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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

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

TABLE OF CONTENTS

Page

A. This Court Should Hold This Petition Pending Its Disposition Of The Lead Petition And Any Further Proceedings In That Case 3

B. Respondents' Jurisdictional Argument Is No Barrier To Granting The Petition, Vacating The Judgment, And Remanding For Further Consideration 6

TABLE OF AUTHORITIES

Cases **Page(s)**

Antonyuk v. *James*,
144 S. Ct. 2709 (2024).....7

Atkinson Trading Co. v. *Shirley*,
532 U.S. 645 (2001).....6

Bartenwerfer v. *Buckley*,
598 U.S. 69 (2023).....5

Brecht v. *Abrahamson*,
507 U.S. 619 (1993).....10

Daimler AG v. *Bauman*,
571 U.S. 117 (2014).....5

Duro v. *Reina*,
495 U.S. 676 (1990).....8

Ex parte Young,
209 U.S. 123 (1908).....8

Federal Energy Administration v.
Algonquin SNG, Inc.,
426 U.S. 548 (1976).....8

Henry v. *Rock Hill*,
376 U.S. 776 (1964).....7

Hornell Brewing Co. v. *Rosebud Sioux*
Tribal Court,
133 F.3d 1087 (8th Cir. 1998).....4

Cases (continued) **Page(s)**

Iowa Mutual Insurance Co. v. *LaPlante*,
480 U.S. 9 (1987).....11

Kiowa Tribe of Oklahoma v. *Manufacturing Technologies, Inc.*,
523 U.S. 751 (1998).....5

Lawrence v. *Chater*,
516 U.S. 163 (1996).....7

Lebron v. *National Railroad Passenger Corp.*,
513 U.S. 374 (1995).....5

Lexington Insurance Co. v. *Smith*,
94 F.4th 870 (9th Cir. 2024) 1, 2, 6

Lexington Insurance Co. v. *Smith*,
117 F.4th 1106 (9th Cir. 2024) 3, 5, 6

Michigan v. *Bay Mills Indian Community*,
572 U.S. 782 (2014).....11

Montana v. *United States*,
450 U.S. 544 (1981).....2

National Farmers Union Insurance Cos. v. *Crow Tribe*,
471 U.S. 845 (1985).....8, 9, 10, 11

Nevada v. *Hicks*,
533 U.S. 353 (2001).....8, 9, 10

Plains Commerce Bank v. *Long Family Land & Cattle Co.*,
554 U.S. 316 (2008).....2, 4, 5, 10, 11

Cases (continued) **Page(s)**

Pulliam v. *Allen*,
466 U.S. 522 (1984).....9, 10

Robb v. *Connolly*,
111 U.S. 624 (1884).....10

Strate v. *A-1 Contractors*,
520 U.S. 438 (1997).....8

Tafflin v. *Levitt*,
493 U.S. 455 (1990).....9

U.S. Bancorp Mortgage Co. v. *Bonner Mall Partnership*,
513 U.S. 18 (1994).....7

United Natural Foods, Inc. v. *NLRB*,
144 S. Ct. 2708 (2024).....7

United States v. *Munsingwear, Inc.*,
340 U.S. 36 (1950).....7

Whole Woman's Health v. *Jackson*,
595 U.S. 30 (2021).....2, 8, 9, 10

Statutes

28 U.S.C. § 2106 7

Other Authorities

Sup. Ct. R. 14.1(a) 5

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REPLY BRIEF FOR PETITIONER

Petitioner made a modest request that this Court hold this petition pending potential review of *Lexington Insurance Co.* v. *Smith*, 94 F.4th 870 (9th Cir. 2024), petition for cert. pending sub nom., *Lexington Insurance Co.* v. *Suquamish Tribe*, No. 24-884 (filed Feb. 13, 2025). The Ninth Circuit relied solely on that decision to resolve this case. Pet. App. 4a-5a. Respondents agree that "all the facts material to the outcome" in the lead case are "present" here. Br. in Opp. 7. And they do not venture any reason why a hold would be unwarranted.

What respondents do say only confirms that this Court should grant review in the lead case. They highlight that the Ninth Circuit's decision rests exclusively

on off-reservation conduct, identify no decision of any other appellate court that has approved tribal-court jurisdiction over such conduct under *Montana* v. *United States*, 450 U.S. 544 (1981), and even admit that the decision below conflicts with the Seventh Circuit as to whether the exercise of tribal jurisdiction 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* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008). See Br. in Opp. 13-21. In short, respondents' brief confirms that the court of appeals endorsed in the lead case the novel proposition that a nonmember's off-reservation provision of commercial services "'satisfies the requirements for conduct occurring on tribal land.'" Pet. App. 5a (quoting *Lexington Insurance Co.* v. *Smith*, 94 F.4th at 882).

In an effort to paint this case as a bad vehicle for assessing the Ninth Circuit's legal fiction that tribal nonmembers can be on tribal land without ever setting foot there, respondents repeat their objection, which was rejected by both courts below, that Article III does not allow federal-court actions against tribal judges. Pet. App. 3a, 24a. They strain to analogize actions brought against tribal judges to prevent those judges' exercise of jurisdiction in violation of federal law to the action in *Whole Woman's Health* v. *Jackson*, 595 U.S. 30 (2021), which was brought against state judges to test the constitutionality of a state law that the state judges had coequal jurisdiction to apply or invalidate. Br. in Opp. 8-12.

The lead case does not implicate *Whole Woman's Health* because the Suquamish Tribe intervened to defend its tribal court's jurisdiction. *Lexington Insurance Co.* v. *Smith*, 94 F.4th at 878. This Court need

not pass on respondents' jurisdictional objection in this case to hold the petition and to grant the petition, vacate the judgment, and remand for further proceedings in the event of a decision in the lead case. And at any rate, respondents' theory is baseless—and no reason to jettison decades of federal-court decisions, including many from this Court, endorsing challenges to unlawful exercises of tribal-court jurisdiction.

A. This Court Should Hold This Petition Pending Its Disposition Of The Lead Petition And Any Further Proceedings In That Case

1. Respondents, like the Ninth Circuit, agree that this case shares "all the facts material to the outcome" in *Lexington Insurance Co.* v. *Suquamish Tribe*. Br. in Opp. 7; see Pet. App. 4a. They also concede that the Ninth Circuit resolved the question of tribal jurisdiction in their favor on the sole ground that its earlier published decision "squarely addressed and resolved the issue." Br. in Opp 7. Thus, although respondents never address petitioner's request (Pet. 11-12) that this petition should be held pending disposition of the petition in No. 24-884, that approach would best accord with this Court's longstanding practice.

2. Respondents also provide no sound reason against granting review in the lead case. They principally argue that the decision below does not implicate any conflict among the lower courts. Br. in Opp. 14-20. But they do not dispute that 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." *Lexington Insurance Co.* v. *Smith*, 117 F.4th 1106, 1114 (9th Cir. 2024) (Bumatay, J., dissenting from denial of rehearing en banc).

Indeed, respondents not only confirm that the Ninth Circuit's decision rests solely on off-reservation conduct, but also highlight the breadth of tribal jurisdiction as the Ninth Circuit now conceives it. According to respondents, a tribe can exercise jurisdiction over a nonmember if "the conduct sought to be regulated" has a "nexus" to tribal land—such as petitioner's "denial of coverage under a policy that is directly connected to tribal land"—unless the nonmember affirmatively opts out of tribal jurisdiction by contract through a "forum selection clause." Br. in Opp. 16. On this view, jurisdiction over a nonmember is proper simply because "a private party"—petitioner—"has consented to insuring tribally owned property on tribal trust land within the tribe's reservation." *Id*. at 17; see also *id.* at 18 (purporting to distinguish *Hornell Brewing Co.* v. *Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), on the ground that petitioner signed a contract to insure "property physically located on the [Cabazon] Band's reservation for losses occurring on-reservation"). This ringing endorsement of tribal jurisdiction over off-reservation contracts that relate to tribal land departs from decisions of other circuits and this Court. No. 24-884 Pet. at 14-19, 22-27.

Respondents also concede that "the Ninth and Seventh Circuits have seemingly taken divergent positions" on whether tribal jurisdiction must flow from "a 'sovereign interest' of the Tribe" under *Plains Commerce Bank*. Br. in Opp. 21. They principally argue that, if the Ninth Circuit had applied that requirement, the Tribe's interest in maximizing "casino revenues" would justify tribal jurisdiction over petitioner's off-reservation practice of insurance. *Id.* at 21-22. But this Court has observed that "[t]ribal enterprises," including "gambling" establishments, fall "beyond what

is needed to safeguard tribal self-governance." *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998). In any event, even if respondents had an argument to establish an inherent sovereign interest that could support tribal jurisdiction, this Court could correct the Ninth Circuit's "evisceration of *Plains Commerce*" and then remand for the Ninth Circuit to apply the correct legal framework. *Lexington Insurance Co.* v. *Smith*, 117 F.4th at 1115 (opinion of Bumatay, J.).*

Finally, respondents assert that the question decided by the Ninth Circuit is not in fact presented because a supposed "agent" of petitioner—Alliant Insurance Services—entered the reservation. Br. in Opp. 13. But respondents stipulated below that "[n]o employee of [petitioner] has physically entered the Reservation at any time." Opp. App. 16a. Although Alliant, a third-party program administrator, did visit the reservation to collect information related to policy renewals, neither in the lead case nor in this case did the Ninth Circuit uphold tribal-court jurisdiction based in any respect on Alliant's visits. The Ninth Circuit instead

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* Respondents also argue that petitioner should have formulated a separate question presented on *Plains Commerce Bank*. Br. in Opp. 20. But the "statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Sup. Ct. R. 14.1(a). Petitioner properly presented a single question—whether the tribal court had jurisdiction over its off-reservation conduct—that implicates multiple reasons why the conduct's off-reservation location prevents respondents from establishing jurisdiction. Pet. i. Rule 14 did not require petitioner to separate each of those reasons into a distinct question presented. *E.g.*, *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 75 n.2 (2023); *Daimler AG* v. *Bauman*, 571 U.S. 117, 136 n.16 (2014); *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379-380 (1995).

held that petitioner could be subject to tribal authority "without ever physically stepping foot on tribal land." *Lexington Insurance Co.* v. *Smith*, 94 F.4th at 881; see Pet. App. 5a. Alliant's visits did not factor into the court of appeals' analysis because they have no nexus to (and thus cannot be a jurisdictional beachhead for) the Cabazon Band's claims, which concern petitioner's off-reservation denial of coverage under an insurance policy that was issued off the reservation. *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 656 (2001).

Respondents' reliance on irrelevant visits by a mere "middleman" underscores what has been true all along: Petitioner "conducted no activity whatsoever on the Tribe's land." *Lexington Insurance Co.* v. *Smith*, 117 F.4th at 1124-1125 (opinion of Bumatay, J.).

B. Respondents' Jurisdictional Argument Is No Barrier To Granting The Petition, Vacating The Judgment, And Remanding For Further Consideration

Respondents object that this Court cannot reach the merits in this case on the theory that federal courts lack Article III jurisdiction to entertain claims against tribal judges. Br. in Opp. 8-12. The lead case is free from this jurisdictional objection, which this Court need not address to hold the petition and, depending on the lead case's disposition, to grant the petition, vacate the judgment, and remand the case for further proceedings. In any event, the objection (rejected twice below, Pet. App. 3a, 24a) is meritless.

1. This Court can "vacate * * * any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the

entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. The Court routinely exercises this power to grant certiorari, vacate the judgment, and remand the case (GVR) for a lower court to consider an intervening decision of the Court. *Lawrence* v. *Chater*, 516 U.S. 163, 169 (1996) (per curiam).

Because a GVR is not a "final determination on the merits," this Court need not be "certain that the case [is] free from all obstacles to reversal on an intervening precedent" to remand for further consideration. *Henry* v. *Rock Hill*, 376 U.S. 776, 776-777 (1964) (per curiam). The Court has often and recently GVR'd for further consideration in light of an intervening decision even when the respondent raises doubts about the court of appeals' jurisdiction. *E.g.*, Br. in Opp. at 24, *Antonyuk* v. *James*, 144 S. Ct. 2709 (2024) (No. 23-910); Br. in Opp. at 14-22, *United Natural Foods, Inc.* v. *NLRB*, 144 S. Ct. 2708 (2024) (No. 23-558). The alternative rule would perversely allow a respondent to shield a decision on the merits from a GVR by resurrecting jurisdictional objections that the court of appeals rejected below.

The Court's power to GVR without addressing a jurisdictional objection also finds support in its line of decisions under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). The Court can vacate a decision on the merits "once it has been determined that the requirements of Article III no longer are (or indeed never were) met." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 21 (1994). If the Court can vacate a decision when the absence of jurisdiction is *established*, it surely has the power to vacate when the absence of jurisdiction is merely *asserted*.

The court of appeals on remand, after all, could enter judgment on the merits for petitioner only if it determines (again) that jurisdiction exists. Pet. App. 3a.

A GVR in the event of further proceedings in the lead case would be appropriate. Respondents did not file a cross-petition seeking to modify the judgment. *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976). Nor would their jurisdictional objection have been worthy of review. In fact, respondents assert that "no other circuit court or state court of last resort has decided the question" and that this Court's resolution on the question "would be premature." Br. in Opp. 12.

2. Respondents' objection to Article III standing is baseless anyway. This Court has long heard cases that nonmembers filed against tribal judges. *Nevada* v. *Hicks*, 533 U.S. 353, 355 n.1 (2001); *Strate* v. *A-1 Contractors*, 520 U.S. 438, 444 (1997); *Duro* v. *Reina*, 495 U.S. 676, 682 (1990); *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845, 848 (1985). Respondents contend that *Whole Woman's Health* v. *Jackson* now bars suits under *Ex parte Young*, 209 U.S. 123 (1908), against tribal judges. Br. in Opp. 8-12. The court of appeals properly rejected that argument. Pet. App. 3a.

In *Whole Woman's Health*, plaintiffs attempted to test the constitutionality of a state law through an action against a state judge (and a state clerk) on the theory that the judge might hear (or the clerk might docket) a future action under the state law. 595 U.S. at 36-37. This Court held that the plaintiffs could not maintain their action against the state judge or state clerk for two principal reasons. First, *Ex parte Young* "does not normally permit federal courts to issue injunctions against state-court judges or clerks" because

they "do not enforce state laws as executive officials might" and instead "work to resolve disputes between parties." *Id.* at 39. State judges have coequal jurisdiction to hear constitutional challenges to state laws, and parties are expected to appeal from those decisions, "including to this Court," rather than seek "the entry of an *ex ante* injunction preventing the state court from hearing cases." *Ibid.* Second, this Court reasoned that "'no case or controversy' exists 'between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute.'" *Id.* at 40 (quoting *Pulliam* v. *Allen*, 466 U.S. 522, 538 n.18 (1984)).

Neither reason applies here. As the Ninth Circuit explained, "*Whole Woman's Health* involved only a suit against state-court judges (not a suit against tribal-court judges) and an attack only against a statute's constitutionality (not an attack on the jurisdiction of a judge's court)." Pet. App. 3a.

The difference between a state court and a tribal court is critical. When a tribal court wrongly asserts jurisdiction, the nonmember cannot remove the case to federal court or pursue an appeal up to this Court. *Hicks*, 533 U.S. at 368. Collateral litigation instead is the standard way—which this Court has already endorsed—to press the claim that "federal law has divested the Tribe" of sovereignty to compel a nonmember "to submit to the civil jurisdiction of a tribal court." *National Farmers*, 471 U.S. at 852-853.

Respondents rely on a flawed one-to-one "analog[y]" between "state and tribal court judges." Br. in Opp. 9. This Court has "consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin* v. *Levitt*,

493 U.S. 455, 458 (1990). The Court also has often pointed to the fact that state judges take an oath "to uphold the Constitution" and federal laws under the Supremacy Clause. *Brecht* v. *Abrahamson*, 507 U.S. 619, 636 (1993); see, *e.g.*, *Robb* v. *Connolly*, 111 U.S. 624, 637 (1884). In contrast, tribal courts are not "courts of general jurisdiction in th[e] sense" described in *Tafflin*. *Hicks*, 533 U.S. at 367. And tribal judges, unlike their state counterparts, exercise "'a sovereignty outside the basic structure of the Constitution'" and so need not honor constitutional rights. *Plains Commerce Bank*, 554 U.S. at 337 (citation omitted). The upshot is that, while state judges presumptively have authority to adjudicate federal issues, the presumption is flipped against tribal-court jurisdiction over nonmembers. *Id.* at 330.

Nor has petitioner sued tribal judges as a vehicle to test the constitutionality of a law that might be enforced against it. Petitioner (which seeks to challenge respondents' improper assertion of tribal-court jurisdiction) and respondents (who "exist to resolve controversies" presented in tribal court) are adverse to each other within the meaning of Article III on the question of tribal-court jurisdiction. *Whole Woman's Health*, 595 U.S. at 40; cf. *id.* at 42 (distinguishing situation where plaintiff seeks an injunction "to prevent the judge from enforcing a rule of her own creation" (citing *Pulliam*, 466 U.S. at 526)).

Shielding tribal judges who assert jurisdiction contrary to federal law from suit would destabilize the sequence that this Court has prescribed for challenging tribal-court jurisdiction. *National Farmers* establishes that nonmembers typically must first exhaust their challenge to tribal jurisdiction in tribal court, 471 U.S. at 856-857, and then can seek protection

from tribal overreach in federal court, *id.* at 852-853. See *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9, 19 (1987). If respondents were right that *Whole Woman's Health* precluded federal-court actions against tribal judges, then tribes could escape federal-court review of actions that they bring against non-members by asserting sovereign immunity from suit. *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782, 788 (2014). That troubling outcome would expand "the limited nature of tribal sovereignty" in practice and strike a blow to "the liberty interests of non-members." *Plains Commerce Bank*, 554 U.S. at 334.

It is bad enough that the Ninth Circuit erred in upholding tribal-court jurisdiction over petitioner's off-reservation conduct. Yet respondents seek not only to defend their newfound extraterritorial powers but also to immunize themselves from structural safeguards in federal court that deter future abuses. This Court need not address respondents' jurisdictional objection to hold this petition or to GVR. But if and when the Court has cause to address the issue, it should reaffirm that federal courts have long played an important and proper role in restraining tribal judges who overstep the limits on their jurisdiction.

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The petition for a writ of certiorari should be held pending this Court's disposition of the petition for a writ of certiorari in *Lexington Insurance Co.* v. *Suquamish Tribe*, No. 24-884 (filed Feb. 13, 2025), and any further proceedings in this Court, and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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April 29, 2025