Nos. 23-55144, 23-55193

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEXINGTON INSURANCE COMPANY,

Plaintiff-Appellant-Cross-Appellee,

v.

MARTIN A. MUELLER and DOUG WELMAS,

Defendants-Appellees-Cross-Appellants.

On Cross-Appeals from the United States District Court
for the Central District of California
Case No. 5:22-CV-00015 | The Honorable John W. Holcomb

LEXINGTON INSURANCE COMPANY'S RESPONSE AND REPLY BRIEF

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INTRODUCTION

The Supreme Court has repeatedly made clear that "tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A–1 Contractors*, 520 U.S. 438, 445 (1997). The tribal-court action here—COVID-19-related insurance claims brought by the Cabazon Band against an off-reservation insurer that never set foot on the Cabazon Reservation—is not one of those limited circumstances. Tribal jurisdiction requires nonmember conduct occurring on the reservation, as well as a dispute that implicates inherent tribal sovereignty.

To get around this requirement, the Cabazon judges first challenge the long-settled manner of litigating tribal-court jurisdiction in federal court. The Supreme Court and this Court have routinely entertained actions against tribal judges, a practice this Court has grounded in the equitable principles of *Ex parte Young*, 209 U.S. 123 (1908). The Cabazon judges argue that *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021), impliedly overturned decades of precedent in the tribal context. But *Whole Woman's Health* does not conflict, much less irreconcilably so, with

the many decisions allowing tribal judges to be named as defendants in actions challenging tribal-court jurisdiction.

The Supreme Court in *Whole Women's Health* confronted a challenge to a law's constitutionality (which judges have no institutional stake in defending) rather than a challenge to a court's lack of jurisdiction (which judges do). The decision also focused on *state* judges who are competent to resolve the constitutionality of state laws, not *tribal* judges who operate outside the Constitution's structure. And the Court emphasized that the traditional remedy for a state court's misapplication of federal law is an appeal (potentially to the Court itself), while the traditional remedy for a tribal court's wrongful assertion of jurisdiction over a nonmember is a collateral federal action of the sort that Lexington brings here. For all of those reasons, the Cabazon judges remain proper defendants under this Court's cases.

The Cabazon judges, once they address their own jurisdiction, seek an unprecedented expansion of tribal-court authority. Before the district court's ruling, tribal courts could exercise jurisdiction over nonmembers only when they engaged in conduct physically within the reservation's borders, given that a tribe's sovereignty is confined to the reservation.

Here, because Lexington indisputably never entered the reservation, the Cabazon judges ask this Court to dispense with the requirement of "conduct inside the reservation." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008) (emphasis omitted).

The Cabazon judges contend that conduct outside the reservation can be treated as inside the reservation if it has any "nexus" or "connection" to tribal businesses on tribal land. But all the cases they cite involve conduct taking place on tribal land—for example, nonmembers who leased mines on tribal land or operated a glass walkway suspended from tribal land over the Grand Canyon. The Cabazon judges also point to cases holding that off-reservation insurers must exhaust their remedies in tribal court before suing tribal judges in federal court. But these exhaustion cases do not "establish[] tribal-court adjudicatory authority, even over the lawsuits involved in those cases." *Strate*, 520 U.S. at 448. And the Cabazon judges further suggest the Cabazon Band can exercise jurisdiction simply because it bought insurance with money earned from economic activity on tribal land. That novel theory conflicts with the rule that tribal jurisdiction depends on the

nonmember's conduct on tribal land and would sweep in a wide range of off-reservation transactions between tribes and nonmembers.

Even if the territorial limits on the Cabazon Band's authority did not foreclose tribal jurisdiction, the tribal court would still lack jurisdiction for other reasons. The first exception of *Montana v. United States*, 450 U.S. 544 (1981), cannot apply here because Lexington never consented to tribal jurisdiction. Nor is jurisdiction over the Tribe's external affairs with Lexington necessary to set conditions on entry, preserve tribal self-government, or control internal relations, as required by *Plains Commerce Bank* for both *Montana* exceptions.

The Cabazon judges' invocation of the Band's "right to exclude" nonmembers from the reservation fares no better as a jurisdictional hook. Although the Cabazon Band can regulate nonmembers on tribal land, that exception to the presumption against tribal-court jurisdiction could scarcely be a more awkward fit for this case, where it is undisputed that Lexington was never on tribal land to begin with.

This Court should decline the Cabazon judges' invitation to create a new carveout from *Ex parte Young*, reverse the district court's vast

expansion of tribal authority, and hold that the Cabazon Reservation Court lacks jurisdiction over Lexington.

ARGUMENT

I. Chief Judge Welmas and Judge Mueller Are Proper Defendants.

The Cabazon judges' lead argument is that nonmembers cannot sue tribal judges in federal court even when tribal courts exercise jurisdiction in violation of federal law. This argument conflicts with the Supreme Court's and this Court's settled decisions allowing such actions and misconstrues a recent Supreme Court decision involving state (not tribal) judges. And although the district court accepted their backup argument that Lexington's claim can proceed against only Judge Mueller as the presiding judge, Chief Judge Welmas too is a proper defendant given his power to assign pro tem judges to the tribal-court matter.

A. The Supreme Court and This Court Have Long Permitted Nonmembers to Sue Tribal Judges for Exercising Jurisdiction in Violation of Federal Law.

Tribal judges have been defendants in many of the Supreme Court's cases on tribal-court jurisdiction. In *Strate v. A–1 Contractors*, 520 U.S. 438 (1997), for example, the defendant in the lower courts (and the petitioner in the Supreme Court) was Tribal Judge William Strate. *Id.*

at 444. The Court also ruled against tribal-court jurisdiction where tribal judges were defendants in *Nevada v. Hicks*, 533 U.S. 353, 355 n.1 (2001), and *Duro v. Reina*, 495 U.S. 676, 682 (1990). And the Court first announced the rule that nonmembers must exhaust tribal remedies in a suit against the judges of the Crow Tribal Court. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 848 (1985).

The longstanding practice of naming tribal judges as defendants complies with long-established principles of equity. Although the tribes themselves may possess sovereign immunity from suit in federal courts, "tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 796 (2014). The Supreme Court has analogized this rule—that plaintiffs can sue tribal officers but not the tribe absent a waiver of sovereign immunity—to *Ex parte Young*, 209 U.S. 123 (1908), which held that state sovereign immunity generally does not bar claims against state officers for violating federal law. *See Bay Mills*, 572 U.S. at 796; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

Applying these principles, this Court has held that tribal sovereign immunity does not bar injunctive actions against tribal judges for exceeding the federal constraints on their jurisdiction over nonmembers. *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1178, 1182 (9th Cir. 2012) (defendants were justices of the Navajo Nation Supreme Court); *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 949, 954 (9th Cir. 2000) (judges of the Crow Tribal Court); *United States v. Yakima Tribal Court*, 806 F.2d 853, 857, 861 (9th Cir. 1986) (chief judge of Yakima Tribal Court). This Court has also routinely entertained claims against tribal judges without hinting at the sort of jurisdictional defect that the Cabazon judges now press. *E.g.*, *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013) (judge of the Hualapai Tribe Court); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) (per curiam) (chief judge of the Colorado River Indian Tribes Tribal Court); *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009) (judge of the White Mountain Apache Tribal Court).

Other circuits also allow nonmembers to sue tribal judges when tribal courts attempt to exercise jurisdiction they do not possess. The

Tenth Circuit—perhaps the only federal court of appeals with a tribal docket that rivals this Court's—has reached the same conclusion. In *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), the court held that plaintiffs can bring injunctive actions against tribal judges to stop "an ongoing violation of federal common law"—namely, the unlawful exercise of tribal-court jurisdiction over a nonmember. *Id.* at 1154–56. The Tenth Circuit has repeatedly applied this rule in cases brought against tribal judges. *E.g.*, *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1251 (10th Cir. 2017); *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1235 (10th Cir. 2014). Other circuits likewise entertain claims against tribal judges. *E.g.*, *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 836 (8th Cir. 2023); *Spurr v. Pope*, 936 F.3d 478, 485 (6th Cir. 2019).

The Cabazon judges cite (at 18) *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901 (9th Cir. 2021), but that decision addressed a different issue: suits against tribal judges for *damages* in their *personal* capacity. *Id.* at 915. As this Court explained in *Acres Bonusing*, "the tribal sovereign immunity analysis turns on whether the suit is against the tribal official in his personal or official capacity." *Id.* at 910; *accord Lewis v. Clarke*,

581 U.S. 155, 164 n.2 (2017) (noting that "personal immunity defenses [are] distinct from sovereign immunity"). This case, by contrast, falls under the rule that nonmembers may sue tribal judges for *injunctive* relief in their *official* capacity. *Bay Mills*, 572 U.S. at 796; *Salt River*, 672 F.3d at 1181.

In short, actions against tribal judges are the traditional method for challenging a tribal court's unlawful exercise of jurisdiction. Decisions of the Supreme Court, this Court, and other courts all reflect this longstanding and routine practice.

B. *Whole Woman's Health* Did Not Overturn Decisions Authorizing Claims Against Tribal Judges.

The Cabazon judges argue that the Supreme Court's decision in *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021)—which did not involve tribal judges—marked a sea change in federal litigation over the propriety of tribal-court jurisdiction. As they read the opinion, judges of any kind can never be proper defendants from this point forward. Cabazon Br. 13–21. But they have misread the decision in multiple ways. *Whole Woman's Health* addressed different judges (state, not tribal) and different claims (attacks on a law's constitutionality, not a court's jurisdiction). That decision does not irreconcilably conflict with this

Court's many decisions authorizing claims against tribal judges, as required for a three-judge panel to revisit circuit precedent under *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc).

The backdrop of *Whole Woman's Health* was that Texas enacted a law that authorized private citizens (but not state officials) to sue doctors for performing abortions that were, at the time, protected under the Due Process Clause by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *See Whole Woman's Health*, 595 U.S. at 35–36. Because the Texas Attorney General had no enforcement role under the statutory scheme, and because abortion providers could not know in advance which members of the general public might sue under the statute, abortion providers sought to test the constitutionality of the law through an action against a state judge (and a state clerk) on the theory that they might hear (or docket) a future action under the Texas law. *Id.* at 36–37.

The Supreme Court held that the abortion providers could not maintain their action against the state judge or state clerk. One problem was the nature of the dispute: a claim against a state judge challenging the constitutionality of a state law that might be applied in a future case.

The doctrine of *Ex parte Young* "does not normally permit federal courts to issue injunctions against state-court judges or clerks" because they "do not enforce state laws as executive officials might" and instead "work to resolve disputes between parties." *Whole Woman's Health*, 595 U.S. at 39. Article III also requires the parties to be adverse to each other, but "'no case or controversy' exists 'between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute.'" *Id.* at 40 (quoting *Pulliam v. Allen*, 466 U.S. 522, 538 n.18 (1984)). Thus, there was a mismatch between the alleged constitutional violation (a Texas law that conflicted with *Casey*) and the defendants (the state judge and state clerk who might be presented with a claim under the law).

Another problem was the remedy. Whenever state judges have erred in addressing the constitutionality of a state law, "the traditional remedy has been some form of appeal, including to [the Supreme] Court, not the entry of an *ex ante* injunction preventing the state court from hearing cases." *Whole Woman's Health*, 595 U.S. at 39. The remedy that the plaintiffs proposed—short-circuiting the state-court process by forbidding Texas clerks even to docket the cases in the first place—would

impermissibly "supervise 'the operations of [state] government.'" *Id.* at 40.

Whole Woman's Health did not involve tribal judges, as the district court noted in denying the Cabazon judges' motion to dismiss on this ground. 1-ER-17. That decision therefore could not have overturned the long line of cases approving of injunctive actions against tribal judges unless it "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller*, 335 F.3d at 900. This is a "'high standard'" that demands more than mere "'tension between the intervening higher authority and prior circuit precedent.'" *Federal Trade Comm'n v. Consumer Defense, LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019). A three-judge panel must follow prior circuit precedent so long as it can be applied "'consistently with that of the higher authority.'" *Avilez v. Garland*, 69 F.4th 525, 533 (9th Cir. 2023). For at least three reasons, the decision in *Whole's Woman Health* is not clearly irreconcilable with this Court's decisions authorizing *Ex parte Young* suits against tribal judges.

First, the claim in this case is different from the claim in *Whole Woman's Health*. There, the plaintiffs argued that a Texas law violated

the Due Process Clause. 595 U.S. at 36. The Supreme Court held that the plaintiffs were not adverse to the state judge, who would not violate the Constitution merely by hearing the dispute and who had an institutional stake only in "resolv[ing] disputes between parties"—not in defending the constitutionality of state statutes. *Id.* at 39. This Court had already held the same. *Grant v. Johnson*, 15 F.3d 146, 147–48 (9th Cir. 1994). Here, however, Lexington's claim is that the Cabazon judges are currently violating "federal common law [that] circumscribes a tribe's inherent authority to regulate non-members." *Salt River*, 672 F.3d at 1182. Lexington (which seeks to avoid wrongful tribal-court jurisdiction) and the Cabazon judges (who "exist to resolve controversies" presented in tribal court) are adverse on this question within the meaning of Article III. *Cf. Whole Woman's Health*, 595 U.S. at 40, 42 (plaintiff can seek injunction "to prevent the judge from enforcing a rule of her own creation") (citing *Pulliam*, 466 U.S. at 526).

Second, there are fundamental differences between tribal and state judges. The Supreme Court has "consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493

U.S. 455, 458 (1990). The Court also has often pointed to the fact that state judges take an oath "to uphold the Constitution" and federal laws under the Supremacy Clause. *Brecht v. Abrahamson*, 507 U.S. 619, 636 (1993); *see, e.g.*, *Robb v. Connolly*, 111 U.S. 624, 637 (1884). In contrast, tribal courts are not "courts of general jurisdiction in th[e] sense" described in *Tafflin*. *Hicks*, 533 U.S. at 367. And tribal judges, unlike their state counterparts, exercise "'a sovereignty outside the basic structure of the Constitution'" and so need not honor constitutional rights. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008). The upshot is that, while state judges presumptively have authority to adjudicate federal issues, the presumption is flipped against tribal-court jurisdiction over nonmembers. *Id.* at 330. Federal courts therefore have long played an important and proper role in restraining tribal judges who overstep the limits on their jurisdiction. *See supra*, at 5–9.

Third, an injunctive action under *Ex parte Young* fills a crucial gap in remedies against tribal judges as compared to state judges. When "a state court errs" in applying federal law, "the traditional remedy has been some form of appeal," potentially all the way up to the U.S. Supreme

Court. *Whole Woman's Health*, 595 U.S. at 39. That sequence was part of the Constitution's original design; the so-called Madisonian Compromise allowed Congress to eschew inferior federal courts and assign adjudication of most federal issues to state judges subject to review, if at all, only by the Supreme Court. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1637 (2023). When a tribal court wrongly asserts jurisdiction, however, the nonmember cannot remove the case to federal court or pursue a direct appeal to the Supreme Court. *Hicks*, 533 U.S. at 368. Collateral litigation in federal court will therefore occur as a matter of course either after exhaustion, as here, or after judgment in an enforcement proceeding, *e.g.*, *Coeur d'Alene Tribe v. Hawks*, 933 F.3d 1052, 1059–60 (9th Cir. 2019). Delaying the inevitable federal-court challenge to tribal-court jurisdiction, as the Cabazon judges urge, would result only in nonmembers suffering the irreparable harm of defending themselves in a tribal court that lacks jurisdiction under federal law.

The Cabazon judges do not grapple with any of the distinctions between this case and *Whole Woman's Health*. They simply assert that "tribal courts and state courts are largely indistinguishable in their roles and responsibilities." Cabazon Br. 18. But the Supreme Court does not

share that view. "Indian courts 'differ from traditional American courts in a number of significant respects,'" including the lack of constitutional guarantees and the political exclusion of nonmembers from tribal government. *Plains Commerce Bank*, 554 U.S. at 337. The Cabazon judges also say that *Whole Woman's Health* has undercut this Court's decisions analogizing tribal judicial officers to tribal executive officers. Cabazon Br. 19–20. In so arguing, they overlook the distinction between a challenge to an unconstitutional statute (where the defendant should be the executive official with enforcement authority) and a claim that a court has exceeded its limited jurisdiction (where the judge is the logical defendant). *See supra*, at 13.

The Cabazon judges have not carried their high burden to establish that *Whole Woman's Health* cannot be reconciled with the longstanding practice of naming tribal judges as defendants in federal-court actions challenging tribal-court jurisdiction. They stress (at 1, 10, 16) that this Court, in first authorizing injunctive actions against tribal officers by analogy to *Ex parte Young*, observed that "[n]o reason has been suggested for not applying this rule to tribal officials." *Burlington N. Railroad Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991). Again and again,

the Cabazon judges say (at 2, 10, 17, 21) that there is similarly "'no reason' not to" extend *Whole Woman's Health* to tribal judges. But "no reason not to" is not the standard for a three-judge panel to bypass prior precedent. Instead, three-judge panels have a duty to follow circuit decisions "if the cases can be applied consistently" with intervening Supreme Court precedent. *Consumer Defense*, 926 F.3d at 1213. *Whole Woman's Health* did not clearly disturb this Court's prior cases involving tribal judges, which remain binding in this case.

C. The District Court Erred in Dismissing Chief Judge Welmas from the Action.

The district court accepted the Cabazon judges' narrower argument that Chief Judge Welmas (as opposed to Judge Mueller) "lacks the direct connection to the Tribal Court's exercise of jurisdiction over Lexington that an *Ex parte Young* action requires." 1-ER-19. The district court misapplied the "direct connection" requirement.

As administrator of the Cabazon Reservation Court, Chief Judge Welmas plays a central role in the ongoing violation of the federal limits on tribal-court jurisdiction. Lexington Br. 59–60. He has the power to assign pro tem judges to decide disputes involving nonmembers and would have the power to appoint a replacement if a federal court were to

enjoin Judge Mueller from adjudicating the dispute. 3-ER-336; *see* Cabazon Tribal Code § 9-103(c) (2-ER-298). Although the Cabazon judges respond (at 23) that Chief Judge Welmas's predecessor originally appointed Judge Mueller to hear the claims against Lexington, 3-ER-329, that fact is irrelevant because Lexington brings an official-capacity suit against Chief Judge Welmas that targets the role of his office in facilitating unlawful tribal-court jurisdiction, which means that any injunction would "remain[] in force against the officer's successors." *Salt River*, 672 F.3d at 1180.

The district court's approach also broke with the Eighth Circuit, which has held that a chief judge is a proper defendant under *Ex parte Young* when he exercises "supervisory and administrative duties related to the tribal court case," even if he does not himself preside over the case. *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1132 (8th Cir. 2019). The Cabazon judges offer no good reason to create a circuit split on this issue.

Like the district court, 1-ER-19, they rely (at 23–24) on *Snoeck v. Brussa*, 153 F.3d 984 (9th Cir. 1998). The plaintiffs there sued members of the Nevada Commission on Judicial Discipline, challenging under the

First Amendment a confidentiality rule for complaints about judicial impropriety. *Id.* at 985–86. This Court held that the Commission's members were not proper defendants under *Ex parte Young* because the Nevada Supreme Court (not the Commission) had promulgated the confidentiality rule *and* had the sole ability to enforce violations by contempt proceedings. *Id.* at 987. As this Court has since explained, *Snoeck* applies only where, unlike here, the named defendant has no role in the allegedly unlawful enforcement action. *E.g.*, *Mendoza v. Strickler*, 51 F.4th 346, 353 (9th Cir. 2022).

The on-point decision here is not *Snoeck*, but *Los Angeles County Bar Association v. Eu*, 979 F.2d 697 (9th Cir. 1992). In that case, a bar association claimed that a California statute limiting the number of judges on the Los Angeles County Superior Court had caused unconstitutional delays in civil litigation. *Id.* at 700. The association named as defendants the California governor and secretary of state, who argued that they lacked the necessary connection to the litigation delays. *Id.* at 704. This Court held that the claims could proceed under *Ex parte Young* because the governor "has a duty to appoint judges to any newly-created judicial positions" and the secretary of state "has a duty to certify

subsequent elections for those positions." *Id.* If the governor's appointment power was a direct enough connection in *Eu*, then Chief Judge Welmas's appointment power is certainly direct enough in this case.

II. The Tribal Court Lacks Jurisdiction Under *Montana*.

The Cabazon judges bear the "burden" to "establish one of the exceptions to [the] general rule" in *Montana v. United States*, 450 U.S. 544 (1981), against tribal-court jurisdiction over nonmembers. *Plains Commerce Bank*, 554 U.S. at 330. The first exception allows tribes to regulate some "activities of nonmembers who enter consensual relationships with the tribe or its members," while the second requires nonmember "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565–66. The Cabazon judges do not invoke the second exception, leaving only the first exception at issue here. Cabazon Br. 11–12.

Jurisdiction does not exist under the first *Montana* exception for three reasons. First, tribal jurisdiction cannot extend to nonmember conduct beyond the reservation's borders, which is the only sort of

conduct at issue here. Second, Lexington never consented by its words or actions to be governed by Cabazon law. And third, tribal jurisdiction does not serve any inherent sovereign interest in regulating entry on tribal lands, controlling internal relations, or preserving tribal self-government.

A. The Cabazon Band Has No Inherent Sovereignty to Regulate Conduct Outside Its Borders.

A reservation's borders have always set the outer limits on tribal authority. Tribes generally retain "attributes of sovereignty over both their members and *their territory*." *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added). Within their borders, "reservation Indians" have a right "to make their own laws and be ruled by them" as to "on-reservation conduct." *Strate*, 520 U.S. at 452–53 (cleaned up). But tribes do not possess "any 'right of governing every person *within their limits* except themselves.'" *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001) (emphasis added) (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring)).

Montana carved out just two exceptions to this general rule against jurisdiction over nonmembers, both of which depend on the existence of nonmember "conduct inside the reservation." *Plains Commerce Bank*,

554 U.S. at 332 (emphasis omitted). As this Court has observed, "tribal jurisdiction is, of course, cabined by geography" and "does not extend beyond tribal boundaries." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009). That principle requires reversal here because all of Lexington's relevant conduct occurred outside the reservation.

i. All of Lexington's Relevant Conduct Occurred Off the Reservation.

Lexington never set foot on the Cabazon Reservation. It did not negotiate or execute the insurance policies with the Cabazon Band on the reservation. Instead, the Cabazon Band negotiated for coverage with Alliant, which operates the Tribal Property Insurance Program as part of its overarching Alliant Property Insurance Program for tribes, municipalities, hospitals, and non-profit organizations. 2-ER-123. Alliant prepared policies consistent with Lexington's underwriting guidelines, and Alliant issued policy documents to the Cabazon Band. 2-ER-123–24. Lexington also made its coverage decision from an off-reservation location. 2-ER-124. And Lexington mailed to the Cabazon Band the letter denying coverage from an off-reservation location. 2-ER-124. From start to finish, all of Lexington's conduct that is

potentially relevant to the Cabazon Band's claims occurred outside the reservation's borders.

The Cabazon judges concede that Lexington never "physically entered the Tribe's Reservation in connection with the policies," but argue that "Lexington's agent, Alliant, did." Cabazon Br. 35 (emphasis omitted). The Cabazon judges cite no authority for treating Alliant, a program administrator that negotiates at arms' length with both insurers and policyholders, as Lexington's agent. More fundamentally, however, Alliant's on-reservation conduct cannot serve as a beachhead for sweeping tribal jurisdiction, which "is not 'in for a penny, in for a Pound.'" *Plains Commerce Bank*, 554 U.S. at 338. The Cabazon judges never explain how annual visits by Alliant "to gather information relevant to the renewal of the [Cabazon Band's] policies with Lexington" form any part of the Cabazon Band's claims concerning Lexington's off-reservation adjustment of insurance claims. 2-ER-125.

ii. The Supreme Court and This Court Have Applied *Montana* Only to On-Reservation Conduct.

Once they turn to the permissibility of tribal-court jurisdiction over off-reservation conduct, the Cabazon judges make the remarkable claim that the Supreme Court has already held tribal sovereignty can extend

beyond a reservation's borders. The supposed proof is a statement in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), that "a tribe has no authority over a nonmember until the nonmember enters tribal lands *or conducts business with the tribe*." *Id.* at 142 (emphasis added). As the Cabazon judges see it, "the Court's 'conducts business' language would be superfluous" if tribes did not possess authority over off-reservation conduct. Cabazon Br. 37.

The Supreme Court has already rejected such overly broad interpretations of *Merrion*. As the Court has explained, *Merrion* "involved a tax that only applied to *activity occurring on the reservation*" and established merely that tribal sovereignty reaches "'transactions occurring on trust lands and significantly involving a tribe or its members.'" *Atkinson*, 532 U.S. at 653 (emphasis added) (quoting *Merrion*, 455 U.S. at 137). Any "parts of the *Merrion* opinion that suggest a broad scope for tribal [sovereign] authority," when read against the backdrop of the on-reservation activity at issue in the case, are "easily reconcilable with the *Montana-Strate* line of authority, which [the Supreme Court] deem[ed] to be controlling." *Id.* Simply put, a tribe's

"sovereign power" (there, to tax) "reaches no further than tribal land." *Id.*

The Cabazon judges also misunderstand *Merrion* on its own terms. *Merrion* suggested in dicta that a tribe's "general authority, as sovereign, to control economic activity *within its jurisdiction*" allowed tribes to tax not only activities on tribal lands but also "non-Indian[s] who establish[] lawful presence in Indian territory" on non-Indian fee land. 455 U.S. at 137, 142–43 (emphasis added). In *Atkinson*, the Supreme Court rejected the suggestion in *Merrion* that the taxing power could be extended from tribal land to non-Indian fee land within the reservation. 532 U.S. at 654. But even *Merrion* came nowhere close to endorsing the extraterritorial authority the Cabazon judges assert here: a power to regulate economic activity outside the Cabazon Reservation that relates in some way to tribal land. In fact, *Merrion* reaffirmed the "territorial component" of tribal sovereignty: "the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction." 455 U.S. at 142. Off-reservation transactions—even those with tribes, and even those that relate in some way to tribal businesses—fall outside the narrow scope of tribal jurisdiction.

The Cabazon judges next argue (at 37) that this Court has approved tribal jurisdiction over nonmember conduct outside a reservation so long as the claims "bear[] some direct connection to tribal lands." *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1135 (9th Cir. 2006) (en banc). But *Smith*, like *Merrion*, did nothing of the sort. In *Smith*, a nonmember sued a tribal college in tribal court for an accident that occurred on a federal highway within the reservation. *Id.* at 1132–35. This Court recognized the general rule that tribal courts have jurisdiction "where the nonmembers are the *plaintiffs*, and the claims arise out of commercial activities *within the reservation*." *Id.* at 1132 (second emphasis added) (citing *Williams v. Lee*, 358 U.S. 217 (1959)). The case thus involved a nonmember who chose to go forward in tribal court as a plaintiff (rather than being named by a tribal member as a defendant) and an Indian defendant whose conduct occurred on tribal land (not off the reservation).

In fact, the reasoning of *Smith* hurts rather than helps the Cabazon judges' position. This Court explained that the relevant question is not "precisely when and where the claim arose"—there, on the federal highway or the tribal campus. 434 F.3d at 1135. Instead, what mattered was that the conduct underlying the claim (the college's failure to

maintain the truck and destruction of post-accident notes) had "occurr[ed] on the reservation, on lands and in the shop controlled by a tribal entity." *Id.* Here, all of Lexington's relevant conduct—issuing the Cabazon Band's policies and processing their insurance claims—occurred outside the reservation. *See supra*, at 22–23. The Cabazon Band's tribal-court claims therefore do not have a direct connection to tribal lands, as this Court applied that phrase in *Smith*.

Since *Smith*, this Court has used "direct connection to tribal lands" only as a way to describe conduct that physically occurred on Indian land—never, as the Tribe does here, as a springboard to tribal jurisdiction over a nonmember based on off-reservation transactions with some nexus to tribal activities:

- In *Wilson v. Horton's Towing*, 906 F.3d 773 (9th Cir. 2018), a tribal officer stopped a nonmember on a state road as he left a tribal casino and seized his car for civil forfeiture upon finding marijuana. *Id.* at 776–77. This Court held that tribal jurisdiction was colorable, even though the stop occurred on non-Indian land within the reservation, because "one could logically conclude that the forfeiture was a response to his unlawful

possession of marijuana *while on tribal land*." *Id.* at 780 (emphasis added). The nonmember's unlawful conduct at the casino "reveal[ed] a 'direct connection to tribal lands'" that required the nonmember to exhaust tribal remedies. *Id.*

- In *Knighton v. Cedarville Rancheria of Northern Pauite Indians*, 922 F.3d 892 (9th Cir. 2019), a former tribal employee argued the tribe could not regulate "alleged misconduct" that "occurred off tribal land, after the tribal administrative offices were relocated to fee land owned by the Tribe" outside the reservation. *Id.* at 901–02. This Court did not dispute the premise that the tribe lacked authority to regulate off-reservation conduct. But the employee was wrong as a factual matter: Most of her relevant conduct "took place on tribal land" before the offices' relocation, and even the "claims that may have arisen outside tribal land" still bore "some direct connection to tribal lands" because they were "based on alleged misconduct and misrepresentations made by [the employee] on tribal land." *Id.* at 902.

- In *Employers Mutual Casualty Co. v. McPaul*, 804 F. App'x 756 (9th Cir. 2020), claims against an insurer bore "no 'direct connection to tribal lands'" because the "relevant conduct—negotiating and issuing general liability insurance contracts to non-Navajo entities—occurred entirely outside of tribal land." *Id.* at 757. The Navajo Nation could not regulate this off-reservation conduct under either its right to exclude or *Montana*, which likewise requires conduct "'within [the] reservation.'" *Id.* (quoting *Montana*, 450 U.S. at 566).

The Cabazon judges also ask (at 29) that this Court treat a different sound bite—"centers on [tribal] trust land"—as a basis for jurisdiction over off-reservation conduct. *Grand Canyon Skywalk*, 715 F.3d at 1205. According to the Cabazon judges, *Grand Canyon Skywalk* involved a dispute merely over "'intangible property rights'" created by a contract between a nonmember and a tribe and thus "shows that a non-Indian's physical presence on tribal land was not necessary for the tribal court's exercise of jurisdiction." Cabazon Br. 29.

Contrary to the Cabazon judges' description of the case, the nonmember in *Grand Canyon Skywalk* was very much present on tribal

land. The case concerned a non-Indian developer's construction and operation of a "glass-bottomed viewing platform," located on "remote tribal land," that was "suspended 70 feet over the rim of the Grand Canyon." 715 F.3d at 1198–99. So when this Court said "the dispute center[ed] on Hualapai trust land," *id.* at 1205, that did not mean merely that the case concerned an intangible property right that was broadly related to tribal land in the sense of an off-reservation commercial arrangement, *contra* Cabazon Br. 29. The Hualapai Tribe instead had colorable jurisdiction to condemn the nonmember's right of "access to the valuable tribal land" and thereby retake the skywalk, "an asset located in Indian country." 715 F.3d at 1204–05.

The Cabazon Band's business activities no doubt occurred on tribal land, but Lexington acted "beyond the reservation's borders where the tribe lack[s] authority to regulate a non-Indian." *Water Wheel*, 642 F.3d at 815. This territorial restriction on tribal jurisdiction is dispositive here.

iii. Exhaustion Cases Do Not Establish Tribal Jurisdiction over Off-Reservation Conduct.

The Cabazon judges next pivot (at 37–38, 48) from *Montana* to two decisions holding that off-reservation insurers must exhaust tribal

remedies before returning to federal court to challenge tribal jurisdiction: *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), and *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999). The Cabazon judges say that *Iowa Mutual* and *Allstate* are decisions that ruled "in favor of tribal jurisdiction" for "suits brought by tribes (or tribal members) against insurance companies." Cabazon Br. 48. But *Iowa Mutual* and *Allstate* addressed only whether the nonmember had to *exhaust* tribal remedies—not whether tribal courts in fact had jurisdiction under *Montana*.

The Supreme Court has explained that the exhaustion context makes a critical difference. In *Strate*, the Court hardly could have been clearer that exhaustion precedents, including *Iowa Mutual*, "do not displace" the *Montana* framework or "establish[] tribal-court adjudicatory authority, even over the lawsuits involved in those cases." 520 U.S. at 448. Even in *Iowa Mutual* itself, the Court explained that the nonmember, after exhausting tribal remedies, could return to federal court and challenge the "determination that the tribal courts have jurisdiction"—a gesture that would have been futile if *Iowa Mutual* had already resolved the question. 480 U.S. at 19. Exhaustion cases thus

leave for another day the ultimate question whether the tribal court has jurisdiction. Yet the Cabazon judges stake out the polar-opposite position.

In addition to misreading *Iowa Mutual* and *Allstate*, the Cabazon judges rely (at 38–40) on three more decisions that required exhaustion simply because the "assertion of tribal court jurisdiction" was not "frivolous or obviously invalid under clearly established law." *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013); *AT&T Corp. v. Oglala Sioux Tribe Util. Comm'n*, 2015 WL 5684937, at *8 (D.S.D. Sept. 25, 2015); *Sprint Commc'ns Co. v. Wynne*, 121 F. Supp. 3d 893, 904 (D.S.D. 2015). They also point to another district court that, while deciding the issue under *Montana*, acknowledged that the tribe had cited "all 'exhaustion cases' for which there only need be a colorable claim of jurisdiction to require exhaustion." *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, 2014 WL 1883633, at *11 n.6 (D.N.D. May 12, 2014).

The well-settled distinction between exhaustion and jurisdiction refutes the Cabazon judges' claim that they amassed a "substantial weight of authority" establishing tribal jurisdiction over off-reservation

conduct. Cabazon Br. 40. All told, that authority consists of five exhaustion cases and one decision from a district court that, like the Cabazon judges, improperly "conflate[d] the issue of jurisdiction with the issue of exhaustion." *Wilson*, 906 F.3d at 780. Lexington, by contrast, asks this Court to "apply *Montana* straight up." *Atkinson*, 532 U.S. at 654.

The full-fledged jurisdictional principles from *Montana* depart in several ways from the lower plausibility threshold required for exhaustion. In *Iowa Mutual*, the Supreme Court short-circuited the *Montana* analysis merely because the off-reservation insurers had not argued that the actions were "'patently violative of express jurisdictional prohibitions.'" 480 U.S. at 19 n.12. And in *Allstate*, this Court thought that *Iowa Mutual* compelled exhaustion. 191 F.3d at 1074–75.

The Supreme Court and this Court have also refined their understanding of tribal jurisdiction since *Allstate*. There, this Court reasoned that the tribal members' claims had "arisen on the reservation" (where the accident occurred) even if the insurer's conduct was off the reservation (where the policy was issued and the claim was processed). 191 F.3d at 1075. But this Court, sitting en banc, subsequently held that

tribal jurisdiction (as opposed to exhaustion) does not depend on "precisely when and where the claim arose" and that the location of the defendant's conduct is what matters. *Smith*, 434 F.3d at 1135. And after *Allstate*, the Supreme Court also made clear that "there can be no assertion of civil authority beyond tribal lands." *Atkinson*, 532 U.S. at 657–58 n.12, and that *Montana* requires "nonmember *conduct inside the reservation* that implicates the tribe's sovereign interests," *Plains Commerce Bank*, 554 U.S. at 332 (partial emphasis added). Those principles—not inapplicable exhaustion cases—resolve this appeal.

iv. Other Circuits Have Rejected Attempts to Extend Tribal Jurisdiction to Off-Reservation Conduct.

The Cabazon judges eventually admit that their position depends not so much on what the Supreme Court or this Court has said, but on what purportedly has not been said. Specifically, they seek to turn the lack of *Montana* precedent supporting their position from a liability into an asset, arguing that tribal-court jurisdiction is proper here because no decision "expressly holds that *Montana*'s consensual relationship framework requires the nonmember's physical presence on tribal land." Cabazon Br. 41.

This attempt to leverage the novelty of tribal jurisdiction over off-reservation conduct gets things backwards. The decisions of the Supreme Court and this Court applying *Montana* have all involved conduct actually occurring on the reservation—and even then, "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Commerce Bank*, 554 U.S. at 328. In fact, every Supreme Court decision upholding tribal jurisdiction has involved nonmember conduct on tribal land in particular, as opposed to non-Indian fee land within the reservation, "with only 'one minor exception.'" *Id.* at 333–34 (discussing *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989), which permitted a tribal zoning restriction "on nonmember fee land isolated in 'the heart of [a] closed portion of the reservation'").

The Supreme Court's longstanding focus on whether conduct occurred on tribal land or non-Indian fee land within the reservation would make little sense if tribes all along have possessed authority over non-Indians who never physically came within the reservation's borders. This supposed silence as to tribal jurisdiction over off-reservation transactions "casts substantial doubt upon the existence of such

jurisdiction." *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 206 (1978) (reasoning similarly for tribal jurisdiction over crimes committed by non-Indians).

In any event, the Cabazon judges' characterization of the case law is wrong: Every other circuit to consider the issue has rejected assertions of tribal authority over off-reservation conduct with just a mere nexus to tribal activities. Lexington Br. 32–35. The Seventh Circuit, for example, has held that tribes lack jurisdiction where nonmembers have "not engaged in *any* activities inside the reservation" and have instead engaged in only off-reservation commercial transactions with tribal entities (there, a tribal payday lender). *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 782 (7th Cir. 2014). The Cabazon judges assert that *Jackson* is different because tribal payday loans were not connected to tribal lands. Cabazon Br. 42. But the rule that tribal jurisdiction cannot exist unless "the nonmember's actions" were "on the tribal land" applies with equal force here. *Jackson*, 764 F.3d at 782–83 n.42 (emphasis omitted).

The Seventh Circuit has since reiterated that "actions of nonmembers outside of the reservation do not implicate the Tribe's

sovereignty." *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207 (7th Cir. 2015). The Cabazon judges attempt to distinguish *Stifel* as having "no connection, direct or indirect, to tribal lands." Cabazon Br. 43. But the nonmembers in *Stifel* (unlike Lexington here) had direct control over tribal property through security interests in the reservation casino's assets and the power to oversee casino revenues. 807 F.3d at 189. The Seventh Circuit nonetheless held that off-reservation commercial contracts related to tribal property could not satisfy the requirement of "on-reservation conduct." *Id.* at 207.

The Cabazon judges also misunderstand *Stifel* when they argue that the Seventh Circuit "ruled against tribal court jurisdiction because the bond contract's forum selection clause vested jurisdiction" in federal and state court. Cabazon Br. 42. The Seventh Circuit held only that the forum-selection clause relieved the nonmembers of the prudential duty to exhaust tribal remedies, 807 F.3d at 195–99, and then went on to decide there was no jurisdiction under *Montana* without referring once to the forum-selection clause, *id.* at 205–09.

The Eighth Circuit too has held that tribal courts lack jurisdiction "over the activities or conduct of non-Indians occurring *outside their reservations*," *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998), and has focused the analysis on whether the nonmember's conduct "occurred within" the reservation's borders, *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe*, 609 F.3d 927, 940 (8th Cir. 2010). The Cabazon judges ignore *Hornell* and insist that the remand in *Attorney's Process* suggests that tribes can regulate off-reservation commercial transactions. Cabazon Br. 43–44. But the district court there held just the opposite: that the tribe lacked jurisdiction because the nonmember received the allegedly converted funds off the reservation, and because the tribe could not prove that the funds were used for the on-reservation conduct (a casino raid). *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe*, 809 F. Supp. 2d 916, 928–31 (N.D. Iowa 2011) ("[C]onduct on the reservation—whether it be tribal trust land or non-Indian fee land within the reservation—is a *sine qua non* to tribal jurisdiction over nonmembers, regardless of which *Montana* exception is invoked.").

The Tenth Circuit agrees that "inherent sovereignty ceases at the reservation's borders." *MacArthur v. San Juan County*, 497 F.3d 1057, 1071 (10th Cir. 2007). The Cabazon judges attempt to recast *MacArthur* as a decision that a tribe could not regulate an on-reservation state entity. Cabazon Br. 44–45. But the Tenth Circuit first held that *Montana* requires nonmember conduct "within the physical confines of the reservation" (the issue here) and further rejected tribal jurisdiction over a state entity operating "within the exterior boundaries of the Navajo reservation" given overriding state interests (the irrelevant issue described by the Cabazon judges). *MacArthur*, 497 F.3d at 1071–73. Tribal jurisdiction in this case does not get over even the initial hurdle of on-reservation conduct.

v. The Cabazon Judges' Understanding of Their Jurisdiction Lacks Principled Limits.

The Cabazon judges also make a policy argument that tribal jurisdiction should exist because Lexington received "premiums paid by Cabazon totaling millions of dollars for different policies over many years." Cabazon Br. 35. This justification would "swallow the rule" against tribal jurisdiction and obliterate the "territorial restriction upon

tribal power" by sweeping in any off-reservation person or entity that does business with tribes or tribal members. *Atkinson*, 532 U.S. at 655.

Just about any time the Cabazon Band buys anything, it pays with money generated through its business activities on the reservation. Often, too, its off-reservation transactions relate in some way to its tribal businesses. But a jurisdictional rule that turns on a tribe's use of its funds to purchase goods and services related to tribal businesses would likewise extend tribal jurisdiction to cover, among others, lawyers, accountants, banks, retailers, and manufacturers operating entirely outside the territorial boundaries of a reservation. Lexington Br. 35–36. That is exactly why the Seventh Circuit has held that focusing on the tribal member's activities on the reservation would invert the *Montana* analysis: Tribal jurisdiction is "tethered to the *nonmember's actions*, specifically the *nonmember's actions on the tribal land*." *Jackson*, 764 F.3d at 782–83 n.42.

The Cabazon judges have offered no principled basis for subjecting off-reservation insurance companies to tribal jurisdiction while excluding, say, banks that provide loans to tribal businesses (the facts of *Stifel*), financial institutions that manage retirement plans for tribal

employees, or law firms and accounting firms that assist tribal casinos with regulatory and tax compliance. They say that "[t]hese predictions will not come to pass because a tribe's regulation of a nonmember is subject to a substantial limit" that "the regulated conduct must occur on tribal lands or have a 'direct connection to' or . . . 'center[]' on tribal lands." Cabazon Br. 56. But their own sweeping arguments in this case show that their out-of-context quotations would no longer represent a substantial limit on tribal-court jurisdiction, which would extend to all off-reservation conduct with some connection to tribal activities. The Cabazon judges understandably shrink from the consequences of their position, but tribal sovereignty either extends beyond the reservation's borders or does not. This is not a one-off case, but an attempt to make the narrow *Montana* exceptions swallow the general rule against tribal-court jurisdiction over nonmembers.

B. Lexington Never Consented to Tribal Jurisdiction.

Even if this Court holds that tribal sovereignty can extend beyond the reservation's borders, the Cabazon Reservation Court would still lack jurisdiction under *Montana*. The first *Montana* exception can apply "only

if the nonmember has consented, either expressly or by his actions," to tribal jurisdiction. *Plains Commerce Bank*, 554 U.S. at 337.

Lexington never expressly agreed to tribal jurisdiction and would not have reasonably anticipated tribal jurisdiction over its off-reservation insurance operations. State law pervasively regulates insurance, largely to the exclusion of even federal law. Lexington Br. 38–39. And the Supreme Court has long held that "Indians going beyond reservation boundaries" generally are "subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973). Those principles together establish that Lexington, as an off-reservation insurer, would have reasonably anticipated that any dispute with the Cabazon Band would be decided under state law in a federal or state forum. Lexington Br. 37–42. None of the three countervailing points stressed by the Cabazon judges—the fact that the Cabazon Band is the policyholder, a service-of-suit provision selecting any court of competent jurisdiction, and the Cabazon Tribal Code's assertion of jurisdiction—establishes consent to a tribal forum.

First, the Cabazon judges argue that Lexington should have been on notice that tribal law would govern because Lexington, through a third-party administrator called Alliant, agreed to insure tribal businesses and received tribal funds in exchange: "Lexington was the insurer, Cabazon was the insured." Cabazon Br. 46–47. They say (at 46) that *Montana* requires only consent to a relationship with a tribe, as opposed to consent to tribal law. But the Supreme Court rejected that view in *Plains Commerce Bank*. Because "nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory"—a tribe may "fairly impose[]" such laws and regulations "only if the nonmember has consented, either expressly or by his actions." 554 U.S. at 337. The question therefore is not whether Lexington reasonably anticipated doing business with tribes in general or the Cabazon Band in particular. The question is whether Lexington reasonably anticipated that any disputes with its policyholders would be decided in the policyholders' own courts under the policyholders' own law, rather than in federal or state court under state law.

In equating anticipation of the policyholder's identity with anticipation of a tribal forum, the Cabazon judges "confuse the [Band's]

role as commercial partner with its role as sovereign." *Merrion*, 455 U.S. at 145. The tribe in *Merrion*, for example, did not "abandon[] its sovereign powers" over on-reservation conduct when entering into "commercial agreements" with nonmembers to operate mines on tribal lands. *Id.* at 146. By the same token, Lexington would not have understood the Cabazon Band to acquire sovereign power over off-reservation conduct when it buys property insurance. Such commercial agreements neither displace nor create tribal authority.

Lexington had even less reason to anticipate tribal jurisdiction here because the Cabazon Band has never before asserted jurisdiction over insurance disputes. As the Cabazon judges admit, Cabazon law is effectively unknowable in advance. Even they do not know "what law or legal principles the tribal court would apply if its jurisdiction is recognized." Cabazon Br. 51. In their view, this mismatch between Cabazon law and insurance regulation is no problem because Lexington has supposedly "confuse[d] choice of law and choice of forum." *Id.* But the Supreme Court, not Lexington, has intertwined the two. Tribal-court jurisdiction cannot exist unless tribal law could be applied to a dispute

because "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, 520 U.S. at 453.

For as much as the Cabazon judges criticize Lexington's consent argument as a "make-weight," they never identify any other case finding consent under similar circumstances. Cabazon Br. 46. Lexington already explained that this Court has applied the first *Montana* exception only where nonmembers expressly agreed to tribal jurisdiction or had long operated on the reservation. Lexington Br. 40–41 (citing *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 933–34 (9th Cir. 2019); *Knighton*, 922 F.3d at 904; *Grand Canyon Skywalk*, 715 F.3d at 1206; *Water Wheel*, 642 F.3d at 818). The Cabazon judges do not rely on any of these decisions applying the governing "reasonable anticipation" framework. Instead, they argue that *Iowa Mutual* and *Allstate* put Lexington on notice that "it could face a suit in tribal court by one of its tribal insureds." Cabazon Br. 48. So the Cabazon judges' lead cases for reasonable anticipation are exhaustion decisions that did not even resolve jurisdiction under *Montana*. *See supra*, at 30–34.

Second, the Cabazon judges argue (at 48–49) that the insurers should have anticipated tribal-court litigation after they agreed to

"submit to the jurisdiction of a Court of competent jurisdiction" for insurance disputes. 3-ER-447. But this argument puts the cart before the horse because the tribal court's jurisdiction is the very issue here. And under *Montana*, a tribal court is presumptively not a court of competent jurisdiction. *Hicks*, 533 U.S. at 367. The clause also undermines anticipation of tribal-court jurisdiction by appointing as agent for service of process "the Superintendent, Commissioner or Director of Insurance or other officer" designated under "any statute of any state, territory or district of the United States" (but not of any tribe) and by reserving the insurers' right "to remove an action" to federal court, 3-ER-447–48, a procedural right stripped from tribal-court defendants, *Hicks*, 533 U.S. at 368–69. These provisions only bolster the conclusion that a federal or state court, not a tribal court, was the intended forum for any dispute.

Nor do the Cabazon judges make any headway in arguing that Lexington should have "negotiat[ed] choice of forum and choice of law provisions" in its insurance policies. Cabazon Br. 56. This is not a new argument; the dissent in *Plains Commerce Bank* said the same thing. 554 U.S. at 346 (Ginsburg, J., concurring in part, concurring in the

judgment in part, dissenting in part). It is no more persuasive this time around. Because *Montana* cabins the "jurisdictional consequences" of any "'consensual relationship,'" nonmembers doing business with tribes off tribal land have no duty to negotiate the surrender of jurisdiction the tribes do not possess. *Id.* at 338 (majority opinion).

Undeterred, the Cabazon judges argue (at 48–49) that Lexington should have anticipated the need for a forum-selection clause after the Chehalis Tribal Court construed the service-of-suit provision as consent to tribal jurisdiction. SER-12–13. This argument only underscores Lexington's untenable situation if tribes can, whenever they please, change hats from commercial counterparties to sovereign regulators. Lexington cannot revise its policies for this nationwide program every time a court of the Chehalis, Cabazon, or any other of the 600 federally recognized tribes misinterprets a provision. Lexington Br. 39–40. Here, for example, tribal jurisdiction over this and other COVID-19-related insurance disputes could require Lexington to navigate potentially conflicting rulings from the tribal courts of every tribe that bought these property insurance policies.

Third, the Cabazon judges rely (at 49) on a provision of the Cabazon Tribal Code that extends tribal-court jurisdiction to cases where the defendant has "transacted business within the Cabazon Indian Reservation and the cause of action arises out of activities or events which have occurred within the Reservation boundaries." Cabazon Tribal Code § 9-102(b)(2)(c) (2-ER-297–98). But regardless of whether a tribal code purports to grant subject-matter jurisdiction under tribal law, *Montana* constrains the exercise of tribal-court jurisdiction. *County of Lewis v. Allen*, 163 F.3d 509, 512–13 (9th Cir. 1998). A tribal code, in other words, cannot will into existence jurisdiction that does not exist under federal law.

Finally, the Cabazon judges protest (at 51–52) that Lexington's objections to a tribal forum reduce to "unwarranted and legally irrelevant" fears about "an inhospitable forum in tribal court." That caricature unfairly minimizes Lexington's weighty concerns about political control over tribal judiciaries, the exclusion of nonmembers from juries, and the lack of due process protections. Lexington Br. 44–45. The Cabazon judges also ignore the Supreme Court's repeated admonitions against "requir[ing] the application of tribal laws to non-Indians who do

not belong to the tribe and consequently had no say in creating the laws that would be applied to them." *United States v. Cooley*, 141 S. Ct. 1638, 1644 (2021). Such assertions of tribal jurisdiction can force nonmembers into "an unfamiliar court." *Strate*, 520 U.S. at 459. And once in that court, the nonmembers must answer claims where tribal law can "be unusually difficult for an outsider to sort out." *Hicks*, 533 U.S. at 384–85 (Souter, J., concurring). Even the Cabazon judges themselves cannot predict "what law or legal principles the tribal court would apply if its jurisdiction is recognized." Cabazon Br. 51.

Montana reflects the fundamental principle that tribal jurisdiction cannot exist without "commensurate consent" from nonmembers to submit to a sovereign that excludes them from political participation and acts "'outside the basic structure of the Constitution.'" *Plains Commerce Bank*, 554 U.S. at 337. Such consent is absent here.

C. Adjudication of This Insurance Dispute Does Not Implicate Inherent Tribal Sovereignty.

Even if Lexington had consented to a tribal forum, the Cabazon Reservation Court still could not exercise jurisdiction under *Montana* unless the tribal-court action concerns "the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or

control internal relations." *Plains Commerce Bank*, 554 U.S. at 337. This limit on *Montana* forecloses tribal jurisdiction over this insurance dispute, which does not concern entry on tribal land, threaten tribal members' ability to make their own laws and be ruled by them, or unsettle internal relations on the reservation.

The Cabazon judges first urge (at 52–54) this Court to disregard the reasoning of *Plains Commerce Bank* as dicta. But the absence of a sovereign interest was the principal basis for the Supreme Court's holding. The Court explained that "*Montana* expressly limits its first exception to the 'activities of nonmembers,' allowing these to be regulated to the extent necessary 'to protect tribal self-government [and] to control internal relations.'" 554 U.S. at 332. And the Court observed that "[t]he regulations we have approved under *Montana* all flow directly from these limited sovereign interests." *Id.* at 335. Because the tribe there had no sovereign interest in regulating the sale of non-Indian fee land within the reservation, the tribal court lacked jurisdiction regardless of whether the nonmember bank had consented: "[W]hatever the Bank anticipated, whatever 'consensual relationship' may have been established through the Bank's dealing with the [tribal members], the jurisdictional

consequences of that relationship cannot extend to the Bank's subsequent sale of its fee land." *Id.* at 338.

The holding in *Plains Commerce Bank* did not "profoundly modify" *Montana*. Cabazon Br. 52. Rather, the Supreme Court reemphasized the territorial limits on tribal-court jurisdiction by pointing out that all but one of its *Montana* cases involved "nonmember conduct on tribal land." *Plains Commerce Bank*, 554 U.S. at 333. The one exception (*Brendale*) allowed "zoning restrictions on nonmember fee land isolated in 'the heart of [a] closed portion of the reservation,'" where the minimal regulation of a nonmember was necessary for the zoning scheme to function. *Id.* at 333–34. And since *Plains Commerce Bank*, the Court allowed tribal police officers to stop "criminal offenders operating on roads *within the boundaries of a tribal reservation*" and detain offenders until the appropriate federal or state authorities could take custody. *Cooley*, 141 S. Ct. at 1643 (emphasis added). The recent *Cooley* decision only further casts doubt on tribal-court jurisdiction here because the Court emphasized the heightened concerns of "full tribal jurisdiction [that] would require the application of tribal laws to non-Indians who do not

belong to the tribe and consequently had no say in creating the laws that would be applied to them." *Id.* at 1644.

The Cabazon judges also argue (at 54) that no court of appeals has read *Plains Commerce Bank* the same way as Lexington. But that is not true. Both the Seventh and Eighth Circuits have understood the Supreme Court to have held that "a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court" unless the dispute implicates inherent tribal sovereignty. *Jackson*, 764 F.3d at 783; *accord Kodiak Oil*, 932 F.3d at 1138. And even if the Cabazon judges were correct that this requirement could be read as dicta, "that would be of little significance because [Circuit] precedent requires" this Court to "give great weight to dicta of the Supreme Court." *Coeur d'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 683 (9th Cir. 2004).

The Cabazon judges nevertheless ask (at 54) this Court to side with the Fifth Circuit, which did cast aside this discussion in *Plains Commerce Bank* as dicta. *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014). The Supreme Court granted certiorari to review that decision and then affirmed the Fifth Circuit's judgment by an equally divided vote, *Dollar General Corp. v. Mississippi Band of*

Choctaw Indians, 579 U.S. 545, 546 (2016) (per curiam)—a disposition that "lacks precedential weight," *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 215 n.1 (1995). And the Fifth Circuit's spurning of *Plains Commerce Bank* was, ironically enough, dicta itself because the decision also held that the tribe's interest in regulating sexual assault at an on-reservation store was "plainly central to the tribe's power of self-government." *Dolgencorp*, 746 F.3d at 175.

The Cabazon judges also argue as a fallback that inherent sovereign interests justify tribal jurisdiction under *Plains Commerce Bank*. Specifically, they assert that the "revenues derived" from the Cabazon Band's insured "businesses, including Fantasy Springs Resort Casino, are vital to support the Tribe's essential services to tribal members." Cabazon Br. 54. But the Cabazon judges never explain why litigating claims about off-reservation commercial transactions in federal or state court would threaten the Cabazon Band's self-government. On the contrary, the Supreme Court has held that state-court jurisdiction over claims by Indians against non-Indians does "not interfere with the right of tribal Indians to govern themselves." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 880

(1986). Tribal self-rule therefore does not require a tribal forum to regulate the Tribe's "commercial transactions" with nonmembers. *Stifel*, 807 F.3d at 209.

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

If the Cabazon Reservation Court cannot exercise jurisdiction under *Montana*, the only other potential basis for jurisdiction would be the right to exclude. But right-to-exclude jurisdiction is even narrower than the *Montana* exceptions. While *Montana* requires nonmember conduct within the reservation's borders, the Cabazon Band's right to exclude applies only to land owned by the Band or held in trust for the Band, thus excluding land within the reservation owned by non-Indians. *Window Rock Unified School Dist. v. Reeves*, 861 F.3d 894, 899–900 (9th Cir. 2017). By definition, Lexington—which never entered the Cabazon Reservation—could not be excluded from the tribal portions of land within the reservation.

The Cabazon judges try to extend the right to exclude well beyond its traditional role in controlling access to and presence on tribal land. They admit that right-to-exclude cases have involved conduct occurring

on tribal land and are therefore "replete with references to physical presence on tribal land." Cabazon Br. 28. But they argue that the right to exclude, like the *Montana* exceptions, can apply to this off-reservation conduct because the insurance policies "'center[ed] on'" tribal land. Cabazon Br. 29 (emphasis omitted) (quoting *Grand Canyon Skywalk*, 715 F.3d at 1205). The Cabazon judges not only lift that quote out of context (as explained above, *see supra*, at 29–30), but also misunderstand the theory underlying the right to exclude.

The theory of the right to exclude is that a tribe can refrain from exercising the greater power (total exclusion of a nonmember from tribal land) in exchange for exercising a lesser power ("conditions on the non-Indian's conduct or continued presence on the reservation"). *Merrion*, 455 U.S. at 144–45. But this justification is self-limiting. The Cabazon Band can regulate "a nonmember's entry or continued presence on tribal land" but loses such authority once the nonmember "is no longer present on tribal land." *Knighton*, 922 F.3d at 902 (emphasis added). That principle necessarily forecloses tribal jurisdiction under this theory because Lexington was never present on tribal land in the first place.

The Cabazon judges reach the wrong conclusion because they refuse to recognize that the right to exclude arises from a tribe's ownership of land. For example, the Cabazon judges suggest that the phrase "'landowner's right to occupy and exclude'" is Lexington's invention. Cabazon Br. 26. But that phrase in fact comes from the Supreme Court: "Tribes cannot assert a landowner's right to occupy and exclude" nonmembers from non-tribal land. *Strate*, 520 U.S. at 456; *accord Hicks*, 533 U.S. at 359. This Court too has explained that right-to-exclude jurisdiction must "concern a property owner's right to exclude." *Elliott*, 566 F.3d at 850. The right to exclude thus offers no basis to exercise jurisdiction over conduct on non-Indian fee land that "has already been removed from the tribe's immediate control" within the reservation, *Plains Commerce Bank*, 554 U.S. at 336, let alone conduct on off-reservation land.

The Cabazon judges represent (at 37) that "this Court has repeatedly endorsed the view in right-to-exclude cases that a nonmember's physical presence on the Reservation is not required." But they have not identified a single case where a tribe exercised a supposed power to "exclude" nonmembers from tribal land they never entered *or*

where this Court approved of such a theory. Cabazon Br. 24–32. They cite (at 11, 25, 28–29) cases involving nonmembers that operated a resort and marina on land leased from the Colorado River Indians, *Water Wheel*, 642 F.3d at 805, shepherded tourists to a skywalk located on Hualapai trust land, *Grand Canyon Skywalk*, 715 F.3d at 1199, ran schools on leased Navajo land, *Window Rock*, 861 F.3d at 896, and worked as a tribal administrator on tribal land within the Cedarville Rancheria of the Northern Paiute Indians, *Knighton*, 922 F.3d at 901–02. As the doctrinal underpinnings of the right to exclude would suggest, all of these cases involved attempts to terminate access to tribal land or to regulate conduct that occurred on tribal land. Lexington Br. 53–54.

The only time a tribe has asked this Court to approve right-to-exclude jurisdiction over off-reservation conduct, this Court declined because the insurer's "relevant conduct" of "negotiating and issuing" the policies "occurred entirely outside of tribal land." *Employers Mut.*, 804 F. App'x at 757. The Cabazon judges attempt (at 30) to distinguish *Employers Mutual* as a case where the policyholders were nonmember subcontractors working on Navajo land. But again, the Cabazon judges confuse the Cabazon Band's role as commercial counterparty with its role

as sovereign landowner. *See supra*, at 43–44. No one would say that a landowner "excludes" Chase Bank from his property if he takes out a home loan from Bank of America.

The Cabazon judges also argue (at 27) that the Cabazon Band "could have, if it so chose, barred Lexington from insuring any and all tribal property." No doubt, the Cabazon Band could have taken its business elsewhere, just like any other policyholder. But that is called freedom of contract—not sovereign regulation. Tribes have no power under *Montana*, much less their right to exclude, to prohibit off-reservation businesses from doing business with tribal members. Consider that tribes generally cannot regulate even *on-reservation* businesses transacting with tribal members on non-Indian fee land unless Congress has delegated such power. *Mazurie*, 419 U.S. at 557. The power to regulate off-reservation transactions resides with Congress alone under the Indian Commerce Clause, as shown by federal statutes regulating the off-reservation sale of alcohol to tribal members. *E.g.*, *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 416–17 (1865).

If this Court were to accept the Cabazon judges' argument that the right to exclude can extend to off-reservation conduct with any mere

nexus to tribal land, that interpretation would deepen an existing circuit split. Only this Court has limited *Hicks*—where the Supreme Court held that "ownership status of land is only one factor to consider" as part of the *Montana* analysis, 533 U.S. at 360—to its specific facts, the execution of a search warrant by state officers. *Water Wheel*, 642 F.3d at 813–14. Conversely, the Seventh, Eighth, and Tenth Circuit have all understood *Hicks* to "put to rest" the argument that *Montana* does not limit tribal jurisdiction over nonmember conduct on tribal land. *MacArthur*, 497 F.3d at 1069–70; *see Stifel*, 807 F.3d at 207 & n.60; *Attorney's Process*, 609 F.3d at 936. This Court's decision to place the right to exclude outside the *Montana* framework has been the subject of criticism from within the Circuit as well. *Window Rock*, 861 F.3d at 913–14 (Christen, J., dissenting). Although this Court need not revisit cases like *Water Wheel* to rule in Lexington's favor, the Cabazon judges' overly broad conception of the right to exclude would amplify this well-recognized "disagreement in the courts of appeals." Brief for the United States as Amicus Curiae at 16 n.2, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, No. 13-1496 (U.S.), 2015 WL 6445774.

In short, the right to exclude is not an amorphous power to regulate off-reservation transactions. It is a power to impose conditions on nonmembers who enter and remain on tribal land. Because the Tribe seeks to regulate how the insurers process claims off the reservation, the district court erred in holding that the Cabazon Reservation Court has jurisdiction under a right-to-exclude theory.

IV. The Tribal Judges Should Be Permanently Enjoined from Exercising Jurisdiction over Lexington.

The Cabazon judges agree that "Lexington's permanent injunction request rises and falls with the merits of its summary judgment motion." Cabazon Br. 57. Because the Cabazon Reservation Court lacks subject-matter jurisdiction over Lexington, this Court should instruct the district court to enter a permanent injunction barring Judge Mueller from adjudicating the Cabazon Band's tribal-court claims and Chief Judge Welmas from assigning another tribal judge to the dispute. Lexington Br. 60.

CONCLUSION

The Court should reverse the district court's decision on cross-motions for summary judgment and remand with instructions for the district court to enter judgment in Lexington's favor and to issue an

injunction against further proceedings in the Cabazon Reservation Court.

Dated: September 25, 2023 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Circuit Rule 28.1-1(b) because it contains 11,671 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

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

Dated: September 25, 2023 Respectfully submitted,

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