insuring on-reservation property and activities, were truly "unprecedented" or contrary to controlling law, Aplt. Br. 2, the *Allstate* court surely would have found a "plain" lack of tribal jurisdiction and would not have remanded for a futile exhaustion analysis. It did not do so, and its analysis makes perfectly clear that the insurer's lack of physical presence on the reservation—the crux of the Insurers' arguments on appeal—did not vitiate tribal court jurisdiction. *See Allstate*, 191 F.3d at 1075.

The Insurers also argue this Court should discard *Allstate* because it supposedly predates Supreme Court cases that have "clarified that *Montana* depends on 'nonmember *conduct* inside the reservation' that threatens sovereign interests." Aplt. Br. 39 (quoting *Plains Commerce Bank*, 554 U.S. at 332). But as explained above, this Court has repeatedly affirmed tribal jurisdiction over nonmembers in various contexts after *Plains Commerce Bank*, making clear that "*Plains Commerce Bank* involved 'a non-Indian's sale of non-Indian fee land,' and thus does not control [a case] in

which the conduct at issue occurred on tribal land." *Window Rock*, 861 F.3d at 901 n.8 (cleaned up). *Plains Commerce Bank* did not change any of the principles governing analysis of the present case under Ninth Circuit law.

C. The Cases Cited by the Insurers are Inapposite

The Insurers cite several inapposite cases in which courts rejected tribal civil jurisdiction over nonmembers under circumstances materially different from those present here.

Although the Insurers rely on *Employers Mutual Casualty Co. v. McPaul*, *see* Aplt. Br. 65, that case is wholly inapposite. In *McPaul*, a nonmember insurer issued a general liability policy to two non-tribal corporate entities located outside Indian country. *See Branch*, 381 F. Supp. 3d at 1145. Those entities hired non-tribal subcontractors who caused a gas leak while working within the Navajo Nation reservation. *See id.* The tribe sued the subcontractors and the insurer in tribal court, but the insurer had not only "never set foot within the tribe's reservation," it "never contracted with any tribal members or organizations, and never expressly directed any activity within the reservation's confines." *Id.* On appeal, this Court declined to recognize tribal jurisdiction because the "insurance contracts, which do not mention liability arising from activities on the reservation, bear no 'direct connection to tribal lands.'" *McPaul*, 804 Fed. App'x at 757 (quoting *Knighton*, 922 F.3d at 902).

Here, the Insurers issued the Policies directly to the Tribe and PME specifically to cover losses to tribal property resulting from "activity within

the reservation's confines." *Id.* The Policies are inextricably connected to Tribal Land, and tribal jurisdiction is accordingly appropriate. In fact, *McPaul* supports the Tribe's position—not the Insurers'—because it confirms that tribal jurisdiction does not rest on a nonmember's physical presence on the Reservation, but rather nonmember conduct with a "direct connection to tribal lands." *Id.* (cleaned up).

The Insurers cite several cases from other circuits rejecting tribal jurisdiction over nonmembers. Those cases do not bind this Court, and are also distinguishable. *Stifel v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015), arose from a dispute related to bond financing for a tribal project. *See id.* at 188-89. Holding the tribe lacked jurisdiction over the nonmembers, the court emphasized that the parties' agreements included provisions under which the tribe "consented to the jurisdiction of the Wisconsin courts (federal or state) *to the exclusion of any tribal courts*." *Id.* at 198 (emphasis in original). And with respect to the *Montana* analysis, the court concluded the action in tribal court did not have a nexus to the nonmembers' on-reservation conduct because it sought to void various of the bond-related agreements rather than "seek[ing] redress for any of Stifel's consensual activities on tribal land." *Id.* at 208. Here, in contrast, the Tribe seeks to enforce the parties' consensual contract that is directly connected to Tribal Land.

Jackson v. Payday Financial, LLC, 764 F.3d 765 (7th Cir. 2014), likewise provides no support for the Insurers. That case arose from state-court

claims by nonmembers alleging violations of Illinois civil and criminal statutes in connection with loans issued by entities affiliated with a tribal member. The Seventh Circuit rejected the exercise of tribal jurisdiction primarily because while the loan documents purported to require arbitration on the tribe's reservation, the "arbitral mechanism detailed in the agreement did not exist." *Id.* at 768. The first *Montana* exception did not apply, the court concluded, because the nonmember plaintiffs' conduct bore no direct connection to tribal lands. *See id.* at 782. *Jackson* is fundamentally different from this case.

The Insurers cite *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe*, 609 F.3d 927, 940-41 (8th Cir. 2010), *cert. denied*, 562 U.S. 1179 (2011), in support of their argument that physical entry on tribal lands is required for tribal court jurisdiction. But that case, which involved a claim of conversion by a non-member that occurred outside tribal lands, specifically recognized that the first *Montana* exception could support tribal jurisdiction if the tribe could show "the conversion claim has a sufficient nexus to the consensual [contractual] relationship between" a tribal member and the nonmember defendant. *Id.* at 941. The Eighth Circuit remanded the case for the district court to analyze that question in the first instance. *Id.* The district court held on remand that the tribe failed to carry its evidentiary burden to prove the basis for jurisdiction under the first *Montana* exception not because of any rigid "physical entry" requirement, but because the record still did not demonstrate "what portion of the

allegedly converted funds may relate to the" tortious on-reservation conduct by Attorney's Process that supported tribal jurisdiction over other claims. *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 809 F. Supp. 2d 916, 930-31 (N.D. Iowa 2011). The courts' analysis confirms that physical entry onto tribal lands is not required to support tribal jurisdiction if the record shows the nonmember's conduct bears a "sufficient nexus" to a consensual relationship involving tribal lands. *See DISH Network*, 725 F.3d at 885 (distinguishing *Attorney's Process*, as it "is not 'plain' that a tribal court lacks … jurisdiction over tort claims closely related to contractual relationships between Indians and non Indians on matters occurring on tribal lands").

Finally, the Insurers cite *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007), contending it holds that "general connections between a nonmember defendant and a tribe or its members are not enough to support tribal-court jurisdiction." Aplt. Br. 36-37. *MacArthur* does not stand for this broad proposition. *MacArthur* arose from employment-related claims against San Juan County, Utah, which operated a health clinic located on non-Indian "fee land owned by the State of Utah." *Id.* at 1061. The Tenth Circuit acknowledged that the first *Montana* exception *could* support tribal civil jurisdiction over a nonmember "based on the existence of a consensual employment relationship … between a member of the tribe and a nonmember individual or entity employing the member within the physical confines of the reservation," *id.* at 1071-72, but held that the

operative relationship in that case was not among private parties—it was between members of the tribe and "a political subdivision of the State of Utah," which entered into the relationships in the "exercise of the [State's] police power." *Id.* at 1072-74. These unique circumstances brought the case within the ambit of *Hicks*—because the relevant relationships were not "*private* consensual relationships," but subject instead to a compelling state interest in exercising the state's police power, *Montana* did not support tribal jurisdiction. *Id.* at 1074.

D. The Insurers Had Every Reason to Anticipate Tribal Jurisdiction

The Insurers contend the "consent" element of the first *Montana* exception is not satisfied because they supposedly "would not have reasonably anticipated" being haled into Tribal Court. Aplt. Br. 42. They base this argument on two premises: (1) the insurance industry is generally subject to state law; and (2) "[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." Aplt. Br. 43. The Insurers' argument fails for several reasons.

At the threshold, the Court must be clear that the "test" of whether a nonmember reasonably should anticipate tribal court jurisdiction "is not subjective." *FMC*, 942 F.3d at 932. "Rather it is whether under the circumstances the non-Indian defendant should have reasonably anticipated that its interactions might trigger tribal authority." *Id.* (citing *Plains Commerce Bank*, 544 U.S. at 337) (cleaned up). Against that objective

standard, the Insurers' arguments do not withstand scrutiny.

The Insurers contend they could not anticipate tribal jurisdiction because the Tribe has not enacted specific regulations governing the insurance industry, which is typically regulated by state law. But choice of law and jurisdiction are separate and distinct concepts. *See Paccar Int'l v. Commerce Bank of Kuwait, S.A.K.*, 757 F.2d 1058, 1063 n.6 (9th Cir. 1985). As explained *infra* 57-58, a tribe's adjudicatory jurisdiction over nonmembers does not turn on the existence of positive tribal law specifically governing the nonmember conduct at issue; the Insurers fail to cite a single case suggesting otherwise. And as the district court noted, the Policies included a "Service of Suit" clause under which the Insurers consented to the jurisdiction of any "Court of competent jurisdiction within the United States," without limitation or reference to any particular choice of law. 1-ER-18. "By insuring tribal business located on tribal land, and in doing business with the Suquamish Tribe, an entity with its own legal system and courts of competent jurisdiction, the Insurers should reasonably have anticipated the possibility that any disputes arising under the policies between the Tribe, PME, and [the] Insurers would fall within the jurisdiction of the tribal courts." 1-ER-18-19.

The Insurers' second argument appears to be that they could not reasonably have anticipated assertion of tribal jurisdiction here because the Tribe supposedly "reach[ed] outside its borders" to purchase the Policies, and the Insurers' conduct supposedly occurred exclusively off the

Reservation. *See* Aplt. Br. 42. Rather than acknowledge that they voluntarily entered into multimillion-dollar contracts to insure Tribal businesses and property on Tribal Lands, the Insurers pretend they had no agency in the matter, asserting they "simply agreed to insure any qualifying tribe or tribal entity" as part of the TPIP, and the Tribe simply "happened to buy a policy through that program." Aplt. Br. 3.

The Insurers' fanciful retelling of the facts—in which their contract with the Tribe was mere serendipity leading them to be shockingly "dragged into Suquamish Tribal Court"—is inconsistent with the record evidence. For years the Insurers contracted directly with the Tribe through the TPIP and Tribal First, which focuses "exclusively on meeting the insurance and risk management needs of tribal governments and enterprises." 1-ER-5; 2-ER-215. The Insurers did not unwittingly stumble into a contractual relationship with the Tribe, and they could not reasonably be surprised by the assertion of tribal adjudicatory jurisdiction over claims arising from Policies.

This Court has stated that "[n]onmembers of a tribe who choose to affiliate with the Indians or their tribes [in a consensual relationship] may anticipate tribal jurisdiction when their contracts affect the tribe or its members." *Smith*, 434 F.3d at 1138. Even the Supreme Court in *Plains Commerce Bank* stated that the "Bank may reasonably have anticipated that its various commercial dealings with the [tribally-affiliated] Longs could trigger tribal authority to regulate those transactions." *Plains Commerce*

Bank, 554 U.S. at 338. And as explained above, multiple decisions of this Court (*Allstate*), the Supreme Court (*LaPlante* and *National Farmers Union*), and other federal courts (*e.g., State Farm*) have upheld or at least identified plausible grounds for tribal jurisdiction over nonmember insurers on facts materially identical to the facts of this case.

What's more, before issuing the Policies in this case, Lexington—the lead Insurer—was held subject to the jurisdiction of the tribal court of the Confederated Tribes of the Chehalis Reservation, based on application of *Allstate* and other Ninth Circuit precedent to Lexington's issuance of a property insurance policy to an on-reservation business. 7-SER-5-15. Yet Lexington proceeded to enter into the Policies at issue here *after* it had been held subject to the jurisdiction of the Chehalis Tribal Court. Surely the Insurers reasonably could have anticipated that entering into exactly the same type of relationship with another Indian tribe in this Circuit might lead to the same result.

The Insurers are sophisticated commercial parties who knowingly entered a contractual relationship with the Tribe and PME to insure on-reservation property and businesses through a specialized insurance program specifically marketed to Indian Tribes. They absolutely should have anticipated that this conduct "could trigger tribal authority," based not only on the governing case law but on *their own actual experience in tribal courts*. Had the Insurers wished to avoid the potential for tribal court jurisdiction, they easily could have bargained for forum-selection or

arbitration clauses in the Policies. *See Plains Commerce Bank*, 554 U.S. at 344 (Ginsburg, J., concurring) ("Had the Bank wanted to avoid responding in tribal court … [t]he Bank could have included forum selection, choice-of-law or arbitration clauses in its agreements."); *United States ex rel. Steele v. Turn Key Gaming*, 135 F.3d 1249, 1250 n.1 (noting tribal court dismissed action against nonmember based on forum-selection clause requiring litigation in federal court). They did not. Instead, they issued Policies containing a broad "Service of Suit" clause subjecting them to the jurisdiction of "any court of competent jurisdiction." 3-ER-399; 4-ER-634; 4-ER-859; 5-ER-1094. The Insurers have no objective basis for claiming "surprise."

E. The Insurers' Conduct Need Not Implicate the Tribe's Inherent Sovereign Authority to Satisfy the First *Montana* Exception, But Any Such Requirement is Satisfied Regardless

The Insurers assert that *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 'even 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.'" Aplt. Br. 51 (quoting *Plains Commerce Bank*, 554 U.S. at 337). The Insurers are incorrect—this Court has never read *Plains Commerce Bank* as imposing new conditions on the *Montana* exceptions. And even if such a requirement were imposed, the circumstances here would satisfy it.

The Insurers' argument is based on *dicta* from *Plains Commerce Bank*,

which in any event does "not control [a case] in which the conduct at issue occurred on tribal land." *Window Rock*, 861 F.3d 901 n.8. The Fifth Circuit in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians* examined in detail and rejected the very same argument the Insurers make. The court in *Dolgencorp* explained the logical flaws in purportedly requiring "an additional showing that one specific relationship" between a nonmember and a tribe, "in itself, intrudes on the internal relations of the tribe or threatens self rule." 746 F.3d at 175. "It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact," the court explained. *Id.* "On the other hand, at a higher level of generality, the ability to regulate the working conditions … of tribe members employed on reservation land is plainly central to the tribe's power of self-government." *Id.* In other words, accepting the Insurers' position would narrow the *Montana* exceptions to the point of non-existence, while ignoring tribes' sovereign interests in systemic regulation. But "[n]othing in *Plains Commerce* requires a focus on the highly specific rather than the general." *Id.* The Supreme Court granted the non-member's petition for certiorari following the Fifth Circuit's decision, and affirmed the judgment. *Dollar Gen. Corp.*, 579 U.S. at 545.

This Court, like the Fifth Circuit, has declined to read *Plains Commerce Bank* as imposing the additional requirements the Insurers advocate. *See generally FMC*, 942 F.3d at 944 (affirming tribal jurisdiction under both *Montana* exceptions without reference to purported additional

requirements under *Plains Commerce Bank*). The losing nonmember in *FMC Corp.* sought certiorari, specifically asking the Supreme Court to decide the question whether "the Ninth Circuit correctly holds that tribal jurisdiction over nonmembers is established whenever a *Montana* exception is met, or whether … a court must also determine that the exercise of such jurisdiction stems from the tribe's inherent authority to set conditions on entry, preserve tribal self-government, or control internal relations."[6] The Supreme Court denied the petition. *See FMC Corp.*, 141 S. Ct. 1046 (2021).[7]

In short, this Court plainly has rejected the Insurers' contention that *Plains Commerce Bank* introduced new requirements into the *Montana* analysis, and the Supreme Court has declined express invitations to impose such requirements. To read *dicta* in *Plains Commerce Bank* as implicitly imposing new limits on tribal jurisdiction—particularly where the Supreme Court itself has chosen not to do so—would "impermissibly broaden *Montana*'s scope beyond what any precedent requires and restrain tribal sovereign authority despite Congress's clearly stated federal interest in promoting tribal self-government." *Water Wheel*, 642 F.3d at 813. This the

[6] *FMC Corp. v. Shoshone-Bannock Tribes,* Petition for a Writ of Certiorari at ii, *available at* https://www.supremecourt.gov/DocketPDF/19/19-1143/138231/20200316121553268_2020-03-16%20FINAL%20FMC%20cert%20petition%20with%20apppendix.pdf.

[7] The Insurers point to *Kodiak Oil & Gas (USA) Inc.*, 932 F.3d 1125 (8th Cir. 2019) in support of the proposition that a "consensual relationship alone is not enough" to established tribal jurisdiction under the first *Montana* exception. Aplt. Br. 53. But *Kodiak* arose in a context where "[f]ederal regulations control[led] nearly every aspect" of the parties' dispute, such that "the entire relationship" between the tribe and nonmembers was "mediated by the federal government." *Kodiak*, 932 F.3d at 1136, 1138. That is not the case here.

Court should not do.

In any event, although this Court's precedents do not require such a showing as a prerequisite to tribal jurisdiction, the record demonstrates that the Insurers' conduct here does implicate the Tribe's sovereign authority to "set conditions on entry" and to "preserve tribal self-government." The Insurers' conduct directly implicates the Tribe's right to exclude, as explained herein. The Tribe's ability to adjudicate significant contract disputes concerning the sale of insurance of Tribal property on Tribal lands impacts the Tribe's ability to self-govern. And as stated in the First Amended Complaint in the Tribal Court, the Insurers' conduct threatens the Tribe's ability to provide government services to its members, because denial of coverage under the Policies will jeopardize the Tribe's ability to maintain those services, a vital function of the Tribal government. 2-ER-225-29, 238-46.

IV. THE TRIBE MAY EXERCISE JURISDICTION PURSUANT TO ITS INHERENT SOVEREIGN RIGHT TO EXCLUDE BECAUSE THE INSURERS ENGAGED IN CONDUCT DIRECTLY CONNECTED TO AND CENTERED ON TRIBAL LAND

As the foregoing makes clear, because the Policies are "direct[ly] connect[ed] to" and "center[ed] on" the Tribe's Reservation lands, the Tribe may exercise adjudicatory jurisdiction over the claims against the Insurers pursuant to the Tribe's inherent sovereign authority to exclude the Insurers, independent of the *Montana* exceptions. *Smith*, 434 F.3d at 1135; *Grand Canyon Skywalk Dev.*, 715 F.3d at 1205.

Where, as here, a nonmember engaged in conduct on or affecting lands to which a tribe holds the sovereign right to exclude, the analysis of tribal civil jurisdiction is straightforward: "[W]ithout evidence of a contrary intent by Congress, a tribe's power to regulate nonmember conduct on tribal land flows from its inherent power to exclude and is circumscribed only to the limited extent that the circumstances in *Hicks*—significant state interests—are present." *Knighton*, 922 F.3d at 903-04; *see also Window Rock*, 861 F.3d at 906 (finding tribal jurisdiction plausible "because the conduct at issue here occurred on tribal land over which the Navajo Nation has the right to exclude nonmembers, and because state criminal law enforcement interests are not present"); *Water Wheel*, 642 F.3d at 816 (holding tribe had adjudicatory jurisdiction where the "land is tribal land and the tribe has regulatory jurisdiction over" nonmember conduct on that land).

Here, the Tribe retains its sovereign power to exclude nonmembers from Tribal Land. That power encompasses authority to exclude the Insurers from issuing insurance policies to the Tribe or its members for property or businesses on Tribal Land. *See Grand Canyon Skywalk*, 715 F.3d at 1204 (tribe's right to exclude applies to nonmember's "intangible property right within a contract" related to tribal lands). "With the power to exclude comes the lesser power to regulate," and "[w]here a tribe has regulatory jurisdiction and interests," it also may exercise adjudicatory jurisdiction. *Grand Canyon Skywalk*, 715 F.3d at 1205 (citing *Water Wheel*, 642 F.3d at 814-16). There are no relevant state interests that might call for

analysis under *Hicks*. Tribal jurisdiction is therefore appropriate under the Tribe's inherent right to exclude.

V. THE INSURERS' REMAINING ARGUMENTS AGAINST TRIBAL JURISDCITION FAIL

A. Lack of Positive Tribal Law Regulating the Insurance Industry is Irrelevant

The Insurers suggest the Tribe cannot exercise adjudicatory jurisdiction because the "Suquamish Tribe does not regulate insurance at all." Aplt. Br. 44. This Court has rejected the same argument before and should do so again.

In *Knighton* the Court explained that its "task is to outline the boundaries of the inherent sovereign power retained by" the Tribe, which is a matter of federal law external to the Tribe, not internal positive Tribal law. *Knighton*, 922 F.3d at 906. "Once the authority to regulate nonmember conduct exists, whether from *Water Wheel* or from *Montana*," then "it makes no difference whether the Tribe adjudicates" the nonmember's conduct according to positive law like written regulations, or through some other source of law such as "tort law." *Id.* at 907; *see Attorney's Process*, 609 F.3d at 938 ("[I]f the Tribe retains the power under *Montana* to regulate [nonmember] conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through tort claims."); *Dolgencorp*, 746 F.3d at 173 (same); *State Farm*, 2014 U.S. Dist. LEXIS 65748, at *33-35 ("State Farm has not presented any reason why the Tribe would not have the right to regulate the economic activity of providing insurance to tribal members on the reservation, and "if the Tribe retains inherent

power under *Montana* to regulate the conduct at issue," "precisely tailored regulations" are not required.).

The Tribe's claims here are for breach of contract, not violation of some insurance regulation. Federal courts routinely affirm tribal courts' jurisdiction over such claims, as explained above. Where, as here, a nonmember engages in conduct that brings the nonmember within the scope of tribal authority, courts do not concern themselves with whether that authority is exercised through tribal statutes or ordinances, tort law, or as here, claims for breach of contract in tribal court.

B. The Insurers' Forum Preferences Are Irrelevant

In their effort to avoid Tribal jurisdiction, the Insurers delve into the merits of the underlying coverage dispute, suggesting the Tribe and PME's claims necessarily would fail in other forums. *See* Aplt. Br. 48-49. Yet in virtually the same breath that they insinuate the Tribe's presumed "prefer[ence] to litigate its claims in its own courts" is somehow improper, the Insurers go on to ask the Court to honor their own naked preference for a purportedly more advantageous forum, based primarily on unsupported

innuendo suggesting the Tribal Court is not a fair forum.[8] Aplt. Br. 48-51.

To be clear, the merits of the underlying dispute and the parties' respective forum preferences are all irrelevant to the Court's analysis, and the Insurers' concerns about due process in the Tribal Court are not a reason to second-guess Tribal jurisdiction. Acknowledging that the Indian Civil Rights Act "requires tribes to provide 'due process' generally," the Insurers nevertheless complain that they "do not possess their standard constitutional rights in tribal court," and that this "Court reviews due-process challenges to tribal-court judgments 'with deference to tribal customs and practices.'" Aplt. Br. 50 (citing 25 U.S.C. § 1302(a)(8) and *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1143 (9th Cir. 2001)). But the Insurers miss the point of the very authorities they cite. Their vague concerns about due process could be asserted in every case involving tribal adjudicatory jurisdiction over nonmembers, yet no court has ever suggested these sorts of concerns vitiate tribal jurisdiction. On the contrary, the Insurers' own citations make clear that nonmembers do have due

[8] The Insurers claim 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." Aplt. Br. 48-49 (citing *Hill & Stout, PLLC v. Mutual of Enumclaw Ins. Co.*, 515 P.3d 525, 534-35 (Wash. 2022)). But the Insurers decline to mention that the policy at issue in *Hill & Stout* included a "virus exclusion," which was central to the court's conclusion that there was no coverage for losses caused by COVID. *See Hill & Stout*, 515 P.3d at 528-29. Here, the operative Policies *did not* contain such an exclusion for viruses or communicable diseases. Policies issued by the Insurers in earlier years did include a virus exclusion, but it was removed starting in the 2017-18 coverage period. *Compare* 2-ER-234-35 ¶¶ 23-24 *with* 3-ER-386, 4-ER-846. The distinction will be of great significance when the parties reach the merits, but the merits are not before this Court.

process rights in tribal court under federal law, and those rights can be enforced through collateral review of tribal court judgments. *See generally Bird*, 255 F.3d at 1141; *FMC*, 942 F.3d at 942. Here, the Insurers have not raised any cognizable due process claim and cannot do so, because the Tribal Court has not yet adjudicated the underlying dispute. Their purported due process concerns are based on nothing more than condescending generalizations about the professionalism and fairness of tribal courts, which this Court has roundly rejected, noting that "empirical studies demonstrate that tribal courts are even-handed in dispensing justice to nonmembers," and that the Court's "[o]wn experience in reviewing tribal court decisions" confirms that "contrary to the contention of [the losing nonmember], tribal courts do not treat nonmembers unfairly." *FMC Corp.*, 942 F.3d at 944.

This Court should reject the Insurers' purported concerns about due process, fairness, and the merits of the underlying dispute as both irrelevant and unsupported.

C. Recognition of Tribal Jurisdiction Here Will Not "Swallow the Rule" of *Montana*

Predictably, the Insurers try to manufacture a "floodgates" argument, suggesting that affirmance of the Tribal Court's jurisdiction in this case would "swallow the general rule" against tribal jurisdiction over nonmembers. Aplt. Br. 18-19. Proceeding from the straw-man premise that the district court's decision and the Tribe's position are based simply on the notion that "a tribe's decision to do business with off-reservation

nonmembers [is] enough" to establish tribal jurisdiction, *id.*, the Insurers go on to assert that recognition of tribal jurisdiction in this case would mean that "anyone else who engages in off-reservation transactions with tribal members could be subject to tribal regulation." *Id.* at 40.

The district court saw through this specious argument, *see* 1-ER-19-20, and this Court likewise should not be swayed by the Insurers' hyperbole. The specific circumstances of this case fully support tribal jurisdiction, and they are not circumstances that exist whenever a tribe decides "to do business with off-reservation nonmembers," as the Insurers suggest. Apt. Br. 18-19. The Insurers did not unwittingly stumble into a contractual arrangement that simply "happen[ed] to have a connection to tribal property." *Id.* at 44. They knowingly entered into insurance contracts with the Tribe and PME over a course of multiple years, agreeing to insure Tribal businesses and property located on Tribal Land. The parties' entire contractual relationship and their dispute "centers on [Tribal] land," it relates directly to the insurance (and therefore necessarily the operation, management, and protection) of Tribal property and Tribal businesses—valuable "asset[s] located in Indian country," and the "potential economic impact" to the Tribe of the Insurers' refusal to honor their contractual obligations is grave. *Grand Canyon Skywalk*, 715 F.3d at 1206. These circumstances not only fit comfortably within this Court's precedents affirming tribal jurisdiction, but they are circumstances very particular to the context of commercial property insurance—not circumstances that arise

whenever a tribe "reach[es] out to buy just about any good or service" from nonmembers located beyond reservation boundaries. Aplt. Br. 19. Far from the "dramatic expansion of the limited jurisdiction of tribal courts" of which the Insurers complain, Aplt. Br. 1, the district court's decision here was well within the bounds of long-established precedent, applied to sophisticated commercial parties who made a specific, knowing decision to insure tribal property and tribal businesses on tribal land. The Court should readily affirm the district court's judgment, and there is no reason to suspect that doing so would "swallow the rule" of *Montana* or otherwise broaden the scope of tribal jurisdiction over nonmembers in any significant way.

CONCLUSION

For the foregoing reasons, the Tribe respectfully urges the Court to affirm the judgment of the district court in its entirety.

Respectfully submitted this 10th day of March, 2023.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Suquamish Tribe states that this case raises issues closely related to those raised in *Lexington Insurance Co. v. Mueller, et al.*, Nos. 23-55144, 23-55193, currently pending in this Court.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This brief complies with the type-volume limitation of Circuit Rule 32-1(a) because it contains 13,887 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Book Antiqua font.

Dated this 10th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 10, 2023.

I certify that all participants in the case are registered users and that service will be accomplished by the appellate CM/ECF system.

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