No. 22-35784

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEXINGTON INSURANCE COMPANY et al.,

Plaintiffs-Appellants,

v.

CINDY SMITH et al.,

Defendants-Appellees.

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

APPELLEE THE SUQUAMISH TRIBE'S RESPONSE TO APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BENC

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INTRODUCTION

The Court should deny Appellants' (the "Insurers") Petition for Panel Rehearing and Rehearing En Banc, which distorts both the Panel's decision and controlling law in contending the Panel departed from Supreme Court and Ninth Circuit precedent to improperly expand the scope of tribal jurisdiction over nonmembers.

The Insurers chose to participate for years in the "Tribal First" insurance program, and they knowingly contracted with the Suquamish Indian Tribe of the Port Madison Reservation (the "Tribe") to insure Tribal businesses and Tribal property exclusively on Tribal lands, reaping millions of dollars in premiums generated by Tribal revenues. But they insist the Tribal Court lacks jurisdiction over the parties' coverage dispute because the Insurers did not physically enter the Tribe's Reservation and, the Insurers contend, physical entry onto tribal lands is a prerequisite to tribal jurisdiction over nonmembers under Supreme Court and Ninth Circuit precedent.

The Insurers' argument fails because this supposed physical-entry rule does not exist. "Nowhere in [its] cases has the [Supreme] Court limited the definition of nonmember conduct on tribal land to physical entry or presence," as the Panel explained. Panel Opinion ("Opn.") 15-16. Instead, the governing test in this Court is whether the claim at issue "bears some direct connection to tribal lands." *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1135 (9th Cir. 2006) (en banc).

This Court held long ago in *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999)—a decision the Insurers do not even deign to mention in accusing the Panel of ignoring Circuit precedent—that an off-reservation insurer could be subject to tribal jurisdiction in a coverage dispute concerning on-reservation property, without regard to any physical entry onto tribal lands.

The Panel's decision resulted from straightforward application of Supreme Court and Ninth Circuit precedent to familiar factual circumstances. The Insurers' protestations to the contrary, and their purported concerns about an illusory expansion of tribal jurisdiction over nonmembers, are without merit. Their Petition falls far short of establishing the exceedingly narrow grounds for rehearing or en banc hearing under Federal Rule of Appellate Procedure 35.

The Court should deny the Petition.

FACTUAL AND PROCEDURAL BACKGROUND

The Tribe is a federally-recognized Indian tribe located on the Puget Sound, on lands the Tribe and its members have occupied since time immemorial. The Tribe holds sovereign authority over the Port Madison Reservation, where it operates numerous businesses, both directly and through its wholly-owned economic development entity, Port Madison Enterprises ("PME"). Opn. 6. All of these Tribal businesses are located on Tribal trust lands within the boundaries of the Reservation. *Id.*

Beginning no later than 2015, the Tribe and PME purchased "all-risk" property insurance policies from the Insurers to cover a wide range of potential loss and damage to Tribal businesses and real and personal property of the Tribe and PME. *Id.* at 6-7. These policies were offered through the Tribal Property Insurance Program ("TPIP"), a specialized program operated by a broker under the moniker "Tribal First." *Id.* at 7. Tribal First exclusively markets to tribal governments and enterprises, holding itself out as the "largest provider of insurance solutions to Native America." *Id.* Tribal First representatives visited the Reservation repeatedly during the parties' relationship to conduct insurance-related activities, such as safety inspections and ergonomics assessments. 6-ER-1319.

Year after year, the Insurers chose to participate in the TPIP, issuing policies annually to the Tribe and PME "based on underwriting guidelines specifically negotiated for the Tribal Program." Opn. 7-8. The Insurers knew they were contracting with the Tribe and PME, which were named insureds under the policies. *Id.* at 8; 2-ER-258; 2-ER-299. "Overall, the policies covered almost $242 million worth of real property, $50 million worth of personal property, and $98 million of business interruption value—all centered on Tribal trust lands." Opn. 8. For the 2019-2020 policy year alone, the Tribe and PME collectively paid the Insurers over $1,567,000 in premiums. 2-ER-287.

In March 2020, the Suquamish Tribal Council declared a public health emergency as a result of the COVID-19 pandemic, and enacted resolutions

restricting access to public facilities and suspending Tribal business operations. Opn. 8. Seeking to recover some of the resulting losses, the Tribe and PME submitted coverage claims to the Insurers. The Insurers issued reservation-of-rights letters in response, so the Tribe and PME commenced suit in the Suquamish Tribal Court, asserting claims for breach of contract and declaratory relief to confirm the Insurers' coverage obligations under the policies. *Id.* at 9.

The Insurers moved to dismiss, contending the Tribal Court lacked jurisdiction. Their core argument was that—even though they knowingly contracted with the Tribe and PME, through the "Tribal First" program specifically targeting tribal governments, to insure Tribal property and businesses exclusively on the Reservation, and collected millions of dollars in premiums generated by these Tribal businesses—the Insurers felt they had not engaged in any "conduct" on Tribal lands because their representatives allegedly never physically entered the Reservation.

The Tribal Court denied the Insurers' motion, and the Tribal Court of Appeals, applying Supreme Court and Ninth Circuit precedent, affirmed. The Insurers next took their jurisdictional challenge to the federal district court, which confirmed the Tribal Court's jurisdiction. *Id.* at 6. The Insurers then commenced the instant appeal.

The Panel unanimously affirmed the district court's judgment. The Panel rejected the Insurers' contention that they could not "be subject to tribal jurisdiction because all relevant conduct occurred off the

Reservation," noting that the Supreme Court stated in *Merrion v. Jicarilla Apache Tribe* that a "tribe has regulatory jurisdiction over a nonmember who 'enters tribal lands *or conducts business with the tribe*,'" and that "[n]owhere in *Merrion* or in subsequent cases has the Court limited the definition of nonmember conduct on tribal land to physical entry or presence." Opn. 15-16 (quoting *Merrion*, 455 U.S. 130, 142 (1982)). The Panel concluded the Insurers' engagement in a consensual "commercial agreement [with the Tribe and PME] that solely involves tribal property on trust land," *id.* at 15, "easily … satisfies the requirements for conduct occurring on tribal land" under controlling Supreme Court and Ninth Circuit precedent. *Id.* at 19.

The Panel went on to hold that the Tribal Court may exercise jurisdiction because the Insurers' "mutual and consensual" commercial relationship with the Tribe and PME—centered exclusively on Tribal lands—satisfies the "first exception" under *Montana v. United States*, 450 U.S. 544 (1981). Opn. 19-24. "Because the Tribe's sovereign interest in managing its businesses on tribal lands is at stake," the Panel explained, "tribal sovereignty principles are implicated." Opn. 23 (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 334 (2008)). "Therefore," the Panel concluded, "the Tribal Court has jurisdiction under the first *Montana* exception." *Id.* at 24.

The Panel noted its conclusion was consistent with this Court's 25-year-old decision in *Allstate*, in which the Court "deemed tribal jurisdiction

over an off-reservation insurance company as 'colorable,' even when the insurance was purchased by a tribal member outside the reservation." Opn. 26-27. "The situation here," the Panel explained, "rises from colorable to actual … . [U]nder the circumstances, the Tribe decidedly has jurisdiction over an off-reservation insurance company." *Id.* at 27.

ARGUMENT

I. STANDARD FOR EN BANC REVIEW

"[E]n banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

A petition for rehearing or hearing en banc is not an opportunity for the losing party to seek a broader audience for the same arguments that failed before the panel, and indeed even a "determination that a panel's decision is wrong is not, by itself, a sufficient reason to grant rehearing en banc." *Kipp v. Davis*, 986 F.3d 1281, 1286-87 (9th Cir. 2021) (Miller, J., concurring). Rather, the Court hears en banc only those very rare cases that meet the "exacting standards" of Rule 35. *Id.* at 1282 (Paez, J., concurring).

II. EN BANC REVIEW IS NOT WARRANTED TO SECURE UNIFORMITY IN NINTH CIRCUIT LAW BECAUSE THE PANEL CORRECTLY APPLIED SUPREME COURT AND CIRCUIT PRECEDENT

A. The Panel Correctly Applied Supreme Court Precedent in Holding the Insurers' Consensual Agreement to Insure On-Reservation Tribal Property and Businesses Constituted On-Reservation Conduct Supporting Tribal Jurisdiction under *Montana*

The Insurers contend the Panel "misapplied Supreme Court

precedent and created a rift with other circuits" by confirming Tribal Court jurisdiction despite the Insurers' insistence that they never physically entered the Port Madison Reservation. Aplts.' Pet. (ECF 44) ("PFR") 7. The Insurers are wrong. Neither the Supreme Court nor any federal court of appeals has ever held that physical entry onto tribal lands is a prerequisite to tribal jurisdiction over a nonmember that engages in consensual business conduct centered on tribal land, as the Insurers did. The Insurers' vague pronouncements about the Supreme Court's supposed "traditional caution in this area," *id.* at 1, cannot mask the reality that they have never cited a single decision by the Supreme Court—or any other court—that supports the supposed physical-entry requirement they advocate.

Supreme Court precedent confirms the invalidity of the Insurers' position, as the Panel recognized. In *Merrion*, the Court explicitly distinguished between physical entry and on-reservation business activities, indicating that *either* form of conduct—both of which center on tribal lands—can support tribal jurisdiction: a "tribe's regulatory authority over a nonmember is triggered when 'the nonmember enters tribal lands ***or*** conducts business with the tribe.'" Opn. 13 (quoting *Merrion*, 455 U.S. at 142) (emphasis added). The Panel followed this clear guidance in rejecting the Insurers' argument that physical entry is strictly required. While the circumstances of *Merrion* involved some physical presence on tribal land, the Panel explained, the "Court did not solely rely on this fact; it specifically pointed to the Apache Tribe's sovereign power over commercial agreements as derivative of a tribe's power to exclude on tribal lands." *Id.* at 14. The Panel's analysis was consistent with Circuit precedent—affirmed by the Supreme Court—holding that "a tribe may regulate nonmembers' contractual relationships with the tribe or tribal

members apart from any physical entry," for example through taxation of "nonmembers' leasehold interests on tribal lands." *Id.* at 16 (citing *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 599-600 (9th Cir. 1984), *aff'd*, 471 U.S. 195 (1985)).

The Insurers contend the Panel's application of *Merrion* was inconsistent with *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001), which stated that *Merrion* "involved a tax that only applied to activity occurring on the reservation." PFR 10. But *Atkinson* did not undermine the relevant principle from *Merrion*; it actually quoted with approval the exact passage on which the Panel relied—"'[A] tribe has no authority over a nonmember until the nonmember enters tribal lands ***or*** conducts business with the tribe'"—and confirmed this principle is "easily reconcilable with the *Montana-Strate* line of authority." *Atkinson*, 532 U.S. at 653 (emphasis added).[1]

The Insurers' primary contention is that the Panel's decision is inconsistent with the Supreme Court's *Plains Commerce* decision. But *Plains Commerce* likewise did not overrule or undermine the relevant principle stated in *Merrion*, and certainly did not hold that nonmember "conduct on tribal land" is limited to physical entry. *Plains Commerce*, 554 U.S. at 333. At the threshold, *Plains Commerce* does not govern here, because it "involved 'a non-Indian's sale of non-Indian fee land,' and thus does not control [a case] in which the conduct at issue occurred on tribal land." *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 901 n.8 (9th Cir. 2017), *cert. denied*, 583 U.S. 1083 (2018). The *Plains Commerce* Court had no occasion to define

[1] *Atkinson* concerned a tribe's attempt to tax nonmember transactions on *non-Indian* fee land, and did not limit relevant nonmember "activity on the reservation" to physical entry. It simply recognized that conduct on non-Indian fee land is distinct from conduct on tribal land. *Atkinson*, 532 U.S. at 653-54.

the scope of relevant "nonmember conduct on tribal land" because the Court's holding did not involve nonmember "conduct" in the relevant sense at all—it exclusively concerned sale of non-Indian fee land by a nonmember, and as the Court stated, "conduct taking place on the land and the sale of the land are two very different things." *Plains Commerce*, 554 U.S. at 340. But the Court did suggest that contractual relationships centered on tribal land—like the insurance agreements here—could support tribal jurisdiction, acknowledging that the bank's issuance of loans secured by on-reservation property "*could* trigger tribal authority to regulate those transactions," without any reference to physical presence on tribal land. *Id.* at 338 (emphasis added). *Plains Commerce* accordingly supports the Panel's decision.

Contrary to the Insurers' claim, the Panel did not plow any new ground by recognizing that through business dealings, contracts, and remote communications, nonmembers like the Insurers "regularly conduct business on a reservation and significantly affect a tribe and its members without ever physically stepping foot on tribal land." Opn. 16-17. For example, it is axiomatic in personal jurisdiction jurisprudence that "a nonresident's physical presence within the territorial jurisdiction of the [forum] court is not required" to support jurisdiction. *Walden v. Fiore*, 571 U.S. 277, 283 (2014). Consistent with that principle, this Court has held that Montana courts had personal jurisdiction over an out-of-state insurer that "issue[d] no policies in Montana and ha[d] no agents there," simply because its "policy coverage extends into Montana and an insured event resulted in litigation there." *Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912-13 (9th Cir. 1990); *see Smith*, 434 F.3d at 1138 ("The Court's 'consensual relationship' analysis under *Montana* resembles

the Court's Due Process Clause analysis for purposes of personal jurisdiction."). There is nothing radical—and certainly no inconsistency with Supreme Court or Circuit precedent—in the Panel's application of the same basic concept in the context of tribal jurisdiction.

B. The Panel Correctly Applied Circuit Precedent

The Insurers contend the Panel's decision "lacks any grounding in Circuit precedent." PFR 11. Nothing could be further from the truth.

The Panel relied on *Smith v. Salish Kootenai College*, an *en banc* decision in which this Court explicitly rejected any strict requirement of physical entry onto tribal lands as a prerequisite to tribal jurisdiction. The jurisdictional inquiry, according to *Smith*, is "not limited to deciding precisely when and where the claim arose … . Rather, [the Court's] inquiry is whether the cause of action … bears some direct connection to tribal lands." *Smith*, 434 F.3d at 1135; *see also Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013), *cert. denied*, 571 U.S. 1110 (2013) (affirming tribal jurisdiction over contract dispute that "center[ed] on" tribal lands).

Tellingly, while the Insurers fault the Panel for supposedly ignoring Circuit precedent, they fail *even to mention* the Ninth Circuit decision most factually apposite to this case, *Allstate Indemnity Co. v. Stump*. In *Allstate*, this Court found a "colorable" basis for tribal court jurisdiction over claims against a nonmember insurer of tribal members who were injured on tribal land, holding the Supreme Court's decision in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), "foreclosed" the same argument the Insurers make here—that the insurer's relevant conduct was solely off-reservation. *Allstate*, 191 F.3d at 1074. Regardless of that contention, the Court held tribal jurisdiction was colorable because the "insured and injured parties …

were tribal members who lived on the reservation; the accident occurred on the reservation; and the insurer [was] an off-reservation entity that sold a policy to a tribal member." *Id.*

Applying *Allstate*, the Panel concluded the "situation here rises from colorable to actual," and the "Tribe decidedly has jurisdiction over" the Insurers. Opn. 27. The Insurers claim the Panel's decision lacked "grounding" in Circuit precedent, but the opposite is true: the Panel's decision was virtually compelled by the holding in *Allstate*. To overrule the Panel's decision in this case would require the Court to overrule *Allstate*, because if the Insurers were correct that physical entry onto tribal lands is a prerequisite to tribal jurisdiction, *Allstate* could not stand. It is the Insurers, not the Panel, who willfully ignore Circuit precedent.

III. EN BANC REVIEW IS NOT WARRANTED BECAUSE THERE IS NO CIRCUIT SPLIT ON ANY QUESTION OF EXCEPTIONAL IMPORTANCE

A. There Is No Circuit Split Regarding the Significance of Nonmember Physical Entry on Tribal Land

The Insurers claim the Panel's decision "creates a needless circuit split," with the Seventh, Eighth, and Tenth Circuits "because those courts hold that tribal-court jurisdiction cannot exist absent relevant nonmember conduct physically on tribal land." PFR 2. Again, the Insurers' position has no support in the case law.

The Eighth Circuit does not require physical entry onto tribal lands as a prerequisite to tribal jurisdiction. In fact, the Panel rightly cited Eighth Circuit cases *in support of* its decision. Opn. 17-18. For example, in *DISH Network Serv. LLC v. Laducer*, 725 F.3d 877, 884 (8th Cir. 2013), the Eighth Circuit recognized grounds for tribal jurisdiction even over a claim arising from nonmember conduct off tribal land if the claim related to a contract

concerning on-reservation activities.

Similarly, neither the Seventh nor the Tenth Circuit has indicated that physical entry onto tribal land is necessary to support tribal jurisdiction, and the Panel correctly distinguished the cases cited by the Insurers as addressing "conduct that could not even plausibly be viewed as connected to tribal land." Opn. 18-19. None of those cases involved facts remotely resembling the circumstances here. They do not raise any inconsistency with the Panel's decision—and certainly not clear disagreement over a "question of exceptional importance." Fed. R. App. P. 35(a)(2).

B. The Panel's Application of "Sovereignty Considerations under *Montana*" Does Not Present a Question of Exceptional Importance

The Insurers fault the Panel for rejecting their "argument that *Plains Commerce* imposed an additional limitation on the *Montana* exceptions, namely that the tribal regulation must not only satisfy *Montana* but also 'stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.'" Opn. 25 (quoting *Plains Commerce*, 554 U.S. at 337); *see* PFR 18. But the Panel's reading of *Plains Commerce* was correct. And more importantly for this Petition, while the Panel acknowledged its "understanding departs from that of the Seventh Circuit," Opn. 26, this "depart[ure]" is not outcome-determinative here, and does not present any grounds for en banc review.

At the outset, the Panel followed clear Circuit precedent in rejecting the Insurers' reading of *Plains Commerce*. The Panel began its analysis with *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 513 (2019), which explained that the quoted passage from *Plains Commerce* "was only affirming the 'varied sources of tribal regulatory power over nonmember conduct on the reservation.'"

Opn. 25 (quoting *Knighton*, 922 F.3d at 903). "If the conduct at issue satisfies one of the *Montana* exceptions," the Panel explained, "it necessarily follows that the conduct implicates the tribe's authority in one of the areas described in *Plains Commerce*." *Id.* at 26. Here, "the Tribe's sovereign interest in managing its business on tribal lands is at stake," so "tribal sovereignty principles are implicated" within the terms of *Montana* and *Plains Commerce*. *Id.* at 23-24.

The Panel's reading of *Plains Commerce* is consistent with that of the Fifth Circuit in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), which was affirmed by the Supreme Court. 579 U.S. 545 (2016). And while the Panel acknowledged the Seventh Circuit's divergent reading, this is no basis for en banc review for two additional reasons.[2]

First, the Panel applied the same understanding of *Plains Commerce* as the prior panel in *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019), a case in which the Supreme Court denied certiorari on the exact same argument the Insurers press here. *FMC* held a nonmember subject to tribal jurisdiction under both *Montana* exceptions without reference to any purported additional requirements under *Plains Commerce*. *See id.* at 932-35. The losing nonmember petitioned for rehearing en banc, which this Court denied. 2020 U.S. App. LEXIS 1052 (9th Cir. Jan. 13, 2020). The nonmember

[2] The Insurers also cite *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015), and *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019). Neither presents any substantial conflict with the Panel's decision. *Little River Band* did not directly concern tribal jurisdiction over a nonmember; it addressed the question "whether the National Labor Relations Board may apply the National Labor Relations Act" to "operation of a casino resort." 788 F.3d at 539. *Kodiak Oil* concerned nonmember oil and gas companies' failure to pay royalties to the federal government under a comprehensive federal regulatory scheme that preempted tribal law. 932 F.3d at 1138.

then sought certiorari on the question whether "the Ninth Circuit correctly holds that tribal jurisdiction over nonmembers is established whenever a *Montana* exception is met, or whether … a court must also determine that the exercise of such jurisdiction stems from the tribe's inherent authority to set conditions on entry, preserve tribal self-government, or control internal relations."[3] The Supreme Court denied the petition, 141 S. Ct. 1046 (2021), confirming this is not a question of "exceptional importance." Fed. R. App. P. 35(a)(2).

Second, even if the Court were to accept the Insurers' preferred reading of *Plains Commerce*, it would not change the outcome of this case because the Panel correctly concluded that "the Tribe's sovereign interest in managing its businesses on tribal lands is at stake," satisfying even the Insurers' preferred reading of *Plains Commerce*. Opn. 23. The Tribal Court in this case asserts jurisdiction over a contract dispute—to which the sovereign Tribe itself is a party—concerning insurance coverage for "properties and operations of [the] [T]ribal government and businesses that extensively 'involved the use of [T]ribal land' and the businesses 'constituted a significant economic interest for the [T]ribe.'" Opn. 27 (quoting *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802, 817 (9th Cir. 2011)). It is difficult to imagine a fact pattern that more squarely implicates the Tribe's sovereign "authority over self-government and internal relations." Opn. 26; *see Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985) (recognizing "the power to resolve disputes arising within the territory governed by the Tribe" as "an attribute of

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

inherent tribal sovereignty"); *cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (recognizing "the sovereign power to try causes in their courts" as among the "essential attributes of sovereignty" retained by States under the Constitution); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1501 (2019) ("[T]he forum State has a sovereign interest in defining the jurisdiction of its own courts.") (Breyer, J., dissenting) (citing *Nevada v. Hall*, 440 U.S. 410 (1979)).

IV. THE PANEL'S DECISION DID NOT EXPAND THE SCOPE OF TRIBAL JURISDICTION OVER NONMEMBERS

The Insurers try to manufacture the impression of a "question of exceptional importance" by claiming the Panel's decision radically expands the scope of tribal court jurisdiction over off-reservation nonmembers based on any "off-reservation conduct that merely 'relates to tribal lands.'" PFR 21 (quoting Opn. 14). There is no support for this hyperbole.

As the Panel made clear:

> The circumstances in this case resulting in tribal jurisdiction are narrow: the nonmember consensually joined an insurance pool explicitly marketed to tribal entities; the nonmember then entered into an insurance contract with a tribe; the contract exclusively covered property located on tribal lands; and the tribe's cause of action against the nonmember arose directly out of the contract.

Opn. 26. The Panel's decision was not based on a "mere[] relat[ion] to tribal lands," and nothing in its opinion supports sweeping application to the parade of accountants, lawyers, banks, and others described in the Insurers' Petition.

The Panel rightly noted that sophisticated actors like the Insurers can

protect their interests through forum-selection clauses, Opn. 27, but beyond that consideration a simple fact belies the Insurers' false "floodgate" argument: *Twenty-five years ago*, this Court held in *Allstate* that an off-reservation insurer, just like the Insurers here, could be subject to tribal court jurisdiction over a dispute regarding coverage of on-reservation losses—and yet, the courts of this Circuit have not been flooded with new lawsuits based on *Allstate* or overreaching assertions of tribal jurisdiction. *Allstate* plainly did not herald a radical expansion in tribal jurisdiction such as the Insurers now predict. Nor will the Panel's decision, because it did not change anything in the law—it did little more than apply *Allstate* to materially similar facts. The Panel's correct decision does not raise any question of exceptional importance calling for en banc review.

CONCLUSION

For the foregoing reasons, the Tribe respectfully urges the Court to deny the Petition for Rehearing.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This brief complies with the type-volume limitation of Circuit Rules 35-4 and 40-1(a) because it contains 4,179 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

Dated this 17th day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 17, 2024.

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

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