No. 24-884

In the Supreme Court of the United States

LEXINGTON INSURANCE COMPANY, ET AL.,
PETITIONERS

v.

SUQUAMISH TRIBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners challenge tribal jurisdiction on two independent grounds that are not in fact presented and bear no resemblance to the Ninth Circuit's decision.

Petitioners offer insurance under a "Tribal First" program "marketed specifically to tribes" and "'focused exclusively'" on "'tribal governments and enterprises.'" In proceedings below, the Ninth Circuit recognized that "tribal jurisdiction is 'cabined by geography,'" and nonmember "conduct must have occurred within the boundaries of the reservation." But in a "narrow" holding limited to this "unique" context, it found that jurisdictional "prerequisite" satisfied: petitioners insured "tribally owned buildings and businesses located on tribal trust land," and the "provision of insurance" was "business conduct on tribal land." It therefore held petitioners' "conduct occurred not only on the reservation, but on tribal lands."

In reaching that conclusion, the panel "emphasize[d]" its holding was limited. It has no bearing outside a tribal-focused program insuring tribal properties and tribal businesses on tribal land under a direct contract with the Tribe itself. And the panel found that petitioners' activities "implicate[]" core "tribal sovereignty principles"—"the Tribe's sovereign interest in managing its businesses on tribal lands is at stake."

The questions (not) presented are:

1. Whether a tribal court can exercise jurisdiction based on off-reservation conduct—a question *not* presented under the panel's express finding of *on*-reservation conduct.

2. Whether tribal jurisdiction requires an "inherent sovereign interest"—a question neither relevant (the panel *identified* such an interest) nor preserved (the question is discussed, but not *presented*, in the petition).

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STATEMENT

1. This case "involves an insurance claim covering tribal properties on tribal land brought by a tribe and its businesses." Pet. App. 5a.

Petitioners operate under "the Tribal Property Insurance Program," which uses "the moniker Tribal First." *Id.* at 6a-7a. This is not ordinary insurance offered to the general public; it is a "specialized" program "'focused exclusively'" on "'tribal governments and enterprises.'" *Id.* at 32a. It is "marketed specifically to tribes" and "'structure[s] insurance programs'" to "'safeguard both [tribal] operations and [tribal] employees.'" *Id.* at 7a, 21a. It is "'the largest provider of insurance solutions to Native America and a leader in the specialty areas of tribal business enterprises.'" *Id.* at 7a.

Since 2015, the Suquamish Tribe and its economic-development arm (Port Madison) bought Tribal First policies from petitioners. Those policies covered "'all risks of physical loss or damage' to 'property of every description both real and personal' located on the trust lands," together with "interruptions to business and tax revenues generated within the Reservation." Pet. App. 8a. "All tribally owned businesses [were] located on tribal trust lands within the Reservation's boundaries," and functioned to "develop community resources 'while promoting the economic and social welfare of the Tribe.'" *Id.* at 31a-32a. The policies covered "almost $242 million worth of real property, $50 million worth of personal property, and $98 million of business interruption value—all centered on Tribal trust lands." *Id.* at 8a. For the year in question, the Tribe and Port Madison "paid $231,963.00" and "$1,336,007.00" for "coverage under their respective policies." *Id.* at 33a-34a.

With COVID-19's outbreak, the Tribe "restricted access to certain public facilities" and "suspended operations at all tribal businesses on the Reservation." Pet. App. 8a. The Tribe ultimately suffered "damage to the buildings on trust lands, loss of business income and tax revenue, and costs associated with disinfecting and sanitizing the business premises." *Ibid.* But when the Tribe made a claim on its "All Risk" policies, petitioners denied coverage. *Id.* at 8a-9a.[1]

2. The Tribe sued petitioners in tribal court to enforce its rights, and petitioners challenged the tribal court's jurisdiction. After the tribal trial and appellate courts up-

[1] Petitioners disparage the Tribe's policy claims (Pet. 34) while ignoring that hundreds of major businesses nationwide read their own policies the same way and sought the same relief.

held jurisdiction under "the Tribe's inherent right to exclude" and *Montana*'s first exception, the parties "agreed to stay further proceedings" so petitioners could litigate jurisdiction in federal court. Pet. App. 9a; *id.* at 129a (appellate holding).

3. The district court rejected petitioners' challenge: because the policies "arose out of activities occurring on tribal land," "a tribe's sovereign right to exclude" and "the consensual relationship between the parties confers tribal adjudicative authority." Pet. App. 30a.

The court confirmed "the dispute involves conduct or activities on tribal land": petitioners "maintain a direct contractual relationship with the Tribe," and "providing insurance to businesses and property owned by the Tribe," "operated by the Tribe," "and located on tribal land involves conduct or activity on tribal land that concerns tribal sovereignty." Pet. App. 40a, 43a-44a. This activates tribal jurisdiction under the right to exclude (*id.* at 44a) and *Montana*'s first exception (*id.* at 49a n.12). *Id.* at 10a (summarizing holding).

4. The Ninth Circuit affirmed. Pet. App. 1a-29a. After flagging "the right to exclude" and *Montana*'s "second exception" as potential alternative grounds, it upheld tribal jurisdiction under *Montana*'s first exception. *Id.* at 6a.

The panel initially traced "several longstanding principles" of tribal jurisdiction, including that tribes generally "'do not'" have jurisdiction over "nonmembers," "a tribe's jurisdiction cannot extend past the [reservation] boundaries," and even if "conduct has occurred within [the reservation]," "a tribe's adjudicative jurisdiction cannot exceed its legislative jurisdiction." Pet. App. 11a-12a.

Applying those principles, the panel held tribal jurisdiction was authorized under these "unique facts." Pet. App. 15a. It first "concluded" petitioners' "conduct occurred not only on the reservation, but on tribal lands."

Id. at 13a. Petitioners' insurance "involves tribally owned buildings and businesses located on tribal trust land," and the "provision of insurance" was "business conduct on tribal land." *Id.* at 14a. As the panel explained, "[t]ribal land literally and figuratively underlies the contract at issue"—"[w]hat could be more quintessentially tribal-land-based than an insurance policy covering buildings and businesses on tribal land?" *Id.* at 15a; *id.* at 18a (finding "a clear nexus" between the Tribe's claim and petitioners' "coverage of tribal properties on tribal land").

The panel also found no "surprise" that petitioners' "contract with the Tribe would trigger tribal authority": petitioners acted through "an insurance program marketed specifically to tribes," and "provide[d] insurance coverage for businesses and properties on tribal trust land"—"[t]he transaction had tribe and tribal lands written all over it." Pet. App. 21a-22a. While stressing "the limited scope of tribal jurisdiction," the panel declared "the Tribe's sovereign interest in managing its businesses on tribal lands is at stake," and "tribal sovereignty principles are [thus] implicated." *Id.* at 24a; *id.* at 26a-27a (petitioners' conduct "implicates the Tribe's authority over self-government and internal relations").

The panel finally cautioned that its holding was "narrow": petitioners "explicitly marketed to tribal entities," "entered into an insurance contract with a tribe," "covered property located on tribal lands," and the action "arose directly out of the contract." Pet. App. 27a. It accordingly did not follow that "nonmember[s]" are "subject to tribal jurisdiction anytime [they] do[] business with a tribe." *Ibid.* Instead, the panel "emphasize[d]," these "circumstances" are limited: "tribal jurisdiction is proper because the relevant insurance policy covers the properties and operations of a tribal government and businesses that

extensively 'involved the use of tribal land' and the businesses 'constituted a significant economic interest for the tribe.'" *Id.* at 28a.

5. The Ninth Circuit denied rehearing. Pet. App. 54a-106a.

Judge Bumatay dissented, asserting the panel "gutted any geographic limits of tribal court jurisdiction" by not requiring "actual *on-reservation actions or conduct*." Pet. App. 73a. Yet Judge Bumatay nowhere explained why insuring tribal businesses on tribal lands is *not* "on-reservation" activity—much less where (in his view) that activity is *instead* taking place. Judge Bumatay also objected that "even if a nonmember satisfies the geographic nexus to tribal land," the decision in *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), silently modified *Montana* and added "another hurdle": tribal jurisdiction requires "an inherent sovereign interest," which he presumed unsatisfied here. *Id.* at 71a-72a.

In response, 16 judges rejected the dissent's take. As they explained, petitioners' "conduct took place on tribal land," "this case directly implicates sovereignty over the land," and the panel's "holding" was ultimately "narrow": "no court has addressed a situation like *Lexington*." Pet. App. 64a-66a. In their view, the dissent distorted the panel's holding and misstated the facts: his "recasting of this case endeavors to reshape the record," and "[h]is claim that the panel 'gutted any geographic limits of tribal court jurisdiction' is unfounded." *Id.* at 59a.

ARGUMENT

A. Neither Question Discussed In The Petition Is *Actually* Presented

Petitioners ask this Court to resolve two purported splits targeting distinct questions about tribal jurisdiction: (i) whether tribal jurisdiction reaches off-reservation conduct; and (ii) whether, under *Plains Commerce*, tribal jurisdiction separately requires an "inherent sovereign interest." Pet. 4-5. Putting aside petitioners' other failings, review is unwarranted for a foundational reason: neither question is *actually* presented.

The first question (off-reservation conduct) is not factually presented: the Ninth Circuit recognized, expressly, that tribal jurisdiction requires on-reservation conduct (Pet. App. 12a); it repudiated that tribes can regulate off-reservation activities (*id.* at 11a-12a); and it held petitioners' activity—insuring tribal businesses and properties on tribal land within the tribal reservation via a contract with the Tribe itself—constituted "conduct occurring on tribal land" (*id.* at 19a). This case presents no occasion to decide whether tribal jurisdiction reaches "off-reservation conduct" (Pet. I)—because *no off-reservation conduct* exists.

The second question (*Plains Commerce*) is not presented at all. Literally. Petitioners neglected to include that distinct question in their questions presented (as this Court requires), thereby forfeiting the question. Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition" "will be considered by the Court."). There is no need to save petitioners from themselves—especially when the outcome would be the same even under petitioners' (mistaken) formulation.

1. a. Petitioners preserved a single question, and it is premised entirely on the tribal action covering "off-reservation conduct." Pet. I. That is the irreducible core of their

petition. They fault the Ninth Circuit for wrongly expanding "tribal jurisdiction to off-reservation conduct." *Id.* at 5. They insist the sole regulated activity is "petitioners' off-reservation practice of insurance." *Id.* at 13. They declare the Ninth Circuit disavowed "the geographic scope of tribal sovereignty" and ignored that "tribal sovereignty is territorial." *Id.* at 12-13. And they leverage these assertions—the panel upheld "tribal jurisdiction" "solely on [petitioners'] off-reservation conduct"—to justify their entire case for review: it is the factual predicate for claiming the Ninth Circuit created a circuit conflict, contravened this Court's decisions, and "vast[ly] expan[ded] tribal jurisdiction." *Id.* at 12-13. Unless "petitioners' conduct occurred off the reservation" (*id.* at 31), petitioners have no case.

b. Unfortunately for petitioners, the Ninth Circuit held—the opposite. Repeatedly. In unequivocal language. It confirmed petitioners' "nonmember conduct" *did* "occur[] on tribal land." Pet. App. 17a. It devoted an entire *section* to "Conduct on Tribal Lands." *Id.* at 13a. It explained "the commercial relationship" "involves tribally owned buildings and businesses located on tribal trust land," with petitioners' "provision of insurance" constituting "business conduct on tribal land." *Id.* at 14a. Far from expanding "tribal jurisdiction to off-reservation conduct" (contra Pet. 5), the panel *rejected* that conduct occurred off-reservation: petitioners' "conduct occurred not only on the reservation, but on tribal lands." Pet. App. 13a. In fact, the panel's position satisfies *petitioners'* view of controlling law: "jurisdiction under *Montana* requires 'nonmember conduct *inside* the reservation'" (Pet. 4)—just as the panel held (Pet. App. 12a).

In so concluding, the panel examined the "unique facts of the Tribe's suit against [petitioners]." Pet. App. 15a. Its analysis was unambiguous: "the insurance policies cover

the Tribe's" "businesses and properties on the Tribe's trust lands"; the dispute "centers" on "losses and expenses incurred by those businesses and properties on the trust lands"; and "[t]ribal land literally and figuratively underlies the contract at issue." *Ibid.* The panel was clear: "What could be more quintessentially tribal-land-based than an insurance policy covering buildings and businesses on tribal land?" *Ibid.* Unlike petitioners' version, the "core" activity was "insuring tribal properties on tribal land"—an obvious form of "conduct on tribal land." *Id.* at 18a. Petitioners' contrary reading is untenable.

Nor was the panel alone in its conclusion. The district court also so held: "providing insurance to businesses and property owned by the Tribe," "operated by the Tribe," and "located on tribal land involves conduct or activity on tribal land." Pet. App. 44a. And 16 circuit judges agreed: petitioners' "actions qualified as conduct on tribal lands"—indeed, "it is difficult to understand why providing insurance policies that exclusively cover tribal property on trust land should not count as conduct occurring on tribal land." *Id.* at 59a-60a. Petitioners perhaps disagree (albeit without explaining why), but they cannot simply redline the operative holdings.

In sum, the panel "easily conclude[d] that [petitioners'] business relationship with the Tribe satisfies the requirements for conduct occurring on tribal land, thereby occurring within the boundaries of the reservation." Pet. App. 19a. That forecloses petitioners' core premise: "a commercial agreement that solely involves tribal property on trust land" "fulfill[s] the territorial component for finding that nonmember conduct occurred on tribal land." Pet. App. 15a. Petitioners have an obvious incentive to imagine "petitioners' conduct occurred off the reservation" (Pet. 31), but they cannot invert the real-world holding to manufacture a case for review.

c. The "off-reservation" question is not properly presented for another reason: there is no dispute over the legal standard. Under any fair reading, the Ninth Circuit adopted the same legal principles and applied the same framework as petitioners themselves. Everyone agrees that tribal jurisdiction has an essential geographic component: the relevant conduct must occur within the reservation. Pet. App. 11a-12a ("tribal jurisdiction" "cannot extend past the boundaries of the reservation"). The Ninth Circuit did not ignore that "territorial" principle (contra Pet. 12-13)—the court expressly applied it: "whether conduct occurred on tribal lands" "underlies our jurisdictional analysis"—"indeed," it is "a prerequisite to tribal jurisdiction." Pet. App. 12a-13a.

At bottom, petitioners disagree with the panel's application of settled law to this "unique" context (Pet. App. 15a): a tribal-insurance program protecting tribal businesses and properties on tribal lands under a contract with the Tribe itself. *Id.* at 5a, 6a-8a. Petitioners have no answer for the actual holding. They brush aside its "limit[ing]" language. *Id.* at 24a, 27a ("[t]he circumstances" "resulting in tribal jurisdiction are narrow"). They ignore the panel's embrace of their own legal rule. *Id.* at 12a ("the conduct must have occurred within the boundaries of the reservation"). If petitioners disagree that their conduct was on-reservation, they should have confronted that holding directly. They instead asked the wrong question. There is no occasion to decide whether tribal jurisdiction reaches "off-reservation" activities

when the Ninth Circuit held the opposite: "all [relevant] conduct occurred" "on tribal lands." *Id.* at 13a.[2]

d. Petitioners' meager response only confirms the weakness of their position. According to petitioners, the panel "acknowledged that 'all relevant conduct occurred off the Reservation.'" Pet. 35 (quoting Pet. App. 15a); accord *id.* at I, 3, 10, 14, 18, 25. But petitioners omit the key leading clause: "[a]ny *suggestion* that * * * all relevant conduct occurred off the Reservation." Pet. App. 15a (emphasis added). The panel did not find off-reservation conduct; it was recapping (before repudiating) *petitioners' own argument*. *Id.* at 15a-16a. It is no wonder petitioners fail to reproduce the full quotation, despite trumpeting this language throughout their petition. Their core argument is an obvious mischaracterization of a snippet from a single sentence of a 29-page opinion. They have truncated the sentence in a manner that fundamentally changes the sentence's meaning. That is reason alone to deny review.

Lest there be any doubt, one need only skim the paragraphs immediately before and after the snippet. In those paragraphs, the panel unambiguously concluded that all relevant conduct occurred on the reservation. Pet. App.

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[2] Simple question: The relevant activity is providing insurance to tribal properties and businesses. Pet. App. 21a-22a. That activity occurs where the properties exist, the businesses operate, and the coverage is provided—on tribal land. If petitioners disagree, why register the policies in Washington (Pet. 8)? Why not register in petitioners' home jurisdiction(s)? Where exactly do petitioners think the activity *is* taking place—wherever the insurer happens to live? No one insuring a house thinks the relevant "activity" is anywhere but the home address; they do not sue for coverage across the country. And no jurisdiction thinks it cannot regulate parties insuring local businesses because a local policy is signed out of state. Petitioners have not squarely challenged the panel's "on-reservation" predicate finding for good reason: their position is specious.

15a (final clause in preceding paragraph: "nonmember conduct occurred on tribal land"); *id.* at 19a (conclusion of same subsection: "[w]e easily conclude that [petitioners'] business relationship with the Tribe satisfies the requirements for conduct occurring on tribal land"). In short, petitioners pluck a stray phrase from a long opinion, mischaracterize what the panel said, and then ignore what the panel held before and after that passing comment. While perhaps a powerful recipe for a DIG, this hardly cements a legitimate case for review.

As their final shot, petitioners argue the panel required only a "'direct connection'" to tribal land, which petitioners argue is insufficient. Pet. 32; see Pet. 3 (inadequate for "off-reservation conduct" to "'relate[] to tribal land[]'"). Petitioners again ignore what the panel said: the conduct in question both establishes and "*exceed[s]*" a "'direct connection.'" Pet. App. 15a (emphasis added). As the panel explained, everything here is "quintessentially" tribal. *Ibid.* The policies insure on-reservation properties and businesses. Every relevant feature involves on-reservation activity. This is not some random connection to tribal land: this is providing insurance for tribal properties and businesses on tribal land under a contract with the Tribe itself—all of which necessarily occurs *on the reservation*. *Id.* at 15a, 27a.

Petitioners again have no answer for these critical statements. They parrot the same misunderstanding of the panel's "narrow" holding (Pet. App. 27a) that infected the rehearing-stage dissent. But the same retort applies here: petitioners misunderstand the opinion, mischaracterize the facts, their "recasting" "endeavors to reshape the record," and their "claim that the panel 'gutted any geographic limits of tribal court jurisdiction' is un-

founded." *Id.* at 59a. There is no reason to waste time reviewing a contrived vehicle premised on a clear misassumption that flips the actual holding upside-down.

2. The second question (concerning *Plains Commerce*) is likewise not presented—but for a different reason. It is *in fact* not presented. Literally. It does not appear in the question(s) presented, which is an express requirement under Rule 14.1(a). *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 (1993). Petitioners instead framed a *single* question—one focused exclusively on "off-reservation conduct." Pet. I.

The second question (*Plains Commerce*) is orthogonal to the first: each raises separate concerns and implicates different considerations. One involves geographic limits, the other "inherent sovereign interests." The second is not included in the first, fairly or otherwise. *Yee* v. *City of Escondido*, 503 U.S. 519, 536 (1992). As petitioners and Judge Bumatay recognized, the questions are independent and distinct. Pet. 19 (conceding this constitutes an "independent, alternative reason"); Pet. App. 71a-72a (deeming *Plains Commerce* a distinct "hurdle," "even if a nonmember satisfies the geographic nexus to tribal land").

Under this Court's Rules, the Court will only consider the formal questions presented in the designated section of the petition. Sup. Ct. R. 14.1(a). This is an express requirement. It is not optional. It is easy to meet, and subject to forfeiture when not met. See *Izumi*, 510 U.S. at 31-32 ("Rule 14.1 would prevent us from reaching" an omitted question); *Yee*, 503 U.S. at 535 ("[t]he framing of the question presented has significant consequences"; Rule 14.1(a) is "prudential in nature, but we disregard it 'only in the most exceptional cases'"). Petitioners strategically chose (for whatever reason) to limit the question presented to a single question about off-reservation conduct,

without adding a separate question about inherent sovereign interests. It makes no difference that petitioners referenced the latter in the body of the petition. *E.g.*, *Wood* v. *Allen*, 558 U.S. 290, 304 (2010). Rule 14.1(a) requires the question to appear *in the questions presented*. A general discussion is insufficient. *Ibid.* ("'the fact that [petitioner] discussed this issue in the text of [his] petition for certiorari does not bring it before us"; "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review").

If petitioners wished to raise "both questions" (Pet. 14), they were obligated to *present* both questions. There is no reason to save petitioners from their own mistake.[3] The "off-reservation conduct" question is meritless but preserved; the *Plains Commerce* question is both meritless and forfeited. *Wood*, 558 U.S. at 304; *Yee*, 503 U.S. at 538.

B. The Decision Below Does Not Conflict With Any Decision Of Any Appellate Court

According to petitioners, the Ninth Circuit created or deepened multiple conflicts among the circuits and state high courts on "both questions." Pet. 14. Petitioners are mistaken.

1. a. First and foremost, no other court confronted a fact pattern like this. Unlike petitioners' authority, this case involves the "narrow" question of insuring *tribal* properties and *tribal* businesses on *tribal* land. Pet. App. 27a. The context here is "unique." *Id.* at 15a. Indeed, "no court has addressed a situation like *Lexington*" (*id.* at 66a): (i) petitioners "explicitly marketed to tribal entities"

[3] Especially given the flaws in the omitted question. As explained below, respondents established the necessary "inherent sovereign interests" (even were that a separate requirement), and there is no genuine circuit conflict over that question on these facts.

(*id.* at 27a); (ii) their activities "exclusively covered [tribal] properties" and "[tribal] operations" (*id.* at 27a-28a); (iii) the coverage implicated "'significant economic interest[s] for the tribe'" (*id.* at 28a); (iv) the contract was directly with the Tribe itself, not individual members (*id.* at 27a);[4] and (v) the question involved *tribal insurance*—an activity "literally and figuratively" covering "[t]ribal land" (*id.* at 15a).

None of the cases in the purported split confront these factors—and there is no indication any circuit would have decided *this* case differently. Those decisions did not involve conduct directly targeting tribal lands and tribal businesses. They did not involve insurance (tribal or otherwise). They did not involve programs designed and marketed specifically for tribes. And they generally involved tribal *members*, not a contract with the Tribe itself. Petitioners cannot credibly argue a conflict exists without a single case confronting any relevant factor, let alone coming out the opposite way.

While petitioners are less candid here, they were more forthcoming below. Before the panel, petitioners readily conceded this situation was in fact unique at the appellate level:

> Q: "[A]re there any cases of which you are aware in which an insurance company has insured tribal commercial properties on tribal land" "where tribal jurisdiction was denied?"

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[4] This factor is significant. The dealings of tribal properties and tribal corporations *are* the dealings of the Tribe. A sovereign entity has a distinct interest in enforcing its own sovereign contracts in its own courts—especially when those contracts target issues essential to the Tribe's economic stability, financial health, and ability to fund and operate core governmental functions. Enforcing these sovereign rights is inherent to tribal self-government. This factor is not similarly presented in any other case identified in the petition.

> A: "Your honor, I'm unaware of any case outside of a District of North Dakota case where that issue has been taken through to final resolution."

9th Cir. Oral Arg. at 9:25-10:03 <https://tinyurl.com/lexington-ca9-argument>. Petitioners' earlier concession was correct: not a *single* contrary circuit-level decision involved insuring tribal property and tribal businesses on tribal land, let alone in a contract with the Tribe itself. There is no circuit conflict, and no reason for this Court to be the second appellate court nationwide to address these "unique" circumstances (Pet. App. 15a).[5]

b. Even setting those problems aside, petitioners further ignore the obvious "contrast[]" between this case and others: every other decision focused on conduct occurring *outside* the reservation. Pet. App. 18a. "[T]he core of this appeal" is "a contract centered on insuring tribal properties on tribal land." *Ibid.* There is an obvious distinction between "conduct on tribal land" (here) and "conduct that could not even plausibly be viewed as connected to tribal land" (petitioners' cases)—which is why the panel distinguished the same authority petitioners stubbornly trot back out from other circuits. *Id.* at 18a-19a (addressing

[5] As for that North Dakota case? It likewise rejected petitioners' position and upheld tribal jurisdiction: "State Farm voluntarily entered into a contractual relationship with the Greenwoods, both of whom are tribal members, and the contract pertained to a home physically located on the Turtle Mountain Indian reservation. * * * [T]his was a sufficient consensual relationship with respect to an activity or matter occurring on the reservation to invoke the first *Montana* exception." *State Farm Ins. Cos.* v. *Turtle Mountain Fleet Farm LLC*, No. 12-94, 2014 WL 1883633, at *4, *11 (D.N.D. May 12, 2014); see also *id.* at *9-*11 (rejecting State Farm's argument that the relevant activity "occurred off the reservation"; "the important factors for purposes of *this* case, given the nature of the activity at issue, are that the insurance policy was issued to members of the Tribe and is for a residence located on the reservation").

petitioners' cases from the Seventh, Eighth, and Tenth Circuits); *id.* at 64a-66a (same).

Petitioners must understand this, which is why they resort to a contrived version of the panel decision—pretending "tribal jurisdiction" was "based solely on [petitioners'] off-reservation conduct." Pet. 12. Again, however, the panel held the *opposite*: "conduct must have occurred within the boundaries of the reservation," and the "conduct" here "occurr[ed] on tribal land." Pet. App. 12a, 19a. The panel meant what it said. It upheld tribal jurisdiction because petitioners' activity (insuring tribal properties and tribal businesses) was on "tribal land"—not, counterfactually, because "[o]nly the Ninth Circuit" extends tribal jurisdiction to "off-reservation conduct" (Pet. 12). Like all other courts, the Ninth Circuit "'cabin[s]'" "tribal jurisdiction" "'by geography'": "a tribe's jurisdiction cannot extend past the boundaries of the reservation." Pet. App. 11a-12a. Petitioners' purported conflict is premised entirely on an indefensible reading of the decision below. *Id.* at 59a (16 circuit judges so concluding).

In the end, petitioners have unearthed decisions applying the same legal principles to distinct contexts. Each court applied the identical framework to whatever situation appeared before it. In applying that uniform framework, the courts (unremarkably) found tribal jurisdiction appropriate over some claims but not others—upholding tribal jurisdiction for *on-reservation* conduct (the decision here) and rejecting tribal jurisdiction for *off-reservation* conduct (petitioners' other decisions). That is not a "conflict"—it merely reflects the same legal framework will have various outcomes on different facts. Contrary to petitioners' contention, zero decisions rejected tribal jurisdiction in this context.

2. Petitioners' position falters even more at a granular level. It takes only a cursory glance at each decision in the so-called "split" to understand petitioners' errors.

a. As their lead argument, petitioners claim a conflict with the Seventh Circuit. Pet. 15-16. This is baseless.

In *Jackson* v. *Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), three Illinois consumers obtained loans over the internet available to the general public for ordinary use. 764 F.3d at 768-769, 772. They had no connection to any tribe and no involvement with any reservation; the loan companies just so happened to be owned by a tribal member. *Id.* at 768, 772. That describes the *converse* of this situation: unlike insurers doing business on tribal land within the reservation, this was a tribal member conducting general business *outside the reservation*. See *id.* at 782 ("the Plaintiffs have not engaged in *any* activities inside the reservation"; "[t]hey applied for loans in Illinois by accessing a website"; "[t]hey made payments on the loans and paid the financing charges from Illinois"). One situation has nothing to do with the other. And it is not hard to understand the difference between offering internet loans to the general public and insuring *tribal* properties and *tribal* businesses on *tribal* land under a contract with *the Tribe itself*.[6]

Petitioners fare no better with *Stifel, Nicolaus & Co., Inc.* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015). As the panel explained, *Stifel* rejected tribal jurisdiction "over nonmembers who issued bonds for a tribe's *off-reservation investment project*." Pet. App. 18a (citing 807 F.3d at 189,

[6] The loan companies were "all limited liability companies organized under the laws of South Dakota" (764 F.3d at 772)—not exactly the same as "a tribally chartered economic development entity that is wholly owned by the Tribe and headquartered on tribal trust lands" (Pet. App. 6a).

207-208; emphasis added). Thus the core activity involved *off-reservation* funding for an *off-reservation* project (807 F.3d at 189)—the opposite of this situation. There is no plausible conflict: the Ninth Circuit, like the Seventh Circuit, confirmed that on-reservation conduct was required (Pet. App. 11a-12a; 807 F.3d at 207); it simply held petitioners' conduct *was* on-reservation. Pet. App. 13a, 19a. Nothing in *Stifel* cuts the other way.

In any event, petitioners misstate *Stifel*'s holding. The Seventh Circuit did not reject tribal jurisdiction because there were no "'consensual activities *on tribal land*.'" Pet. 15 (quoting 807 F.3d at 208). It rejected jurisdiction because there was *no nexus* between the tribal action and the on-reservation activity. 807 F.3d at 207-208. The tribal action sought to invalidate contracts on grounds irrelevant to the nonmember's on-reservation conduct. *Id.* at 208 (rather than seeking redress for "'misrepresent[ations]'" during on-reservation meetings, the actions sought to "void" the "bond documents" as "unapproved management contracts under the IGRA," etc.). *That* failing drove *Stifel*'s holding. *Ibid.*

Here, by contrast, the requisite "nexus" is "no mystery" (Pet. App. 23a): the "Tribe has provided a clear nexus between its breach-of-contract claim and [petitioners'] coverage of tribal properties on tribal land." *Id.* at 18a, 21a-22a. There is every reason to believe the Seventh Circuit would adopt the same conclusion as the Ninth Circuit in this "narrow" context (*id.* at 27a). Compare, *e.g.*, 807 F.3d at 208 ("[b]ecause the tribal court action does not seek redress for any of Stifel's consensual activities on tribal land, it does not fall within *Montana*'s first exception"—suggesting if the action *did* seek redress for consensual activities on tribal land, it *would* fall within *Montana*'s first exception).

Finally, petitioners' *Stifel* discussion misleads in an additional respect. Petitioners focus heavily on the fact that the bonds were secured by tribal property as collateral (Pet. 15 (citing 807 F.3d at 189-192)), which was true. What petitioners neglect to mention: the nature of the collateral was *irrelevant* to the analysis. It was not mentioned in *Stifel*'s operative discussion (807 F.3d at 207-208), and it was only noted in passing in the opinion's background section (*id.* at 189-192—about *fifteen pages* earlier). Petitioners have a transparent incentive to characterize *Stifel* as rejecting tribal jurisdiction despite that on-reservation hook. But tribal jurisdiction was lacking due to the disconnect (no nexus) between the tribe's claims and any on-reservation conduct—not because the bond-related collateral supposedly lacked a "tribal land[]"-based connection (contra Pet. 18).

b. Petitioners' reliance on cases from the Eighth Circuit is equally meritless. Pet. 16-17. Petitioners first highlight *Hornell Brewing Co.* v. *Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), which is mystifying. As the majority explained in denying rehearing, that case involved a tribal action against "nonmember breweries for their use of the name 'Crazy Horse' for their malt liquor." Pet. App. 65a (quoting 133 F.3d at 1093-1094). The product was "manufactured, sold, and distributed" "only outside the reservation," and it "had no connection to the reservation other than [general] advertising on the Internet." *Id.* at 66a (citing 133 F.3d at 1093); see also 133 F.3d at 1091 ("It is undisputed that the Breweries do not conduct those activities on the Rosebud Sioux Reservation or within South Dakota."). Assuredly petitioners understand the difference: a consumer product marketed and sold off-reservation (even with general internet advertising) is nothing like a "Tribal First" program exclusively target-

ing tribes to insure specific tribal properties and businesses on tribal lands. Pet. App. 6a-7a; see also *Allstate Indem. Co.* v. *Stump*, 191 F.3d 1071, 1075 (9th Cir. 1999) (distinguishing *Hornell* in the insurance context: *Hornell* is "a case in which the non-Indian defendant had not conducted any activities on the reservation or communicated with anyone there"; "Allstate's conduct in this case, unlike the brewery's in *Hornell*, is related to the reservation").

And it goes further downhill. Unlike here, *Hornell* involved *statutory* and *tort* claims, not a contract dispute (133 F.3d at 1089); it involved *Montana*'s *second* exception, not its first (*id.* at 1093); and it merely rejected that tribes have a protected interest in "'providing a forum'" whenever "'a tribal member is a party to a lawsuit'" (*ibid.*)—an aggressive position not advanced here. Far from a square conflict, *Hornell* addresses a different universe.

Nor did petitioners identify a genuine split with *Attorney's Process & Investigation Services, Inc.* v. *Sac & Fox Tribe*, 609 F.3d 927 (8th Cir. 2010). That case involved payments to an off-reservation security firm who (among other things) conducted a raid on tribal grounds. 609 F.3d at 930. The Eighth Circuit held the on-reservation raid *was* subject to tribal jurisdiction (*id.* at 939)—much like the on-reservation insurance is subject to tribal jurisdiction here (Pet. App. 19a, 23a). While the court separately rejected tribal jurisdiction over a conversion claim (the firm's off-reservation receipt of tribal money), its reasoning was critical: it did *not* reject tribal jurisdiction merely because the converted funds were accepted off-reservation (609 F.3d at 940-941); it did so because the tribe failed to connect the funds to *on-reservation activities*—as opposed to "other," unspecified, *off-reservation* services. 609 F.3d at 941 ("it remains unclear what portion of the allegedly converted funds may relate to the October 1 raid, as

opposed to other services"; "[b]ecause we cannot determine what services these funds paid for, we cannot examine what conduct" "the conversion claim seeks to regulate"). If anything, this supports *respondents*: petitioners' pocketing of millions in premiums off-reservation does not preclude tribal jurisdiction *if those payments were made for on-reservation activities*—as the panel held was the case (Pet. App. 19a).

Even if its rationale (somehow) helped petitioners, *Attorney's Process* is again distinguishable: it likewise involved torts, not contracts (609 F.3d at 932); it confirmed the *Montana* framework controls (*id.* at 935-936); its core analysis was conducted under *Montana*'s *second* exception, not its first (*id.* at 941); it emphasized the jurisdictional calculus requires a "careful[]" balancing of interests, which necessarily varies by context (*id.* at 934); and it cast zero doubt on tribal jurisdiction under the facts here—claims involving on-reservation conduct (insuring tribal businesses and properties on tribal land), where the Eighth Circuit found "[t]ribal civil authority * * * at its zenith" (*id.* at 940). It is mystifying how any of this supports petitioners.[7]

c. Petitioners are likewise wrong that a conflict exists with the Tenth Circuit. Pet. 17 (citing *MacArthur* v. *San Juan County*, 497 F.3d 1057 (10th Cir. 2007)). *MacArthur* turned on three factors irrelevant here: (i) the case involved a clinic on "non-Indian fee land," which is distinct

[7] On top of everything else, the Eighth Circuit remanded so "the district court may consider the applicability of the first *Montana* exception to the Tribe's conversion claim"—since the off-reservation contract *still* might "establish tribal court jurisdiction" via a "consensual relationship" "with the Tribe itself 'or its members.'" 609 F.3d at 941. If anything, this undercuts petitioners' view of tribal jurisdiction, and certainly does not suggest the Eighth Circuit's position is *narrower* than the Ninth Circuit's.

from tribal land; (ii) the entity "administer[ing] the clinic was 'a political subdivision of the State of Utah,'" which is not subject to tribal regulation; and (iii) its "focus on an employment relationship is far afield from this case." Pet. App. 65a (explaining why "*MacArthur* is also inapposite"); see also 497 F.3d at 1060-1061, 1072-1074 (the clinic is "located" on "fee land owned by the State of Utah," and the "regulated entity is another independent sovereign acting in its governmental capacity"; "we hold" "the tribes may not regulate a State qua State on non-Indian land").

MacArthur did suggest tribal power ceases "at the reservation's borders." 497 F.3d at 1071. Yet that is exactly *this* case. The Tribe is not targeting insurance contracts for property *outside* the reservation. Petitioners' activities target core tribal businesses operating on tribal land within tribal bounds. Pet. App. 19a. Each tribal property and tribal business is "within the physical confines of the reservation." 497 F.3d at 1071-1072; see Pet. 19 (endorsing this standard). The Tenth Circuit's position thus mirrors the Ninth Circuit's: "a tribe's jurisdiction cannot extend past the boundaries of the reservation." Pet. App. 11a-12a. It is baffling how petitioners perceive a conflict between these two identical standards.

d. Petitioners finally give a cursory run at two state-court decisions (Pet. 17-18), but those cases are irrelevant. Petitioners' own descriptions explain away any conflict. The South Dakota Supreme Court addressed a "custody dispute" where "'the conduct at issue'" "'occurred entirely off the reservation.'" Pet. 17-18 (quoting *In re J.D.M.C.*, 739 N.W.2d 796, 810-811 (S.D. 2007)). And the Washington Supreme Court limited "assertions of tribal authority 'outside the reservation'"—preventing a tribal officer from pursuing "a drunk driver beyond the reservation's

borders." *Id.* at 18 (quoting *State* v. *Eriksen*, 259 P.3d 1079, 1083 (Wash. 2011)).[8]

Why petitioners believe either state court would resolve this case differently from the Ninth Circuit is anyone's guess.

3. Shifting gears, petitioners also contend the Ninth Circuit "deepened a circuit split" regarding whether *Plains Commerce* requires tribal adjudication to serve an "inherent sovereign interest." Pet. 19-21. Petitioners forfeited this question by not presenting it, which is sufficient reason to deny review. Sup. Ct. R. 14.1(a). But petitioners are wrong in any event: there is no circuit conflict.

a. Petitioners insist the circuits are divided, but they fail to identify a single example where tribal jurisdiction would be upheld in the Ninth Circuit but denied anywhere else. Their decisions instead declared tribal jurisdiction lacking for other reasons—without any square holding isolating a missing "inherent sovereign interest."

Nor did petitioners identify a single case presenting similar circumstances: the provision of insurance for tribal "properties and operations" that "'involve[] the use of tribal land'" and "'constitute[] a significant economic interest for the tribe.'" Pet. App. 28a. Put simply, this case *does* involve an inherent sovereign interest: "the Tribe's sovereign interest in managing its businesses on tribal lands is at stake," and "tribal sovereignty principles are implicated." *Id.* at 24a (citing *Plains Commerce*, 554 U.S. at 334). Respondents are unaware of any decision where a court faced similar considerations and invoked *Plains Commerce* to reject tribal jurisdiction.

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[8] *Eriksen*'s discussion of *Montana* was also limited to its second exception (not its first), and its fact pattern—an arrest outside tribal bounds—obviously has nothing to do with providing insurance for tribal businesses and tribal properties on tribal lands within the reservation. Compare *Eriksen*, 259 P.3d at 1083.

In short, a true circuit conflict means different circuits addressed the same situation and reached opposite results. Petitioners failed to identify any case where tribal jurisdiction was proper under *Montana* but rejected under *Plains Commerce*. There is no conflict.

b. Petitioners once again distort the few decisions they invoke.

First, petitioners assert the Seventh Circuit rejected tribal jurisdiction "under *Montana* because the tribal entities 'made no showing that the present dispute implicates *any* aspect of "the tribe's inherent sovereign authority."'" Pet. 19 (quoting *Jackson*, 764 F.3d at 783). Petitioners are confused.

The Seventh Circuit's analysis proceeded in two parts. The first asked whether *Montana*'s first exception was met—and it did not tack on any elements to *Montana*'s traditional analysis. See 764 F.3d at 781-782 (Part C.1). The *Plains Commerce* language appeared in a *different* subsection of the opinion—one addressing whether the plaintiffs separately "consented" to tribal jurisdiction. See *id.* at 783 (Part C.2). The *Plains Commerce* remark simply explained that *consent* does not supply any sovereign interests otherwise required for jurisdiction. But it nowhere suggested *Plains Commerce* altered *Montana*'s first exception—which is why it separated out these points (*Montana*-based jurisdiction and consent-based jurisdiction) in its analysis.[9]

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[9] The panel's belief that its "understanding of *Plains Commerce*" deviated from *Jackson* (Pet. App. 26a n.4) was thus *twice* overstated: *Jackson* addressed *consent-based* arguments, not *Montana*'s first exception, and the Ninth Circuit's position on a *distinct* question did not "depart[]" from *Jackson*. Indeed, *Jackson* noted its position was consistent with the Fifth Circuit's position (764 F.3d at 783 n.43 (*Dolgencorp* "is not to the contrary")), which even petitioners concede is

Second, petitioners maintain the Eighth Circuit "requires a separate inquiry into whether tribal regulation serves an inherent sovereign interest." Pet. 19-20 (citing *Kodiak Oil & Gas (USA) Inc.* v. *Burr*, 932 F.3d 1125 (8th Cir. 2019)). But *Kodiak* turned on the Eighth Circuit's belief that tribal courts lack power to adjudicate *federal* causes of action—and it thus held the tribe lacked an "inherent sovereign interest" to adjudicate those federal claims. 932 F.3d at 1134-1137 ("we conclude the better reading is that tribal courts lack jurisdiction to adjudicate federal causes of action absent congressional authorization"); *id.* at 1138 ("The first *Montana* exception does not apply here. * * * The complete federal control of oil and gas leases on allotted lands—and the corresponding lack of any role for tribal law or tribal government in that process—undermines any notion that tribal regulation in this area is necessary for tribal self-government."). That (odd) presumption is irrelevant here: this is an insurance claim predicated on an insurance contract. Pet. App. 27a. There is nothing federal about this—and there is no plausible conflict where the operative factor (the presence of exclusive federal claims) is missing. Compare 932 F.3d at 1136 ("Unlike 'routine contracts' that are 'governed by general common law principles of contract,' oil and gas leases on federally-held Indian trust land are governed by federal law.").

Again, there is no telling how *Jackson* or *Kodiak* would resolve *this* case: where the relevant activities occur on the reservation, the claim is not federal, the nonmember provides insurance to key tribal lands and businesses (all of which are essential to tax revenue and the

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aligned with the Ninth Circuit (Pet. 20-21). That reinforces the lack of any conflict.

Tribe's governmental functions), and the contract is with the Tribe itself.

* * *

In the end, petitioners fail to identify a single case, anywhere, confronting the relevant factors and reaching the opposite conclusion. The Ninth Circuit, like all other circuits, recognized the limits of tribal jurisdiction and applied those limits to the "unique" context of property and business insurance. It never once suggested tribal actions could target off-reservation conduct; it simply disagreed that petitioners' conduct occurred off-reservation. Petitioners did not directly challenge *that* finding—presumably because they realize the question is "narrow" (as the Ninth Circuit confirmed) and splitless (as petitioners conceded below). Petitioners cannot manufacture a circuit conflict using decisions far afield from any relevant principle implicated here.[10]

[10] If an insurance company wants to insure tribal companies on tribal lands, surely the Tribe has some say in how those insurers conduct their business. *E.g.*, *Strate* v. *A-1 Contractors*, 520 U.S. 438, 457 (1997) (recognizing "'inherent'" tribal authority "'to prescribe the terms upon which noncitizens may transact business within its borders'"); see also *Plains Commerce*, 554 U.S. at 332-333 (tribes may tax "nonmembers for the privilege of doing business within the reservation"). And that is especially true where the insured is the tribal government itself. *E.g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (recognizing "tribe's general authority, as sovereign, to control economic activity within its jurisdiction").

C. This Case Is An Exceptionally Poor Vehicle For Deciding A "Narrow" Question Of Marginal Significance

1. This case is an exceptionally poor vehicle on every level.

a. Neither question is factually presented. As noted above (Part A.1), petitioners ask whether tribal jurisdiction exists over "off-reservation conduct" (Pet. I)—despite the panel's holding that "conduct" was *on the reservation* (indeed, "on tribal land"). Pet. App. 13a, 19a. If petitioners want an answer about off-reservation conduct, petitioners must await a case involving—*off-reservation conduct*. The panel found the opposite below, and petitioners failed to challenge that predicate finding.

Petitioners' (counterfactual) question is poorly presented even in the abstract. The Ninth Circuit *adopted* petitioners' legal framework. It *agreed* "tribal jurisdiction" "cannot extend" "[off] the reservation." Pet. App. 11a-12a. That leaves no dispute over the question presented—the sides disagree only how that settled legal principle applies in this case-specific context.

At bottom, the panel held on-reservation conduct was required, and it held petitioners' conduct was on the reservation. Pet. App. 11a-12a, 19a. Petitioners preserved only a single question, and they chose the wrong question for the wrong case.

Nor is the *Plains Commerce* question factually presented (were it *presented* at all). This case offers no occasion to decide whether an "inherent sovereign interest" is independently required (Pet. 14) because the panel expressly identified *an inherent sovereign interest*—thus satisfying petitioners' own reading of *Plains Commerce*. *E.g.*, Pet. App. 24a ("Because the Tribe's sovereign interest in managing its businesses on tribal lands is at stake, tribal sovereignty principles are implicated.") (citing

Plains Commerce, *supra*); *id.* at 28a (reinforcing this point).

Petitioners would lose under their own theory based on the Ninth Circuit's express findings (which petitioners ignore). It is pointless to address this question where the answer is entirely academic.

b. In any event, petitioners forfeited the *Plains Commerce* question by not presenting it. Sup. Ct. R. 14.1(a). There is no reason for this Court to waste its bandwidth when petitioners strategically limited their petition and respondents have timely objected. Part A.2, *supra*.

c. An additional factual dispute infects petitioners' vehicle: the record shows petitioners' own agents physically entered tribal lands under these contracts. The district court flagged this problem,[11] and petitioners lost below in a parallel case on this independent ground.[12] Thus even if petitioners think *physical* presence is required—a question they did not directly raise—they would still lose.

While this factual question has not yet been definitively resolved, it stands as an independent obstacle to deciding the question presented: putting all else aside, there is no need to ask anything about "off-reservation conduct" if petitioners' own agents physically entered tribal land and inspected tribal businesses and tribal properties as part of providing tribal insurance on tribal grounds. It is unclear how this Court can sensibly decide the question

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[11] Pet. App. 41a n.5 (questioning "whether the acts of Tribal First are imputed to the Insurers on whose behalf Tribal First sold insurance"; "[s]ince 2008, representatives of Tribal First have apparently visited the Suquamish Reservation on several occasions, for purposes including safety inspections and ergonomic assessments; this includes recent visits to the Reservation in July and November 2019").

[12] *Lexington Ins. Co.* v. *Mueller*, No. 24-906 (U.S.), Pet. App. 31a-32a (filed Feb. 20, 2025) (petitioners' "agent—Alliant—did conduct business on tribal land").

presented without first resolving this fact-bound predicate question.

d. Petitioners also overlook multiple alternative grounds supporting the decision. The district court upheld tribal jurisdiction on an independent ground (right to exclude, see Pet. App. 30a, 39a-40a, 44a-46a), and the Ninth Circuit separately flagged two issues (right to exclude and *Montana*'s second exception, see *id.* at 6a). Petitioners thus realistically could lose under at least two alternative grounds—including one independently supporting the original judgment. The vehicle is inadequate when the question presented will not even resolve the propriety of tribal jurisdiction in this very case.

2. Notwithstanding petitioners' hyperbole, this case is of minimal importance and no obvious future significance.

a. The decision below is "narrow" and cabined on its face. Pet. App. 27a-28a ("emphasiz[ing]" limiting factors). It involves solely tribal insurance under a program designed and marketed exclusively to tribes for operation on tribal lands, targeting core tribal properties and businesses essential to tribal government. *Id.* at 14a-15a, 27a-28a. It applies in that "unique" context alone (*id.* at 15a), and disclaims any broader application: "Importantly, we do not suggest that an off-reservation nonmember company may be subject to tribal jurisdiction anytime it does business with a tribe or tribal member or provides goods or services on tribal lands." *Id.* at 27a; contra Pet. 13-14 (stressing, oddly, this repudiated point); APCIA Amicus Br. 15-16 (same).

The panel's holding targets a specific activity (insuring core tribal businesses and properties) on tribal lands within the tribal reservation. Those "narrow" "circumstances" "result[] in tribal jurisdiction," and this case has

no bearing beyond that "unique" context. Pet. App. 15a, 27a.[13]

b. Nor is there any reason to believe this "narrow" situation will frequently (if ever) recur. Petitioners are "sophisticated" actors in an industry that pays special attention to contracts and contractual terms. Pet. App. 28a. Any insurer looking to avoid tribal jurisdiction is free to condition new contracts and annual renewals on the acceptance of choice-of-law and forum-selection clauses. *Ibid.* And there is every reason to believe both tribal and federal courts would honor those provisions—as the Ninth Circuit has confirmed. *Ibid.* If petitioners still end up in tribal court, it is because they *acquiesced* to tribal court.

And any failure (past or present) to limit tribal jurisdiction is petitioners' alone. Petitioners knew in advance that any actions to enforce these agreements were likely headed for tribal court. That was the result foreshadowed by existing precedent,[14] and the lead petitioner (Lexington) itself lost an earlier effort to avoid tribal jurisdiction

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[13] While the law on tribal jurisdiction is not always clear, this case does not implicate any areas of genuine confusion. It does not involve insurance for buildings or businesses outside tribal grounds; it does not involve non-Indian fee land inside a reservation (like *Plains Commerce*); it does not involve tort claims, which present greater complexity (due to the lack of consensual commercial agreements); it does not involve off-reservation markets open to the general public (with goods that just happen to be shipped to tribal members); it does not even involve tribal members acting individually—this involves a direct contract with the Tribe itself. This case cannot clear up any broader issue of tribal jurisdiction outside this "unique" context (tribal insurance).

[14] Pet. App. 27a (recounting *Allstate Indem. Co.* v. *Stump*, 191 F.3d 1071 (9th Cir. 1999)).

in parallel circumstances.[15] But the reality of the present situation is obvious: petitioners knew they might lose out on business if they demanded concessions from the tribes. This was no unfair surprise, and any contrary assertion is meritless. Contra APCIA Amicus Br. 9. This issue has been on petitioners' own radar for decades. They were aware of the risks and chose not to negotiate around them—all to secure millions in tribal business (Pet. App. 45a).[16]

Petitioners now ask federal courts to grant them a contractual right they failed to negotiate in a free and fair market. If petitioners truly believe these suits belong in non-tribal court, they can refuse insurance to anyone who will not agree—and tribes likewise have the right to deal with insurers who bargain on different terms.[17] But there

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[15] *Confederated Tribes of the Chehalis Reservation* v. *Lexington Ins. Co.*, No. CHE-CIV-11/08-262 (Chehalis Tribal Ct. Apr. 21, 2010) ("an insurance contract offered by a non-member insurance company covering tribal property does equate to non-Indian activity on tribal lands"; "Lexington is a non-member party who entered into a consensual commercial contract to provide the Lucky Eagle Casino, a tribal entity, a service on tribal land"; "[t]he policy fits within the type of commercial dealing that *Montana*'s consensual relationship exception was intended to include") (available at Doc. 22, C.A. Supp. E.R. 10-16).

[16] Indeed, as the contract's drafters, the insurers control the language—and any omissions are construed against them.

[17] The rehearing dissent frets that permitting tribal jurisdiction will hurt tribes by prompting "nonmembers" to "abandon business with tribes and tribe members." Pet. App. 101a-102a. Tribes are capable of making these decisions for themselves—including disavowing tribal jurisdiction if necessary to convince a nonmember to engage in business. But this is a free market. The tribes *and* insurers realize this. Each is free to bargain for those rights deemed essential to a deal. And tribes have a built-in incentive (read: *rational self-interest*) not to act in ways that would increase costs or discourage market services.

is no basis to supplant market forces and grant insurers rights out of whole cloth while overriding parties' existing contracts. And there is certainly no point in wasting time on an improperly framed question with no future significance that will predictably resolve itself.

c. As a last resort, petitioners trot out the usual "floodgates" arguments. Pet. 32-33. But the same legal rule has persisted for decades. Pet. App. 27a; C.A. Supp. E.R. 10-16. The sky has not fallen. Tribes have not started haling everyone into tribal court. Federal courts (including the Ninth Circuit) have not embraced far-reaching forms of tribal jurisdiction.

On the contrary, the panel's rationale here shows how careful the courts have been. They insist upon a showing of conduct on tribal land. Pet. App. 11a-12a. They recognize the general prohibition against asserting tribal jurisdiction against non-members. *Id.* at 11a. They look to the precise, "limited" exceptions this Court itself has articulated and enforced for decades. *Id.* at 24a. And they stress the "narrow" circumstances authorizing tribal jurisdiction—with detailed findings of on-reservation conduct. *Id.* at 27a-28a. There is no actual problem in the real world, and no epidemic of expansive tribal jurisdiction—which is why petitioners are forced to frame their concerns in hypothetical language. Pet. 5, 32 (holding "*could* serve as a launching pad" or "*could* sweep in").[18]

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[18] Petitioners attack tribal courts as unfair and unreliable. Pet. 33-34. This tired assertion has been roundly rejected by this Court and lower courts; it has no factual support; and it ignores contrary "empirical studies" and real-world "experience." Pet. App. 25a (citing authority). Petitioners are equally misleading in suggesting their rights are wholly unprotected in tribal court. Pet. 34. This again ignores decades of settled law. The Constitution might not apply in tribal courts by its own force, but Congress regulates tribal courts and requires

Petitioners have been on notice for nearly 15 years. They had every opportunity to contract around tribal jurisdiction. Tribes have had every opportunity to assert fanciful jurisdictional grounds to open the floodgates as petitioners (baselessly) predict. Yet no problems have come to pass. If any concrete issues arise, this Court can always consider granting review then. But there is no need to grant review now, with no percolation, to revisit settled law over a splitless, "narrow" question in a poor vehicle with a common-sense answer—petitioners' conduct has "tribal lands written all over it." Pet. App. 21a.

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those courts to adhere to basic procedural and substantive protections. *E.g.*, 25 U.S.C. 1302(a)(8). Those rights are faithfully applied in these venues. Pet. App. 25a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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