No.

IN THE

Supreme Court of the United States

LEXINGTON INSURANCE COMPANY, ET AL.,

Petitioners,

v.

SUQUAMISH TRIBE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Montana* v. *United States*, 450 U.S. 544 (1981), this Court recognized a general rule against tribal jurisdiction over nonmembers, subject to two narrow exceptions for "non-Indians on their reservations." *Id.* at 565. The Court has stressed that both exceptions "permit tribal regulation of nonmember conduct *inside* the reservation that implicates the tribe's sovereign interests." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008) (emphasis altered).

The Suquamish Tribe sued its off-reservation, nonmember insurers in tribal court, seeking coverage for business losses caused by the COVID-19 pandemic on a theory that federal and state courts have rejected virtually unanimously. The insurers filed this action to prevent the exercise of tribal jurisdiction over their off-reservation conduct. While recognizing that "all relevant conduct occurred off the Reservation," the Ninth Circuit upheld tribal-court jurisdiction over the insurers, reasoning that their conduct "relate[d] to tribal lands" because the insurance policies covered tribal businesses on tribal land. App., *infra*, 14a-16a. That decision made the Ninth Circuit "the first and only circuit court to extend tribal court jurisdiction over a nonmember without requiring the nonmember's actual physical activity on tribal lands." *Id.* at 73a (Bumatay, J., dissenting from denial of rehearing en banc).

The question presented is whether a tribal court can exercise jurisdiction over nonmembers of the tribe based on off-reservation conduct.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioners are Lexington Insurance Company, Homeland Insurance Company of New York, Hallmark Specialty Insurance Company, Aspen Specialty Insurance Company, Aspen Insurance UK Ltd., and Certain Underwriters at Lloyd's, London and London Market Companies Subscribing to Policy Nos. PJ193647, PJ1900131, PJ1933021, PD-10364-05, PD-11091-00, and PJ1900134-A, which were plaintiffs in the district court and appellants in the court of appeals.

Petitioner Lexington Insurance Company is a wholly owned subsidiary of AIG Property Casualty U.S., Inc., which is a wholly owned subsidiary of AIG Property Casualty Inc., which in turn is a wholly owned subsidiary of American International Group, Inc., a publicly traded company (NYSE: AIG). No public company has an interest of 10% or more in American International Group, Inc.

Petitioner Homeland Insurance Company of New York is an indirect wholly owned subsidiary of Intact Insurance Group USA Holdings, Inc. Intact Insurance Group USA Holdings, Inc. is a wholly owned subsidiary of Intact Financial Corporation, a publicly held company (TO: IFC). No parent corporation or other entity owns 10% or more of the stock of Intact Financial Corporation.

Petitioner Hallmark Specialty Insurance Company is a wholly owned subsidiary of American Hallmark Insurance Company of Texas, which in turn is a wholly owned subsidiary of Hallmark Financial Services, Inc., a publicly traded company (NYSE: HALL). No parent corporation or other entity owns 10% or more of the stock of Hallmark Financial Services, Inc.

Petitioner Aspen Specialty Insurance Company is a wholly owned subsidiary of Aspen American Insurance Company. Aspen American Insurance Company is a wholly owned subsidiary of Aspen U.S. Holdings, Inc., a Delaware corporation. Aspen U.S. Holdings, Inc. is a wholly owned subsidiary of Aspen (UK) Holdings Limited, a U.K. corporation. Aspen (UK) Holdings Limited is a wholly owned subsidiary of Aspen Insurance Holdings Limited (AHL), a Bermuda exempted company. AHL is a wholly owned subsidiary of Highlands Holdings, Ltd., a Bermuda exempted company. All of the ordinary shares of Highlands Holdings, Ltd. are, directly or indirectly, owned by certain investment funds managed by subsidiaries of Apollo Global Management, LLC (AGM), a Delaware limited liability company. Class A units and certain preferred shares of AGM are publicly traded (NYSE: APO).

Petitioner Aspen Insurance UK Ltd. is a wholly owned subsidiary of Aspen European Holdings Limited (AEHL), a UK domiciled holding company. AEHL is a wholly owned subsidiary of Aspen Insurance Holdings Limited (AHL), a Bermuda exempted company. AHL is a wholly owned subsidiary of Highlands Holdings, Ltd., a Bermuda exempted company. All of the ordinary shares of Highlands Holdings, Ltd. are, directly or indirectly, owned by certain investment funds managed by subsidiaries of Apollo Global Management, LLC (AGM), a Delaware limited liability company. Class A units and certain preferred shares of AGM are publicly traded (NYSE: APO).

Petitioner Syndicate 1414 is the lead underwriter at Lloyd's, London subscribing to Policy Nos. PJ193647 and PJ1933021. It is organized and registered under the laws of the United Kingdom with its principal

place of business in the United Kingdom. Ascot Underwriting Group Limited is the parent corporation of Syndicate 1414, and Canada Pension Plan Investment Board is the parent corporation of Ascot Underwriting Group Limited. They are not publicly traded, and no publicly traded corporation or company possesses 10% or more interest in Syndicate 1414.

Petitioner Syndicate 510 is the second underwriter at Lloyd's, London subscribing to Policy Nos. PJ193647 and PJ1933021. It is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. Syndicate 510 is managed by Tokio Marine Kiln Syndicates Ltd., of which Tokio Marine Underwriting Limited (TMUL) is an underwriting member and has a share greater than 50%. TMUL is wholly owned by Tokio Marine & Nichido Fire Insurance Co. Ltd., which is wholly owned by Tokio Marine Holdings, Inc., a Japanese publicly traded company (TSE: TKOMY).

Petitioner XL Catlin Insurance Company UK Limited (now known as AXA XL Insurance Company UK Limited) is a London market company subscribing to Policy Nos. PJ193647 and PJ1933021. It is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. XL Catlin Insurance Company UK Limited is a direct subsidiary of Catlin Insurance Company (UK) Holdings Limited and an indirect subsidiary of XL Bermuda Limited, EXEL Holdings Limited, XLIT Limited, XL Group Limited and AXA S.A., which is a French publicly traded company (PSE: AXAHY). No publicly held company owns 10% or more of AXA S.A.'s stock.

Petitioner Syndicate 4444 is the lead underwriter at Lloyd's, London subscribing to Policy No. PJ1900131. It

is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. It is not publicly traded, and no publicly traded corporation or company possesses 10% or more interest in Syndicate 4444.

Petitioner Syndicate 2987 is the lead underwriter at Lloyd's, London subscribing to Policy Nos. PD-10364-05 and PD-11091-00. Syndicate 2987 is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. Syndicate 2987 is an unincorporated association, the managing agent of which is Brit Syndicates, Ltd. Brit Syndicates, Ltd. is a limited liability company registered in England & Wales. Brit UW Ltd. is the corporate member of Syndicate 2987. Brit Ltd. is the direct parent and whole-owner of Brit Syndicates, Ltd., and Brit UW Ltd. Fairfax Financial Holdings, Ltd. owns more than 10% of Brit Ltd. Ontario Municipal Employees Retirement System (OMERS) is the owner of more than 10% of Brit Ltd. No publicly held company owns more than 10% of Fairfax Financial Holdings, Ltd. or OMERS.

Petitioner Endurance Worldwide Insurance Limited (EWIL) is the lead London market company subscribing to Policy No. PJ1900134-A. EWIL is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. EWIL is 100% owned by Endurance Worldwide Holdings Ltd. (EWHL), which is incorporated in England & Wales. EWHL is 100% owned by Endurance Specialty Insurance Ltd. (ESIL), which is incorporated in Bermuda. ESIL is 100% owned by Sompo International Holdings Ltd. (SIHL), which is incorporated in Bermuda. SIHL is 100% owned by Sompo Japan Insurance Inc. (SJII), which is incorpo-

rated in Japan. SJII is 100% owned by Sompo Holdings, Inc., which is a Japanese publicly traded company (TSE: SMPNY).

Respondent Suquamish Tribe intervened as a defendant in the district court and was an appellee in the court of appeals. Respondents Cindy Smith, in her official capacity as Chief Judge for the Suquamish Tribal Court; Eric Nielsen, in his official capacity as Chief Judge of the Suquamish Tribal Court of Appeals; Bruce Didesch, in his official capacity as Judge of the Suquamish Tribal Court of Appeals; and Steven D. Aycock, in his official capacity as Judge of the Suquamish Tribal Court of Appeals, were named as defendants in the district court and were appellees in the court of appeals. The respondent tribal judges informed the district court that "the matter will be defended by the Tribe as intervenor." D. Ct. Doc. 40, at 4 (Mar. 21, 2022). They have not participated further in the district court or the court of appeals.

RELATED PROCEEDINGS

United States District Court (W.D. Wash.):

Lexington Insurance Company v. *Smith*
No. 21-cv-5930 (Sept. 12, 2022)

United States Court of Appeals (9th Cir.):

Lexington Insurance Company v. *Smith*
No. 22-35784 (Feb. 29, 2024)

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 94 F.4th 870. The order of the court of appeals denying rehearing and opinions respecting

that order (App., *infra*, 54a-106a) are reported at 117 F.4th 1106. The order of the district court on the parties' cross-motions for summary judgment (App., *infra*, 30a-53a) is reported at 627 F. Supp. 3d 1198.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2024. A petition for rehearing was denied on September 16, 2024 (App., *infra*, 58a). On December 3, 2024, Justice Kagan granted petitioners' application to extend the time to file this petition to and including February 13, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

This Court has recognized tribal authority to regulate nonmembers only in limited circumstances when on-reservation conduct interferes with the tribe's ability to set conditions on entry to tribal land or to govern itself. But after adopting an expansive test for tribal-court jurisdiction over nonmembers' off-reservation conduct, the Ninth Circuit now stands as an "outlier" that has "pierce[d] the geographic limits of tribal jurisdiction." App., *infra*, 106a (Bumatay, J., dissenting from denial of rehearing en banc). That erroneous ruling, which created one circuit split and deepened another, warrants this Court's review.

Petitioners are insurers that underwrote policies for respondent Suquamish Tribe's commercial properties. The Tribe bought property insurance from a nationwide program administered off the reservation, so petitioners never set foot on the reservation. After a temporary COVID-19-related suspension of its operations on the reservation, the Tribe sought to recover business losses from petitioners. The "vast majority" of federal and state courts (including in the Tribe's

home state of Washington) have rejected similar claims that property-insurance policies cover business losses relating to the pandemic. *Another Planet Entertainment, LLC* v. *Vigilant Insurance Co.*, 548 P.3d 303, 307 (Cal. 2024); see *Hill & Stout, PLLC* v. *Mutual of Enumclaw Insurance Co.*, 515 P.3d 525, 534-535 (Wash. 2022). But the Tribe instead sued its insurers in its own tribal court.

This is not the Suquamish Tribe's first time pushing the boundaries of its authority over nonmembers. When the Ninth Circuit approved the Tribe's unprecedented attempt to prosecute a nonmember for an on-reservation crime, this Court intervened and held that tribes categorically lack criminal jurisdiction over nonmembers. *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191, 212 (1978). The Court later held that *Oliphant* "support[s] the general proposition" that tribes also lack civil jurisdiction over nonmembers, subject to only two exceptions for "non-Indians on their reservations." *Montana* v. *United States*, 450 U.S. 544, 565 (1981). Under those exceedingly narrow exceptions, the Court has "never held that a tribal court had jurisdiction over a nonmember defendant." *Nevada* v. *Hicks*, 533 U.S. 353, 358 n.2 (2001).

Fast forward half a century: The Suquamish Tribe again pressed a novel expansion of its jurisdiction over nonmembers. And the Ninth Circuit again accepted its theory, reasoning that tribes can regulate nonmembers' off-reservation conduct so long as it "relates to tribal lands." App., *infra*, 14a. Even though "all relevant conduct occurred off the Reservation," and even though petitioners were never "physically present there," the court concluded that the Tribe could sue petitioners in its own court because the Tribe's claims

"bear 'some direct connection to tribal lands.'" *Id.* at 15a-16a (citation omitted).

Only the Ninth Circuit has projected tribal sovereignty beyond the reservation's borders. The Seventh, Eighth, and Tenth Circuits have all held that tribal jurisdiction cannot reach nonmember conduct outside the physical boundaries of a reservation. *E.g.*, *Stifel, Nicolaus & Co.* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207-208 (7th Cir. 2015). The South Dakota and Washington Supreme Courts also have refused to apply the *Montana* framework to tribal attempts to regulate off-reservation conduct.

The Ninth Circuit erred in endorsing tribal jurisdiction over nonmembers' off-reservation conduct that "relates to" tribal lands. App., *infra*, 14a. Its decision rests on an analogy between the territorial limitations on a tribal court's subject-matter jurisdiction over nonmembers and the due-process limitations on a state court's personal jurisdiction over nonresidents. But *Montana* is not *International Shoe* for tribal courts. Time and again, this Court has made clear that subject-matter jurisdiction under *Montana* requires "nonmember conduct *inside* the reservation that implicates the tribe's sovereign interests." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008) (emphasis altered). Tribes categorically lack subject-matter jurisdiction over conduct *outside* the reservation because tribal sovereignty "reaches no further than tribal land." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 653 (2001).

The Ninth Circuit also deepened a preexisting split in disregarding this Court's guidance that any tribal regulation must "stem from the tribe's inherent sovereign authority to set conditions on entry, preserve

tribal self-government, or control internal relations." *Plains Commerce Bank*, 554 U.S. at 337. The Seventh and Eighth Circuits have understood that language to dictate that tribal jurisdiction over nonmembers requires not only a consensual commercial relationship but also an inherent sovereign interest. In contrast, the Fifth Circuit has discounted *Plains Commerce Bank* as mere "dicta" and refused to follow it. *Dolgencorp, Inc.* v. *Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014), aff'd by an equally divided Court, *Dollar General Corp.* v. *Mississippi Band of Choctaw Indians*, 579 U.S. 545 (2016) (per curiam). The Ninth Circuit acknowledged this conflict and sided with the Fifth Circuit. App., *infra*, 26a & n.4.

As Judge Bumatay explained, this "evisceration of *Plains Commerce* puts [the Ninth Circuit] on the wrong side of a circuit split." App., *infra*, 74a. That conflict matters because the Tribe's effort to regulate petitioners' off-reservation conduct does not stem from any sovereign interest identified in *Plains Commerce Bank*. This petition provides an opportunity to eliminate confusion that has only spread since the Court divided evenly in *Dollar General*.

The Ninth Circuit's unprecedented expansion of tribal jurisdiction to off-reservation conduct has sweeping real-world consequences. The Suquamish Tribe is just one of the 435 tribes within the Ninth Circuit. The notion that tribes can regulate off-reservation conduct that merely "relates to" tribal lands could serve as a launching pad for tribal-court lawsuits against countless nonmembers who have never set foot on a reservation. Once in tribal court, nonmembers may lack fair notice of tribal law (which is often unwritten and infused with tribal custom) and may be subject to massive financial liability even though they are not

guaranteed their constitutional rights. Such severe alterations to "the liberty interests of nonmembers" should not escape this Court's review. *Plains Commerce Bank*, 554 U.S. at 334.

This Court should grant review and reject the Ninth Circuit's extension of tribal-court jurisdiction to petitioners' off-reservation conduct.

STATEMENT

A. Factual Background

1. In 1859, the Senate ratified a treaty with the Suquamish Tribe establishing the Port Madison Reservation in what was then Washington Territory. Treaty of Point Elliott Art. II, 12 Stat. 928 (1855). The treaty forbade "any white man * * * to reside upon the same without permission" of the Tribe. *Ibid.* The Tribe also "acknowledge[d] [its] dependence on the government of the United States." Art. IX, 12 Stat. 929.

The Suquamish Tribal Council has the power to make tribal law "govern[ing] the conduct of all persons * * * to the fullest extent allowed under applicable Federal law." Suquamish Const. Art. III(i), tinyurl.com/2vyud9je. Only tribal members can run or vote for the Tribal Council. Suquamish Tribal Code §§ 1.2.7-1.2.8, tinyurl.com/ys44yd2y. And the Tribe limits its membership based on descent from those with "Suquamish Indian blood" who were enrolled members in 1942. Suquamish Const. Art. II, § 1.

The Tribal Council has established both trial and appellate courts. Suquamish Tribal Code §§ 3.1.1-3.1.3. The Council appoints judges to either three-year terms or pro tem positions. §§ 3.3.2, 3.4.3. The Council has broad authority to remove trial judges for cause, § 3.3.3, and somewhat more limited authority

to remove appellate judges, § 3.4.3(c). Since the 1970s, the Tribe has chosen to exclude nonmembers "from Suquamish tribal court juries." *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191, 194 (1978); see Suquamish Tribal Code § 4.4.3(a).

2. Spanning just twelve square miles, the Port Madison Reservation "is a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained by Kitsap County." *Oliphant*, 435 U.S. at 192-193. The Tribe and its corporate arm run several businesses on tribal land, including a casino, a seafood company, and gas stations. App., *infra*, 6a.

The Tribe looked beyond the reservation to buy insurance for its properties. Its insurance broker, which is not a tribal member, negotiated for coverage with nonparty Alliant Insurance Services, a nonmember that set up and administers the nationwide Tribal Property Insurance Program. App., *infra*, 6a-7a, 33a. That program provides insurance to tribal businesses located across the country as part of the larger Alliant Property Insurance Program that also insures municipalities, hospitals, and nonprofit organizations. *Id.* at 7a; see C.A. E.R. 1348. Alliant separately negotiates with insurers to provide coverage under general underwriting guidelines to tribes seeking policies. App., *infra*, 7a-8a. From its off-reservation office, Alliant handles the entire process, providing quotes to tribes, preparing policies consistent with insurers' underwriting guidelines, collecting premiums, and maintaining policy-related documents. *Ibid.*

Alliant, which is not an affiliate of any petitioner, prepared property-insurance policies that petitioners underwrote to cover the Tribe and its corporate arm

for "physical loss or damage" and business losses resulting from the same. App., *infra*, 8a. No petitioner is located on either tribal land or nonmember-owned land (called non-Indian fee land) within the reservation. *Id.* at 145a. In fact, petitioners never physically entered the reservation, had no direct contact with the Tribe during the underwriting process, and learned of the Tribe's identity only after Alliant issued the policies to the Tribe. *Id.* at 15a-16a; *id.* at 77a-78a (Bumatay, J., dissenting from denial of rehearing en banc). Petitioners registered the insurance contracts "under the insurance code of the state of Washington." C.A. E.R. 342, 739.

Following the pandemic's outbreak in early 2020, the Tribe temporarily suspended business operations on the reservation in an effort to slow the spread of COVID-19. App., *infra*, 8a. The Tribe and its corporate arm then made insurance claims seeking to recover business income they lost during that shutdown. *Id.* at 8a-9a. Petitioners responded with letters noting that the policies may not cover COVID-19-related losses because of the absence of physical loss or damage to property. *Id.* at 9a.

B. Procedural History

1. Before petitioners issued a final decision on the Tribe's insurance claims, the Tribe and its corporate arm sued petitioners in their own tribal court, alleging breach of the property-insurance policies and seeking a declaration of entitlement to coverage for lost business income. App., *infra*, 9a. Petitioners moved to dismiss the case for lack of subject-matter jurisdiction under federal law, pointing out that they had engaged in no conduct on the reservation. *Id.* at 156a.

The Suquamish Tribal Court held that it possessed jurisdiction over petitioners under the first exception (covering certain commercial relationships between tribes and nonmembers) to the general rule against tribal regulation of nonmembers in *Montana* v. *United States*, 450 U.S. 544 (1981). App., *infra*, 154a-161a. The court rejected petitioners' argument that tribal jurisdiction could not exist "because they do not have a physical presence on the land and did not physically enter the land." *Id.* at 156a. The court also reasoned that petitioners implicitly consented to tribal-court jurisdiction because their off-reservation conduct in considering the Tribe's insurance claim had a "direct connection to tribal lands." *Id.* at 161a.

The Suquamish Tribal Court of Appeals permitted petitioners to take an interlocutory appeal and then affirmed the tribal court's decision upholding its jurisdiction under *Montana*. App., *infra*, 116a-127a. The court agreed that tribal jurisdiction could reach petitioners even though "they were never physically present on the Tribe's land and their conduct did not occur on the land." *Id.* at 122a. The court grounded jurisdiction in the theory that the Tribe's claim is "directly related" to its businesses on tribal lands. *Id.* at 125a.

2. Once petitioners had exhausted their remedies in tribal court, they filed this action in federal court against the respondent tribal judges seeking a declaration that the tribal courts lack jurisdiction over the insurance dispute. App., *infra*, 35a-36a; see *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845, 856 (1985). The Tribe intervened as a defendant. App., *infra*, 36a.

The district court granted summary judgment to respondents. App., *infra*, 30a-53a. As relevant here,

it held that the tribal court could exercise jurisdiction over petitioners under the first *Montana* exception because "the issuance of the insurance policies arose out of activities occurring on tribal land—namely, tribal owned business activities on tribal owned land." *Id.* at 30a; see *id.* at 46a-50a.

3. The Ninth Circuit affirmed. App., *infra*, 4a-29a.

The court of appeals first held that petitioners' conduct, though occurring off the reservation, still qualified as "conduct occurr[ing] on tribal land" within the meaning of the *Montana* exceptions. App., *infra*, 13a. The court accepted that "tribal jurisdiction is 'cabined by geography'" and "cannot extend past the boundaries of the reservation." *Id.* at 11a-12a (citation omitted). The court also acknowledged that "all relevant conduct occurred off the Reservation" and that petitioners were never "physically present there." *Id.* at 15a-16a. And the court recognized that its prior decisions had never upheld "tribal jurisdiction over nonmembers" without "some form of physical presence" on the reservation. *Id.* at 17a. Nonetheless, the court held that the tribal court could exercise jurisdiction over petitioners because their off-reservation conduct "*relate*[*d*] to tribal lands." *Id.* at 14a (emphasis added). The court of appeals sought to justify this expansive conception of the requirement of "nonmember conduct occurr[ing] on tribal land" with the observation that, in "our contemporary world," "nonmembers, through the phone or internet, regularly conduct business on a reservation and significantly affect a tribe and its members without ever physically stepping foot on tribal land." *Id.* at 17a.

The court of appeals next held that the first *Montana* exception for consensual relationships applies

here. App., *infra*, 20a-24a. The court determined that petitioners had not expressly consented to tribal-court jurisdiction in the insurance policies. *Id.* at 22a n.3. But the court inferred consent on the theory that petitioners "should have reasonably anticipated" such jurisdiction because the policies "bore a direct connection to and could affect the Tribe's properties on trust land." *Id.* at 22a-23a.

The court of appeals turned to this Court's guidance that tribal authority over nonmembers must "stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." App., *infra*, 25a (quoting *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008)). Expressly breaking with the Seventh Circuit, the court held that this Court had not imposed "a supplemental requirement to the *Montana* analysis" and that any conduct that "satisfies one of the *Montana* exceptions * * * necessarily * * * implicates the tribe's authority in one of the areas described in *Plains Commerce*." *Id.* at 26a & n.4 (citing *Jackson* v. *Payday Financial, LLC*, 764 F.3d 765, 783 (7th Cir. 2014)).

4. The Ninth Circuit denied rehearing en banc. App., *infra*, 58a.

a. Judge Bumatay, joined by five other judges, dissented from the denial of rehearing en banc. App., *infra*, 69a-106a. He argued that the panel's endorsement of tribal-court jurisdiction over off-reservation conduct created a split with the Seventh, Eighth, and Tenth Circuits, *id.* at 95a-96a, departed from this Court's focus on "physical, on-reservation conduct by the nonmember," *id.* at 93a, and lacked historical support, *id.* at 80a-87a. He also criticized the panel's "evisceration of *Plains Commerce*" that had put the

Ninth Circuit "on the wrong side of a circuit split." *Id.* at 74a. And he explained that the panel's refusal to address whether an inherent sovereign interest supported tribal-court jurisdiction under *Plains Commerce Bank* made a difference because "it's doubtful that the Tribe can justify its authority over this insurance suit." *Id.* at 105a.

b. The panel judges, joined by 13 other judges, filed a statement responding to Judge Bumatay's dissent. App., *infra*, 58a-69a. They defended their "broad understanding" of the first *Montana* exception and deemed the lack of historical support for tribal-court jurisdiction over off-reservation conduct to be "not informative." *Id.* at 63a.

REASONS FOR GRANTING THE PETITION

In upholding the exercise of tribal jurisdiction over petitioners based solely on their off-reservation conduct, the Ninth Circuit created a rift with three federal courts of appeals and two state supreme courts as to the geographic scope of tribal sovereignty. This Court has recognized a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers," subject to two narrow exceptions for "non-Indians on their reservations." *Montana* v. *United States*, 450 U.S. 544, 565 (1981). The Seventh, Eighth, and Tenth Circuits, as well as the South Dakota and Washington Supreme Courts, have held that "on their reservations" means what it says: Tribes lack any power over off-reservation activities of nonmembers. Only the Ninth Circuit has extended *Montana* to off-reservation conduct on the theory that it "relates to tribal lands." App., *infra*, 14a.

Along the way, the Ninth Circuit also entrenched an existing circuit split concerning *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), which explained that any tribal regulation of a nonmember "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* at 337. The Seventh and Eighth Circuits again agree that *Plains Commerce Bank* means what it says: A consensual relationship with a tribe cannot support jurisdiction absent a showing of one such sovereign interest. But the Ninth Circuit here joined the Fifth Circuit in gutting that constraint on the theory that any consensual relationship "necessarily" satisfies *Plains Commerce Bank*. App., *infra*, 26a.

The Ninth Circuit's conclusion that Suquamish courts have jurisdiction over petitioners' off-reservation practice of insurance conflicts with this Court's decisions. Because tribal sovereignty is territorial, the *Montana* framework applies only to "nonmember conduct *inside* the reservation." *Plains Commerce Bank*, 554 U.S. at 332 (emphasis altered). Nonmember conduct *outside* the reservation categorically exceeds tribal authority's geographic scope. And aside from exceeding that limit, the Ninth Circuit also erred in both inferring consent to tribal jurisdiction from petitioners' willingness to engage in off-reservation commerce with tribes and disregarding the fact that such conduct implicated no inherent sovereign interest.

The question presented is of paramount importance. The decision below endorses a vast expansion of tribal jurisdiction for the nearly 450 tribes within the Ninth Circuit. Any nonmember who does business with such a tribe or tribal member off the reservation—anywhere in the country or even across

the world—now faces the new and serious threat of a lawsuit in tribal court, where unwritten law may be drawn from tribal customs and norms, where defendants are not afforded constitutional rights, and where they are likely to face a jury consisting only of tribal members. This Court should grant review and restore the territorial limitations on tribal sovereignty that the Ninth Circuit jettisoned.

I. THE DECISION BELOW DEPARTS FROM OTHER COURTS' REJECTION OF TRIBAL JURISDICTION OVER OFF-RESERVATION CONDUCT

The Ninth Circuit created one split and deepened another in holding that tribal courts may exercise jurisdiction over nonmembers that do business with a tribe without ever physically entering tribal land. It alone holds that a tribal court can exercise jurisdiction over off-reservation conduct if it "relates" to tribal lands. App., *infra*, 14a. And it cemented another conflict over whether *Plains Commerce Bank* requires any tribal regulation to flow from an identified inherent sovereign interest. *Id.* at 26a & n.4. The Ninth Circuit could uphold the Suquamish courts' exercise of jurisdiction over petitioners' off-reservation conduct only by breaking with other lower courts on both questions.

A. Only the Ninth Circuit has held that a tribal court may exercise jurisdiction over a nonmember of the tribe even when "all relevant conduct occurred off the Reservation." App., *infra*, 15a. That approach departs from the Seventh, Eighth, and Tenth Circuits, as well as the South Dakota and Washington Supreme Courts, each of which has held that tribes cannot exercise jurisdiction over nonmembers based on conduct outside the reservation's physical confines.

1. The Seventh Circuit has held that tribal jurisdiction cannot exist over a nonmember unless the claim arises from the nonmember's on-reservation conduct. In *Jackson* v. *Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), a tribal payday lender made loans to nonmembers off the reservation and then sought to steer an action alleging usurious rates from federal court to tribal court. *Id.* at 768. The Seventh Circuit refused to enforce the agreements' provision selecting a tribal forum because "*Montana* and its progeny permit tribal regulation of nonmember *conduct inside the reservation* that implicates the tribe's sovereign interests." *Id.* at 782 (quoting *Plains Commerce Bank*, 554 U.S. at 332). Even though a tribal entity had "executed the contracts" on the reservation, tribal jurisdiction could not exist because the nonmembers themselves "ha[d] not engaged in *any* activities inside the reservation." *Id.* at 782-783 & n.42.

The Seventh Circuit returned to the question in *Stifel, Nicolaus & Co.* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015). There, a tribal court asserted jurisdiction over nonmembers who had bought bonds that were secured by the revenues and assets of an on-reservation casino and accompanied by a trust indenture giving the bondholder the power to manage casino operations. *Id.* at 189-192. The Seventh Circuit rejected the tribe's argument that "the court need not limit its consideration to the on-reservation actions" and reiterated its holding in *Jackson* that the *Montana* exceptions do not apply to "[t]he actions of nonmembers outside of the reservation." *Id.* at 207. The tribal court lacked jurisdiction because the lawsuit did not "seek redress for any of [the nonmembers'] consensual activities *on tribal land*." *Id.* at 208 (emphasis added).

The Eighth Circuit has likewise held that tribal jurisdiction cannot be premised on off-reservation conduct. In *Hornell Brewing Co.* v. *Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), the court held that a tribal court lacked jurisdiction over claims against an off-reservation brewery for the allegedly unauthorized use of a deceased tribal leader's name. *Id.* at 1089, 1091. The court recognized that tribes possess limited "'inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*.'" *Id.* at 1091 (quoting *Montana*, 450 U.S. at 565). The court emphasized that, because the "operative phrase is 'on their reservations,'" *Montana* does not allow tribal jurisdiction over the "conduct of non-Indians occurring *outside their reservations*." *Ibid.* The court then rejected the argument that a nonmember's online advertising could satisfy the requirement of on-reservation conduct just because tribal members could see such advertising from the reservation. *Id.* at 1093.

The Eighth Circuit reiterated the importance of on-reservation conduct in *Attorney's Process & Investigation Services, Inc.* v. *Sac & Fox Tribe,* 609 F.3d 927 (8th Cir. 2010). There, a tribe's chairman attempted to end an intratribal dispute over control of a casino by hiring an off-reservation security firm, which sent armed employees to raid the casino and seize confidential information. *Id.* at 932. The rival faction sued the security firm in tribal court for both conversion of the tribal funds paid by the chairman under the security contract and intentional torts committed on tribal land. *Ibid.* Although the court held that the tribal court had jurisdiction under *Montana* over torts committed during the raid on tribal land, the tribal court

lacked jurisdiction over the conversion claim because the tribe did not allege that the nonmembers' conversion of the funds "occurred within the Meskwaki Settlement." *Id.* at 940-941.

The Tenth Circuit recognized the same territorial limits on the *Montana* exceptions in *MacArthur* v. *San Juan County*, 497 F.3d 1057 (10th Cir. 2007). There, a tribal court asserted jurisdiction over tribal members' claims against their employer (a health services district), the county, and employees of those entities. *Id.* at 1060-1062. But the Tenth Circuit held that, because "inherent sovereignty ceases at the reservation's borders," "a tribe only attains regulatory authority based on the existence of a consensual employment relationship when the relationship exists between a member of the tribe and a nonmember individual or entity employing the member *within the physical confines of the reservation*." *Id.* at 1071-1072 (emphasis added). That holding foreclosed the exercise of tribal-court jurisdiction over all the nonmembers except the employer who employed tribal members "within the exterior boundaries of the Navajo reservation" (but who was separately protected from tribal-court jurisdiction as a state instrumentality). *Id.* at 1072; see *id.* at 1074.

Consistent with those decisions, two state supreme courts have emphasized that tribal sovereignty stops at the reservation's borders. The Supreme Court of South Dakota has noted that "[t]he Montana analysis generally applies to conduct *within the reservation*" and refused to uphold tribal jurisdiction over a custody dispute between a member and nonmember, in part because "the conduct at issue in th[e] case occurred entirely off the reservation." *In re J.D.M.C.*,

739 N.W.2d 796, 810-811 (S.D. 2007). And the Washington Supreme Court held that the *Montana* framework governs only "the scope of a tribe's civil regulatory jurisdiction within the reservation" and "do[es] not naturally extend to" cases involving assertions of tribal authority "outside the reservation"—there, a tribal officer's pursuit of a drunk driver beyond the reservation's borders. *State* v. *Eriksen*, 259 P.3d 1079, 1083 (Wash. 2011).

2. In upholding the exercise of tribal-court jurisdiction here, the Ninth Circuit departed from the well-settled geographic limitations on tribal sovereignty. The court held that "a nonmember's business with a tribe may very well trigger tribal jurisdiction—even when the business transaction does not require the nonmember to be physically present on those lands." App., *infra*, 17a. Although the court accepted that "all relevant conduct occurred off the Reservation," the court reasoned that petitioners' conduct need not take place on the reservation so long as it "relates to" tribal land. *Id.* at 14a-15a.

That interpretation cannot be reconciled with the decisions of other courts of appeals. In *Stifel*, the Seventh Circuit rejected the exercise of tribal jurisdiction over nonmembers who had purchased bonds that came with the right to control the assets and direct the management of an on-reservation casino—a transaction that "related" to tribal lands at least as much as the insurance contracts here. See 807 F.3d at 189. In *Hornell*, the Eighth Circuit declined to dispense with the requirement of nonmember conduct physically occurring on the reservation even though the nonmember's advertisements related to the tribe and reached tribal members on tribal lands via the internet. See 133 F.3d

at 1093. And in *MacArthur*, the Tenth Circuit required conduct "within the physical confines of the reservation" as a prerequisite to applying the *Montana* framework. 497 F.3d at 1071-1072.

Petitioners would have prevailed in all those courts that adhere to the traditional understanding of the territorial limitations on tribal sovereignty. As Judge Bumatay noted, only the Ninth Circuit looks at the "*object*" of the nonmember's conduct rather than "actual *on-reservation actions or conduct*." App., *infra*, 73a.

B. The Ninth Circuit also deepened a circuit split over the meaning of this Court's guidance in *Plains Commerce Bank* that any tribal regulation of nonmembers "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." 554 U.S. at 337.

1. In *Jackson*, the Seventh Circuit rejected tribal-court jurisdiction for the independent, alternative reason that the nonmembers' off-reservation conduct did not trigger the tribe's inherent sovereignty under *Plains Commerce Bank*. 764 F.3d at 783. The nonmembers there had consented to tribal jurisdiction in the loan agreements. *Ibid.* But applying *Plains Commerce Bank*, the Seventh Circuit held that the consensual relationship could not establish jurisdiction under *Montana* because the tribal entities "made no showing that the present dispute implicates *any* aspect of 'the tribe's inherent sovereign authority.'" *Ibid.*

The Eighth Circuit also requires a separate inquiry into whether tribal regulation serves an inherent

sovereign interest. In *Kodiak Oil & Gas (USA) Inc.* v. *Burr*, 932 F.3d 1125 (8th Cir. 2019), the court held that a tribal court lacked jurisdiction over a lawsuit by tribal members seeking to recover royalties from non-members that operated oil wells on tribal land. *Id.* at 1129-1130. The contractual relationship alone could not support jurisdiction under *Montana* because "the tribe may regulate non-member activities only where the regulation 'stem[s] from the tribe's inherent sovereign authority.'" *Id.* at 1138 (quoting *Plains Commerce Bank*, 554 U.S. at 336). The tribe had not satisfied that constraint because its regulation of royalty payments was "not necessary for tribal self-government or controlling internal relations." *Ibid.*

2. By contrast, the Fifth Circuit has rejected the need to assess whether a consensual relationship with a tribe or tribal member "'implicate[s] tribal governance [or] internal relations'" under *Plains Commerce Bank*. *Dolgencorp, Inc.* v. *Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014). The court labeled as "dicta" this Court's discussion and held that inherent tribal sovereignty was already "built into the first *Montana* exception," which eliminates any need to assess how tribal jurisdiction enforces conditions on entry, preserves tribal self-government, or controls internal relations. *Ibid.* After five judges objected that the panel ignored *Plains Commerce Bank*'s "plain" requirement, *Dolgencorp, Inc.* v. *Mississippi Band of Choctaw Indians*, 746 F.3d 588, 590 (5th Cir. 2014) (Smith, J., dissenting from denial of rehearing en banc), this Court granted review but was unable to decide the case due to an equally divided vote, *Dollar General Corp.* v. *Mississippi Band of Choctaw Indians*, 579 U.S. 545 (2016) (per curiam).

3. The Ninth Circuit recognized this circuit split and adopted a position that "aligns with that of the Fifth Circuit" and "departs from that of the Seventh Circuit." App., *infra*, 26a n.4; accord *id.* at 60a (opinion of Hawkins, Graber, and McKeown, JJ.). Breaking with the *Jackson* decision, the court rejected the 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.'" *Id.* at 25a (quoting *Plains Commerce Bank*, 554 U.S. at 337). And agreeing with the Fifth Circuit, the court held that "[i]f the conduct at issue satisfies one of the *Montana* exceptions, it necessarily follows that the conduct implicates the tribe's authority in one of the areas described in *Plains Commerce*." *Id.* at 26a.

The Ninth Circuit thus concluded, like the Fifth Circuit but unlike the Seventh and Eighth Circuits, that *Plains Commerce Bank* does not impose an independent check on tribal-court jurisdiction.

* * *

The Ninth Circuit is the "first and only circuit court to extend tribal court jurisdiction over a nonmember without requiring the nonmember's actual physical activity on tribal lands." App., *infra*, 73a (opinion of Bumatay, J.). And once inside the *Montana* framework, the Ninth Circuit could uphold tribal-court jurisdiction here only by deepening another split on the meaning of *Plains Commerce Bank*. Those outcome-determinative conflicts justify this Court's review.

II. THE NINTH CIRCUIT'S EXPANSION OF TRIBAL JURISDICTION TO OFF-RESERVATION CONDUCT CONFLICTS WITH THIS COURT'S DECISIONS

The Ninth Circuit's outlier decision cannot be squared with this Court's decisions. Any assertion of tribal jurisdiction over a nonmember is "presumptively invalid." *Plains Commerce Bank*, 554 U.S. at 330 (citation omitted). Given the guardrails this Court has imposed on tribal assertions of power over nonmembers, the Tribe had to prove (A) nonmember conduct inside the reservation, (B) consent to tribal jurisdiction, and (C) an inherent sovereign interest. The Ninth Circuit wrongly discounted that the off-reservation location of petitioners' conduct forecloses the Tribe's ability to make any of those showings here.

A. This Court's decisions establish that conduct is potentially subject to tribal regulation only when it occurs within the reservation's physical boundaries, not when it merely "relates to tribal lands." App., *infra*, 14a.

1. Tribal sovereignty stops at the reservation's borders. The first time that the Court heard a case on tribal sovereignty, Justice Johnson observed that tribes lacked "the right of governing every person within their limits except themselves." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (concurring opinion). Chief Justice Marshall later described tribes as "distinct political communities, having territorial boundaries, within which their authority is exclusive." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). As this Court recognized long ago, the corollary is that, when a nonmember's "act was beyond the territorial limits of [a tribe's] jurisdiction," that fact "'alone would be conclusive'" of the tribe's lack of authority.

Elk v. *Wilkins*, 112 U.S. 94, 108 (1884) (citation omitted).

Tribes presumptively lack power over nonmembers, even when within their borders. In *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191 (1978), the same Tribe that here sued petitioners in its own tribal court prosecuted a nonmember for an on-reservation crime. *Id.* at 194. The Court rejected that exercise of jurisdiction because tribes, by virtue of their incorporation into the United States, categorically lack jurisdiction over crimes by nonmembers. *Id.* at 209-210. The Court noted that federal law historically allowed tribes to decide only controversies among their members and "reserve[d] to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." *Id.* at 204 (quoting *In re Mayfield*, 141 U.S. 107, 116 (1891)). The only historical exception to a tribe's lack of authority over nonmembers concerned unlawful "non-Indian settlements *on* Indian territory." *Id.* at 197 n.8 (emphasis added); see App., *infra*, 80a-86a (opinion of Bumatay, J.) (cataloging absence of historical support for tribal regulation outside narrow circumstances when nonmember was "*physically* present on tribal lands"). As a result, a "historical perspective" on the territorial limits on tribal sovereignty "casts substantial doubt" on tribal attempts to regulate off-reservation conduct. *Oliphant*, 435 U.S. at 206.

The Court in *Montana* later applied *Oliphant*'s bar on tribal authority over nonmembers to civil jurisdiction, subject to only two exceptions for certain "non-Indians *on their reservations*." 450 U.S. at 565 (emphasis added). First, tribes have limited authority to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members,

through commercial dealing, contracts, leases, or other arrangements." *Ibid.* The Court pointed to four examples, all of which involved conduct by nonmembers within the reservation's physical boundaries. *Id.* at 565-566; see, *e.g.*, *Williams* v. *Lee*, 358 U.S. 217, 223 (1959) (nonmember operating general store "on the Reservation"); *Morris* v. *Hitchcock*, 194 U.S. 384, 393 (1904) (nonmember grazing cattle "wrongfully within [tribal] territory"). Second, a tribe "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

This Court has reinforced that the *Montana* exceptions require nonmember conduct within the reservation's territorial boundaries. In *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645 (2001), the Court held that tribal authority "reaches no further than tribal land" and that the tribe there could tax only "transactions occurring on *trust lands* [*i.e.*, lands held in trust for the tribe] and significantly involving a tribe or its members." *Id.* at 653 (citation omitted). And in *Plains Commerce Bank*, the Court reiterated that "tribes do not, as a general matter, possess authority over non-Indians," even those "who come within their borders." 554 U.S. at 327-328. Both exceptions to the general rule against tribal jurisdiction "permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests." *Id.* at 332. The Court also underscored that all four cases cited in *Montana* show that the first exception requires proof of "non-Indian activities *on the reservation* that ha[ve] a discernible effect on the tribe or its members." *Ibid.* (emphasis added).

The *Montana* framework therefore does not apply at all to this case. The Ninth Circuit acknowledged that "all relevant conduct occurred off the Reservation." App., *infra*, 15a. And this Court's decisions confirm that, although the insurance policies concerned the Tribe's businesses on tribal land, "nonmember 'conduct taking place on the land' and transactions *related* to the land * * * 'are two very different things.'" *Id.* at 95a (opinion of Bumatay, J.) (quoting *Plains Commerce Bank*, 554 U.S. at 340). That is the end of the road: "no on-reservation conduct, no jurisdiction." *Id.* at 89a.

2. The Ninth Circuit's expansive conception of the territorial scope of tribal sovereignty rests on a distorted snippet from one of this Court's opinions, a faulty analogy to due-process limitations on personal jurisdiction, and an effort to adapt tribal jurisdiction to modern conditions despite the absence of any historical support.

The Ninth Circuit relied principally on *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which stated that "a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe." *Id.* at 142. It asserted that the disjunctive "or" supported the tribe's ability to regulate off-reservation commercial relationships related to tribal businesses. App., *infra*, 16a. But this Court already rejected that overreading in *Atkinson*, which explained that *Merrion* "involved a tax that only applied to *activity occurring on the reservation*" and that any "parts of the *Merrion* opinion that suggest a broader scope for tribal [sovereign] authority" cannot overcome the general principle that tribal jurisdiction "reaches no further than tribal land." 532 U.S. at 653 (emphasis added). The Ninth Circuit's

only serious attempt to reconcile its holding with this Court's decisions on tribal jurisdiction thus rests on an inferential leap from *Merrion* that has already been "disclaimed by the Court." App., *infra*, 99a (opinion of Bumatay, J.).

The Ninth Circuit's "relates to tribal lands" test for tribal courts' subject-matter jurisdiction also derives from a strained analogy to personal jurisdiction. App., *infra*, 14a-15a (citing *Smith* v. *Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (en banc)). The Ninth Circuit in *Smith* equated the first *Montana* exception with the "minimum contacts" test from *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), governing state courts' exercise of personal jurisdiction over nonresidents. 434 F.3d at 1138 (citation omitted). That analogy is flawed because tribal courts "*cannot* be courts of general jurisdiction" like state courts, which are generally open to claims on all subjects. *Nevada* v. *Hicks*, 533 U.S. 353, 367 (2001) (emphasis added); accord *Atkinson*, 532 U.S. at 653 n.5 (rejecting attempt to analogize tribal taxing power to "state taxing authority"). The Ninth Circuit's transformation of *Montana*'s limited exceptions for subject-matter jurisdiction over nonmembers into a miniature version of *International Shoe* defies the principle that the "sovereign authority of Indian tribes is limited in ways state and federal authority is not." *Plains Commerce Bank*, 554 U.S. at 340.

The panel further erred in disregarding the lack of historical support for tribal jurisdiction over off-reservation conduct. App., *infra*, 63a (opinion respecting denial of rehearing en banc). Half a century ago, the Ninth Circuit upheld the Suquamish Tribe's prosecution of a nonmember based on "practical considerations," *Oliphant* v. *Schlie*, 544 F.2d 1007, 1013 (9th

Cir. 1976), brushing off then-Judge Kennedy's objection that the assertion of tribal jurisdiction was "novel and unusual, and certainly inconsistent with prior practice," *id.* at 1014 (dissenting opinion). This Court reversed because tribal jurisdiction does not stretch beyond its historical limits to meet perceived modern needs. *Oliphant*, 435 U.S. at 206-207, 210.

The Ninth Circuit has again expanded the jurisdiction of the Suquamish courts into uncharted territory, supposedly to keep pace with "our contemporary world." App., *infra*, 17a. In its view, tribal-court jurisdiction should be expanded because "nonmembers, through the phone or internet, regularly conduct business on a reservation and significantly affect a tribe and its members without ever physically stepping foot on tribal land." *Ibid.* That mode of analysis remains as wrong today as it was in *Oliphant*. After all, this Court decided *Montana* in 1981 and *Plains Commerce Bank* in 2008—long after "technological innovations" like the phone and internet, respectively. *Id.* at 100a (opinion of Bumatay, J.).

B. Even if the *Montana* framework could apply to off-reservation conduct in some circumstances, the Ninth Circuit still would have erred in upholding tribal jurisdiction under the first *Montana* exception. This Court has limited that exception in recognition that "nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 554 U.S. at 337. "Consequently," the Court continued, "those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." *Ibid.* Petitioners here may have consented to do business with the

Tribe, but they in no way consented to tribal jurisdiction over their off-reservation practice of insurance.

As an initial matter, petitioners never gave express consent to tribal jurisdiction. A nonmember may consent to tribal-court jurisdiction by stipulation or a forum-selection clause. See *Hicks*, 533 U.S. at 383 (Souter, J., concurring). But the Ninth Circuit held that petitioners did not consent to tribal-court jurisdiction in the relevant insurance policies. App., *infra*, 22a n.3.

Petitioners also did not consent to tribal jurisdiction by their actions. Certain conduct, such as setting up shop on the reservation, *Williams*, 358 U.S. at 223, or becoming a tribal member, 7 Op. Att'y Gen. 174, 185 (1855), might constitute constructive consent to tribal jurisdiction. But merely "trading with the Indians" cannot qualify as such consent. *Id.* at 186. Under the Indian Commerce Clause, federal law rather than tribal law has long governed *on*-reservation commerce between tribes and nonmembers. U.S. Const. Art. I, § 8, cl. 3; see, *e.g.*, Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790). And the remedy for a nonmember's violation of any tribal conditions on entry or presence was expulsion from the reservation enforced (typically) by federal authorities—not an action in a tribal court. *E.g.*, *Morris*, 194 U.S. at 392; Act of Mar. 30, 1802, ch. 13, § 5, 2 Stat. 142.

Whatever limited set of on-reservation actions might establish consent to tribal jurisdiction, inferring consent from an off-reservation transaction is a bridge too far. The Ninth Circuit reasoned that petitioners had impliedly consented to tribal jurisdiction because the insurance contracts "bore a direct connection to and could affect the Tribe's properties on [tribal] land." App., *infra*, 22a-23a. But the court disregarded

the importance of the fact that the Tribe reached out beyond the reservation to buy insurance from petitioners. This Court has established a default rule that "Indians going beyond reservation boundaries" are "subject to nondiscriminatory state law." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973). And petitioners accordingly registered the contracts under Washington law. See p. 8, *supra*. Nothing in that course of events establishes that petitioners consented by their actions to tribal jurisdiction.

C. The Ninth Circuit further erred in disregarding the limitation that, even when nonmembers have consented to tribal regulation, "the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 554 U.S. at 337.

1. In the Ninth Circuit's view, this Court in *Plains Commerce Bank* "merely stat[ed]" the justifications for the *Montana* exceptions but did not require courts to decide whether the tribal regulation does, in fact, stem from one of those sovereign interests. App., *infra*, 26a. The court aligned itself with the Fifth Circuit, *ibid.* n.4, which called that requirement "dicta," *Dolgencorp*, 746 F.3d at 175.

That view of *Plains Commerce Bank* is wrong. The absence of a sovereign interest was the principal basis for the holding in *Plains Commerce Bank* that the tribal court lacked jurisdiction over a nonmember bank's sale of land within a reservation. The Court determined that the sale of non-Indian fee land did not implicate the tribe's right to exclude others from tribal land, its power to govern its members, or its control of internal relations. 554 U.S. at 335-336. For that reason, the Court held that, "[w]hatever the Bank

anticipated, whatever 'consensual relationship' may have been established through the Bank's dealing with the [tribal members], the jurisdictional consequences of that relationship cannot extend to the Bank's subsequent sale of its fee land." *Id.* at 338. The Ninth Circuit's conclusion that a consensual relationship under the first *Montana* exception "necessarily" establishes an inherent sovereign interest, App., *infra*, 26a, cannot be squared with *Plains Commerce Bank*.

2. Had the Ninth Circuit faithfully applied *Plains Commerce Bank*, the off-reservation nature of petitioners' conduct should have played a dispositive role in its assessment of inherent tribal sovereign interests.

The tribe's power to "set conditions on entry" cannot support jurisdiction here. *Plains Commerce Bank*, 554 U.S. at 337. Tribes have a "landowner's right to occupy and exclude" nonmembers from tribal land. *Strate* v. *A-1 Contractors*, 520 U.S. 438, 456 (1997); see Treaty of Point Elliot Art. II, 12 Stat. 928 (forbidding any "white man" to "reside upon [the reservation] without permission" from the Tribe). But that right could not possibly apply to nonmembers that have never set foot on the reservation. App., *infra*, 105a (opinion of Bumatay, J.).

Tribal jurisdiction over off-reservation businesses that transact with tribes and tribal members also does not "preserve tribal self-government." *Plains Commerce Bank*, 554 U.S. at 337. This Court has held that state "jurisdiction over the claims of Indian plaintiffs against non-Indian defendants * * * d[oes] not interfere with the right of tribal Indians to govern themselves." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 476 U.S. 877, 880 (1986); accord *Strate*, 520 U.S. at 459. And the Court

also has recognized that "gambling" and other business enterprises go "beyond what is needed to safeguard tribal self-governance." *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998). The Tribe's attempt to regulate nonmembers' off-reservation provision of property insurance for its tribal casino is even further removed.

Nor is tribal jurisdiction necessary to "control internal relations." *Plains Commerce Bank*, 554 U.S. at 337. Internal relations are (for example) tribal membership, crimes by members, domestic relations among members, and inheritance of property by members. *United States* v. *Wheeler*, 435 U.S. 313, 322 & n.18 (1978). But this case is about the Tribe's *external* relations with off-reservation insurers.

* * *

At every turn, the Ninth Circuit gave no legal effect to the acknowledged fact—one that should have been dispositive—that petitioners' conduct occurred off the reservation. This Court's decisions establish that the Ninth Circuit never should have applied the *Montana* framework to the off-reservation conduct of the nonmember petitioners, as tribes categorically lack power to regulate such conduct. The court also wrongly divined consent to tribal jurisdiction from petitioners' willingness to do business with tribes that leave the reservation to buy property insurance. And the court disregarded the need for the Tribe to prove that its exercise of jurisdiction over petitioners' conduct flowed from an inherent sovereign interest. This Court should grant review and reject the Ninth Circuit's flawed approach to assessing the propriety of tribal-court jurisdiction over nonmembers.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

A. The decision below represents a massive expansion of tribal-court jurisdiction. Many tribes run commercial enterprises that transact all over the globe. Frequently, their purchases of goods and services "relat[e] to tribal lands" because that is where the *tribes* (not the nonmembers) have located their businesses. App., *infra*, 14a. The consequence of the Ninth Circuit's ruling is that, "even though the Tribe's reservation is only 12 square miles, its courts can now reach the furthest corners of the country—and perhaps the ends of the earth." *Id.* at 95a (opinion of Bumatay, J.). Petitioners here—insurers and underwriters headquartered across the United States and in the United Kingdom, *id.* at 145a—reflect the worldwide reach of the ruling. And that effect will be multiplied hundreds of times over because the Ninth Circuit contains three-quarters of the nearly 600 federally recognized tribes. Ninth Circuit Committee on Tribal and Native Relations, *Newsletter* 1 (Summer 2024), tinyurl.com/43mz4kzx.

The Ninth Circuit claimed that its decision was "narrow." App., *infra*, 27a. Not so. Its ruling unbound tribal jurisdiction from the constraints of geography and the inherent sovereign interests in *Plains Commerce Bank*, replacing them with an amorphous inquiry into whether the nonmember's conduct "bore a direct connection to and could affect" the tribe's own activities on tribal lands. *Id.* at 22a-23a. That rule could sweep in, for example, banks that make loans that are secured by tribal land or tribal property, cf. *Stifel*, 807 F.3d at 207, financial institutions that administer ERISA plans for tribal businesses, 29 U.S.C. § 1002(32), and lawyers who assist casinos with compliance under the

Indian Gaming Regulatory Act, see App., *infra*, 76a (opinion of Bumatay, J.). Only the traditional understanding that "nonmember *conduct* inside the reservation" means actions occurring within the reservation's physical boundaries could prevent the first *Montana* exception from "'swallow[ing] the rule'" that tribes generally lack power over nonmembers. *Plains Commerce Bank*, 554 U.S. at 330, 332 (citation omitted).

Allowing tribes to exercise tribal jurisdiction over nonmembers who sell goods or services to tribes or tribal members off the reservation magnifies the burdens of legal compliance. Here, for example, the Ninth Circuit held that "the Tribe's lack of insurance regulations" was irrelevant because the Tribe can make contract law for insurance policies on the fly. App., *infra*, 25a. Such unwritten tribal law can incorporate the tribe's "'customs, traditions, and practices,'" making tribal law "unusually difficult for an outsider to sort out." *Hicks*, 533 U.S. at 384-385 (Souter, J., concurring) (citation omitted); see, *e.g.*, *Plains Commerce Bank*, 554 U.S. at 338 (discussing "novel" antidiscrimination claim embraced by tribal jury). At least when a nonmember locates his business on the reservation, that nonmember is tasked with piecing together just one tribe's codes, precedent, and customs. But when a nonmember generally offers services to tribes across the country, that nonmember risks winding up in almost 600 different tribal-court systems, each applying its own tribal customs.

That variation is a recipe for unfairness. Many tribes respected their territorial boundaries by filing property-insurance lawsuits in state or federal court that met no success, just like suits filed by hundreds of other policyholders. *E.g.*, *Mashantucket Pequot Tribal Nation* v. *Factory Mutual Insurance Co.*, 313

A.3d 1219, 1237-1238 (Conn. App. 2024); *Cherokee Nation* v. *Lexington Insurance Co.*, 521 P.3d 1261, 1270 (Okla. 2022). But other tribes, including the Suquamish, seek to extract millions of dollars from insurers in their own tribal courts through claims that have been rejected in virtually all federal and state courts. App., *infra*, 146a; see, *e.g.*, *Lexington Insurance Co.* v. *Mueller*, 2024 WL 5001815, at *2 (9th Cir. Dec. 6, 2024) (upholding jurisdiction of Cabazon court over COVID-19 insurance claims on same theory advanced here). If courts "push coverage beyond its terms" and create "an insurance product that covers something no one paid for," petitioners cannot fairly price insurance. *Santo's Italian Café LLC* v. *Acuity Insurance Co.*, 15 F.4th 398, 407 (6th Cir. 2021). That dynamic benefits neither the nonmembers who do business with tribes nor the tribes themselves.

B. The Ninth Circuit's extension of tribal-court jurisdiction does serious damage to "the liberty interests of nonmembers." *Plains Commerce Bank*, 554 U.S. at 334. In tribal court, nonmembers do not possess their constitutional rights because tribes exercise "a sovereignty outside the basic structure of the Constitution." *Id.* at 337 (citation omitted). The Indian Civil Rights Act also grants tribal courts substantial "leeway" to depart from federal protections, *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (citation omitted), including (as here) exclusion of nonmembers from juries, *Oliphant*, 435 U.S. at 194. Meanwhile, "[t]ribal courts are often 'subordinate to the political branches of tribal governments.'" *Duro* v. *Reina*, 495 U.S. 676, 693 (1990) (citation omitted). And those tribal political branches are unchecked by the ordinary democratic process in this context because "nonmembers 'have no part in tribal government' and have 'no say in the laws and regulations that govern tribal territory.'" *United*

States v. *Cooley*, 593 U.S. 345, 353 (2021) (quoting *Plains Commerce Bank*, 554 U.S. at 337).

Even though this Court has frequently relied on such concerns in rejecting overbroad assertions of tribal jurisdiction, the Ninth Circuit declared that "[c]onsideration of the political structure of tribal governments, including their judicial systems, has *no* place in our *Montana* analysis." App., *infra*, 24a (emphasis added). That language will empower federal and tribal courts alike within the Ninth Circuit to give the back of the hand to nonmembers' good-faith objections to submitting disputes to tribal forums that do not guarantee their constitutional rights or allow their political participation.

C. This petition is an ideal vehicle. The case cleanly raises the question presented because the Ninth Circuit acknowledged that "all relevant conduct occurred off the Reservation." App., *infra*, 15a. This Court can directly answer that question because petitioners exhausted their tribal remedies. See pp. 8-9, *supra*. But if the decision below remains undisturbed, tribal courts may deny nonmembers interlocutory appeals to exhaust their jurisdictional challenges, complicating nonmembers' ability to seek protection in federal court. *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9, 17 (1987). This Court should grant review before the Ninth Circuit's capacious view of tribal jurisdiction calcifies in the courts of the nearly 450 tribes within its geographic scope.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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