No. 24-884

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate-disclosure statement in the petition for a writ of certiorari remains accurate.

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The Ninth Circuit's conception of tribal sovereignty is so broad that even the Suquamish Tribe is unwilling to defend it. The decision below eliminated the territorial limitations on the exceptions to the general rule against tribal jurisdiction over nonmembers in *Montana* v. *United States*, 450 U.S. 544 (1981), and instead analogized to the jurisdiction that state courts possess over nonresidents who do business with state residents under *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). No other court of appeals would permit tribal courts to exercise jurisdiction over a nonmember where, as here, "all relevant conduct occurred off the Reservation." Pet. App. 15a.

The Tribe wants to keep that rule but, seeing no basis to justify it, attempts to rewrite the decision below. It claims that the "factual predicate" of off-reservation conduct is absent because petitioners' conduct "'occurred on tribal land.'" Br. in Opp. 7-8 (quoting Pet. App. 15a). This bald assertion might have surprised the 23 judges who divided on the proper application of the *Montana* framework at the en banc stage, if on closer inspection the assertion was not both trivial and circular: Instead of making a *factual* "finding of on-reservation conduct," *id.* at i (emphasis omitted), the Ninth Circuit adopted the *legal* fiction that petitioners' off-reservation conduct occurred "on tribal land" in some metaphysical sense because it had a "'direct connection'" to tribal land, Pet. App. 17a (citation and emphasis omitted).

The facts are what they are: The Ninth Circuit conceded petitioners' "employees never entered the Reservation." Pet. App. 18a. And the Tribe does not dispute that, if the decision below rests on off-reservation conduct, then it creates a circuit split and defies this Court's decisions. In manufacturing a "factual predicate" that supposedly precludes review, the Tribe has simply reframed the Ninth Circuit's legal conclusion, which is erroneous and certworthy, as that "predicate."

The Tribe tries to rewrite not only the Ninth Circuit's decision but also the question presented. Br. in Opp. i. It contends petitioners should have divided their arguments into two separate questions. *Id.* at 12-13. But petitioners properly presented a single question—whether the tribal court had jurisdiction over their off-reservation conduct—that implicates multiple reasons why the conduct's off-reservation location prevents the Tribe from establishing jurisdiction. No rule requires petitioners to separate each of

those reasons into a distinct question presented. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379-380 (1995).

The Ninth Circuit's decision opens a new frontier of tribal-court jurisdiction. Surveying our Nation's history and this Court's cases, Judge Bumatay found no support for tribal jurisdiction over off-reservation conduct. Pet. App. 80a-93a (opinion dissenting from denial of rehearing en banc). The panel rejected history as "not informative" in the "contemporary world." *Id.* at 17a, 63a. But that history has long informed this Court's *Montana* framework. It is not for the Ninth Circuit to say that the "contemporary world" requires something different. *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997).

A. The Tribe's Jurisdiction Rests Solely On Off-Reservation Conduct

The opposition's animating premise is what the Tribe calls "the panel's express finding of *on*-reservation conduct." Br. in Opp. i; accord, *e.g.*, *id.* at 26-28, 32. But the Ninth Circuit didn't "find" anything of the sort. It held, on undisputed facts and as a pure matter of law, that petitioners' off-reservation activity was sufficiently related to tribal land to create tribal jurisdiction. Pet. App. 14a-19a.

The panel determined that petitioners' decision to insure tribal businesses and property "'bears some direct connection to tribal lands'" that permits the exercise of tribal jurisdiction without petitioners "ever physically stepping foot on tribal land." Pet. App. 17a (citation and emphasis omitted). Leaving nothing to doubt, the panel later repeated that "a 'direct connection to tribal lands'" alone is enough and that "no physical presence requirement exists." *Id.* at 59a-60a,

66a (opinion respecting denial of rehearing en banc) (citation omitted).

Judge Bumatay summarized the panel's own recitation of facts, which make clear petitioners were "at least three steps removed from any conduct occurring on the reservation." Pet. App. 95a. Step one: The Tribe sought insurance "from a nonmember insurance broker, who was located off the reservation." *Id.* at 94a. Step two: The nonmember broker contacted Alliant, "an insurance middleman" that operates the Tribal First program off the reservation. *Ibid.* Step three: Alliant contracted with petitioners to provide insurance and "handled all the paperwork" with the Tribe, *id.* at 95a, including preparing the Tribe's policies and receiving the Tribe's premiums, which it remitted to petitioners, *id.* at 78a; C.A. E.R. 307. Those three degrees of separation persisted when the Tribe made its insurance claim: Its nonmember broker sent the claim to Alliant, which contacted petitioners to initiate a claims process. C.A. E.R. 1181-1186, 1261-1264.

As those undisputed facts reflect, insurers do not supernaturally manifest where the insured property is. Cf. Br. in Opp. 10 n.2. Insurance is a commercial transaction that can occur beyond the "limited territorial jurisdictio[n]" of the insured property. *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 552 (1944). The Tribe stresses that the Ninth Circuit *labeled* petitioners' off-reservation actions to offer insurance "'conduct on tribal land,'" even though petitioners never set foot on that land. Br. in Opp. 8, 15 (quoting Pet. App. 18a). But the Tribe has not uncovered a devastating vehicle problem. It has highlighted the legal question that divided 23 circuit judges below.

The *Montana* framework applies only to "nonmember conduct *inside* the reservation." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008) (emphasis altered). The dissent interpreted this language to require "physical, on-reservation conduct." Pet. App. 93a. Conversely, the statement respecting denial defended *Montana*'s extension to off-reservation conduct that "bears some direct connection to tribal lands." *Id.* at 64a (citation and emphasis omitted). The Tribe's opposition depends entirely on that theory of *constructive presence* on tribal land, but whether that theory is right is precisely the question petitioners have asked the Court to decide.

Everyone has been clear-eyed that the Ninth Circuit held "that nonmember physical presence on a reservation is not required to satisfy *Montana*'s first exception." Comment, 138 Harv. L. Rev. 1689, 1689 (2025). Some endorse that broad conception of tribal sovereignty to account for "modern tribal practices," *ibid.*, or the modern economy, Pet. App. 17a. Others reject that approach and would adhere to traditional territorial limitations because a "historical perspective can cast substantial doubt upon the existence of tribal jurisdiction." *Id.* at 79a (opinion of Bumatay, J.) (alterations omitted) (quoting *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191, 206 (1978)). But all agree (including the tribal judges opposing review in a related case) that this case presents the question whether *Montana* allows "tribal jurisdiction [over] nonmembers who never set foot on the reservation." No. 24-906 Br. in Opp. at 14. Not surprisingly, the Tribe itself conceded below that petitioners never "physically entered the reservation or engaged in any on-reservation conduct other than issuing the insurance policy [off the reservation]." Resp. C.A. Br. 35.

The Tribe contends an "additional factual dispute" "infects" this case because a footnote in the district-court opinion "question[ed]" whether certain visits to the reservation by Alliant to collect information related to policy renewal might be imputed to petitioners. Br. in Opp. 28-29. The short answer to this strained see-if-this-footnote-sticks contention is that the Ninth Circuit did not uphold tribal-court jurisdiction based on any visit by Alliant but instead held that petitioners could be subject to tribal authority "without ever physically stepping foot on tribal land." Pet. App. 17a. In fact, the Tribe never argued to the Ninth Circuit that Alliant was petitioners' agent nor that its visits could otherwise support tribal jurisdiction. Cf. Resp. C.A. Br. 5 (stray mention in background). It is therefore too late for the Tribe's recently invented vehicle problem. In any event, Alliant's visits could not support tribal jurisdiction because they have no nexus to the Tribe's claims, which concern petitioners' off-reservation denial of coverage under an insurance policy that was likewise issued off the reservation. *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 656 (2001).

In short, petitioners "conducted no activity whatsoever on the Tribe's land." Pet. App. 94a (opinion of Bumatay, J.). The Tribe's word games in describing petitioners' off-reservation conduct are no reason to deny review.

B. The Ninth Circuit Alone Extends Tribal Jurisdiction Beyond The Reservation's Borders

The Tribe's entire opposition hinges on the theory that the "factual predicate" of off-reservation conduct establishing a "circuit conflict" disappeared simply because the Ninth Circuit labeled it "'conduct on tribal

land.'" Br. in Opp. 7 (citation omitted). Without that argument, the Tribe cannot deny the circuit split.

1. The Tribe agrees that the Seventh, Eighth, and Tenth Circuits have "reject[ed] tribal jurisdiction for *off-reservation* conduct." Br. in Opp. 16. At the same time, the Tribe insists it is simply unknowable how those circuits would approach the particular type of off-reservation conduct here. *Id.* at 13-15. But the answer is clear under the "legal framework" that those circuits share and that the Ninth Circuit rejects. *Id.* at 16. Because petitioners engaged in no conduct "within the physical confines of the reservation," *MacArthur* v. *San Juan County*, 497 F.3d 1057, 1072 (10th Cir. 2007), they would have been protected from tribal jurisdiction in each of those circuits.

The factors that the Tribe stresses could not support tribal jurisdiction over off-reservation conduct in any other circuit. Br. in Opp. 17-22. Except in the Ninth Circuit, a commercial relationship with a tribe or tribal member cannot support tribal jurisdiction when the nonmember "did not enter the reservation" to negotiate or execute the agreement. *Jackson* v. *Payday Financial, LLC*, 764 F.3d 765, 782 (7th Cir. 2014). That remains true even when the transaction concerns the tribe, *Hornell Brewing Co.* v. *Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091, 1093 (8th Cir. 1998), and even when the nonmember takes a financial interest in property that the tribe owns on tribal land, *Stifel, Nicolaus & Co.* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 189 (7th Cir. 2015). The Tribe's response (Br. in Opp. 19) that the nonmembers' security interest in tribal property on tribal land played no role in *Stifel*'s analysis proves *petitioners'* point—the commercial

transaction still did not involve "activities on the reservation." 807 F.3d at 208.

The Ninth Circuit's metaphysical understanding of "conduct inside the reservation" is endlessly manipulable. Consider *Jackson*, which the Tribe describes as a case where a tribal payday lender "conduct[ed] general business *outside the reservation*" by lending money to nonmembers. Br. in Opp. 17. The tribal member there described the scenario the other way around—the nonmembers reached out to the tribal payday lender, which executed loan agreements on the reservation. *Jackson*, 764 F.3d at 782 n.42. Here, too, the Tribe says that petitioners "directly target[ed] tribal lands and tribal businesses," Br. in Opp. 14, but the Tribe (through its nonmember broker) was the one who reached out to an off-reservation program for coverage from off-reservation insurers, see Pet. App. 94a-95a (opinion of Bumatay, J.). The only stable legal rule is the one that other circuits have adopted: *Montana* "is tethered to the *nonmember's* actions, specifically the *nonmember's actions on the tribal land*." *Jackson*, 764 F.3d at 782 n.42.

2. Nor can the Tribe obscure the sharp disagreement about whether *Plains Commerce Bank* requires an inherent sovereign interest to support the specific exercise of tribal jurisdiction. The Tribe protests that the Ninth Circuit's admitted "'depart[ure]'" from the Seventh Circuit was "overstated." Br. in Opp. 24 n.9 (quoting Pet. App. 26a n.4). But the Ninth Circuit made clear its view that any conduct that "satisfies one of the *Montana* exceptions" "necessarily" satisfies *Plains Commerce Bank*. Pet. App. 26a. By contrast, the Seventh Circuit holds that a consensual relationship under *Montana* does not suffice without any "tribal concern that satisfie[s] the requirement of

Plains Commerce Bank," *Jackson*, 764 F.3d at 783 n.43, and that "actions of nonmembers outside of the reservation do not implicate the Tribe's sovereignty," *Stifel*, 807 F.3d at 207. This square conflict confirms the need for this Court's review.

C. The Tribe Does Not Attempt To Square The Actual Decision Under Review With This Court's Decisions

Petitioners presented one question: "whether a tribal court can exercise jurisdiction over nonmembers of the tribe based on off-reservation conduct." Pet. i. Petitioners also gave three reasons why the answer is "no": (1) *Montana* categorically does not apply to off-reservation conduct, Pet. 22-27; (2) off-reservation conduct cannot be treated as consent to tribal jurisdiction, Pet. 27-29; and (3) off-reservation conduct does not implicate any inherent tribal sovereign interest under *Plains Commerce Bank*, Pet. 29-31. The Tribe all but admits defeat on the first, ignores the second, and never explains how jurisdiction over off-reservation conduct serves any inherent sovereign interest.

1. The Tribe purports to agree that "the relevant conduct must occur within the reservation." Br. in Opp. 9. But the Tribe insists that it has satisfied this test because the off-reservation conduct here *relates* to tribal land—the policies insure "*tribal* properties and *tribal* businesses on *tribal* land." *Id.* at 13. Petitioners do not dispute that the *Tribe* is present on tribal land. Nor do petitioners dispute that property insurance obviously relates to the Tribe's property. And they do not dispute that a state court could exercise personal jurisdiction over a nonresident based on similar out-of-state conduct—that is why petitioners registered the policies under Washington law, *id.* at 10 n.2.

The Tribe below blurred the lines between tribal sovereignty and state sovereignty in invoking the principle of "personal jurisdiction jurisprudence that 'a nonresident's physical presence within the territorial jurisdiction of the [forum] court is not required' to support jurisdiction." C.A. En Banc Resp. 9 (quoting *Walden* v. *Fiore*, 571 U.S. 277, 283 (2014)). But the Tribe now is unwilling to defend the Ninth Circuit's transformation of *Montana* into *International Shoe* for tribal courts. Pet. 26. Judge Bumatay had it right: "[N]onmember 'conduct taking place on the land' and transactions *related* to the land * * * 'are two very different things.'" Pet. App. 95a (quoting *Plains Commerce Bank*, 554 U.S. at 340).

2. Aside from insisting that the Ninth Circuit by wave of a magic wand can transform off-reservation conduct into on-reservation conduct, the Tribe does not defend the ruling that petitioners consented by their actions to tribal jurisdiction. Pet. App. 22a-23a. The Tribe does not dispute that "Indians going beyond reservation boundaries" are "subject to nondiscriminatory state law." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973). That is exactly what the Tribe did in hiring an off-reservation broker to negotiate with an off-reservation administrator for coverage from off-reservation insurers.

3. The Tribe also cannot establish that its regulation of petitioners' off-reservation practice of insurance "stem[s] from [its] 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 Tribe could not impose its jurisdiction as a condition on entry that never occurred or as an incident to a "right to exclude" that was never implicated. Br. in Opp. 29. And the Tribe's interest

in tapping nonmember pockets to replace "tax revenue" and fund "governmental functions," *id.* at 25-26, cannot justify tribal jurisdiction because "[t]ribal 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).

D. The Tribe Cannot Obscure This Case's Importance

The Tribe says "[t]ribes have not started haling everyone into tribal court." Br. in Opp. 32. But now that the Ninth Circuit has held for the first time that off-reservation conduct with a "direct connection to tribal lands" is enough, all bets are off. Pet. App. 15a (citation omitted). Had other tribes anticipated that shift in the law, they doubtless would have sued for coverage of COVID-19-related losses in their own courts, instead of suing (and losing) in federal and state courts. *E.g.*, *Tulalip Tribes of Washington* v. *Lexington Insurance Co.*, 2025 WL 955713, at *7 (Wash. Ct. App. Mar. 31, 2025). And allowing hundreds of tribes to displace well-established state insurance law would undermine the certainty and predictability that unlock broad and affordable insurance coverage. APCIA Br. 10-15.

The Tribe insists the Ninth Circuit's decision applies only in the "unique" context of insurance contracts that relate to tribal properties, are signed by the tribe itself, and "target issues essential to the Tribe's economic stability, financial health, and ability to fund and operate core governmental functions." Br. in Opp. 14 n.4, 29. Yet the Ninth Circuit laid down a rule for not just this case, but *every* case. The nearly 450 tribes in that circuit will have every incentive to recharacterize countless contracts with nonmembers

that directly relate to tribal properties and bear on the financial health of tribes—cybersecurity services, payment processing, television advertising, and even retainer agreements with law firms that advise on gaming issues—as conduct on tribal land where the nonmember never set foot.

The Tribe falls back on the possibility that forum-selection clauses could allow nonmembers to escape tribal jurisdiction. Br. in Opp. 30. But as the Tribe acknowledges, a forum-selection clause would be worth only as much as a tribal court's willingness to enforce it. *Ibid.* And the suggestion is antithetical to the presumption against tribal jurisdiction over nonmembers. *Plains Commerce Bank*, 554 U.S. at 330. Although dissents may have treated forum-selection clauses as a panacea for expansive tribal jurisdiction, *id.* at 346 (opinion of Ginsburg, J.), *the Court* has never required nonmembers to negotiate with tribes to relinquish jurisdiction they do not rightfully possess, *id.* at 338.

Confusion about the limits of tribal power has only grown since this Court was unable to reach a decision in *Dollar General Corp.* v. *Mississippi Band of Choctaw Indians*, 579 U.S. 545 (2016) (per curiam). The Court should grant review before the Ninth Circuit's decision unleashes further unlawful exercises of tribal jurisdiction.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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