No. 24-906

IN THE

Supreme Court of the United States

LEXINGTON INSURANCE COMPANY,

Petitioner,

v.

MARTIN A. MUELLER AND DOUG WELMAS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Under the rule and reasoning of *Whole Woman's Health v. Jackson,* 595 U.S. 30 (2021), does this Court lack subject matter jurisdiction to adjudicate Petitioner's *Ex parte Young*-based claims against Respondent tribal court judges because no Article III case or controversy exists between them.

(2) Whether, under the particular facts of this case, including the fact that Petitioner's agent did physically enter and conduct business on the Cabazon Indian Reservation, was the court of appeals correct in holding that the tribal court had adjudicative jurisdiction over the insurance coverage dispute between the Tribe and Petitioner under the first exception to *Montana v. United States*, 450 U.S. 544 (1981), which recognizes tribes may regulate nonmembers through consensual relationships.

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INTRODUCTION

In order to bolster its corporate profits, Petitioner Lexington Insurance Company made the conscious business decision to join a national insurance program, the sole and exclusive purpose of which was to insure American Indian tribes and their on-reservation property from on-reservation losses. Lexington's participation in this Indian tribal insurance program was facilitated by an insurance brokerage company—Alliant Insurance Services, Inc., doing business as "Tribal First"—that acted as Lexington's agent in securing tribal clients for Lexington. In keeping with the purpose of the tribal insurance program, over many years, Lexington repeatedly made the voluntary business decision to enter into insurance contracts with the Cabazon Band of Mission Indians (now called the Cabazon Band of Cahuilla Indians), a federally recognized Indian tribe. Under those contracts, Lexington agreed to insure certain tribal businesses and properties, all of which Lexington knew were located on the Cabazon Indian Reservation in Southern California. Under those contracts, Petitioner Lexington was the insurer and the Cabazon Band was the insured. When Lexington denied coverage for a claim that the Cabazon Band filed under one of those policies in 2020, the Tribe sued Lexington in the Cabazon Reservation Court, giving rise to the present litigation.

Lexington disputes the tribal court's jurisdiction to adjudicate that claim because, it asserts, none of its employees ever entered the Cabazon Reservation in connection with insuring tribal property. But the issue here is not that simple or clear-cut. In fact, the district court expressly found that the third party administrator Alliant was "Lexington's agent" and

that "its agent—Alliant—did conduct business on tribal land," Pet. App. 31a, significantly altering the basis for the Petition.

To even reach that issue, however, this Court would have to resolve a threshold question as to the federal courts' Article III jurisdiction to adjudicate this case at all. To challenge the Cabazon Reservation Court's assertion of jurisdiction, Lexington has sued two Reservation Court judges under *Ex parte Young,* 209 U.S. 123 (1908). But this Court held in *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021), that no case or controversy typically exists when an *Ex parte Young* action is brought against *state court* judges. Respondents contended below that reasoning necessarily extends to, and thus forecloses suit against, the Cabazon Reservation Court judges as well. As the question of Article III jurisdiction is one "the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998), the Court would need to address Article III jurisdiction before it considered the merits of Lexington's Petition.

Finally, it is worth noting that Lexington has been on notice of its possible susceptibility to tribal court jurisdiction since at least 2010, when Lexington was sued in tribal court by the Confederated Tribes of the Chehalis Reservation concerning coverage under a materially identical insurance policy. Respondent's Supplemental Appendix ("Resp. Supp. App.") 1a–8a (*The Confederated Tribes of the Chehalis Reservation v. Lexington Ins. Co.*, Case No. CHE-CIV-11/08-262 (Chehalis T. Ct. Apr. 21, 2010)). As a result of that litigation, Lexington surely recognized that it could avoid the possibility of becoming subject to tribal court

jurisdiction by simply amending its standard policy form to add a forum selection clause. That amendment could have required coverage disputes be litigated in Massachusetts, Lexington's home state, or it could have simply expressly excluded tribal courts from hearing disputes under the policy.[1] Had Lexington made this simple amendment to its standard policy more than a decade ago, it could have easily avoided any claim of tribal court jurisdiction by any of its tribal insurance clients. Instead, Lexington made the business decision not to so amend its policy form, thereby leaving it subject to the adjudication of claims in tribal courts.

STATEMENT OF THE CASE

This case concerns the first *Montana* exception, which acknowledges that tribes retain inherent jurisdiction over nonmembers who enter consensual relationships with tribes. The question at issue in this case is whether a tribal court has jurisdiction under *Montana* over a suit by a tribe against its insurance company for denying coverage under an all-risk policy for a loss sustained by the insured, tribally-owned business on trust land within its reservation.

For many years leading up to and including 2020, the Cabazon Band purchased property insurance policies from Respondent Lexington through a program called the Tribal Property Insurance Program. Pet. App. 9a; Resp. Supp. App. 10a (Joint Statement of Undisputed Facts and Genuine Disputes No. 14,

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[1] *See, e.g.*, *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 198 (7th Cir. 2015) (corporate bond purchaser included in its form contract a provision that disputes be resolved in "Wisconsin courts (federal or state) to the exclusion of any tribal courts") (emphasis removed).

("SOF"); *id.* at 27a (Declaration of Jonathan Rosser in Support of Defendants' Cross-Motion for Summary Judgment ("Rosser Decl.") ¶¶ 6, 7). Lexington knew that its policies insured Cabazon-owned businesses, including Fantasy Springs Resort Casino, located on trust lands within its Reservation. Pet. App. 14a. Indeed, annually, Lexington's agent Alliant would enter the Cabazon Reservation to obtain underwriting information for Lexington's policies. App. 31a; Resp. Supp. App. 20a (SOF No. 77). Lexington acknowledges it was the insurer and the Tribe was its insured under the policies. Pet. App. 13a.

In the spring of 2020, in the face of the COVID-19 pandemic, the Cabazon Band closed its on-Reservation businesses, including Fantasy Springs Casino. *Id.* at 12a. Asserting that the resulting loss of revenue was a covered loss under its business interruption policy, the Tribe filed a claim with Lexington, which Lexington denied. *Id.* The Tribe then filed suit in the Cabazon Reservation Court to challenge what it regarded as a bad faith denial of coverage. *Id.* Lexington challenged the Reservation Court's jurisdiction at the trial and appellate levels but after full briefing and oral arguments, both tribal courts, in carefully considered opinions, held that the Court had jurisdiction under the first *Montana* exception or, alternatively, under the Tribe's inherent right to exclude nonmembers from its Reservation. *Id.* at 12a–13a.

Having exhausted its tribal court remedies, Lexington filed a complaint in federal court against Respondents Martin A. Mueller and Doug Welmas, both sued in their official capacities as, respectively, trial judge and Chief Judge of the Reservation Court. *Id.* at 7a–8a, 19a. Lexington sought declaratory and

injunctive relief against Respondents under *Ex parte Young*, 209 U.S. 123 (1908), seeking to halt the Reservation Court's continued exercise of jurisdiction over the Cabazon Band's suit against its insurer. *Id.* at 2a–3a.

On the parties' cross-motions for summary judgment, the district court ruled in favor of Respondents. *Id.* at 33a. In the course of doing so, the district court first considered Respondents' argument that Lexington's case must be dismissed for lack of jurisdiction under the reasoning of *Whole Woman's Health*, which held that an *Ex parte Young* suit against state judges failed to satisfy Article III's case or controversy requirement. *Id.* at 20a–24a. Logically, Respondents argued, that reasoning must also extend to tribal court judges. In the same vein, Respondents argued that Lexington's complaint failed to state a claim for relief because, again under *Whole Woman's Health*, judges were not adverse parties to Lexington. Pet. App. 20a. The district court acknowledged that Respondents' "argument has merit," but felt compelled to reject it because Ninth Circuit precedent permitting *Ex parte Young* suits against tribal court judges was not "clearly irreconcilable" with *Whole Woman's Health*, which had dealt only with state court judges. *Id.* at 23a–24a.

Next, the district court considered—and granted—Respondents' motion to dismiss Lexington's suit against Chief Judge Welmas. *Id.* at 24a–26a. The district court agreed that "Chief Judge Welmas's general supervisory responsibilities over the Tribal Court are too attenuated from the enforcement of tribal jurisdiction to establish standing." *Id.* at 26a.

Finally, the district court held that the Cabazon Reservation Court had jurisdiction over the Tribe's

suit against Lexington based on the Tribe's sovereign right to exclude nonmembers from its Reservation. *Id.* at 28a–32a. Though Lexington, itself, had not physically entered the Reservation, "it surely conducted activity on tribal land" by insuring Cabazon-owned businesses there. *Id.* at 30a. Moreover, Lexington's insistence that physical entrance onto tribal lands was a necessary precondition for tribal court jurisdiction failed on its own terms because Lexington's agent had conducted business on Lexington's behalf on Cabazon's Reservation. *Id.* at 31a, 32a. Given these facts, the district court upheld the Reservation Court's exercise of jurisdiction, for "[t]o 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." *Id.* at 32a. Having upheld the Reservation Court's jurisdiction pursuant to the Tribe's sovereign right to exclude, the district court found no need to consider whether the court also had jurisdiction under the first *Montana* exception. *Id.* at 31a–32a.

The Ninth Circuit court of appeals affirmed. *Id.* at 5a. First addressing Respondents' *Whole Women's Health* argument, the panel acknowledged "[a]t first blush, it is not clear why this rationale"—that state court judges are not adverse to the parties whose cases they decide—"would not apply to tribal judges." *Id.* at 3a. Like the district court before it, however, the panel held that it was "bound by circuit precedent because [the precedent was] not 'clearly irreconcilable' with *Whole Woman's Health*." *Id.*

The panel below then addressed the question of tribal court jurisdiction, holding that the Ninth Circuit's recent decision in *Lexington Ins. Co. v. Smith*, 94 F.4th 870, *reh'g en banc denied,* 117 F.4th 1106 (9th Cir. 2024), squarely addressed and resolved the issue in the Cabazon Band's favor. *Id.* at 4a. Relying on this Court's pronouncement in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982) that "a tribe has regulatory jurisdiction over a nonmember who 'enters tribal lands or conducts business with the tribe,'" *Smith* "easily conclude[d] that Lexington's business relationship with the [Suquamish] Tribe satisfies the requirements for conduct occurring on tribal land, thereby occurring within the boundaries of the reservation and triggering the presumption of jurisdiction." *Id.* at 5a (quoting *Smith*, 94 F.4th at 882 (quoting *Merrion*, 455 U.S. at 142)). *Smith* had further concluded that "Lexington's insurance contract with the [Suquamish] Tribe squarely satisfie[d] [the] consensual-relationship exception"—*i.e.*, the first exception—under *Montana*. *Id.* (quoting *Smith,* 94 F.4th at 883–84). As all the facts material to the outcome in *Smith* were present in the case at bar, the panel below upheld the Cabazon Reservation Court's exercise of jurisdiction over Lexington under *Montana*. *Id.*

REASONS FOR DENYING THE PETITION

I. This Case Presents a Novel and Previously Unlitigated Question as to the Federal Courts' Article III Jurisdiction That This Court Would Have to Resolve Before Reaching the Question Presented in Lexington's Petition.

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes . . . . The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Steel Co.*, 523 U.S. at 94 (internal citations and quotation marks omitted). Lexington's suit against Respondents presents a novel, threshold question as to the federal courts' Article III jurisdiction over this case that this Court must resolve before it can reach Lexington's Question Presented.

In *Whole Woman's Health*, 595 U.S. 30 (2021), this Court dismissed *Ex parte Young*-based claims against a state court judge and clerk. This Court admonished that *Ex parte Young's* "narrow exception" to the doctrine of state sovereign immunity "does not normally permit federal courts to issue injunctions against state court judges or clerks." *Id.* at 532. Moreover, this Court held that suits against state judges fail to create the requisite case or controversy under Article III because of a lack of adversity between the parties:

> Judges 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. at 40 (internal citation and quotation marks omitted).

In both federal courts below, the Respondents argued that the rule and reasoning of *Whole Woman's Health* applies to Petitioner's *Ex parte Young* suits against tribal court judges, thereby barring Lexington's suit against those defendants for lack of jurisdiction.

Both the district court and the Ninth Circuit found some merit in Respondent's argument. The district court described it as "a powerful argument," Pet. App. 22a, that "has merit," *id.* at 23a, while the court of appeals noted that "[a]dmittedly, there is some tension between *Whole Woman's Health* and our precedents allowing tribal judges to be sued under *Ex parte Young*," *id.* at 2a, and "[a]t first blush, it is not clear why this rationale would not apply to tribal judges." *Id.* at 3a.

The rationale for analogizing state and tribal court judges is, in fact, powerful. Indian tribes, like states, are governments, *Lac du Flambeau Band v. Coughlin*, 599 U.S. 382, 392–93 (2023), and tribal courts, like state courts, are creatures of those governments. As this 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." Pet. App. 23a.

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. And because tribal court judges perform 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 U.S. 2836 (2022); *see also* William C. Canby Jr., *American Indian Law in a Nutshell* 77 (9th ed. 2020) (same).

Given these facts, the courts below had ample justification for finding that the rule and reasoning of *Whole Woman's Health* should be applied to tribal courts and tribal court judges such as the Respondents here. But, in the end, both courts began and ended their analyses of this question by simply holding that they were bound by prior Ninth Circuit precedent.

In the last twenty-five years, the Ninth Circuit has issued several rulings that allowed *Ex parte Young*-based claims to be brought against tribal court judges, but did so without any analysis of the jurisdictional basis for those rulings. *See, e.g.*, *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1177–78 (9th Cir. 2012) (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 *Ex parte Young*); *Big Horn Cty. Electric Coop v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) (permitting *Ex parte Young* action against tribal executive officials and judges, describing such defendants as "tribal officers under the *Ex [p]arte Young* framework").

Whole Woman's Health expressly rejected the idea that judges are the equivalent of executive officials for *Ex parte Young* purposes because judges do not enforce laws as executive officials might; judges instead work to resolve disputes between parties, 595 U.S. at 39. But neither of the courts below incorporated this reasoning into their analyses of the issue. Instead, they simply held that because *Whole Woman's Health* did not mention tribal court judges, they were bound by the recent Ninth Circuit decisions. Pet. App. 3a, 24a. They did so on the basis of *Miller v. Gammie*, which had held that lower courts were bound by existing circuit precedents unless "intervening Supreme Court authority is clearly irreconcilable with [their] prior circuit authority." 335 F.3d 889, 900 (9th Cir. 2003).

The problem with this rather shallow analysis is that it failed to apply the relevant law on this issue. It is axiomatic that cases are not authority for propositions not considered therein. *United States v. Tucker Truck Lines*, 344 U.S. 33, 38 (1952) (case not precedent for questions not discussed in the Court's opinion). This is even more important when the undecided issue involves a question of jurisdiction. As this Court clearly stated in *Pennhurst State School & Hospital v. Halderman*:

> [W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, [the] Court [is not] bound when a subsequent case finally brings the jurisdictional issue [to the forefront].

465 U.S. 89, 119 (1984) (citation omitted).

And that, of course, is exactly the situation presented here. Earlier cases in the Ninth Circuit have allowed adjudication of *Ex parte Young* actions against tribal court judges. But they did so without considering or addressing the specific jurisdictional issue raised here: whether an Article III case or controversy exists in such circumstances. In light of *Whole Woman's Health*, that specific jurisdictional issue is squarely presented in this case for the first time and this Court would need to address it before considering the merits of the Petition. But because no other circuit court or state court of last resort has decided the question, it would be premature to do so here and the Petition should therefore be denied.

II. Lexington's Petition Omits One Salient Fact: Petitioner's Agent Did Conduct Business on the Cabazon Reservation.

The Petition in this matter seeks to raise the issue of whether a tribal court has jurisdiction over a non-Indian "who never set foot on the reservation." Pet. at 8. How can a tribal court assert jurisdiction over a non-member who "never physically entered the reservation," *id.* at 3, the Petitioner asks. An interesting question, but not exactly the one presented here.

In fact, the district court expressly found that Alliant Insurance Services, Inc. was "Lexington's agent" and that "its agent—Alliant—did conduct business on tribal land." Pet. App. 31a; *id.* at 32a. These findings are neither surprising nor subject to dispute. Lexington acknowledges that:

> Alliant handles the entire process, providing quotes to tribes, preparing policies consistent with insurers' underwriting guidelines, collecting premiums, and maintaining policy-related documents.

Pet. at 3. With respect to the specific Cabazon policies at issue in this case, Lexington further acknowledges that Alliant prepared those policies for Lexington. *Id.* Moreover, the uncontroverted Statement of Undisputed Facts considered by the district court noted that

> [a]nnually over the last decade, an Alliant employee would visit the Cabazon Reservation to meet with Tribal employees to gather information relevant to the renewal of the Tribe's policies with Lexington.

Resp. Supp. App. 20a (SOF No. 77); *see also id.* at 28a (Rosser Decl. ¶7).

Lexington's Petition omits any mention of this very significant fact. As a result, the Petition in this matter does not present the clear-cut issue that it asks this Court to address and the Court should therefore deny the Petition.

III. The Ninth Circuit Decisions Neither Create Nor Deepen Any Circuit Split.

Petitioner contends that the decision below, and the decision upon which it was grounded—*Smith*—have created a circuit split with respect to the "off-reservation conduct" issue, Pet. at 8–9, and deepened an existing circuit split involving the proper scope of this Court's ruling in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). Pet. at 9–10. Neither contention is correct. A review of the cases cited in the Petition merely demonstrate the fact-specific nature of the analysis courts use in applying *Montana* and its exceptions. Moreover, the *Plains Commerce Bank* issue is not even properly presented by the Petition.

A. The Cases That Petitioner Claims Create A Circuit Split Are Readily Distinguishable From The Case At Bar.

Lexington claims that the Ninth Circuit created a circuit split in this case by extending the first *Montana* exception for tribal jurisdiction to nonmembers who never set foot on the reservation. Pet. at 8 (citing *Montana*, 450 U.S. at 565). As support, Lexington cites three federal court of appeals decisions and two state supreme court decisions purportedly at odds with the Ninth Circuit's decision upholding jurisdiction here. *Id.* (citing *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207–08 (7th Cir. 2015);

MacArthur v. San Juan County, 497 F.3d 1057, 1071–72 (10th Cir. 2007); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998); *State v. Eriksen*, 259 P.3d 1079, 1083 (Wash. 2011); *In re J.D.M.C.*, 739 N.W.2d 796, 810–11 (S.D. 2007)). Yet none of these cases create a split with the Ninth Circuit's decisions here.

The first case Lexington alleges creates a circuit split with the Ninth Circuit is *Stifel*, a Seventh Circuit decision. *Stifel* arose out of a sale of bonds by a Wisconsin-based tribal corporation to finance its off-reservation commercial ventures in Mississippi. 807 F.3d at 189. Following a protracted dispute over the validity of the bonds, the tribal corporation instituted a tribal court suit against various non-tribal bondholders, seeking a declaration that the bonds were invalid; the non-tribal entities, including the initial bond purchaser Stifel, in turn, challenged the tribe's jurisdiction in federal court. *Id.* at 191–92. The district court ruled in favor of the non-tribal entities, holding that the tribal court lacked jurisdiction. *Id.* at 192–93.

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 (emphasis removed). Second, the court held that the tribe lacked jurisdiction under *Montana's* first exception because the tribe did "not seek to regulate any of Stifel's activities on the reservation." *Id.* at 208. Stifel's on-reservation activities were alleged to have been misrepresentations of material terms in the bond transaction, whereas the tribal court action sought to void the bond documents for their noncompliance

with federal gaming and tribal laws. *Id.* at 208. In short, the court found no nexus to the nonmember's consensual conduct. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) ("*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself."). As a result, the Ninth Circuit, observed that the conduct in *Stifel*, "could not even plausibly be viewed as connected to tribal land." *Smith*, 94 F.4th at 882 (citing *Stifel*, 807 F.3d at 189, 207–08).

Here, by contrast, the Ninth Circuit found it "no mystery" that a nexus existed in this case. *Smith*, 94 F.4th at 884; Pet. App. 5a.

The Cabazon Band's tribal court suit has a clear nexus to the conduct sought to be regulated—Lexington's denial of coverage under a policy that is directly connected to tribal land in that it insures tribally-owned property on tribal trust land for losses occurring on-reservation. Pet. App. at 13a–14a, 31a, 37a; *see also Smith*, 94 F.4th at 884. Furthermore, unlike the contract in *Stifel* that required litigation exclusively in Wisconsin courts, Lexington's insurance policy contains no forum selection clause requiring either party to litigate coverage disputes in any specific court; rather, disputes may be brought in any court of competent jurisdiction. Pet. App. at 10a–11a. Simply put, the different outcomes in *Stifel* and *Smith* are driven by disparate facts, not disparate reasoning.

The same is true of *Smith's* supposed conflict with the Tenth Circuit decision in *MacArthur*. Indeed, *MacArthur's* 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 ("District"), a political subdivision of the State of Utah, which operated a health clinic on non-Indian fee land owned by the State of Utah within the Navajo Nation. 497 F.3d at 1060–61. Plaintiffs alleged discrimination and other violations arising out of their employment at the District's clinic. The tribal court issued injunctive relief in favor of the plaintiffs, who sought to enforce the 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 District under the first *Montana* exception. *Id.* at 1064.

On appeal, the Tenth Circuit rejected that conclusion, holding that 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 [(the District)] on that sovereign's land" involving "employment relationships . . . entered into exclusively in [the District's] governmental capacity." *Id.* at 1073 & 1074. *MacArthur* bears no resemblance to the Cabazon Band's dispute with Lexington, which involves a contract between a tribe and a private party—Lexington—that has consented to insuring tribally owned property on tribal trust land within the tribe's reservation. Pet. App. 13a–14a, 31a, 37a.

Lexington next asserts the Ninth Circuit decision here creates a split with the Eighth Circuit's decision in *Hornell*. *Hornell*, however, is legally and factually distinguishable from this case. In *Hornell*, the estate

of the deceased Crazy Horse, a revered leader of the Lakota Sioux people who opposed the use of alcohol, brought suit in the Rosebud Sioux tribal court against breweries, challenging their unauthorized use of Crazy Horse's name in manufacturing, selling, and distributing an alcoholic beverage called Crazy Horse Malt Liquor. 133 F.3d at 1088–89. The estate brought various state and federal law claims based on the misuse of Crazy Horse's name and likeness. *Id.* at 1089. Citing *Montana's* rule that tribes retain inherent sovereign power over the conduct of non-Indians on their reservations, the Eighth Circuit held that the conduct at issue was the breweries' manufacture, sale, and distribution of Crazy Horse Malt Liquor, which undisputedly did not occur on the Rosebud reservation. *Id.* at 1091. Nor did the breweries have any contract with the tribe or any tribal members.

Hornell is factually distinguishable from this case as Lexington both had a contract with the Cabazon Band and insured property physically located on the Band's reservation for losses occurring on-reservation. Moreover, Lexington's agent had physically entered the Cabazon Band's reservation to obtain information relevant to Lexington's underwriting of the Tribe's policies. Pet. App. 31a; Resp. Supp. App. 20a (SOF No. 77).

Hornell is also distinguishable by the fact that no party in that case asserted *Montana's* consensual relationship exception. *Id.* at 1093. Rather, the parties' argued whether jurisdiction was proper under *Montana's* second exception for regulation of non-Indian conduct that threatens or has some direct effect on the health or welfare of the tribe. *Id. Montana's* second exception is not at issue here, only the first exception is. Pet. App. 5a.

Lexington further argues—again, incorrectly—that the Ninth Circuit's decision here conflicts with *J.D.M.C.*, 739 N.W.2d 796 (S.D. 2007). However, as with the federal court decisions, *J.D.M.C.* is readily distinguishable from this case. *J.D.M.C.* is a family law Indian Child Welfare Act case involving an Indian child's tribal member mother and a non-Indian father. The South Dakota Supreme Court held that the tribal court lacked *personal* jurisdiction over the father because he lacked minimum contacts with the tribe. *J.D.M.C.*, 739 N.W.2d at 812–13. Personal jurisdiction is not at issue in this case; *subject matter* jurisdiction is. Thus, while *J.D.M.C.* discussed *Montana's* consensual relationship exception, the discussion is *dicta* given the fact that there was no ruling on subject matter jurisdiction. *Id.* at 809.

Finally, the Washington Supreme Court's decision in *State v. Eriksen* does not create any "split" as Lexington alleges. 259 P.3d 1079 (Wash. 2011). Aside from its status as a state court decision, *Eriksen's* facts diverge sharply from the case at hand. *Eriksen* involves a criminal misdemeanor prosecution of a non-Indian charged with driving under the influence. *Id.* at 1080. The question presented there was whether tribal police, who had observed the defendant commit obvious traffic violations on-reservation, had authority to follow her outside of the reservation to stop and detain her until county police arrived. *Id.* at 1079–80. The court held tribal police had no such authority for two reasons. *Id.* First, the tribe's treaty did not explicitly grant the tribe the right to regulate or enforce traffic laws beyond reservation borders. *Id.* at 1082. Next, *Montana's* second exception, which allows regulation of nonmember conduct that threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe, did

not provide a source of tribal authority to stop and detain the defendant off-reservation. *Id.* at 1083.

In contrast to the case at bar, *Eriksen* involved the assertion of authority over a nonmember having no consensual relationship with the Tribe; it was analyzed under the second *Montana* exception, not the first. In short, *Eriksen* provides no reason to grant Lexington's petition.

In sum, then, the cases Petitioner cites do not establish a circuit split warranting this Court's review.

B. Even if the *Plains Commerce Bank* Issue Were Properly Presented, the Case At Bar Is Entirely Consistent With *Plains Commerce Bank*.

Petitioner argues that the Court should resolve a purported circuit split over the correct interpretation of the Court's decision in *Plains Commerce Bank*. Pet. at 9–10. This issue, however, is not properly preserved for review because it was not included as an express question presented. Sup. Ct. Rule 14.1(a). Under Rule 14.1(a), it is not enough to mention a point in a party's Argument (Pet. at 9); an actual question must be presented. Nor is the *Plains Commerce Bank* issue a "subsidiary question fairly included" in the single question actually presented. This Court should not excuse Petitioner's failure to comply with this Court's Rules or grant review of an issue Petitioner felt insufficiently important to include as an official question. In any event, because the facts of this case satisfy Petitioner's own standard, this is not the appropriate case for that review.

Petitioner contends that *Plains Commerce Bank* added an additional requirement for the application of *Montana*'s first exception: that the conduct of the non-Indian must implicate a "sovereign interest" of the Tribe. *Id.* While the Ninth and Seventh Circuits have seemingly taken divergent positions on this issue, the facts of this case, involving the ability of the Cabazon Band to raise and protect critical tribal revenues, plainly involves a sovereign governmental interest of the Tribe.

The Cabazon Band brought its action against Lexington in tribal court after the insurer denied the Tribe's claim under its business interruption insurance policy. In the spring of 2020, in response to the COVID-19 pandemic, the Tribe had closed its on-Reservation casino for several months. As a result, the Tribe had lost millions of dollars in tribal revenues. Resp. Supp. App. 28a (Rosser Decl. ¶ 8). And those casino revenues were "vital sources used to support the Tribe's essential services to tribal members and persons visiting and doing business on the Reservation." *Id.* at 27a (Rosser Decl. ¶5).

Raising and protecting tribal revenues to provide essential governmental services is a quintessential sovereign interest. As this Court noted years ago, when the Cabazon Band was fighting to establish its gaming business, the "overriding goal" of federal Indian policy is to "encourag[e] tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). The Court then went on to affirm the Cabazon Band's right to operate gaming activities on its Reservation, holding that "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."

Id. at 219; *see also Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (recognizing that "tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions" because "tribal business operations are critical to the goals of tribal self-sufficiency"); *Merrion*, 455 U.S. at 137 (recognizing the power to tax as "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government . . . that enables a tribal government to raise revenues for it essential services").

The Ninth Circuit, whose opinion the Court affirmed in *Cabazon*, was even more explicit on this point. In describing the need for the Cabazon Band and other tribes to raise tribal revenues through gaming, the Court noted that "[t]he Tribes in this case are engaged in the *traditional governmental function* of raising revenue. They are thereby exercising *inherent sovereign governmental authority*." *Cabazon Band of Mission Indians v. County of Riverside,* 783 F.2d 900, 906 (9th Cir. 1986) (emphasis added).[2]

Lexington argues here that the Court needs to grant certiorari to determine whether the application of *Montana*'s first exception requires the implication of a sovereign tribal interest. But this case, involving the ability of the Cabazon Band to generate and protect essential tribal revenues, clearly meets this test,

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[2] These sovereign tribal interests were later codified by Congress in the Indian Gaming Regulatory Act, 25 U.S.C. 2701 et seq. In that Act, Congress found that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency and strong tribal governments," *id.* at 2701 (4), and that among the purposes of the Act was "to protect such gaming as a means of generating tribal revenue." *Id.* at 2702 (3).

whether required or not. As a result, this case is not the appropriate one to address that question and the Petition should be denied on that ground.

CONCLUSION

In other cases, the Court has expressed concerns about unknowing parties inadvertently making themselves subject to tribal court jurisdiction through the vagaries of where a traffic accident occurred, *Strate v. A-1 Contractors*, 520 U. S. 438, 457 (1997), or through the off-reservation purchase of non-Indian fee land by a non-Indian purchaser, *Plains Commerce Bank*, or by hunting on privately owned land that happened to be located within the exterior boundaries of a large Indian reservation, *Montana*, 450 U.S. at 557–67. This is not such a case. Here, a large, sophisticated corporation sought to profit by participating in a national insurance program *the sole and exclusive purpose of which was to enter into contracts with Indian tribes to insure tribal property located on tribal reservations*. Moreover, the Petitioner was made aware, more than a decade ago, that these activities could subject it to tribal court jurisdiction and that it could eliminate this possibility by a simple amendment to its standard form tribal insurance policy, *but chose not to do so*. To the extent that Petitioner now complains about the situation in which it finds itself, it is a situation entirely of its own making and does not warrant intervention by this Court.

Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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