No. 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-APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT CASE NO. 5:22-CV-00015

HON. JOHN W. HOLCOMB, DISTRICT JUDGE, PRESIDING

PRINCIPAL AND RESPONSE BRIEF OF DEFENDANTS MUELLER AND WELMAS

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INTRODUCTION

Defendant tribal court judges Doug Welmas and Martin A. Mueller ("Defendants") have cross-appealed the district court's denial of their motion to dismiss. The district court's denial warrants reversal under *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021). There, the Supreme Court held that *state* court judges are not proper defendants in an action under *Ex parte Young*, 209 U.S. 123 (1908). *Id.* at 531–34. The Supreme Court's holding ought to foreclose *Ex parte Young* actions against *tribal* court judges as well. But because the *Whole Woman's Health* decision did not explicitly discuss tribal judges, the district court felt bound to apply Ninth Circuit precedent permitting such suits. This was error because the analysis in *Whole Woman's Health* has undercut the theory and reasoning underlying this Circuit's precedent permitting suits against tribal court judges so as to render that precedent "clearly irreconcilable" with current Supreme Court law. *Ex parte Young* did not expressly mention tribal officials. Yet, when first applying the *Ex parte Young* doctrine to tribal officials, this Court held, without any significant analysis, that there is "no reason" not to apply the doctrine to tribes. *Burlington N. R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *cert. denied* 505 U.S. 1212 (1992), *overruled on other grounds by Big Horn Cty. Elec. Co-op. v. Adams*, 219 F.3d 944 (9th Cir. 2000). In the same vein, this Court should apply the *exception* to *Ex parte Young* enunciated in *Whole Woman's Health* to tribes

as there is equally "no reason" not to. Under these circumstances, this Court can—and should—reverse the district court's denial of Judges Mueller and Welmas' motion to dismiss, and enter judgment dismissing them from the case.

If this Court reverses the district court's denial of Defendants' motion to dismiss, the Court need not address Plaintiff Lexington Insurance Company's ("Lexington's") arguments contesting tribal jurisdiction. If the Court reaches these arguments, it should reject them. This case involves a garden variety insurance coverage dispute between the Cabazon Band of Cahuilla Indians ("Cabazon" or "Tribe")[1] and its insurer, Lexington. The Tribe's suit alleges that Lexington breached the insurance policies it issued to cover several Cabazon-owned businesses that Lexington knew operated on trust lands within the Cabazon Indian Reservation ("Reservation"). Because Lexington had consensually engaged in business on the Reservation, the Tribe opted to file suit in the Cabazon Reservation Court.

In a decision entirely in keeping with Supreme Court precedent and the decisions of this Court, the district court held that the Tribe's exercise of jurisdiction was proper. This Court should affirm on the ground asserted by the district court: the Tribe's assertion of jurisdiction was an incident of its inherent right to exclude nonmembers from entering or doing business on the Reservation. Alternatively, this Court may affirm based on the first exception described in *Montana v. United States*,

[1] Formerly the Cabazon Band of Mission Indians.

by which tribes may regulate nonmembers who enter "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," when—as here—the assertion of jurisdiction has a nexus to the consensual relationship. 450 U.S. 544, 565 (1981).

Lexington contends that upholding the Tribe's assertion of jurisdiction when no Lexington employee ever physically entered the Reservation would represent a dramatic expansion of tribal jurisdiction over nonmembers. Not so. This Court's precedents recognize that a tribe may premise its jurisdiction on a nonmember's conduct directly connected to tribal lands even if arguably occurring outside those lands. *See Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1204–05 (9th Cir. 2013), *cert. denied* 134 S. Ct. 825 (2013); *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1074–75 (9th Cir. 1999). It was, therefore, no stretch for the district court to conclude that "Lexington's activity took place *on tribal* land" and thus subjected itself to the Tribe's authority. 1-ER-24 (emphasis in original). And even if a nonmember's physical presence on tribal lands were a prerequisite to a tribe's power to regulate, that was satisfied by the actions of Lexington's agent, Alliant Underwriting Solutions and/or Alliant Insurance Services, Inc. ("Alliant"). *Id.* at 22-23; 2-ER-125, No. 77.

STATEMENT OF JURISDICTION

The district court had federal question jurisdiction under 28 U.S.C. § 1331.

Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852–53 (1985). The district court entered final judgment on February 6, 2023. 1-ER-27. Plaintiff Lexington timely noticed its appeal on February 14, 2023. 4-ER-783. Defendants Mueller and Welmas timely noticed their cross-appeal on February 28, 2023. SER-3–6. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The issue on cross-appeal is whether Lexington's *Ex parte Young*-based claims against tribal court judges Mueller and Welmas should be dismissed on the strength of *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), which dismissed *Ex parte Young*-based claims against a state court judge for lack of a case or controversy.

The issue on appeal is whether the Cabazon Reservation Court, a court system established by Cabazon, a federally-recognized Indian tribe, has subject matter jurisdiction over an insurance coverage dispute brought by Cabazon against Lexington, a non-tribal insurance company that voluntarily entered into a contract with Cabazon to insure tribally-owned property located on the Reservation against on-Reservation perils.

STATEMENT OF THE CASE

Cabazon and Lexington: The Parties to the Tribal Court Action

Cabazon is a federally recognized Native American tribe. 2-ER-123, No. 1.

The Tribe is the beneficial owner of the Reservation, which is located near Indio, California, and which is held in trust for the Tribe by the United States. *Id.* at 123, No. 2. The Tribe owns and operates the Fantasy Springs Resort Casino, located within the Reservation. *Id.* at 123, No. 3. The Tribe is insured through a nationwide property insurance program known as the Tribal Property Insurance Program ("TPIP"). *Id.* at 123, No. 4. TPIP is part of a larger property insurance program known as the Alliant Property Insurance Program ("APIP"). *Id.* at 123, No. 5. Lexington participates in APIP and TPIP. *Id.* at 123, No. 8. TPIP is maintained and administered by a third-party service called "Tribal First," a trade name used by Alliant. *Id.* at 123, No. 10.

Lexington Insures Tribal Property Against On-Reservation Loss

For several years prior to this litigation, Cabazon bought multiple property insurance policies issued by Lexington under TPIP (hereinafter the "Lexington Policies"). *Id.* at 123, No. 14. The Lexington Policies relevant to this action were for the policy period from July 1, 2019, to July 1, 2020. *Id.* at 123, No. 15. Under the Lexington Policies, Lexington was the insurer and the Tribe was the insured. *Id.* at 125, Nos. 71 and 75. (In fact, while the Policy identified the Tribe as a "Named Insured," it was not the only one. The Policies specifically identified several Cabazon-operated entities as "Named Insureds," including Fantasy Springs Resort Casino. 3-ER-377.) The Lexington Policies insured property owned by the Tribe

on its Reservation, including the Fantasy Springs Resort Casino and other property, and insured against "all risk of direct physical loss or damage" to property. 2-ER-125, No. 73.

Annually over the last decade, an Alliant employee would visit the Reservation to meet with Cabazon employees to gather information relevant to the renewal of the Tribe's policies with Lexington. *Id.* at 125, No. 77. When interacting with the Tribe and the other named insureds, the district court found that Alliant was acting as Lexington's agent. 1-ER-23 (line 18), 24 (lines 20–21). With respect to the Lexington Policies, Alliant collected premiums from the Tribe and remitted them to Lexington. 2-ER-123, No. 23. The Tribe paid $594,492 in premiums for the TPIP for policy year 2019-2020. *Id.* at 126, No. 81.

Lexington Denies the Tribe's Insurance Claim

In March 2020, the Tribe temporarily suspended some of its business operations because of the COVID-19 pandemic. *Id.* at 124, No. 44. The Tribe's decision to suspend operation of its on-Reservation businesses, including Fantasy Springs Resort Casino, resulted in the loss of use of those facilities and cost the Tribe millions of dollars in lost business revenues. *Id.* at 126, No. 79. In March 2020, the Tribe submitted its insurance claim for business interruption losses under the Lexington Policy to Alliant. *Id.* at 124, No. 45. The Tribe's claim for which it sought coverage from Lexington was based on losses suffered by a Tribe-owned

business located on the Reservation. *Id.* at 125, No. 74. In March and April 2020, Crawford & Company, Lexington's claims adjuster, conducted an investigation into the Tribe's insurance claim. *Id.* at 124, Nos. 47, 48. In April 2020, Lexington issued a letter to the Tribe denying coverage. *Id.* at 124, No. 49. The decision to deny coverage was made by Lexington. *Id.* Lexington's letter denying coverage was sent by Lexington from outside the territorial boundaries of the Tribe to the attention of Johnathan Rosser, the Tribe's Staff Attorney/Acting Director of Legal Affairs, at his office address, which is located on the Reservation. *Id.* at 124, No. 50.

The Cabazon Reservation Court Proceedings

As a component of its tribal government, the Tribe operates a tribal court system called the "Cabazon Reservation Court," which is composed of a trial court and an appellate court. *Id.* at 125, No. 70. Per the Cabazon Tribal Code ("Tribal Code"), the Reservation Court had jurisdiction over "[a]ll civil causes of action arising within the exterior boundaries of the Cabazon Indian Reservation in which: The defendant has entered onto or transacted business within the Reservation and the cause of action arises out of activities or events which have occurred within the Reservation boundaries." *Id.* at 297–98 (Tribal Code § 9-102(b)(2)(c)). On November 24, 2020, the Tribe sued Lexington in the Cabazon Reservation Court. *Id.* at 124, No. 52. The Tribe asserted that Lexington's denial of coverage breached the insurance contract and the implied covenant of good faith and fair dealing, and

sought a declaration that its COVID-19-related financial losses were covered under the Lexington Policies. *Id.* at 124, No. 53.

Under the tribal court's rules, when a tribal court litigant is a non-Indian, such as Lexington, the Tribe retains a *pro tem* judge who has no affiliation or any commercial dealings with the Tribe or any of its departments to preside over the proceedings. *Id.* at 126, No. 80. The aim is both to provide an entirely impartial forum and to avoid even the appearance of bias. *Id.* In this case, Defendant Martin A. Mueller was the sitting *pro tem* judge who presided over the Tribe's suit against Lexington. *Id.* at 124, No. 54. Defendant Chief Judge Welmas oversees the administration of the tribal court (*id.* at 124, No. 55), but had nothing at all to do with the tribal court proceedings involving Lexington or with the decisions issued in that case. 3-ER-329, ¶¶ 5, 6.

In January 2021, Lexington made a limited special appearance and moved to dismiss the tribal court action for lack of subject matter and personal jurisdiction under both Cabazon tribal law and federal law. 2-ER-124, No. 56. After full briefing and oral argument, Judge Mueller denied Lexington's motion to dismiss for lack of subject matter and personal jurisdiction. *Id.* at 124, No. 57. Lexington timely appealed Judge Mueller's decision to the Cabazon Reservation Court of Appeals. *Id.* at 124, No. 59. In November 2021, after full briefing and oral argument, the three-judge panel of the tribal court of appeals, composed of three nationally-known

federal Indian law professors sitting as pro tem judges, affirmed the tribal court's order upholding tribal court jurisdiction. *Id.* at 124, No. 60. The appellate court's decision is in the record at 4-ER-755–81.

Lexington subsequently brought an action against Judges Mueller and Welmas in United States District Court, challenging the subject matter jurisdiction of the Cabazon Reservation Court to hear the Tribe's insurance coverage claim.

Defendants Mueller and Welmas filed a motion to dismiss Lexington's complaint (2-ER-257–3-ER-329), and both sides filed cross-motions for summary judgment (2-ER-162–94; *id.* at 127–61). On February 6, 2023, the district court entered a judgment, 1-ER-27, and on February 9, 2023, it entered an order, 1-ER-24. The order granted in part and denied in part the motion to dismiss, granted the Defendants' motion for summary judgment and denied Lexington's summary judgment motion.

This appeal and cross-appeal followed.

SUMMARY OF ARGUMENT

Whole Woman's Health requires dismissal of this action against two tribal court judges. The district court's decision to deny the judges' motion to dismiss was error and should be reversed in this cross-appeal. In *Whole Woman's Health*, the Supreme Court held that judges are not proper defendants under the *Ex parte Young* doctrine, which generally permits suits against governmental executive officials.

Whole Woman's Health, 142 S. Ct. at 532. The Supreme Court's reasoning that no case or controversy exists between parties to disputes and judges who resolve such disputes is clearly irreconcilable with this Circuit's decisions that have cursorily permitted suits against tribal court judges under *Ex parte Young*. The district court declined to apply *Whole Woman's Health* here because the Supreme Court addressed *state* court judges in *Whole Woman's Health* and did not mention *tribal* court judges. But tribal courts function as state courts do, acting as judicial instruments of sovereign entities and resolving disputes among parties. Further, *Ex parte Young* did not involve or mention tribes, but this Court nonetheless permitted suits against tribal executive officials under the *Ex parte Young* doctrine without the need for a Supreme Court decision explicitly applying the doctrine to tribes, holding that there was "no reason" not to apply that doctrine to tribes. *Burlington N. R. Co.*, 924 F.2d at 901. This Court should similarly apply the exception to *Ex parte Young* enunciated in *Whole Woman's Health* to tribal court judges because there are many reasons for doing so and "no reason" not to.

This Court need not address Lexington's arguments regarding tribal civil jurisdiction if it reverses the district court's denial of the Defendants' motion to dismiss. If it reaches such arguments, this Court should affirm the district court's holding that the Tribe's inherent right to exclude provides the tribal court with civil jurisdiction over Lexington because it "conducted activity on tribal land by

providing insurance to the Tribe" to insure tribal property on tribal trust land. 1-ER-21–23. As the district court correctly held, physical presence on Reservation land is not a prerequisite to such inherent tribal jurisdiction, but even if it was, Lexington's agent Alliant "did conduct business on tribal land." *Id.* at 23.

The Tribe's right to exclude provides the basis for tribal court civil jurisdiction over Lexington that is *independent* from the *Montana* analysis. *See Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 898 (9th Cir. 2017), *cert. denied* 138 S. Ct. 648 (2018) ("*Window Rock*"); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 810, 814 (9th Cir. 2011) (per curiam) ("*Water Wheel*"). But in the event this Court decides to conduct a *Montana* analysis, the tribal court nevertheless has jurisdiction over Lexington.

Montana provides two exceptions to the general rule that tribes lack inherent civil authority over nonmembers on non-Indian fee land. *Montana*, 450 U.S. at 565. Under the first *Montana* exception, which is the only exception at issue here, tribes may exercise civil authority over "nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Because Lexington entered a consensual relationship with Cabazon to insure on-Reservation property against on-Reservation perils—as memorialized in the insurance contract between Lexington, the insurer, and Cabazon, the insured—the tribal court has civil jurisdiction over Lexington.

Contrary to Lexington's assertions, no additional requirements must be shown to establish jurisdiction under the first *Montana* exception.

Montana does not require that the nonmember be physically present on Reservation land for the tribe to regulate the nonmember's conduct, nor does *Montana* require a showing that the nonmember's conduct implicates the Tribe's inherent sovereign interests. Regardless, the Court need not even rule upon such questions because, as the district court found, Lexington's agent Alliant *did* enter Reservation land. 1-ER-23; 2-ER-125, No. 77. Additionally, Lexington's conduct *does* implicate the Tribe's inherent sovereign interests because Lexington insured businesses, including the Fantasy Springs Resort Casino, which is located on tribal trust lands, and the revenues of such casino are vital to support the Tribe's essential services to its tribal citizens. 2-ER-125, No. 78; *see, e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218–19 (1987) (recognizing tribal gaming as providing sole source of revenues for operating tribal governments and providing tribal services).

Thus, if this Court reaches Lexington's jurisdictional arguments, this Court should uphold the tribal court's jurisdiction under the right to exclude doctrine as the district court did, or alternatively uphold tribal court jurisdiction under the first *Montana* exception.

STANDARD OF REVIEW

The district court's Federal Rule of Civil Procedure ("FRCP") 12(b)(6) decision on a motion to dismiss is reviewed de novo. *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106, 1109 (9th Cir. 2019). In reviewing an FRCP 12(b)(6) dismissal, this Court "must take all well-pleaded allegations of material fact as true and construe them in the light most favorable to the non-moving party." *Id*. 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). The question of tribal court jurisdiction is a question of federal law reviewed de novo, with underlying factual findings reviewed for clear error. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1130 (9th Cir. 2006) (en banc), *cert. denied* 547 U.S. 1209 (2006). "Dismissal may be affirmed on any ground supported by the record, even if the district court did not reach the issue or relied on different grounds or reasoning." *Hansen v. Dep't of Treasury*, 528 F.3d 597, 600 (9th Cir. 2007) (internal quotation marks omitted).

ARGUMENT

I.
LEXINGTON'S COMPLAINT SHOULD BE DISMISSED ON THE BASIS OF *WHOLE WOMAN'S HEALTH v. JACKSON*

In their motion to dismiss below, Defendants (now Appellees/Cross-Appellants) Mueller and Welmas argued that Plaintiff Lexington's claims against

them should be dismissed under FRCP 12(b)(1) and (6) because those claims failed to satisfy Article III's case or controversy requirement. 2-ER-268. This argument was based on the Supreme Court's ruling in *Whole Woman's Health*, which held that state court judges were not proper defendants in actions initiated pursuant to *Ex parte Young*. *Whole Woman's Health*, 142 S. Ct. at 532. The Supreme Court reasoned in *Whole Woman's Health*:

> [j]udges exist to resolve controversies about a law's meaning or its conformance to the Federal and State constitutions, not to wage battle as contestants in the parties' litigation
>
> [and therefore]
>
> 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. (internal quotation marks omitted).[2]

The district court here understood that *Ex parte Young* had "recognized a narrow exception" to the sovereign immunity doctrine "that allows certain private

[2] *See also Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994):

> one seeking to enjoin the enforcement of a statute on constitutional grounds ordinarily sues the enforcement official authorized to bring suit under the statute . . . . One typically does not sue the court or judges who are supposed to adjudicate the merits of the suit that the enforcement official may bring.

parties to seek judicial orders in federal court preventing state *executive officials* from enforcing state laws that are contrary to federal law." 1-ER-15–16 (emphasis added) (quoting *Whole Woman's Health*, 142 S. Ct. at 532 and *Ex parte Young*, 209 U.S. at 159–60). The district court further acknowledged that *Whole Woman's Health* had imposed a significant limitation on the *Ex parte Young* doctrine in holding that *Ex parte Young* "does not normally permit federal courts to issue injunctions against state court *judges*" and that "an injunction against a state court or its machinery would be a violation of the whole scheme of our government." *Id.* at 16–17 (emphasis added). As a result, the district court correctly noted that the Supreme Court, in *Whole Woman's Health*, had directed the dismissal of the *Ex parte Young* claims against the state court judge for lack of a case or controversy. *Id*.

In their motion to dismiss below, Defendant tribal court Judges Mueller and Welmas contended that Lexington's *Ex parte Young*-based claims against them should be dismissed on the weight of *Whole Woman's Health*. 2-ER-271–72. While the district court described this as a "powerful argument" with "merit," 1-ER-16, 17, it denied that motion for one reason: over the years, this Court had applied the *Ex parte Young* doctrine to allow suits against tribal court judges and the district court did not believe that the judicial limitation announced in *Whole Woman's Health* was "clearly irreconcilable" with those Ninth Circuit cases because *Whole Woman's*

Health did not expressly mention tribal court judges. *Id*. at 17–18 (citing *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)).

The district court's ruling on this issue is flawed and requires reversal for several reasons. First and foremost, it ignores the fact that *Ex parte Young* itself made no mention of Indian tribes or tribal officials, yet when this Court first applied *Young* to tribes and tribal officials, the Court briefly discussed *Young* and its progeny and then, without any significant analysis, simply held that there was "no reason . . . for not applying this rule to tribal officials." *Burlington N. R. Co.*, 924 F.2d at 901. In reaching this conclusion, this Court stated that the application of *Ex parte Young* to Indian tribes had been "suggested" in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) and "strongly implied" in *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047, 1051–52 (9th Cir.) *rev'd in part on other grounds*, 474 U.S. 9 (1985) and *California v. Harvier*, 700 F.2d 1217, 1218–20, 1220 n.1 (9th Cir. 1983), *cert. denied* 464 U.S. 820 (1983). *Id*. But, like *Burlington Northern Railroad Company*, none of these cases offered any reasoned analysis for such a result. *See Santa Clara Pueblo*, 436 U.S. at 59 (holding without analysis that "[a]s an officer of the [tribe], petitioner [] [wa]s not protected by the tribe's sovereign immunity from suit") (citing *Ex parte Young*); *Chemehuevi Indian Tribe*, 757 F.2d at 1051–52 (cursorily acknowledging *Ex parte Young* applies to tribal officials and ruling *Ex parte Young* inapplicable as no tribal officials had been sued); *Harvier*,

700 F.2d at 1218–20, 1220 n.1 (implying *Ex parte Young* applies to tribes, but holding State failed to raise *Ex parte Young* issue). This Court seems to have reasoned that if state officials are proper defendants under *Ex parte Young*, tribal officials should be treated the same way. And significantly for this appeal, it did so without the type of "irreconcilability" analysis that the district court below thought necessary.

Since this Court found it appropriate to apply *Ex parte Young* to tribal officials because there was "no reason" not to do so, it should apply that same standard to hold that the limitation of *Whole Woman's Health* also applies to tribal court judges. Stated another way, if there was "no reason" not to apply the rule of *Ex parte Young* (which does not mention tribes) to tribal governments and their officials, there is likewise "no reason" not to apply the limitation on *Young* from *Whole Woman's Health* (which also does not mention tribes) to tribal courts and tribal judges.

There is certainly ample justification for this conclusion. Tribal courts, like state courts, are creatures of their governments and, as the Supreme Court has noted, "[t]ribal courts play a vital role in tribal self-government and the Federal government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987) (citation omitted). Congress did so explicitly in the Indian Tribal Justice Support Act of 2009 where it stated that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring . . .

the political integrity of tribal governments." 25 U.S.C. § 3601(5). In this sense then, tribal courts and state courts are largely indistinguishable in their roles and responsibilities and, as the district court correctly noted, "as tribal courts are the judicial instruments of a sovereign entity, there are substantial similarities between tribal courts and state courts." 1-ER-17.

Tribal court judges also perform the same functions and exercise many of the same authorities as their state counterparts. Both neutrally interpret and apply the laws relevant to a dispute and decide cases as presented to them. Importantly, this Court has also recognized that because tribal court judges are performing the same judicial functions as other judges, tribal court judges are entitled to the same form of judicial immunity as any other judge. *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 915 (9th Cir. 2021) ("[A] tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges."), *cert. denied* 142 S. Ct. 2836 (2022); *see also* William C. Canby Jr., *American Indian Law in a Nutshell* 77 (9th ed. 2020) (same).

Given these facts, this Court has ample justification for finding that the rule and reasoning of *Whole Woman's Health* applies equally to tribal courts and tribal court judges such as Defendants Mueller and Welmas.

Additionally, the district court's ruling on this issue requires reversal because it misapplied *Gammie*. *Gammie* explains the circumstances when a three-judge

panel of this Court can reexamine prior Circuit authority "in light of an inconsistent decision by a court of last resort on a closely related, but not identical issue." 335 F.3d at 899. This Court held in *Gammie* that "the issues decided by the higher court need not be identical in order to be controlling" and in order to thus overrule prior circuit precedent. *Id.* at 900. "Rather, the relevant court of last resort must have *undercut the theory or reasoning underlying the prior circuit precedent* in such a way that the cases are clearly irreconcilable." *Id*. (emphasis added).

Whole Woman's Health undercuts this Circuit's precedent in just that way. When the Supreme Court ruled that "no case or controversy exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute" because "[j]udges exist to resolve controversies about a law's meaning or its conformance to the [governing] constitutions, not to wage battle as contestants in the parties' litigation," *Whole Woman's Health*, 142 S. Ct. at 532, that reasoning was not based on characteristics unique to state court judges. Rather, the judges were not proper defendants because they were sued for performing their judicial function of applying a statute or legal doctrine and deciding cases as presented to them. That same reasoning applies equally to tribal court judges.

Whole Woman's Health's holding is thus irreconcilable with the theory underlying *Big Horn Cty. Elec. Co-op. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) and other decisions allowing *Ex parte Young* claims against tribal court judges. Such

decisions cursorily equate tribal court *judges* with *executive officials* (and implicitly hold that a case or controversy exists in suits against such judicial defendants). *See, e.g.*, *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1177–78 (9th Cir. 2012) (ruling lawsuit for prospective injunctive relief could proceed against tribal "officials," which included tribal judges and executive officials, through "routine application" of *Ex parte Young* and without any analysis as to why judges and executive officials were treated the same); *BNSF Ry. Co. v. Ray*, 297 F. App'x 675, 676 (9th Cir. 2008) (mem.) (designating, without analysis, tribal judge as a "tribal officer" under *Young*); *Adams*, 219 F.3d at 954 (permitting *Ex parte Young* action against tribal executive officials and judges, describing such defendants as "tribal officers under the *Ex Parte Young* framework"). The Supreme Court in *Whole Woman's Health* rejected the idea that judges are the equivalent of executive officials because judges do not enforce laws as executive officials might; judges instead work to resolve disputes between parties, 142 S. Ct. at 532. This reasoning applies equally to state and tribal court judges.

This Court's initial extension of *Ex parte Young* to tribal court judges also stands on questionable grounds given the fact that *Ex parte Young* itself expressly admonished that its ruling ought not be applied to judicial proceedings. *See* 209 U.S.

at 163.[3] *Whole Woman's Health* now expressly forecloses this extension of *Ex parte Young* to judicial officials. The district court's decision not to apply this exclusion to tribal court judges was error. Rather, as explained above, this Court can and should conclude that there is "no reason" not to hold, and ample justification for holding, that the judicial exemption of *Whole Woman's Health* applies equally to tribal court judges. As a result, this Court should order the dismissal of Lexington's claims against tribal court judges Mueller and Welmas on that basis.

II.
THE DISTRICT COURT CORRECTLY DISMISSED LEXINGTON'S CLAIMS AGAINST CHIEF JUDGE WELMAS

Although the district court failed to dismiss Lexington's First Amended Complaint in its entirety under *Whole Woman's Health*, it did grant the Defendants' motion to dismiss with respect to Chief Judge Welmas. 1-ER-19. The court found 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." *Id*. In so

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[3] The Court in *Ex parte Young* stated quite clearly:

> the right to enjoin an individual, even though a state official, . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature . . . . The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former.

209 U.S. at 163.

holding, the district court relied upon *Snoeck v. Brussa*, 153 F.3d 984 (9th Cir. 1998). *Id.* In *Snoeck*, this Court dismissed *Ex parte Young* claims against certain state officials, finding that their connection to the alleged state law violations were too attenuated to provide standing for the claims. *Snoeck*, 153 F.3d at 986–87. As this Court said in *Snoeck* (and the cases cited therein), a defendant's connection "must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject the officer to suit [under *Ex parte Young*]." *Id* at 986 (citations omitted).

Pursuant to that Ninth Circuit authority, the court below dismissed Lexington's claims against Chief Judge Welmas, correctly finding that his "general supervisory responsibilities over the Tribal Court are too attenuated from the enforcement of tribal jurisdiction to establish standing." 1-ER-19.

The record in this case supports that conclusion. Chief Judge Welmas played no role whatsoever in the tribal court proceedings involving Lexington. 3-ER-329, ¶ 5. Nor did Chief Judge Welmas even appoint Judge Mueller to his position. *Id.* at 329, ¶ 6. Further, Chief Judge Welmas has no authority to remove Judge Mueller from his position as removal requires action by the Cabazon General Council, which consists of all Cabazon tribal citizens over the age of 18. *Id.* at 329, ¶ 8; 2-ER-299. The most one can say of Chief Judge Welmas' connection to Lexington's claims is that, as Chief Judge, he has general administrative responsibility for the operation of

the Cabazon Reservation Court. 2-ER-300 (Tribal Code § 9-104(b) providing that "the Chief Judge shall be responsible for the administration of the Court, shall assign cases and manage the Court's calendar and business"). Relying on *Snoeck*, the district court properly held that those general supervisory responsibilities were inadequate to provide standing for Lexington's claims against the Chief Judge. 1-ER-19.

Lexington offers two unpersuasive responses to the district court's holding. First, Lexington asserts, incorrectly, that Chief Judge Welmas assigned Judge Mueller to hear the parties' dispute. Lex. Pr. Br. at 59. But Judge Mueller's appointment was made by Chief Judge Welmas's predecessor. 3-ER-329, ¶ 6. And as the only *pro tem*, non-tribal judge on the tribal court, Judge Mueller's assignment to the Lexington case was automatic. 2-ER-126, No. 80; *id.* at 293–94. But even if Chief Judge Welmas had assigned the Lexington case to Judge Mueller, that "general supervisory power" would be an inadequate connection to establish standing under *Snoeck*.

Lexington's second response to the district court's holding is equally unavailing. Lexington cites to and relies on the Eighth Circuit's decision in *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 11323 (8th Cir. 2019). *See* Lex. Pr. Br. at 59. This Court has held, in a long line of authorities collected in *Snoeck*, that general supervisory or administrative duties are insufficient to provide standing in

an *Ex parte Young* action. The fact that the Eighth Circuit may have adopted a somewhat different standard on this question provides no basis for overturning the district court's ruling on this issue. As a result, if it needs to reach that issue, this Court should affirm the lower court's dismissal of Lexington's claims against Chief Judge Welmas.

III.
THE CABAZON RESERVATION COURT HAS SUBJECT MATTER JURISDICTION

In the event this Court does not dismiss Lexington's claims in their entirety under *Whole Woman's Health*, this Court should affirm the district court's holding that, under federal law, the tribal court has subject matter jurisdiction over the conduct of Lexington and its agents pursuant to Cabazon's inherent power to exclude. 1-ER-21. Alternatively, this Court should uphold jurisdiction under the first *Montana* exception because the tribal court lawsuit arises out of Lexington's alleged breach of its consensual agreement with Cabazon to insure tribal businesses operated on tribal trust lands. 450 U.S. at 565.

A. Under the Right to Exclude, Cabazon's Inherent Authority Over Lexington's Conduct on and Affecting the Tribe's Reservation Land Provides the Cabazon Reservation Court with Subject Matter Jurisdiction Over a Lawsuit Arising Out of That Conduct.

Through its issuance of the Lexington Policies to the Tribe, the district court held that Lexington "conducted activity on tribal land," and as such, the tribal court, as an incident of the Tribe's inherent right to exclude, has jurisdiction to adjudicate

Lexington's alleged breach of those policies. 1-ER-21–23. This Court should affirm that holding.

1. Cabazon Possesses the Sovereign Right to Exclude Nonmembers From Its Tribal Lands.

Indian tribes possess inherent sovereign powers, including the authority to exclude persons from tribal land. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) ("A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established."). This Court "has long recognized" that this right to exclude provides an analytic framework distinct from the *Montana* exceptions "for determining whether a tribe has jurisdiction over a case involving a non-tribal-member defendant." *Window Rock*, 861 F.3d at 898; *see also Grand Canyon Skywalk Development, LLC*, 715 F.3d at 1204 ("[A] tribe's inherent authority over tribal land may provide for regulatory authority over non-Indians on that land without the need to consider *Montana*.") (emphasis added).[4] And, as the Supreme Court has held, "where tribes possess authority to regulate the activities of nonmembers, *civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts*." *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (emphasis added) (cleaned up).

[4] As explained in Section III.B, *infra*, even if *Montana* applies to this case, the Tribe would have jurisdiction over Lexington under the "first" or "consensual relationship" exception to *Montana's* general rule.

Lexington suggests the tribal "power to exclude" is nothing more than any "landowner's right to occupy and exclude" rather than an inherent sovereign power. Lex. Pr. Br. at 52. That contention is wrong. The Tribe is not a mere landowner but a sovereign government, and did not relinquish its sovereign authority to regulate Lexington by entering a consensual commercial relationship or by not expressly reserving those powers in the insurance contract. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145–47 (1982). "Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty." *Id*. at 145 n.12 (quoting F. Cohen, Handbook of Federal Indian Law 143 (1942) (emphasis removed); *see also LaPlante*, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.")

As the district court found, Lexington "conducted activity on tribal land" by insuring on-Reservation property against on-Reservation perils, which is sufficient to establish right to exclude jurisdiction. 1-ER-21–23. Lexington accepted premium payments originating on the Reservation, and ultimately sent notice to the Tribe's on-Reservation headquarters that the Tribe's claim has been denied. 2-ER-123, No. 23; *id*. at 124, Nos. 49, 50; *id*. at 126, No. 81. The policy that Lexington wrote, and Lexington's non-performance under that policy, had a direct connection to tribal lands. Additionally, Lexington's agents, employees of Alliant, entered the

Reservation to negotiate the Lexington Policies and inspect the Tribe's on-Reservation premises. *Id.* at 123, No. 23; *id.* at 124, Nos. 49, 50; *id.* at 125, No. 77.

The issue is not merely whether Cabazon had the right to physically exclude Lexington and its agents from the Tribe's land, but also whether Cabazon could have prohibited Lexington from doing business or regulated the performance of its business on the Reservation. As the sovereign government exercising jurisdiction over its Reservation, Cabazon could have, if it so chose, barred Lexington from insuring any and all tribal property, or alternatively, limited the types of tribal property to be insured or the amounts of such coverage. There is no principled basis for treating differently an entity that knowingly does business on the Reservation from an entity that knowingly engages in business with the Reservation (even if it does so from outside the Reservation). Just as Cabazon has authority to regulate the former, so too it has authority to regulate the latter. *See Strate*, 520 U.S. at 453. It follows from the foregoing principles that Cabazon's dispute with Lexington is properly before the Cabazon Reservation Court because Lexington's conduct took place on and bears a direct connection to Cabazon's Reservation.

2. That Lexington, Itself, Has Not Physically Entered the Reservation Does Not Divest the Tribal Court of Jurisdiction Over the Insurance Coverage Lawsuit.

Lexington argues that the Tribe's right to exclude (and, thus, the ancillary rights to regulate and adjudicate) is dependent upon Lexington's physical presence

on tribal land. Lex. Pr. Br. at 50. This contention is inconsistent with the decisions of this Circuit and others.[5]

Lexington fails to cite a single decision expressly holding that tribal jurisdiction over a nonmember depends on actions taken while physically present on tribal lands. To be sure, many decisions analyzing tribal jurisdiction involve nonmember conduct committed while actually present within a reservation; predictably, these cases are replete with references to physical presence on tribal land. *See, e.g.*, *Knighton v. Cedarville Rancheria*, 922 F.3d 892, 895 (9th Cir. 2019); Lex. Pr. Br. at 52–53 (citing cases). But that does not suggest, much less establish, that a nonmember's occupation of tribal land is a *prerequisite* for the tribe's assertion of jurisdiction.

Grand Canyon Skywalk Development, LLC is particularly instructive. *Grand Canyon Skywalk Development, LLC* arose out of a revenue sharing contract between the non-Indian plaintiff ("GCSD") and a tribally-chartered corporation owned by the Hualapai Indian Tribe, for the development and operation of a glass skywalk on land held in trust for the tribe on its reservation. 715 F.3d at 1199, 1205. Subsequently, the Tribe invoked its powers of eminent domain to acquire GCSD's interest in the

[5] Even if physical presence were necessary for a finding of a tribe's inherent right to exclude, Alliant, which acted as Lexington's agent, did enter the Reservation with Lexington's knowledge and for Lexington's benefit precisely to engage in negotiations regarding policy renewals at least annually over the last decade. 2-ER-125, No. 77.

contract and excluded GCSD from the skywalk. *Id.* at 1199. GCSD filed suit in federal district court seeking a declaration that the tribe lacked authority to condemn its contract rights and seeking a TRO preventing the tribe from enforcing its purported right of eminent domain. *Id.* The district court denied the motion because tribal court jurisdiction was not plainly lacking, and thus the tribal court should have the right to consider its jurisdiction in the first instance. *Id.* at 1199–00.

The Ninth Circuit affirmed. *Id.* at 1200–01. As an initial matter, the Court held that *Montana* was unlikely to apply because "the dispute *centers on Hualapai trust land* and there are no obvious state interests at play." *Id.* at 1205 (emphasis added). Moreover, even though the dispute involved nonmember GCSD's "intangible property rights with a contract," that contract had a direct connection to the Tribe's lands, thereby implicating the Tribe's right to exclude. *Id.* 1204. Because tribal regulatory and adjudicatory jurisdiction flow from the right to exclude, tribal jurisdiction was not plainly lacking. *Id.* at 1204–05. The Court's conclusion shows that a non-Indian's physical presence on tribal land was not necessary for the tribal court's exercise of jurisdiction as an incident of its right to exclude.

Lexington cites the *McPaul* decision for the proposition that the right-to-exclude doctrine does not apply when a nonmember has not physically entered and engaged in activity on tribal land. Lex. Pr. Br. at 57; *See Emp'rs Mut. Cas. Co. v.*

Branch, 381 F. Supp. 3d 1144 (D. Ariz. 2019) ("*Branch*"), *aff'd sub nom.*, *Emp'rs Mut. Cas. Co. v. McPaul*, 804 F. App'x 756 (9th Cir. 2020) (mem.) ("*McPaul*"). Not only is *McPaul* readily distinguishable on its facts, but the district court judge's reasoning in that case actually supports the outcome advocated by Defendants here. *McPaul* involved the Navajo Tribal Court's assertion of jurisdiction over a suit filed by the Navajo Nation against an Iowa-based insurance company (Empire Mutual) and two companies it insured. 804 F. App'x at 756. The insureds, both non-Indian corporations, were sued for their role in an on-reservation gasoline leak. *Id.* at 756–57. Empire Mutual, by contrast, had "never contracted with any tribal members or organizations," nor had it or its agents ever stepped foot on the Navajo Reservation. *Branch*, 381 F. Supp. 3d at 1145, 1149. Empire Mutual's "insurance contracts [did] not mention liability arising from activities on the reservation, [and bore] no direct connection to tribal lands." *McPaul*, 804 F. App'x at 757 (citation and internal quotation marks omitted).

Because Empire Mutual's only connection to the tribe was "negotiating and issuing general liability insurance contracts to non-Navajo entities" (which negotiations "occurred entirely outside of tribal land"), the district court and the Ninth Circuit both held that "tribal court jurisdiction [could not] be premised on the Navajo Nation's right to exclude." *Id.*

The factual predicate for tribal jurisdiction in this case is far more compelling

than in *McPaul*. Here, the Lexington Policies were issued directly *to the Tribe* for the purpose of insuring *tribal property on Reservation lands*. 2-ER-125, Nos. 73, 76. The policies identified Cabazon as the insured (*id.*, No. 75) and obligated Lexington to insure the tribal property against all risk of direct physical on-Reservation loss or damage. *Id.*, No. 73. Annually, employees of Alliant, Lexington's agent, would visit the Reservation to gather information relevant to the renewal of the Tribe's Lexington Policies. *Id.*, No. 77. Lexington, itself, made the decision to deny coverage of the Tribe's claim; after doing so, a letter denying coverage was mailed by Lexington to the Tribe's director of legal affairs on the Reservation. 2-ER-124, Nos. 49–50. It is Lexington's breach of its obligation to insure the Tribe's property—property it knew was on tribal lands when it agreed to insure the Tribe—that prompted the Tribe's suit in the Cabazon Reservation Court. In short, unlike the insurer in *McPaul*, Lexington's policies were with the Tribe, and its conduct targeted the Reservation and directly spawned the tribal court litigation.

Moreover, the district court in *McPaul* expressly acknowledged that a tribal court could lawfully assert jurisdiction over an insurance company in the circumstances present between Cabazon and Lexington.

> This outcome is consistent with the several cases in which courts suggested it may be possible to sue an insurance company in tribal court despite the absence of any physical presence on tribal land. All but one of these cases involved circumstances where the insurance company contracted directly with a tribal member when selling the policy and

> thereafter engaged in *conduct directed toward the reservation*.

See Branch, 381 F. Supp. 3d at 1149–50 (citing *Stump*, 191 F.3d at 1075; *State Farm Ins. Cos. v. Turtle Mt. Fleet Farm LLC*, No. 1:12–cv–00094, 2014 WL 1883633 (D.N.D. May 12, 2014)) (emphasis added).

Lexington's argument that the Tribe's right to exclude is dependent on its physical presence on tribal land is far too broad a generalization. In fact, the cases paint a far more nuanced picture. Certainly, where the nonmember's conduct occurs on the reservation, power to exclude jurisdiction is at its strongest. But lack of physical presence is not a determining factor when, as here, the nonmember's conduct is focused on the Reservation and directly affects the Tribe's on-Reservation interests. In that case, the Tribe's power to regulate and adjudicate disputes regarding the non-member's conduct is equally well established because, as Judge Holcomb correctly noted, "to hold otherwise would allow parties to skirt tribal jurisdiction over activity occurring on tribal land through agency (as was the case here, since Alliant was Lexington's agent) or through virtual tools such as Zoom. Such a holding would degrade a tribe's inherent authority to manage its own affairs." 1-ER-24.

In sum, the Court can and should affirm the district court's holding that the Cabazon Reservation Court has subject matter jurisdiction over Lexington based upon the Tribe's power to exclude.

B. If a *Montana* Analysis is Necessary, the Cabazon Reservation Court Has Jurisdiction Over the Tribe's Suit Against Lexington under the First *Montana* Exception Because the Suit Arises From the Parties' Consensual Relationship, the Objective of Which is Directly Connected to Tribal Lands.

The district court held it need not engage in an analysis under *Montana* because the Tribe had jurisdiction over Lexington pursuant to the Tribe's inherent power to exclude a nonmember from entering or engaging in conduct on its Reservation. 1-ER-21. The district court's reasoning was sound (*id.* at 22–24), and this Court can affirm on that ground.

Under this Court's precedent, a tribe's assertion of jurisdiction over a nonmember must satisfy a *Montana* exception only when the nonmember's conduct is on or is directly connected to non-Indian fee land. *See Window Rock*, 861 F.3d at 898, 902; *Grand Canyon Skywalk Development, LLC*, 715 F.3d at 1204. As the tribal business insured by Lexington and to which it denied coverage indisputably is on tribal land (2-ER-123, No. 2; *id.* at 125, No. 73), the Tribe's satisfaction of a *Montana* exception is not a prerequisite to asserting jurisdiction over the insurer.

Nonetheless, to the extent the *Montana* exceptions are relevant to Cabazon's assertion of jurisdiction over Lexington, the evidentiary record in this case supports the Tribe's assertion of jurisdiction over Lexington under the first *Montana* exception. The *Montana* exceptions are rooted in inherent tribal sovereign powers; thus, satisfaction of either *Montana* exception justifies a tribe's assertion of

jurisdiction over a nonmember conduct on or directly connected to its tribal lands. *Knighton*, 922 F.3d at 904.

1. The Tribal Court Lawsuit Arose Out of the Parties' Consensual Relationship By Which Lexington Agreed to Insure Cabazon's Businesses Located on Trust Lands Within the Tribe's Reservation, Thus Satisfying the First *Montana* Exception

Under the first *Montana* exception, a Tribe may assert civil jurisdiction (regulatory and adjudicatory) over "the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. "Our inquiry [under *Montana*] is not limited to deciding precisely when and where the claim arose, a concept more appropriate to determining when the statute of limitations runs or to choice-of-law analysis. Rather, our inquiry is *whether the cause of action brought by these parties bears some direct connection to tribal lands*." *Smith*, 434 F.3d at 1135 (emphasis added); *see also Stump*, 191 F.3d at 1073–75 (requiring exhaustion of tribal court remedies because nonmember insurer's conduct was related to the Reservation). "In extending the *Montana* framework to the question of a tribal court's adjudicative jurisdiction, . . . a tribal court has jurisdiction over a nonmember only where the claim has a nexus to the consensual relationship between the nonmember and the disputed commercial contacts with the tribe." *Philip Morris USA, Inc. v. King Mt. Tobacco Co.*, 569 F.3d 932, 942 (9th Cir. 2009); *see also Knighton*, 922 F.3d at 904 (Consensual relationship exception requires that "the

regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.") (internal quotation marks and citation omitted).

Between the parties' stipulated facts and the district court's own factual findings, there can be no serious dispute that the Lexington-Cabazon relationship satisfies the first *Montana* exception. Over the course of many years, the Tribe purchased multiple Lexington-issued insurance policies; Lexington was the insurer and the Tribe was the insured. 2-ER-123, No. 14; *id.* at 125, Nos. 71 and 75. Most communications with the Tribe were handled by Lexington's agent, Alliant. *Id.* at 125, No. 77; *id.* at 123, No. 23; *id.* at 124, No. 45. Though no *Lexington employee* physically entered the Tribe's Reservation in connection with the policies, *Lexington's agent, Alliant*, did. 1-ER-23–24; 2-ER-125, No. 77. Lexington received the premiums paid by Cabazon totaling millions of dollars for different policies over many years. 2-ER-123, Nos. 14, 23; *id.* at 126, No. 81; *id.* at 125, No. 77. The purpose of the policies was to insure the Tribe's Fantasy Springs Resort Casino and other property on tribal trust land within the Reservation. *Id.* at 125, No. 73. When Cabazon filed a claim for a covered loss under its policy, Lexington's adjustor conducted an investigation, which led to Lexington denying coverage and mailing a letter of its decision to the Tribe's representative on the Reservation. *Id.* at 124, Nos. 47, 48. The Tribe then sued Lexington in tribal court over Lexington's alleged breach of its insurance obligations. *Id.* at 124, Nos. 52, 53.

These facts demonstrate that Lexington voluntarily entered into a commercial relationship with the Tribe for the insurance of a tribally-owned business that Lexington knew was on the Reservation, and that Lexington's alleged breach of those insurance obligations prompted the Tribe's suit in tribal court. The Tribe's assertion of adjudicatory jurisdiction over Lexington thus has a close nexus with the parties' consensual relationship. The court's jurisdiction was therefore authorized under the first *Montana* exception.

2. Lexington's Arguments Against Tribal Jurisdiction Under the First *Montana* Exception Are Irreconcilable With This Court's Precedents

Lexington offers three reasons for why the first *Montana* exception does not authorize the Tribe's assertion of jurisdiction: first, because Lexington was never physically present on the Tribe's Reservation in connection with the insurance policies; second, because Lexington never consented to the Tribe's jurisdiction; and third, because the tribal court's adjudication of the dispute "does not implicate inherent tribal sovereignty." Lex. Pr. Br. at 36, 37. Lexington's arguments are inconsistent with this Court's decisions and should be rejected.

a. Nonmember Conduct on Tribal Land Is Not a Prerequisite to a Tribe's Assertion of Jurisdiction Under *Montana*

Lexington's primary argument is that "nonmember conduct on tribal land is a prerequisite to jurisdiction under *Montana*." Lex. Pr. Br. at 36. Neither the Supreme Court nor this Court has held this; in fact, both courts have suggested quite the

opposite. For example, in *Merrion*, the Supreme Court declared that "a tribe has no authority over a nonmember until the nonmember enters tribal lands *or conducts business with the tribe*." 455 U.S. at 142 (emphasis added). If, as Lexington asserts, a nonmember's presence on tribal lands were the essential prerequisite to tribal jurisdiction, the Court's "conducts business" language would be superfluous. Lexington's position also cannot be squared with this Court's declarations in *Smith*: "Our inquiry is not limited to deciding precisely when and where the claim arose . . . . Rather, our inquiry is whether the cause of action brought by these parties bears *some direct connection to tribal lands*." 434 F.3d at 1135 (emphasis added); *see also id.* at 1132 ("[W]hether tribal courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are *related to tribal lands*.") (emphasis added).

As discussed previously (see Section III-A-2, *supra*), this Court has repeatedly endorsed the view in right-to-exclude cases that a nonmember's physical presence on the Reservation is not required. The same is true in cases addressing the first *Montana* exception. For instance, *Stump* involved a single car accident on the Chippewa Cree Tribe's Rocky Boy Reservation, killing the driver and two passengers (all tribal members). 191 F.3d at 1072. The driver was insured by Allstate under a policy that had been purchased through an independent agent located outside the Reservation. When Allstate denied coverage, the estates of the

deceased tribal members sued the insurer in tribal court for refusing settle the claim in violation of Montana insurance law. *Id*. at 1073.

Allstate filed suit in federal court to contest the tribal court's jurisdiction. *Id*. The district court affirmed the tribe's jurisdiction under the first *Montana* exception, holding that the dispute arose out of the consensual relationship between Allstate and its insured. *Id*. On appeal, Allstate argued that exhaustion of tribal court remedies was futile because it had not conducted any activity on the Reservation related to its insurance policy. *Id*. at 1074–75. This Court rejected that argument even though there was no evidence that Allstate ever had stepped foot onto tribal lands. This Court explained that "Allstate's conduct [was] related to the reservation[;] Allstate sold an automobile insurance policy and mailed monthly premium statements to an Indian resident of the reservation. After the accident on the reservation, Allstate's agents communicated with the Indians and their counsel." *Id*. at 1075. If a nonmember insurer's physical presence on tribal lands were essential to the exercise of tribal jurisdiction, *Stump* would have been decided differently.

Several decisions out of the Eighth Circuit also have rejected the proposition that a tribe's jurisdiction must be predicated on nonmember conduct committed while on tribal lands. For instance, *DISH Network Serv. L.L.C. v. Laducer* arose out of DISH's contract to provide satellite television service to Laducer, a member of

the Turtle Mountain Band of Chippewa Indians, on his Tribe's Reservation. 725 F.3d 877, 879 (8th Cir. 2013). A billing dispute led to DISH filing a complaint in federal court for breach of contract and related claims against Laducer. *Id*. at 880. Laducer then filed suit against DISH in Turtle Mountain tribal court alleging abuse of process based on DISH's federal court filing. *Id*. DISH moved to dismiss the tribal court complaint, but the tribal court ruled that it had jurisdiction under the first *Montana* exception. *Id*. at 881.

DISH sought a federal court injunction barring the tribal court from ruling on Laducer's lawsuit. *Id*. DISH argued that *Montana* and its progeny "presume that the challenged conduct must have occurred on tribal territory," and that because "the filing challenged by [Laducer] occurred outside tribal territory, . . . there is an insurmountable barrier to the existence of tribal court jurisdiction." *Id*. at 884. The Eighth Circuit rejected DISH's argument, reasoning: "Even if the alleged abuse of process tort occurred off tribal lands, jurisdiction would not clearly be lacking in the tribal court because the tort claim arises out of and is intimately related to DISH's contract with [Laducer] and that contract relates to activities on tribal land." *Id.* at 884.

The district court's decision in *State Farm Insurance Companies* is to the same effect. Tribal members sued State Farm Insurance for its bad faith administration of the insurance policy to insure their home on the Turtle Mountain

Reservation. 2014 WL 1883633, at *3–4. After the tribal appellate court held that the Tribe had jurisdiction over the members' bad faith action pursuant to the first *Montana* exception, State Farm challenged the jurisdictional ruling in federal court. *Id*. at *9–15. Like Lexington in this case, State Farm argued "that any acts that might give rise to a claim against it"—including "entering into the insurance contract" and "the decisions regarding coverage"—occurred off the reservation. *Id*. at *24. The federal court rejected this argument because, fundamentally, "the first *Montana* exception . . . is not limited to where the conduct necessary to establish a particular element of a claim for breach of contract or tort took place but rather, more broadly, is whether there is a sufficient nexus between the claims being asserted and the consensual relationship." *Id*. at *28. Because "State Farm entered into an agreement to provide property damage and loss coverage for a residence owned by tribal members located on the Turtle Mountain Reservation," the court concluded "this was a sufficient consensual relationship with respect to an activity or matter occurring on the reservation to invoke the first *Montana* exception." *Id*. at *31; *see also AT&T Corp. v. Oglala Sioux Tribe Util. Comm'n*, No. CIV 14-4150, 2015 WL 5684937, at *6 (D.S.D. Sept. 25, 2015); *Sprint Commc'ns Co. L.P. v. Wynne*, 121 F. Supp. 3d 893, 899–900 (D.S.D. 2015).

Given this substantial weight of authority, if this Court conducts a *Montana* analysis, it should hold that a nonmember's physical presence on tribal land is not a

prerequisite for the assertion of tribal jurisdiction. Rather, under the first *Montana* exception, it is sufficient that the nonmember's actions have a direct connection to tribal lands and that there is a nexus between the assertion of tribal authority and the nonmember's consensual relationship with the tribe.

b. The Cases Lexington Cites Do Not Support its Argument that *Montana's* Exception Require Nonmember Presence on Reservation Lands

Lexington argues that a tribe's exercise of jurisdiction under the *Montana* exceptions requires nonmember conduct within a tribe's reservation. Lex. Pr. Br. at 29, 36. But none of the cases cited by Lexington expressly holds that *Montana's* consensual relationship framework requires the nonmember's physical presence on tribal land. Moreover, the cases cited by Lexington are so far afield factually from the case at bar as to render them irrelevant.

Jackson v. Payday Financial, LLC, involved a state court suit (later removed to federal court) by nonmember plaintiffs against tribal entities over the legality of defendants' loan agreements (which plaintiffs completed online). 764 F.3d 765, 768 (7th Cir. 2014). The tribal defendants argued that the tribal court had jurisdiction under the first *Montana* exception or, in the alternative, that plaintiffs were required to exhaust their tribal court remedies. *Id.* at 782, 784. But the Seventh Circuit held that tribal jurisdiction was not even colorable because the nonmembers had not engaged in any activity on tribal land or that implicated tribal sovereignty with

respect to its land. *Id.* at 782. No agreement in *Payday Financial* bore any connection, direct or indirect, to tribal lands. *Payday Financial* is inapposite to the case at bar because the Lexington Policies and the actions of Lexington and its agent Alliant quite clearly have a direct connection to tribal lands, and unlike the nonmembers in *Payday Financial*, Lexington was the insurer of vital tribal businesses located on the tribe's lands. 2-ER-125, Nos. 71 and 75.

Likewise, *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, has no bearing on the dispute between the Tribe and Lexington. 807 F.3d 184 (7th Cir. 2015). *Stifel* arose out of a sale of bonds by a Wisconsin-based tribal corporation to finance commercial ventures in Mississippi. *Id.* at 189. A dispute arose concerning the bond indenture agreement, resulting in the tribal corporation suing the bond purchasers in tribal court; the purchaser, in turn, challenged the tribe's jurisdiction in federal court. *Id.* at 191–92. The district court ruled in favor of the bond purchaser, holding that the tribe lacked jurisdiction. The Seventh Circuit affirmed for two independent reasons. First, the court of appeals ruled against tribal court jurisdiction because the bond contract's forum selection clause vested jurisdiction over all bond-related disputes in "Wisconsin courts (federal or state) to the exclusion of any tribal courts." *Id.* at 198. Second, the court held that tribe lacked jurisdiction under *Montana* because the tribe "does not seek to regulate any of Stifel's activities on the reservation. Rather, the tribal court action

seeks to void each of the bond documents." *Id.* at 208. As in *Payday Financial*, the agreement in *Stifel* had no connection, direct or indirect, to tribal lands. Here, by contrast, Cabazon seeks to adjudicate a dispute involving Lexington's conduct under an insurance contract that is directly connected to tribal land. 2-ER-123, Nos. 14, 15; *id.* at 125, Nos. 71 and 75.

Lexington also cites *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe*, but like the other cases, this one does not support the proposition that a nonmember's physical presence within a tribe's reservation is a perquisite for the exercise of tribal jurisdiction. 609 F.3d 927 (8th Cir. 2010). The *Attorney's Process* matter involved a suit by the Sac & Fox Tribe in tribal court against nonmember Attorney's Process & Investigation Services, Inc. ("API") for the latter's alleged conversion of tribal funds paid pursuant to a contract between the parties. *Id.* at 932. API filed suit in federal court contesting the tribal court's jurisdiction. *Id.* at 933. The federal district court ruled in favor of the tribe. *Id.* at 937. On appeal, however, the Eight Circuit held there were insufficient facts to determine "whether the conversion claim has a sufficient nexus to the consensual relationship between [the former tribal chairman] and API." *Id.* at 941. Consequently, the court could not determine whether the first *Montana* exception authorized the tribe's jurisdiction over the conversion matter. *Id.* And on remand in the district court, the tribe failed to show there was a nexus between the tribe's assertion of jurisdiction and the

parties' consensual relationship involving tribal lands; consequently, there was insufficient basis for finding jurisdiction under the first *Montana* exception. *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe*, 809 F. Supp. 2d 916, 930–31 (N.D. Iowa 2011). In this case, however, there is a clear nexus between the assertion of tribal court jurisdiction and the parties' consensual relationship because Cabazon has sued Lexington for alleged breach of the insurance contracts that evidence their relationship.

Finally, Lexington also cites *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007), but its facts are so readily distinguishable as to deprive it of any relevance to the case at bar. *MacArthur* involved a tribal court lawsuit brought by members and nonmembers of the Navajo Nation against the San Juan Health Services District ("SJHSD") , a political subdivision of the State of Utah, based on the plaintiffs' employment at a health clinic operated by the SJHSD on non-Indian fee land owned by the State of Utah within the Navajo Nation Reservation. 497 F.3d at 1060–61. The tribal court issued injunctive relief in favor of the plaintiffs, who sought to enforce that tribal court's orders in federal district court. *Id.* at 1063. The federal district court held that the Navajo Nation had regulatory and adjudicatory jurisdiction over the tribal members' claims against the SJHSD under the first *Montana* exception. *Id.* at 1064. On appeal, the Tenth Circuit rejected that conclusion, holding that, under *Nevada v. Hicks*, 533 U.S. 353 (2001), the first

Montana exception contemplates tribal jurisdiction over "private individuals or entities who voluntarily submit themselves to tribal jurisdiction" through consensual relationships. *MacArthur*, 497 F.3d at 1073. Navajo could not, however, "exercise regulatory authority over another independent sovereign [SJHSD] on that sovereign's land" involving "employment relationships . . . entered into exclusively in SJHSD's governmental capacity." *Id*. at 1073 & 1074. *MacArthur* is clearly distinguishable from Cabazon's dispute with Lexington, which involves a contract between a tribe and a private party that has consented to insuring vital tribally owned property on tribal trust land within the tribe's reservation. 2-ER-123, Nos. 14, 15; *id*. at 125, Nos. 71 and 75.

c. Lexington Entered Into a Consensual Relationship with Cabazon to Insure the Tribe's On-Reservation Businesses Under Circumstances that Lexington Should Have Reasonably Anticipated Might Trigger the Tribe's Assertion of Authority

Lexington also contends that under the first *Montana* exception, "tribal law may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." Lex. Pr. Br. at 38, 39 (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008)). Lexington misstates the appropriate inquiry. The *Montana* consensual relationship exception recognizes that a "tribe may regulate . . . the activities of non-members who enter consensual relationships with the tribe or its members." *Montana*, 450 U.S. at 565. It is the

nonmember's consent *to that relationship with the Tribe* (*or tribal member*)—not to tribal law—that must be established expressly or by the nonmember's actions. *See Water Wheel*, 642 F.3d at 818 (citing *Plains Commerce Bank*, 554 U.S. at 337).

A separate but related consideration is "whether under th[e] circumstances the non-Indian defendant should have reasonably anticipated that [its] interactions might 'trigger' tribal authority." *Id*. (citing *Plains Commerce Bank*, 554 U.S. at 338). Lexington argues that its relationship was not truly consensual because it "would not have reasonably anticipated that the Cabazon Band would attempt to regulate" Lexington's alleged bad faith denial of insurance coverage. Lex. Pr. Br. at 38. These are make-weight arguments.

Lexington portrays itself as a disengaged, passive actor who knew nothing and did nothing with respect to the issuance of the many insurance policies it issued to Cabazon over many years (Lex. Pr. Bri. at 38)—policies for which Lexington received millions of dollars in premiums. 2-ER-123, Nos. 14, 15; *id*. at 125, No. 77, *id*. at 126, No. 81. But in fact, over many years, Lexington knowingly wrote policies on businesses and property it knew to be on the Cabazon Reservation. 2-ER-125, No. 14. Lexington stipulated that it was the insurer and the Tribe was the insured. 2-ER-125, Nos. 71, 75. Alliant Insurance Services served as Lexington's agent with respect to Cabazon and the other named insureds. 1-ER-23-24; 2-ER-124-125, Nos. 16, 22-24 . Annually, Alliant, would visit the Cabazon Reservation to meet with

Tribal employees to gather information relevant to the renewal of the Tribe's policies with Lexington. 2-ER-125, No. 77. In short, Lexington knowingly directed its conduct towards the Tribe's lands.

Equally strained is Lexington's argument that it "would not have reasonably anticipated" the Tribe asserting its jurisdiction over claims based on Lexington's insurance policies with the Tribe. Lex. Pr. Br. at 4, 38. The test is objective not subjective, and turns on whether, in light of the surrounding circumstances, the nonmember should have reasonably anticipated being subject to tribal authority. *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 932 (9th Cir. 2019), *cert. denied* 141 S. Ct. 1046 (2021); *Water Wheel*, 642 F.3d at 818 ("[Nonmember's] subjective beliefs regarding his relationship with the tribe do not change the consensual nature of that relationship for purposes of regulatory jurisdiction.") Surely that standard is met here. Again, Lexington was the insurer, Cabazon was the insured. 2-ER-125, Nos. 71, 75. Lexington specifically identified Fantasy Springs Resort Casino among the "Named Insureds" covered by its policies (2-ER-125, No. 73; 3-ER-377) so it is completely reasonable to conclude Lexington knew Fantasy Springs was located on tribal lands within the Tribe's Reservation.

Likewise, Lexington certainly could anticipate a dispute over coverage might arise, as such disputes are commonplace, and the Named Insureds of Lexington's policies were of vital economic importance to the Tribe. *See Smith*, 434 F.3d at 1138

("[n]onmembers of a tribe who choose to affiliate with the Indians or their tribes [in a consensual relationship] may anticipate tribal jurisdiction when their contracts affect the tribe or its members."). Moreover, many decisions from the Supreme Court, this Court, and elsewhere have documented not just tribal court suits brought by tribes (or tribal members) against insurance companies but determinations in favor of tribal jurisdiction. *See, e.g.*, *LaPlante*, 480 U.S. at 19–20; *Stump*, 191 F.3d at 1072–76; *State Farm Ins. Cos.*, 2014 WL 1883633 at *28, 31.

But Lexington didn't need to read *LaPlante* or *Smith* to know it could face a suit in tribal court by one of its tribal insureds, because Lexington experienced that situation first-hand almost fifteen years ago when it found itself in Chehalis Tribal Court defending a business interruption claim related to the Chehalis Tribe's casino. SER-7. Lexington challenged the tribal court's assertion of jurisdiction, making the same arguments it has in this case (including that all interactions with the Tribe were through third parties) that it had not entered into a relationship with Chehalis. SER-10. The tribal court held that these dealings satisfied *Montana*'s consensual relationship test. SER-12–13.

The Chehalis Tribal Court also considered the insurance policy's "Service of Suit" provision which provided in relevant part: "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." SER-12–13. Based on Lexington's consensual relationship with Chehalis and the aforementioned forum language, the Chehalis Tribal Court determined it had jurisdiction over the Tribe's coverage suit against Lexington. SER-13.

The case at bar is a near carbon copy of Chehalis's dispute with Lexington, down to Service of Suit language in the Cabazon-Lexington policies that is identical to the corresponding language in the Chehalis-Lexington policy. 2-ER-123, No. 27. If that was not enough to put Lexington on notice it could face suit in the Cabazon Reservation Court, Lexington only needed to consult the Cabazon Judicial Code. That Code, first codified and published in 1990 and which long predates the Lexington Policies, gives every indication that the Tribe would claim adjudicative authority over a breach of contract dispute concerning obligations towards the protection of tribal property on tribal lands: "The Reservation Court shall have jurisdiction over . . . . All civil causes of action arising within the exterior boundaries of the Cabazon Indian Reservation in which: . . . The defendant has entered onto or 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." 2-ER-297-298 (Tribal Code § 9-102(b)(2)(c) (emphasis added).[6]

[6] This assertion of jurisdiction in the Tribe's Code is consistent with the Supreme Court's recognition that tribal courts are "competent law-applying bodies" and thus "appropriate forums for the exclusive adjudication of disputes affecting important

Under the circumstances, Lexington had every reason to anticipate being subject to tribal authority for its alleged breach of the insurance policy.

Lexington counters that two additional factors made it unreasonable to anticipate Cabazon's assertion of jurisdiction. First, Lexington argues that the insurance industry has long been regulated by states and state law, Lex. Pr. Br. at 38–39, and that it was unexpected (and improper) for the Tribe to insert itself into this field when the Tribe does not (and should not) regulate insurance. *Id.* at 39. Second, Lexington contends it is unlikely it would have issued policies by which it consented to the jurisdiction of every tribe to which it issued a policy given the array of tribal laws and legal systems to which it would have been subjected.

Regarding the proposition that tribes have no business regulating insurance, this case has nothing to do with regulating the insurance industry. It is a run-of-the-mill coverage dispute between an insurer and an insured. In addition, Lexington's argument is the same one this Court rejected when made by Allstate to avoid tribal jurisdiction in the *Stump* case. This Court rejected the argument then, and should do so now: "Allstate also argues that the exercise of tribal jurisdiction would interfere with Montana's ability to regulate insurance. However, the tribe also has a strong interest in adjudicating liability for an accident involving tribal members on the

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personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 66 (1978).

reservation." *Stump*, 191 F.3d at 1076.

As for the unlikelihood of Lexington agreeing to submit to the authority of every tribe to which it issued a policy, the question is not whether Lexington thought it was consenting to tribal jurisdiction. Rather, the test is an objective one: whether, under the circumstances, Lexington should have reasonably anticipated that its interactions with Cabazon "*might trigger tribal* authority." *Water Wheel*, 642 F.3d at 818 (emphasis added) (internal quotation marks omitted). As explained above, a reasonable insurer should have anticipated that possibility.

Furthermore, Lexington's concern with being subject to an array of legal systems and potential laws seems to confuse choice of law and choice of forum. The issue before the district court and now on appeal is whether the Tribe has authority to adjudicate the parties' dispute. There is nothing in the record here as to what law or legal principles the tribal court would apply if its jurisdiction is recognized. Nor is there evidence or reason to believe that the tribal court would refuse to entertain arguments as to what law should govern. Lexington plainly fears it will be litigating in an inhospitable forum in tribal court. Lex. Pr. Br. at 44, 45. But there is no suggestion that it has been denied due process up to now and no reason to think it would in the future. In any event, the Supreme Court has dismissed such concerns as unwarranted and legally irrelevant to the question of tribal jurisdiction: "The alleged incompetence of tribal courts [as a basis for denying tribal court jurisdiction]

. . . would be contrary to the congressional policy promoting the development of tribal courts. Moreover, the Indian Civil Rights Act, 25 U. S. C. § 1302 *et seq.*, provides non-Indians with various protections against unfair treatment in the tribal courts." *LaPlante*, 480 U.S. at 19; *see also Stump*, 191 F.3d at 1076 ("Allstate's objections to the legitimacy of process in the tribal court may not be considered as a basis for depriving tribal courts of jurisdiction.").

In sum, by insuring tribal businesses located on tribal land, and in doing business with the Cabazon Band, an entity with its own legal system and courts of competent jurisdiction, Lexington should reasonably have anticipated the possibility that any disputes arising under the polices between itself and the Tribe would fall within the jurisdiction of the tribal courts.

d. The First *Montana* Exception Does Not Require a Showing that Lexington's Conduct Implicated the Tribe's Inherent Sovereign Interests in Order for the Tribe to Assert Jurisdiction Over the Parties' Insurance Dispute

Lexington reads *Plains Commerce Bank* to further narrow the *Montana* consensual relationship exceptions by imposing a new and additional requirement: the [Tribe's] regulation must stem from the tribe's inherent authority to set conditions on entry, preserve tribal self-government, or control internal relations." Lex. Pr. Br. at 46 (citing *Plains Commerce Bank*, 554 U.S. at 337). Had it been the Supreme Court's aim to profoundly modify *Montana*—the "pathmarking case" regarding tribal regulation of nonmembers—one would have expected the Court to

announce such an important change clearly rather than mention it in passing. *Plains Commerce Bank*, 554 U.S. at 343.

In fact, the Supreme Court's most recent decision applying *Montana* does not support Lexington's position. In *United States v. Cooley*, 141 S. Ct. 1638, 1643 (2021) the Court confirmed that the "two important exceptions" to *Montana's* general rule remain unchanged from when originally announced. After setting forth the exceptions by quoting the relevant language from *Montana*, the Court did not refer to the additional limitation that Lexington gleans from *Plains Commerce Bank*. *Id.* Instead, the Court observed: "We have subsequently repeated *Montana's* proposition and exceptions in several cases involving a tribe's jurisdiction over the activities of non-Indians within the reservation" (*id.*)—thus making clear that the *Montana* framework has not materially changed since it was first established. *See also id.* at 1645 ("[W]e have also repeatedly acknowledged the existence of the exceptions and preserved the possibility that certain forms of nonmember behavior may sufficiently affect the tribe as to justify tribal oversight.") (internal quotation marks omitted).

Additionally, this Court has not adopted Lexington's reading: in the many *Montana*-related decisions in the 15 years since *Plains Commerce Bank* was decided, this Court has continued to describe and apply both *Montana* exceptions without applying the gloss that Lexington argues for in this case. Moreover, the one

federal court of appeals to have thoroughly considered the argument advanced by Lexington has rejected it. *See Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014) (holding that the *Plains Commerce Bank* language was *dicta*).

Even if the first *Montana* exception depends on nonmember conduct implicating a tribe's sovereign interests, Lexington's insuring of Cabazon's businesses on its tribal lands suffices. The revenues derived from those businesses, including Fantasy Springs Resort Casino, are vital to support the Tribe's essential services to tribal members and persons visiting and doing business on the Reservation. 2-ER-125, No. 78; *Cabazon Band of Mission Indians*, 480 U.S. at 218–19 (1987) ("The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services . . . . Self-determination and economic development are not within reach if the Tribes cannot raise revenues."). Indeed, a key premise of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (pursuant to which Fantasy Springs is operated via a Gaming Compact with the State of California) was its recognition of tribal gaming "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. It follows that Lexington's denial of business interruption coverage imperiled the tribal programs and services funded by the Tribe's businesses.

Finally, permitting Lexington to insure the Tribe's vital, on-Reservation businesses without being subject to tribal regulation of that consensual relationship disregards the principle that "tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," and subverts the "vital role [of tribal courts] in tribal self-government." *LaPlante*, 480 U.S. at 14, 18. Moreover, given that the *Montana* exceptions are "rooted" in the tribes' inherent power to regulate nonmember behavior, *Knighton*, 922 F.3d at 904, failing to recognize tribal jurisdiction over Lexington under the first *Montana* exception here would necessarily adversely implicate the Tribe's sovereign interests.

To sum up, the Tribe has inherent sovereign authority to regulate nonmember conduct on tribal lands if the regulation satisfies either of the *Montana* exceptions. Here, the parties entered a consensual relationship through commercial dealings that were directly connected to tribal lands—specifically, the insurance of a tribally owned business on those lands. There is a direct nexus between the tribal court's assertion of jurisdiction and the parties' consensual relationship because the lawsuit is based on Lexington's alleged breach of the insurance contracts underlying that relationship. Therefore, jurisdiction is authorized under the first *Montana* exception.

e. Upholding the Tribe's Assertion of Jurisdiction Will Not Lead to the Parade of Horribles Suggested by Lexington

Lexington argues "in addition to being unprecedented, the district court's reasoning would have far-ranging consequences" if affirmed. Lex. Pr. Br. at 35. As

explained above, the district court was not breaking new ground; indeed, ruling otherwise would have been contrary to this Court's decisions and many others around the country. *See* Section III-A, *supra; Stump*, 191 F.3d at 1073–75.

Lexington's prediction of a jurisdictional free-for-all is, likewise, baseless. Lexington contends that if its conduct is deemed "on tribal land,"

> 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.

Lex. Pr. Br. at 35–36. These predictions will not come to pass because a tribe's regulation of a nonmember is subject to a substantial limit—one this court has been applying for years: the regulated conduct must occur on tribal lands or have a "direct connection to" or that "centers on" on tribal lands. *See Smith*, 434 F.3d at 1135; *Grand Canyon Skywalk Development, LLC*, 715 F.3d at 1205.

In the meantime, Lexington and other non-Indian businesses can easily protect themselves by negotiating choice of forum and choice of law provisions in their customer contracts. *See Plains Commerce Bank*, 554 U.S. at 344 (Ginsburg, J., concurring) ("Had the Bank wanted to avoid responding in tribal court . . . [t]he Bank could have included forum selection, choice-of law, or arbitration clauses in its

agreements."); *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1250 n.l (8th Cir. 1998) (per curiam) (referencing tribal court dismissal of tribe's suit against nonmember based on forum-selection clause requiring litigation in Florida federal court). One imagines that Lexington has considered controlling jurisdictional issues in this way since the Chehalis Tribal Court asserted jurisdiction over the insurer in 2010, but apparently chose not to do so. Other insurance companies have, however, including some that have issued policies through the TPIP covering Cabazon's on-Reservation property. *See, e.g.*, 4-ER-675, 676 (Ironshore Specialty Insurance Company Site Pollution Policy § VII-G (Choice of Forum) and § VII-H (Choice of Law) under same TPIP requiring that litigation or arbitration against Ironshore take place only in New York and subject to New York law).

In short, Lexington's worries about an unprecedented expansion of tribal jurisdiction are unfounded and offer no reason for ruling against the Tribe's assertion of jurisdiction in this case.

IV.
LEXINGTON IS NOT ENTITLED TO A PERMANENT INJUNCTION

Lexington's permanent injunction request rises and falls with the merits of its summary judgment motion. As Lexington's motion for summary judgment fails, the Court need not independently consider the permanent injunction argument.

CONCLUSION

For the reasons stated above, on cross-appeal this Court should reverse the district court's denial of Defendants' motion to dismiss as *Whole Woman's Health* prohibits *Ex parte Young* claims against judges such as Defendants. If the Court reaches Lexington's jurisdictional arguments on appeal, the Court should affirm summary judgment in favor of Defendants on the same basis as the district court did—the tribal court has civil jurisdiction over Lexington under the Tribe's right to exclude. Alternatively, this Court should affirm summary judgment in favor of Defendants because the first *Montana* exception recognizes Cabazon's authority to assert jurisdiction over claims to enforce its consensual relationship with Lexington, pursuant to which Lexington agreed to insure the Tribe's businesses operating on trust lands within the Tribe's Reservation.

Dated: July 26, 2023

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Dated: July 26, 2023

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Circuit Rule 28.1-1(c) because it contains 13,958 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 Rules 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 Times New Roman font.

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Local Rule 28-2.6, Defendants Martin A. Mueller and Doug Welmas hereby advise the Court that *Lexington Insurance Co. v. Smith*, No. 22-35784, is a related proceeding that raises the same or closely related issues.

Dated: July 26, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using appellate CM/ECF system on July 26, 2023.

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

Dated: July 26, 2023

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