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 PRINCIPAL BRIEF

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CORPORATE DISCLOSURE STATEMENT

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

Dated: May 25, 2023

Respectfully submitted,

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INTRODUCTION

The district court in this case endorsed a dramatic expansion of the limited jurisdiction of tribal courts over nonmembers of tribes, reaching far beyond the boundaries set by the Supreme Court and this Court. The district court allowed the Cabazon Band of Cahuilla Indians to bring its COVID-19-related insurance claims in its own tribal court against a nonmember that never set foot on tribal land. Businesses have filed hundreds of similar suits against their insurers without success. In fact, eleven federal courts of appeals (including this one) and many state supreme courts have held that property-insurance policies like those bought by the Cabazon Band do not cover pandemic-related losses of business income. So if the Cabazon Band had sued Lexington Insurance Company for lost income in federal or state court, Lexington already would have won that lawsuit.

The question in this appeal is whether the Cabazon Band can bring its COVID-19-related insurance claims in its own tribal court rather than in federal or state court. Because Lexington is not a member of the Cabazon Band, never entered its reservation, and poses no threat to the Cabazon Band's ability to govern itself or control its internal relations,

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

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

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

Nothing about this case warrants a different result. Jurisdiction under *Montana* requires nonmember conduct on the reservation, and there was no such conduct here. Lexington never set foot on the reservation. It merely agreed to insure any qualifying tribe or tribal entity as part of a nationwide insurance program created and administered by a third party, and the Cabazon Band happened to buy a policy through that program. In other words, the Cabazon Band looked beyond the Cabazon Reservation's borders for coverage. But a tribe's decision to buy insurance outside its reservation does not mean the insurer itself did anything on the reservation that could subject it to tribal-court jurisdiction—no more than an off-reservation bank becomes subject to tribal jurisdiction by providing commercial services to tribal members.

Jurisdiction does not exist under *Montana* for several other reasons. The tribal judges, sued as defendants in this case, have conceded the second *Montana* exception does not apply. And as for the first exception, the Supreme Court in *Plains Commerce Bank v. Long*

Family Land & Cattle Co., 554 U.S. 316, 337 (2008), held that it requires not just commercial dealings with a tribe or tribal entity, but also a showing that (i) the nonmember consented to tribal-court authority and (ii) the regulation of nonmember conduct promotes the tribe's inherent authority to preserve its own government or control its internal relations. Lexington never expressly consented to Cabazon insurance regulation and did not implicitly consent either because it did not reasonably anticipate the Cabazon Band would attempt to displace state insurance law for this off-reservation contract. That is particularly true given that the Cabazon Band are one of almost 600 tribes across the country, many of which lack a formal legal code and may borrow, at their discretion, from a mix of federal law, state law, and tribal customs. And the Cabazon Band's regulation of its external relations with Lexington is unnecessary to serve any inherent sovereign interest protected by *Montana*.

The district court did not engage at all with the Supreme Court's framework for tribal-court jurisdiction under *Montana*. Instead, the district court relied on this Court's precedent recognizing what appears to be an independent third exception to the general rule against tribal authority over nonmembers. This Court has held that a tribe can

exercise power over nonmembers by relying on its right as a landowner to exclude people from its property. The district court concluded the Cabazon Band has jurisdiction over Lexington under this right-to-exclude exception.

No one doubts a tribe's authority to kick trespassers off tribal land or its lesser incidental authority to set conditions on nonmembers' entry onto tribal land, but attempts to regulate *off-reservation* activity do not fit within that right-to-exclude framework. This case simply has nothing to do with the Cabazon Band's right to exclude anyone from its property. After all, Lexington never set foot on the Cabazon Band's reservation. The district court nonetheless ruled that the general connection between the Cabazon Band's insurance policy and tribal land was enough to implicate its right to exclude. If that were correct, the presumption against tribal jurisdiction would cease to exist for disputes with nonmembers that have any arguable connection to tribal land.

The general rule that tribal courts lack jurisdiction over nonmember defendants governs this case. Otherwise, any tribe would be able to project its jurisdiction beyond the reservation's borders by entering into an off-reservation commercial transaction with some

connection to tribal land. This Court should reverse the judgment and remand with instructions for the district court to enter an injunction barring further proceedings against Lexington in the Cabazon Reservation Court.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852–53 (1985). The district court entered final judgment on February 6, 2023. 1-ER-27. Lexington timely noticed its appeal on February 14, 2023. 4-ER-783. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

There is a strong presumption that tribal courts may not exercise jurisdiction over nonmember defendants. Neither the Supreme Court nor this Court has ever held that a tribal court has jurisdiction over a nonmember defendant whose conduct took place outside a reservation. Here, the Cabazon Band sued Lexington, a nonmember, in its own tribal court even though Lexington never set foot on tribal land and has not threatened the Cabazon Band's ability to govern itself or to control its

internal relations on the reservation. Does the Cabazon Reservation Court lack subject-matter jurisdiction over Lexington?

STATEMENT OF FACTS

I. The Cabazon Band Buys Insurance Policies Through an Intermediary from an Insurer Located off the Reservation.

In 1876, President Grant set aside land "for the permanent use of the Mission Indians," including the Cabazon. Exec. Order (May 15, 1876), *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 821 (1904). The Senate later enacted legislation establishing the Cabazon Reservation in what is now Riverside County, California. Mission Indian Relief Act, 26 Stat. 712 (1891). On the reservation, the Cabazon Band of Cahuilla Indians (formerly the Cabazon Band of Mission Indians) runs several businesses, including the Fantasy Springs Resort Casino. 2-ER-123; *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204–05 (1987).

The Cabazon Band looked outside the reservation to buy insurance policies for its properties. It negotiated for coverage with a non-Indian program administrator, Alliant Insurance Services, Inc., through Alliant's Tribal Property Insurance Program. 2-ER-123. From an office in Thousand Oaks, California, the Tribal First division of Alliant handled

the entire process, providing quotes, preparing the policies consistent with Lexington's underwriting guidelines, collecting premiums, and maintaining policy-related documents. 2-ER-123–24. An Alliant employee would also visit the Cabazon Reservation annually to gather information relevant to the renewal of the Cabazon Band's insurance policies. 2-ER-125.

Through Alliant, the Cabazon Band bought property-insurance policies issued by Lexington Insurance Company. 2-ER-123. Lexington is one of various insurance companies that participate in the Tribal Property Insurance Program, which is one component of the Alliant Property Insurance Program that insures municipalities, hospitals, and non-profit organizations in addition to tribes. 2-ER-123. Lexington never dealt directly with the Cabazon Band or any other tribe insured through Alliant's Program. 2-ER-124. Lexington instead agreed with Alliant to insure the property of any tribe or tribal entity that satisfied the requirements of the Program. 2-ER-123. Because Lexington did not know in advance which tribes would buy property insurance through the Program, Lexington never set foot on the Cabazon Reservation to market, sell, or issue the policies. 2-ER-124.

Subject to terms, conditions, limitations, and exclusions of coverage, the policies insure the Fantasy Springs Resort Casino and other property owned by the Cabazon Band. 2-ER-125. These policies follow the same master policy form. 2-ER-123. They cover, among other things, "direct physical loss or damage" to covered property, 3-ER-432, business losses resulting from "direct physical loss or damage" to covered property, but only for a "period of restoration" ending when "the damaged property should have been repaired, rebuilt or replaced," 3-ER-427; 3-ER-431, and business losses from government orders prohibiting access to covered property due to nearby "damage to or destruction of property" during that same period of restoration, 3-ER-428; 3-ER-431.

II. After Temporarily Closing Some Businesses to Slow the Spread of COVID-19, the Cabazon Band Files Insurance Claims with Lexington.

In March 2020, the Cabazon Band temporarily suspended some of its business operations in an effort to slow the spread of COVID-19. 2-ER-124. That same month, the Cabazon Band also submitted a claim for insurance coverage for COVID-19-related financial losses to the Tribal First division of Alliant. 2-ER-124. Alliant forwarded that claim to Lexington, whose claims adjuster Crawford & Crawford conducted an

investigation into the Cabazon Band's coverage for its financial losses. 2-ER-124. In April 2020, Lexington issued a letter to the Cabazon Band denying coverage. 2-ER-124.

III. The Cabazon Band Sues Lexington in Tribal Court.

After Lexington issued a decision on the insurance claims, the Cabazon Band sued Lexington in its own tribal court. 2-ER-124. The Cabazon Band claimed Lexington had breached the property-insurance policies and an implied covenant of good faith and fair dealing. 2-ER-124. The Cabazon Band also sought a declaration that those policies cover financial losses resulting from COVID-19-related closure orders. 2-ER-124.

Lexington made a limited special appearance in the Cabazon Reservation Court to contest subject-matter jurisdiction and personal jurisdiction. 2-ER-124. The presiding judge, Martin A. Mueller, denied Lexington's motion to dismiss for lack of jurisdiction. 2-ER-124.

Lexington appealed from the denial of its motion to the Cabazon Reservation Court of Appeals, which accepted review. 2-ER-124. The tribal appellate court rejected Lexington's challenge to subject-matter jurisdiction on two grounds. First, it ruled that Lexington implicitly

consented to tribal-court jurisdiction by accepting the Cabazon Band's request for insurance coverage under the Tribal Property Insurance Program. 4-ER-772–73. Second, the court held that the Cabazon Band's right to exclude nonmembers from tribal lands was broad enough to support tribal-court jurisdiction over insurance claims regarding tribal property even though Lexington was never physically present on the Cabazon Reservation. 4-ER-779–81.

Since the tribal appellate decision, the Cabazon Reservation Court has continued to exercise jurisdiction over Lexington. 2-ER-124.

IV. After Lexington Challenges Tribal-Court Jurisdiction in Federal Court, Lexington and the Tribal Judges File Cross-Motions for Summary Judgment.

Tribal-court defendants can challenge tribal-court jurisdiction in federal court after exhausting available tribal remedies. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987). After Lexington exhausted its available remedies in the Cabazon courts, it sued Judge Mueller as well as Chief Judge Doug Welmas, who administers the Cabazon Reservation Court. 3-ER-336. Lexington sought declaratory and injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), against the tribal judges'

continued exercise of jurisdiction over Lexington in connection with the Cabazon Band's insurance claims. 3-ER-360–62.

The tribal judges moved to dismiss Lexington's complaint on three grounds. First, they argued that Lexington's challenge to tribal-court jurisdiction does not present a case or controversy under Article III. The tribal judges contended they were not "adverse" to Lexington in the constitutional sense, and Chief Judge Welmas also argued he was not a proper defendant because relief against him could not redress Judge Mueller's allegedly wrongful exercise of jurisdiction over Lexington. 2-ER-271–73. Second, they argued *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), established that tribal judges can no longer be enjoined under *Ex parte Young*. 2-ER-274–80. Third, the tribal judges insisted Federal Rule of Civil Procedure 19 mandated dismissal because the Cabazon Band was a required party but could not be joined due to tribal sovereign immunity. 2-ER-280–90.

Lexington responded that federal-court actions against tribal judges are a traditional method of challenging a tribal court's exercise of jurisdiction that this Court had expressly recognized. 2-ER-224 (citing *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1177

(9th Cir. 2012)). Longstanding precedent, Lexington explained, confirms federal courts have the power to hear claims against tribal judges for exceeding the federal-law limits on their jurisdiction, 2-ER-228–33, and to enjoin tribal judges from continuing to violate federal law, 2-ER-233–39, regardless of whether the tribe formally intervenes in the action, 2-ER-240–48.

While the tribal judges' motion to dismiss was pending, the parties also cross-moved for summary judgment on the question of the Cabazon Reservation Court's jurisdiction. Lexington stressed the presumption that tribal courts lack subject-matter jurisdiction over defendants who are not tribal members. 2-ER-145 (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328, 330 (2008)). Lexington also argued the tribal judges could not rebut this presumption by demonstrating this case falls within any of three exceptions. First, Lexington did not consent to tribal-court jurisdiction through its off-reservation business activities, and the Cabazon Band's adjudication of this insurance dispute did not implicate any inherent power of tribal sovereignty. 2-ER-147–55. Second, the Cabazon Band's political and economic integrity did not require a tribal court to be the forum for the

dispute. 2-ER-150. Finally, the Cabazon Band's right to exclude applies only when nonmembers physically enter tribal land—not when the Cabazon Band participates in an off-reservation insurance marketplace. 2-ER-155–58.

The tribal judges, for their part, insisted Lexington's off-reservation conduct was sufficiently connected to tribal land to support tribal jurisdiction. Although they acknowledged the Cabazon Band had not sought to "physically exclude" Lexington from tribal land, the tribal judges defended the Cabazon Reservation Court's jurisdiction under a right-to-exclude theory, arguing that Lexington entered into a contract related to tribal property even if Lexington did so from outside the reservation. 2-ER-180–81. The tribal judges also contended that Lexington, by insuring tribal property, had consented to tribal-court jurisdiction under the first of the two *Montana* exceptions. 2-ER-183–87. But the tribal judges disclaimed any reliance on the second *Montana* exception, which the Supreme Court has limited to nonmember conduct "within [a] reservation [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566; *see* 2-ER-111.

V. The District Court Holds That the Cabazon Reservation Court Has Jurisdiction over Lexington.

The district court largely denied the tribal judges' motion to dismiss. It held that Lexington could pursue its claims for injunctive and declaratory relief, rejecting the argument that the Supreme Court's decision in *Whole Woman's Health* had abrogated this Court's precedent "permitting a plaintiff to seek relief against tribal judges under *Ex parte Young* if that plaintiff 'sought prospective injunctive relief against the tribal officers acting in their official capacities.'" 1-ER-14–18 (quoting *BNSF Ry. Co. v. Ray*, 297 F. App'x 675, 676 (9th Cir. 2008), and citing *Salt River*, 672 F.3d at 1177). It also applied decisions of this Court establishing that the tribe itself is not a necessary party when a plaintiff sues tribal officers. 1-ER-19–20. But the district court dismissed the claims against Chief Judge Welmas, reasoning that his duties in administering the Cabazon Reservation Court are "too attenuated from the enforcement of tribal jurisdiction to establish standing" under *Ex parte Young*. 1-ER-19.

In the same order, the district court granted the tribal judges' motion for summary judgment and denied Lexington's cross-motion, upholding the exercise of jurisdiction by the Cabazon Reservation Court.

The court reasoned that the Cabazon Band's "right to exclude includes the right to regulate Lexington's provision of insurance to tribal entities operating on tribal land." 1-ER-23. Even though "Lexington never physically entered tribal land," the court continued, Lexington "conducted activity on tribal land by providing insurance" to the Cabazon Band and by having a purported "agent" (that is, Alliant) "conduct business on tribal land." 1-ER-23. Its ruling did not address the *Montana* framework for tribal-court jurisdiction. 1-ER-21.

SUMMARY OF ARGUMENT

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

This is not the rare case that falls within an exception to the general rule against tribal authority over nonmembers. To begin with, tribal jurisdiction requires something that is missing here: nonmember conduct on the reservation. Lexington never did anything on the reservation. It instead provided insurance coverage from an off-reservation location through an intermediary, under one branch of a nationwide insurance program that allowed any qualifying tribe or tribal entity to get property insurance. The Cabazon Band reached beyond its borders to buy coverage from an insurance marketplace over which it has no sovereign power. That a tribe goes beyond its borders to seek and buy a financial service that may have some indirect financial impact on tribal property is not enough to confer tribal jurisdiction over off-reservation conduct. Instead, the crucial question is whether the nonmember's activity occurred *on* the reservation. *E.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332–34 (2008); *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 782 n.42 (7th Cir. 2014). If a tribe's decision to do business with off-reservation nonmembers were enough, the exception would swallow the general rule against jurisdiction; tribes, by reaching out to buy just about any good or service,

could make the seller subject to tribal regulation and tribal-court jurisdiction.

Even if the lack of Lexington's presence on the reservation were not dispositive, the Cabazon Band would still lack jurisdiction under the first exception of *Montana v. United States*, 450 U.S. 544 (1981), which allows tribes to regulate certain consensual relationships between nonmembers and members. (The second exception has never been at issue in this case.) The Supreme Court explained in *Plains Commerce Bank* that the first exception applies only where the nonmember has consented to tribal authority *and* the tribal regulation stems from the tribe's inherent authority to "set conditions on entry, preserve tribal self-government, or control internal relations." 554 U.S. at 337.

Neither of those things is true here. Lexington never consented to tribal authority. There is no evidence Lexington expected or should have expected to be dragged into Cabazon Reservation Court—or the court of any of the hundreds of other federally recognized Indian tribes, for that matter. The Cabazon Band does not even regulate insurance in the first place. Nor is tribal jurisdiction over nonmember insurers that have never set foot on the reservation somehow necessary to preserve a tribe's

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

Rather than address the *Montana* framework, the district court relied on this Court's recognition of an independent third exception premised on a tribe's right to exclude nonmembers from its land. But the right to exclude is even more limited than *Montana*; it requires conduct taking place specifically on land owned by the tribe or held in trust for the tribe (as opposed to conduct taking place on non-Indian fee land within a reservation). The right to exclude is therefore irrelevant here because a property owner's right to keep people off his land or set conditions on entry has nothing to do with the owner's relationship with financial-services providers, like insurers and banks, that have never come anywhere near the land.

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

barring further proceedings in the tribal court. That injunction should redress Lexington's injury by prohibiting Judge Mueller from adjudicating the Cabazon Band's claims and Chief Judge Welmas from assigning another tribal judge to the case.

STANDARD OF REVIEW

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

ARGUMENT

I. Tribes Lack Inherent Sovereign Authority to Regulate Off-Reservation Conduct.

Tribal sovereignty arises from tribal membership and control over tribal land. For that reason, tribes generally lack authority to regulate nonmembers' conduct on non-Indian fee land within the reservation, let

alone off-reservation conduct. The Supreme Court and this Court have recognized just three exceptions to this rule against tribal jurisdiction over nonmembers. None can apply here because claims in the Cabazon Reservation Court are an attempt to regulate Lexington's off-reservation conduct of entering into property insurance policies and processing claims under those policies.

A. Tribes Presumptively Lack Jurisdiction over Nonmembers.

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

Tribes generally retain "attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). For example, "unless limited by treaty or statute, a tribe has the power to determine tribe membership, to regulate domestic relations

among tribe members, and to prescribe rules for the inheritance of property." *Wheeler*, 435 U.S. at 322 n.18 (citations omitted).

But tribes generally cannot exercise power over nonmembers. For example, tribal courts have no inherent power to try and punish non-Indians. The Supreme Court reasoned that tribal courts had never enjoyed the power to try non-Indians, and that Congress had never granted it. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 197–211 (1978). In *Duro v. Reina*, 495 U.S. 676 (1990), the Court went a step further, holding that tribes lack criminal jurisdiction over anyone (including other Indians) except their own members. Tribes have the power to "restrain those who disturb public order on the reservation, and if necessary, to eject them," but they have no power to prosecute the crimes of nonmembers in their own courts. *Id.* at 697. Congress overruled *Duro* by authorizing tribal criminal jurisdiction over nonmember Indians, underscoring that tribes are dependent nations that lack power over nonmembers unless Congress affirmatively grants it. *Strate v. A–1 Contractors*, 520 U.S. 438, 445 n.5 (1997); *see United States v. Lara*, 541 U.S. 193, 207 (2004) (upholding congressional amendment of *Duro*).

The principle that tribes presumptively lack jurisdiction over nonmembers is as true in civil cases as in criminal ones. The lead case on tribal civil authority over nonmembers is *Montana v. United States*, 450 U.S. 544 (1981). *Montana* presented the question whether tribes have any power to regulate hunting and fishing on reservation land owned by nonmembers. This Court had decided the Crow Tribe had "that power as an incident of the inherent sovereignty of the Tribe over the entire Crow Reservation." *Id.* at 563. The Supreme Court reversed, explaining that Indian sovereignty has been completely "divested" as to, among other things, "'the relations between an Indian Tribe and nonmembers of the tribe.'" *Id.* at 564 (emphasis omitted). The Court held that the reasoning of *Oliphant* is not limited to criminal cases, and instead rests on the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565.

Montana recognized two narrow exceptions to the strong presumption that tribes lack civil jurisdiction over nonmembers. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the

tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

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

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

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

This case falls within the general presumption against tribal jurisdiction for a simple (and geographic) reason. The Cabazon Reservation Court's continued exercised of jurisdiction violates the principle that tribes cannot exercise jurisdiction outside their territorial boundaries. Because Lexington did nothing within the reservation, let alone specifically on tribal land, neither the Cabazon Band's limited regulatory authority under *Montana* nor its right to exclude nonmembers from tribal land could possibly support the jurisdiction of the Cabazon Reservation Court.

From the start, the Supreme Court has cabined tribal jurisdiction to tribal membership and territorial boundaries. The first time the Court heard a case on Indian sovereignty, Justice Johnson observed that the tribes lacked "the right of governing every person within their limits except themselves." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (concurring opinion). Chief Justice Marshall later described tribes "as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557

(1832). But tribes could not regulate commerce outside these boundaries. Instead, the Indian Commerce Clause empowers the federal government to regulate off-reservation transactions involving tribes and tribal members, U.S. CONST. art. I, § 8, cl. 3, as when Congress criminalized the sale of alcohol to Indians "when they are outside of a reservation, as well as within it," *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 416–17 (1865).

Indian law has changed in some ways. For example, courts now hold that state law applies on reservations and gives states "jurisdiction over crimes committed in Indian country" by non-Indians. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493–94 (2022). But other things have stayed the same. In particular, the "dependent status of Indian tribes" recognized in *Worcester* remains "necessarily inconsistent with their freedom independently to determine their external relations." *Wheeler*, 435 U.S. at 326. *Montana* reflects this principle, explaining that inherent tribal sovereignty encompasses "their members and their territory," which can justify only limited "forms of civil jurisdiction over non-Indians *on their reservations*." 450 U.S. at 563–65 (emphasis added).

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

- a non-Indian operator of a general store "on the Reservation" could sue a tribal member for his nonpayment only in a tribal court, *Williams v. Lee*, 358 U.S. 217, 223 (1959);
- tribes have the power to require non-Indians to pay permit taxes for grazing their livestock on tribal land, *Morris v. Hitchcock*, 194 U.S. 384, 389 (1904);
- a tribe has the "inherent" power to require non-Indians to pay permit taxes for the privilege of "transact[ing] business within its borders," *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905);
- and tribes retain the inherent "power to impose their cigarette taxes on nontribal purchasers" buying cigarettes "on trust lands." *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152 (1980).

Post-*Montana* decisions state this territorial limitation in unmistakable terms. In *Atkinson Trading Co. v. Shirley*, 532 U.S. 645

(2001), a unanimous Supreme Court surveyed the restrictions on inherent tribal sovereignty, beginning with Justice Johnson's *Fletcher* concurrence and continuing through *Montana*. *Id.* at 649–51. Those decisions, the Court held, established that tribal authority "reaches no further than tribal land," which meant the tribe could tax only "transactions occurring on *trust lands* and significantly involving a tribe or its members." *Id.* at 653 (cleaned up). ("Trust land" is land held in trust by the federal government for the benefit of tribes. *Carcieri v. Salazar*, 555 U.S. 379, 387–88 (2009).)

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

This Court has recognized the same principle: "'there can be no assertion of civil authority beyond tribal lands.'" *Smith v. Salish*

Kootenai College, 434 F.3d 1127, 1132 (9th Cir. 2006) (en banc). In other words, "tribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009). And the right-to-exclude exception recognized by this Court is narrower still. While *Montana* requires nonmember conduct within the reservation's borders, the tribe's right to exclude applies only to land owned by the tribe or held in trust for the tribe, thus excluding land within the reservation owned by non-Indians. *Window Rock*, 861 F.3d at 899–900.

That geographic principle resolves this case. The district court held that Lexington "surely conducted activity on tribal land by providing insurance to the Tribe." 1-ER-23. But all of Lexington's relevant conduct was indisputably outside the Cabazon reservation. Lexington does not maintain any operations whatsoever inside the reservation. 2-ER-123. Lexington also did not negotiate or execute the insurance policies with the Cabazon Band on the reservation. 2-ER-123–24. Instead, Lexington negotiated with Alliant, a non-Indian program administrator, on the terms of their participation in the Tribal Property Insurance Program,

while the Cabazon Band separately negotiated with Alliant. 2-ER-123. Nor was Lexington on the reservation when it considered the Cabazon Band's claims for business losses resulting from COVID-19-related closures, which is the conduct that serves as the basis for the claims that Lexington breached the insurance policies and an implied covenant of good faith and fair dealing. 2-ER-124. Although the Cabazon Band may have "'general authority, as sovereign, to control economic activity within its jurisdiction,'" *Atkinson*, 532 U.S. at 652, it cannot extend its jurisdiction "beyond the reservation's borders where the tribe lack[s] authority to regulate a non-Indian," *Water Wheel*, 642 F.3d at 815.

The district court believed Lexington engaged in conduct *on* tribal land (in some metaphysical sense) just because its off-reservation commercial arrangement with the Cabazon Band *related* to tribal property. But this arrangement shows only that the Cabazon Band participated as a commercial actor in an off-reservation insurance marketplace—not that Lexington engaged in commerce within the reservation's borders. After all, property insurance is a risk-shifting commercial transaction: The insurer accepts a stream of payments in exchange for a promise to pay the policyholder if very carefully defined

circumstances come to pass. 3-ER-427–32. Entering into a property-insurance contract did not transport Lexington physically onto the Cabazon Reservation to protect tribal property from harm.

Plains Commerce Bank illustrates the error in the district court's conclusion that tribes can treat off-reservation commercial activity related to tribal land as a form of "activity on tribal land" subject to tribal jurisdiction. 1-ER-23. There, the Supreme Court considered whether the Cheyenne River Sioux could regulate the sale of reservation land owned in fee simple by a non-Indian. The answer was no: *Montana* permits tribes to regulate "certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development)" that "intrude on the internal relations of the tribe or threaten tribal self-rule." 554 U.S. at 334–35. But a nonmember's "sale of the land" is different from "conduct on it," which meant that the tribe had not identified "nonmember *conduct* inside the reservation" that could support tribal jurisdiction. *Id.* at 332, 334. It's the same story here: "conduct taking place on the land" and insurance transactions merely related to property on tribal land "are two very different things" for purposes of tribal jurisdiction. *Id.* at 340.

Circuit courts also have consistently held that tribal courts lack authority to adjudicate disputes over commercial transactions between tribes and off-reservation entities even when the transactions relate to tribal property. In *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015), for example, an investment vehicle bought tribal bonds that were secured by the revenues and assets of a reservation casino. *Id.* at 189. The accompanying trust indenture gave the bondholder and the trustee (Wells Fargo) the power to oversee casino revenues. *Id.* When the tribe was unable to meet its obligations, newly elected tribal leaders repudiated the bonds and sued the bondholder, the brokerage firm, and Wells Fargo in tribal court, seeking a declaration voiding the bond-related documents. *Id.* at 191–93. The Seventh Circuit rejected the tribe's attempt to regulate off-reservation commercial activity, even though the bonds were secured by tribal property. Under *Montana*, "actions of nonmembers outside of the reservation do not implicate the Tribe's sovereignty" and cannot support tribal jurisdiction. *Id.* at 207.

Stifel came on the heels of *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), which concerned off-reservation borrowers who

sued on-reservation tribal payday lenders for deceptive business practices. *Id.* at 768–69. The Seventh Circuit allowed the dispute to proceed in federal court because the tribal court would have lacked jurisdiction over the borrowers' claims. Even though the tribal lenders had executed the contracts on the reservation, that was beside the point because *Montana* focuses on "the *nonmember's* actions, specifically the *nonmember's actions on the tribal land*." *Id.* at 782 n.42. The mere existence of a commercial relationship with a tribal entity was not enough to support tribal jurisdiction because the borrowers had "not engaged in *any* activities inside the reservation. They did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents." *Id.* at 782.

The Eighth Circuit has likewise held that *Montana* does not "allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*." *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091–92 (8th Cir. 1998). Take, for instance, *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe*, 609 F.3d 927 (8th Cir. 2010). There, a tribe's chairman attempted to end an intratribal dispute over control of a casino by hiring

an off-reservation security firm, which sent armed employees to force their way into the casino and seize financial and operational information. *Id.* at 932. The rival faction prevailed in tribal elections and sued the security firm in tribal court for (i) conversion of the tribal funds paid by the erstwhile chairman under the security contract and (ii) various intentional torts committed on tribal land, including assault and property damage. *Id.* The Eighth Circuit held that although the tribal court had jurisdiction under *Montana* over the torts occurring during the casino raid, the tribe had no power to regulate the allegedly "unauthorized receipt and retention of tribal funds" because that conduct did not "occur[] within the Meskwaki Settlement." *Id.* at 939–41 (no jurisdiction under second *Montana* exception); *see Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe*, 809 F. Supp. 2d 916, 928 (N.D. Iowa 2011) (holding on remand that tribe lacked jurisdiction under first *Montana* exception for same reason).

Tenth Circuit precedent is much the same. In *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007), a Navajo tribal court entered an injunction against nonmember defendants. The Tenth Circuit refused to enforce that injunction because the tribal court lacked

jurisdiction over nonmember defendants. For all but one of the tribal-court defendants, it was dispositive that they did not engage in conduct "within the physical confines of the reservation." *Id.* at 1071–72. (The last defendant, a state entity, operated "within the exterior boundaries of the Navajo reservation" but could not be subject to tribal jurisdiction given overriding state interests. *Id.* at 1072–73.) As the Tenth Circuit explained, "Supreme Court precedent clearly limits the regulatory authority of tribes . . . to the reservation's borders," and general connections between a nonmember defendant and a tribe or its members are not enough to support tribal-court jurisdiction. *Id.* at 1071–72.

In addition to being unprecedented, the district court's reasoning would have far-ranging consequences. If Lexington is "on tribal land" here, 1-ER-23, anyone else who engages in off-reservation transactions with tribal members could be subject to tribal regulation. Any bank, for example, that offers mortgages to a tribal member would be "on tribal land" because of the loan paperwork. Or whenever a tribal member buys a share of stock on a stock exchange, a tribal court could deem the seller (and perhaps even the exchange itself) to have been transported onto

tribal land for jurisdictional purposes. This is a recipe for tribal jurisdiction without limit.

These outcomes would violate the principle that tribes, "by virtue of their dependent status," do not possess "freedom independently to determine their external relations." *Wheeler*, 435 U.S. at 326. Because inherent tribal sovereignty does not reach beyond the reservation's borders, the Cabazon Band cannot regulate how Lexington processes claims outside the reservation under either *Montana* or its right to exclude.

II. No *Montana* Exception Applies Here.

Nonmember conduct on tribal land is a prerequisite to jurisdiction under *Montana*. But this case also does not implicate the only *Montana* exception invoked by the tribal judges in the district court. The first exception allows tribes a limited authority to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. This exception permits tribes to regulate (1) "only if the nonmember has consented, either expressly or by his actions," to tribal

jurisdiction and (2) only when the regulation "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 554 U.S. at 337. The Cabazon Reservation Court's assertion of jurisdiction over Lexington flouts both limitations.

A. Lexington Never Consented to Tribal Jurisdiction.

Plains Commerce Bank made clear that consent is necessary—albeit insufficient by itself—to justify tribal jurisdiction. Because nonmembers "have no say in the laws and regulations that govern tribal territory," tribal law "may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." 554 U.S. at 337. The first *Montana* exception therefore applies only to "private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction." *Hicks*, 533 U.S. at 372. This consent requirement guards against the harms that result from "the application of tribal laws to non-Indians who do not belong to the tribe and consequently ha[ve] no say in creating the laws that would be applied to them." *United States v. Cooley*, 141 S. Ct. 1638, 1644 (2021).

This Court has formulated the test under the first *Montana* exception as "whether under the circumstances the non-Indian defendant should have reasonably anticipated that its interactions might trigger tribal authority." *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 932 (9th Cir. 2019) (cleaned up). The consensual relationship in this case formed when the Cabazon Band reached outside its borders to negotiate with Alliant, a non-Indian program administrator, for property insurance, and when Lexington separately negotiated with Alliant to provide insurance under a master policy form. 1-ER-123–25. Lexington, which operates outside the territorial boundaries of the Cabazon Reservation, would not have reasonably anticipated that the Cabazon Band would attempt to regulate the business of insurance.

Two background rules show why. First, state law has long "enjoyed a virtually exclusive domain over the insurance industry," subject only to limited federal preemption. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978). Congress has declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. So the insurance marketplace, by and large, takes its cues only from state laws and state

regulators. *See, e.g.*, Cal. Ins. Code §§ 12919–13555. Second, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973). The Cabazon Band may have sought insurance for businesses located on tribal property, but it reached beyond reservation boundaries—into land governed by state law—to buy coverage.

Nothing overcomes these presumptions and demonstrates that Lexington was on notice that the Cabazon Band would assert sovereign authority over any insurance transactions that happen to have a connection to tribal property. Nor could the Cabazon Band make this showing, for two reasons. First, the Cabazon Band does not regulate insurance at all. 2-ER-125. Second, the number of tribes and the great variety in their laws make it unlikely that a nonmember would automatically consent to the jurisdiction of any tribe with which it happens to do business. There are almost 600 federally recognized tribes. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (2022).

While some larger tribes have formal courts with well-developed bodies of law, many tribal courts rely on unwritten "'values, mores, and norms of a tribe.'" *Hicks*, 533 U.S. at 384 (Souter, J., concurring); *see, e.g.*, *Plains Commerce Bank*, 554 U.S. at 338 (discussing "novel" antidiscrimination claim accepted by tribal jury). In negotiating master policy forms with Alliant, Lexington did not consent to potentially hundreds of tribal courts interpreting standardized language according to different tribal customs.

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

- In *FMC*, a non-Indian mining corporation had "operated on the Reservation for over 50 years," had enjoyed "an extensive relationship with the Tribes for 70 years," and had "consented to tribal jurisdiction" inside the reservation for its land-use permits. 942 F.3d at 921, 933–34.
- In *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892 (9th Cir. 2019), a non-Indian should have reasonably anticipated a tribal court could hear a workplace-

misconduct claim after serving as "an employee of the Tribe for approximately sixteen years" during which time she, "as Tribal Administrator, was responsible for the overall supervision and management of tribal operations and carrying out tribal projects consistent with the Tribal Constitution." *Id.* at 904.

- In *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013), a non-Indian company that had agreed by contract to comply with tribal law reasonably anticipated tribal jurisdiction over its continued operation of a tourist attraction on tribal land. *Id.* at 1206.
- And in *Water Wheel*, a non-Indian that had operated a resort on tribal land for two decades reasonably anticipated tribal jurisdiction over eviction proceedings for unpaid rent under leases that expressly provided that tribal law would apply to his activities on tribal property. 642 F.3d at 818.

In these four cases, the nonmembers either expressly consented to the application of tribal law to disputes arising from their activities on the reservation or at least reasonably anticipated being subject to tribal law. Lexington lacked similar notice that the Cabazon Band would

attempt to switch hats from mere commercial counterparty to sovereign regulator for the property-insurance policies.

In the district court, the tribal judges tried to establish consent to tribal-court jurisdiction through the insurance policies' service-of-suit clause, which provides that "in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Named Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States." 3-ER-447. Lexington, they said, should have drafted this clause to expressly foreclose tribal-court jurisdiction. 2-ER-184–85.

But that reasoning puts the cart before the horse. The service-of-suit clause does not establish jurisdiction. By referring to a "court of competent jurisdiction," the clause merely states that Lexington will submit to "a court with an existing source of subject-matter jurisdiction." *Lightfoot v. Cendant Mortgage Corp.*, 580 U.S. 82, 92 (2017). That is the very question at the heart of this case: whether the Cabazon Reservation Court has subject-matter jurisdiction in the first place. And as *Hicks* explained, "[t]ribal courts, it should be clear, cannot be courts of general

jurisdiction" because a tribe's "inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction." 533 U.S. at 367. So a tribal court is presumptively not a court of competent jurisdiction for claims against non-Indians. *Plains Commerce Bank*, 554 U.S. at 330.

In fact, the service-of-suit clause suggests any dispute would be resolved in federal or state court, not in tribal court. It appoints 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," as opposed to the law of any tribe. 3-ER-448. The clause also reserves Lexington's right "to remove an action to a United States District Court." 3-ER-447. But if a policyholder can file in tribal court, Lexington would be deprived of that right because defendants in tribal court cannot invoke the provisions authorizing removal to federal court. *Hicks*, 533 U.S. at 368. And the clause further reserves Lexington's right "to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States." 3-ER-447. This provision, which does not mention tribal law, would likewise have no effect in tribal court.

The Cabazon Band no doubt prefers to litigate its claims in its own courts given the fate of similar insurance-coverage claims elsewhere. Nearly every federal appellate and state supreme court to consider the issue—including this Court, *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021)—has joined this overwhelming consensus.* And the possibility of a different outcome here is a vice, not a virtue, of tribal-court jurisdiction. As the Supreme Court has observed, "[t]ribal courts are often 'subordinate to the political branches of tribal

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* *E.g.*, *SAS Int'l, Ltd. v. Gen. Star Indem. Co.*, 36 F.4th 23 (1st Cir. 2022); *10012 Holdings, Inc. v. Sentinel Ins. Co.*, 21 F.4th 216 (2d Cir. 2021); *Wilson v. USI Ins. Servs.*, 57 F.4th 131 (3d Cir. 2023); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022); *Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co.*, 29 F.4th 252 (5th Cir. 2022); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021); *Goodwill Indus. of Cent. Okla. Inc. v. Philadelphia Indem. Ins. Co.*, 21 F.4th 704 (10th Cir. 2021); *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347 (11th Cir. 2022); *Hill & Stout, PLLC v. Mutual of Enumclaw Ins. Co.*, 515 P.3d 525 (Wash. 2022); *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545 (Iowa 2022); *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266 (Mass. 2022); *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974 N.W.2d 442 (Wis. 2022); *Tapestry, Inc. v. Factory Mut. Ins. Co.*, 286 A.3d 1044 (Md. 2022); *Neuro-Communication Servs., Inc. v. Cincinnati Ins. Co.*, — N.E.3d —, 2022 WL 17573883 (Ohio Dec. 12, 2022); *Sullivan Mgm't, LLC v. Fireman's Fund Ins. Co.*, 879 S.E.2d 742 (S.C. 2022).

governments.'" *Duro*, 495 U.S. at 693. Here, for example, Chief Judge Welmas, who handpicked Judge Mueller for this dispute, also serves as Chairman, the political head of the Cabazon Band. 3-ER-336. And the Cabazon General Council has the ability to suspend Judge Mueller from his pro tem position. Cabazon Tribal Code § 9-103(f) (2-ER-299). Yet removal to federal court—again, the typical check on home-field advantage when a defendant is "in an unfamiliar court"—is not available in tribal court. *Strate*, 520 U.S. at 459 & n.13.

Lexington also does not possess its standard constitutional rights in tribal court because tribal sovereignty is "'outside the basic structure of the Constitution.'" *Plains Commerce Bank*, 554 U.S. at 337 (citing *Talton v. Mayes*, 163 U.S. 376, 382–85 (1896)); *see, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 (1978) (no right to civil jury trial). Although the Indian Civil Rights Act requires tribes to provide "due process" generally, 25 U.S.C. § 1302(a)(8), this Court reviews due-process challenges to tribal-court judgments "with deference to tribal customs and practices," *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1143 (9th Cir. 2001). This latitude threatens Lexington's right to due process before the judge selected by the Cabazon Band to rule on its own claims.

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

Plains Commerce Bank clarified a second limitation on tribal-court jurisdiction under *Montana*. Not only must the nonmember consent to the application of tribal law, but "[e]ven then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." 554 U.S. at 337. Tribal jurisdiction over this insurance dispute does not serve any of these interests.

The power to set conditions on entry cannot justify tribal jurisdiction. Lexington has never set foot on the reservation, and the Cabazon Band does not seek to enforce any right to control entry onto tribal property. 2-ER-124; *see also infra* at 55–58.

Tribal jurisdiction is not necessary to preserve self-government either. The forum for this dispute does not threaten the Cabazon's ability "to make their own laws and be ruled by them"—for example, its ability "to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Strate*, 520 U.S. at 459 (cleaned up). As the Supreme Court has held, 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). This Court too has recognized that there is "no reason why commercial agreements between tribes and private citizens cannot be adequately protected by well-developed state contract laws." *Gila River Indian Community v. Hennington, Durham & Richardson*, 626 F.2d 708, 715 (9th Cir. 1980). Tribal self-rule therefore does not require a tribal forum to regulate the Cabazon Band's own "commercial transactions" with nonmembers. *Stifel*, 807 F.3d at 209.

Finally, this dispute is about the Cabazon Band's external relations with Lexington, not its internal relations with tribal members. A case illustrating control of internal relations is *Fisher v. District Court of Sixteenth Judicial District of Montana*, 424 U.S. 382 (1976) (per curiam), which held that tribal courts have exclusive jurisdiction over custody proceedings for tribal members arising on tribal land. *Id.* at 387–88. In contrast, jurisdiction over outward-facing disputes with nonmembers—like the claims against Lexington—conflicts with the principle that tribes

do not possess the "freedom independently to determine their external relations." *Wheeler*, 435 U.S. at 326.

Other courts of appeals have agreed with Lexington that "a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court" under *Plains Commerce Bank* unless the tribal regulation flows from conditions on entry into tribal land, tribal self-government, or internal affairs on the reservation. *Jackson*, 764 F.3d at 783; *accord NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 546, 554 (6th Cir. 2015). In *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019), for example, the Eighth Circuit held that "[a] consensual relationship alone is not enough" under the first *Montana* exception even though a dispute arose on tribal land leased by tribal members to non-Indian oil and gas companies. *Id.* at 1138. There was no need for tribal law to regulate the disputed royalty payments there because federal law comprehensively did so. *Id.* The same reasoning applies here because state law already regulates the coverage issues raised by the Cabazon Band under its property-insurance policies. *See supra*, at 38–39, 44 n.*.

* * *

The first *Montana* exception does not apply here. Lexington has never set foot on tribal land. It also never "consented, either expressly or by [its] actions," to regulation in tribal court. *Plains Commerce Bank*, 554 U.S. at 337. And because the Cabazon Band does not need to regulate insurance to protect its ability to govern itself or to control its internal relations, there is no inherent sovereign interest in this case that could sustain tribal-court jurisdiction.

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

The district court bypassed *Montana* and went straight to a third exception that applies when a tribe exercises its right to exclude nonmembers who have entered tribal lands. In *Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) (per curiam), the Court held that "*Montana* limited the tribe's ability to exercise its power to exclude only as applied to the regulation of non-Indians on non-Indian land, not on tribal land." *Id.* at 810.

The district court erred in grounding right-to-exclude jurisdiction in Lexington's off-reservation conduct of agreeing to insure tribal

property and processing claims under those policies. 1-ER-23. The right to exclude is even more limited than *Montana* from a territorial perspective. *See supra*, at 28–29. Because this Court has limited the *Montana* presumption against tribal-court jurisdiction to nonmember conduct occurring on non-Indian land within the reservation, the right-to-exclude doctrine applies only "to nonmember conduct on tribal land"—that is, only to a subset of land within the reservation. *Window Rock*, 861 F.3d at 898. Because the Cabazon Band seeks neither to exclude Lexington from tribal land nor to regulate Lexington as a condition of entering tribal land, its right to exclude cannot support the exercise of tribal jurisdiction over Lexington's off-reservation insurance activities.

This conclusion follows from longstanding precedent. No one disputes that tribes have an inherent right to exclude nonmembers from entering tribal land. *Duro*, 495 U.S. at 696. But from its earliest cases, the Supreme Court has always linked the right to exclude to non-Indians who are physically present on tribal land. Chief Justice Marshall explained that the Cherokee Nation "occup[ied] its own territory, with boundaries accurately described," where "the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves" or as

permitted by federal law. *Worcester*, 31 U.S. (6 Pet.) at 561. The Court described the right the same way when non-Indians who had contracted for the right to graze livestock on tribal land challenged the Chickasaw Nation's right to impose a per-head tax on cattle. *Morris*, 194 U.S. at 385 & n.†. The tribe's right to exclude implied the lesser "power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory." *Id.* at 389. By refusing to pay the tax, the ranchers were "wrongfully within the territory," and the tribe could forcibly remove their cattle from its lands. *Id.* at 393.

The Supreme Court has carried forward this understanding to this day. Unless Congress says otherwise, tribes may "exclude outsiders from entering tribal land." *Plains Commerce Bank*, 554 U.S. at 328. This power to exclude also "includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct" because "[w]hen a tribe grants a non-Indian the right to be *on Indian land*, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (first emphasis added).

But this is not a free-ranging tribal power to regulate off-reservation conduct that happens to have some impact on tribal land or property. Instead, it is an "incidental" component of the "right of absolute and exclusive use and occupation" of tribal land. *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). Any regulation must flow from the "landowner's right to occupy and exclude," which tribes have retained, rather than some inherent sovereign power over nonmembers, which tribes have never had. *Strate*, 520 U.S. at 456; *see Fletcher*, 10 U.S. (6 Cranch) at 147 (Johnson, J., concurring).

This Court has also treated physical entry onto tribal lands as a requirement for right-to-exclude jurisdiction. In *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (en banc), for example, the Court reasoned that "[i]f the power to exclude implies the power to regulate those who enter tribal lands, the jurisdiction that results is a consequence of the deliberate actions of those who would enter tribal lands to engage in commerce with the Indians." *Id.* at 1139. Put another way, the nonmember agrees not to violate conditions on "entry or continued presence on tribal land" in exchange for access. *Knighton*, 922 F.3d at 902. But here is the catch: "this inherent power does not permit

the Tribe to impose new regulation upon [a nonmember's] conduct retroactively when she is no longer present on tribal land." *Id.* Regulation *after* the nonmember has left does not fly because the right to exclude regulates only presence on tribal land.

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

- tribal courts can hear eviction proceedings against nonmembers that operate businesses on tribal land, *Water Wheel*, 642 F.3d at 812–13;
- tribal courts plausibly have jurisdiction over condemnation proceedings to exclude non-Indian developers with contractual rights to manage a tourist attraction on tribal land, *Grand Canyon Skywalk*, 715 F.3d at 1204;
- tribes can "condition entry" onto the reservation by repo men upon "permission of the Tribe or the individual car owner,"

Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 594 (9th Cir. 1983);

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

The overarching principle is that tribal courts gain jurisdiction over nonmembers *on tribal land* because "a nonmember who enters the jurisdiction of the tribe" agrees to "compl[y] with the initial conditions of entry" and any later "conditions on the non-Indian's conduct or continued presence on the reservation." *Merrion*, 455 U.S. at 144–45. Because the

tribe always has the option of forbidding entry to or forcing exit from tribal land, jurisdiction rests on "the deliberate actions of those who would enter tribal lands." *Smith*, 434 F.3d at 1139. That is why right-to-exclude cases all involve an effort by the tribe either to remove non-Indians from tribal land, *e.g.*, *Water Wheel*, 642 F.3d at 812–13 (eviction), or to impose conditions on non-Indians entering or remaining on tribal land, *e.g.*, *Knighton*, 922 F.3d at 906 (workplace misconduct).

This case does not fit under this right-to-exclude framework. All of Lexington's relevant conduct occurred off the reservation, and Lexington did not even directly interact with the Cabazon Band in negotiating and issuing the policies. 2-ER-123–25. In fact, the district court agreed that "Lexington never entered tribal land." 1-ER-23. The Cabazon Band's "status as landowner" thus has no role to play in this case. *Grand Canyon Skywalk*, 715 F.3d at 1204. Although the Cabazon Band (like any policyholder) could choose to buy property insurance elsewhere in the future, it would not be exercising any right to "exclude" Lexington from tribal land if it so chose.

The district court also pointed to visits by Alliant to the Cabazon Reservation to collect information related to policy renewal. 1-ER-23.

But the court identified nothing that could establish an agency relationship between Lexington and Alliant. Alliant negotiated at arm's length with both Lexington and the Cabazon Band as a third-party administrator of the Tribal Property Insurance Program. *See supra*, at 7–8. And at any rate, an agency relationship would be irrelevant because the Cabazon Band does not seek to keep Alliant off tribal land. Visits by Alliant that form no part of the Cabazon Band's claims concerning Lexington's off-reservation processing of insurance claims 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.

In short, the Cabazon Band does not want to exclude Lexington from tribal land because Lexington has never been *on* tribal land. 1-ER-124. Nor does the Cabazon Band want to exclude Alliant from tribal land because its claims have nothing to do with those annual visits. Instead, the Cabazon Band wants a ruling on the scope of an insurance policy that it bought outside the reservation. This case simply has nothing to do with any right to physically exclude someone from tribal land, or the corollary right to set conditions on entry.

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

The court below, by contrast, took the opposite approach: equating "providing insurance" to the Cabazon Band with "activity on tribal land." 1-ER-23. That mistaken reasoning provides a roadmap to circumvent the guardrails on tribal jurisdiction over nonmembers with respect to many commercial activities that courts have for decades placed outside tribal-court jurisdiction. If the district court's analysis were right, then tribes could easily get around *Montana*'s requirement that tribal regulations

must "stem from the tribe's inherent sovereign authority." *Plains Commerce Bank*, 554 U.S. at 337. They could simply point to this supposed right to exclude nonmembers from off-reservation transactions that happen to have some connection to tribal land.

At the end of the day, the Cabazon Band is on the reservation. Its property is too. But Lexington is not and never was. The Cabazon Band instead looked outside the reservation to buy insurance for its property—a commercial transaction that has nothing to do with who can enter tribal land. Because the parties' dispute over the scope of that insurance does not implicate any power to exclude Lexington from tribal land that it was never on, the district court erred in upholding the jurisdiction of the Cabazon Reservation Court under a right-to-exclude theory.

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

This Court should remand with instructions for the district court to enter a permanent injunction prohibiting Judge Mueller from exercising jurisdiction over Lexington in the Cabazon Reservation Court. This is the standard remedy when tribal judges unlawfully exercise jurisdiction over nonmembers. *E.g.*, *Strate*, 520 U.S. at 444; *Big Horn County Electric Coop., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000). Such an

injunction would redress Lexington's irreparable harm of litigating in a tribal forum that lacks jurisdiction to hear the dispute. *Stifel*, 807 F.3d at 194. Judge Mueller will suffer no injury the law recognizes as valid if he cannot adjudicate a dispute he lacks jurisdiction to decide; for much the same reason, the public interest decisively favors an injunction that enforces the limits on tribal sovereignty. *Crowe v. Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153 (10th Cir. 2011).

This injunction should reach Chief Judge Welmas as well. The district court held that Chief Judge Welmas "lacks the direct connection to the Tribal Court's exercise of jurisdiction over Lexington that an *Ex parte Young* action requires." 1-ER-19. But Chief Judge Welmas's connection to the illegal exercise of tribal-court jurisdiction could hardly be more direct: He assigned Judge Mueller to hear the parties' dispute as a pro tem judge. 3-ER-336; *see* Cabazon Tribal Code § 9-103(c) (2-ER-298). And as the Eighth Circuit has held, 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*, 932 F.3d at 1132.

In the district court, the tribal judges also argued that no remedy against Chief Judge Welmas could redress Lexington's injury in an Article III sense because the Cabazon General Council alone has the power to remove Judge Mueller from his pro tem position. 2-ER-273; *see* Cabazon Tribal Code § 9-103(f) (2-ER-299). But the tribal judges have conflated Chief Judge Welmas's lack of power to *fire* Judge Mueller with his administrative power to *assign* pro tem judges to tribal cases. A potential remedy also need not fully undo the harm caused by Chief Judge Welmas's assignment of Judge Mueller to preside over the tribal-court case. *E.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007). Instead, redressability under Article III requires nothing more than a remedy that "would at least partially redress" the injury. *Meese v. Keene*, 481 U.S. 465, 476 (1987). An injunction prohibiting Judge Mueller from adjudicating the claims and Chief Judge Welmas from assigning a different tribal judge to hear the parties' dispute would work in lockstep to eliminate the unlawful exercise of tribal-court jurisdiction over Lexington.

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: May 25, 2023

Respectfully submitted,

/s/ *Richard J. Doren*
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Circuit Rule 28.1-1(b) because it contains 11,660 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: May 25, 2023

Respectfully submitted,

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

CERTIFICATE OF RELATED CASES

Under Circuit Rule 28-2.6, Plaintiff-Appellant Lexington Insurance Company identifies *Lexington Insurance Co. v. Smith*, No. 22-35784, as a related proceeding that raises the same or closely related issues.

Dated: May 25, 2023

Respectfully submitted,

/s/ *Richard J. Doren*
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