No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a tribal court can exercise jurisdiction over nonmembers of the tribe based on off-reservation conduct.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. All parties to the proceeding are named in the caption.

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

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Lexington Insurance Company v. *Mueller*
No. 22-cv-15 (Feb. 6, 2023)

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

Lexington Insurance Company v. *Mueller*
Nos. 23-55144, 23-55193 (Dec. 6, 2024)

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

PETITION FOR A WRIT OF CERTIORARI

Lexington Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is not published in the Federal Reporter but is available at 2024 WL 5001815. The order of the district court on respondents' motion to dismiss and the parties' cross-motions for summary judgment (App., *infra*, 6a-33a) is not published in the Federal Supplement but is available at 2023 WL 2056041.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case concerns whether tribes possess inherent sovereignty to adjudicate claims against people who are not members of tribes and who have never set foot on the reservation. In *Lexington Insurance Co.* v. *Smith*, 94 F.4th 870 (9th Cir. 2024), petition for cert. pending, No. 24-884 (filed Feb. 13, 2025), the Ninth Circuit held that tribal courts can exercise jurisdiction over nonmembers under *Montana* v. *United States*, 450 U.S. 544 (1981), based on off-reservation conduct that "relates to tribal lands." 94 F.4th at 880. The Ninth Circuit thereby became "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). In the judgment below here, the Ninth Circuit endorsed another tribal court's exercise of jurisdiction over a nonmember on that identical theory.

1. In 1876, President Grant set aside land "for the permanent use of the Mission Indians," including the Cabazon. Exec. Order (May 15, 1876), reprinted in 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 821 (1904). The Senate later enacted legislation establishing the Cabazon Reservation in what is now Riverside County, California. Mission Indian Relief Act, ch. 65, 26 Stat. 712 (1891). On the reservation, the Cabazon Band of Cahuilla Indians (formerly the Cabazon Band of Mission Indians) runs several businesses,

including the Fantasy Springs Resort Casino. App., *infra*, 7a; see *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 204-205 (1987).

The Band looked beyond the reservation to buy insurance policies for its commercial properties. It negotiated for coverage with Alliant Insurance Services, a nonmember that set up and administers the nationwide Tribal Property Insurance Program. App., *infra*, 7a. That program provides insurance to tribal businesses located across the country as part of the larger Alliant Property Insurance Program that also insures municipalities, hospitals, and nonprofit organizations. C.A. E.R. 123. Alliant separately negotiates with insurers to provide coverage under general underwriting guidelines to tribes seeking policies. App., *infra*, 9a. From its off-reservation office, Alliant handled the entire process, providing quotes to tribes, preparing policies consistent with insurers' underwriting guidelines, collecting premiums, and maintaining policy-related documents. *Id.* at 9a-10a.

Alliant prepared policies that petitioner Lexington Insurance Company underwrote to cover the Band for "direct physical loss or damage" and business losses resulting from the same. App., *infra*, 14a (citation omitted). Petitioner is not a member of the Band and is located in Massachusetts—not on either tribal land or nonmember-owned land (called non-Indian fee land) within the Cabazon Reservation. *Id.* at 13a, 36a. In fact, petitioner never physically entered the reservation, had no direct contact with the Band during the underwriting process, and learned of the Band's identity only after Alliant, which is not an affiliate of petitioner, issued the policies to the Band. *Id.* at 9a.

Following the pandemic's outbreak in early 2020, the Band temporarily closed its on-reservation casino

in an effort to slow the spread of COVID-19. App., *infra*, 38a. The Band then made insurance claims seeking to recover business income they lost during that shutdown. *Id.* at 2a. Petitioner denied coverage. *Ibid.*

2. The Cabazon Band sued petitioner in its own tribal court, claiming breach of the property-insurance policies and an implied covenant of good faith and dealing. App., *infra*, 36a. The Band also sought a declaration that those policies cover business losses from COVID-19-related closure orders and consequential damages. *Ibid.*

Petitioner made a limited special appearance in the Cabazon Reservation Court to contest subject-matter jurisdiction. App., *infra*, 12a-13a. The presiding judge, respondent Martin A. Mueller, denied that motion. *Id.* at 13a.

The Cabazon Reservation Court of Appeals affirmed, holding that Cabazon Reservation Court could exercise jurisdiction over petitioner under the first *Montana* exception (covering certain commercial relationships between tribes and nonmembers) to the general rule against tribal regulation of nonmembers. App., *infra*, 51a-62a. The court reasoned that, "[g]iven the rise of tribal governmental capacity and tribal economic activity in the last half century, nonmember consent to tribal powers to regulate and tax is the norm, not the exception." *Id.* at 54a. The court rejected petitioner's argument that tribal jurisdiction could not exist because petitioner never "physically enter[ed] tribal land." *Id.* at 56a (citation omitted). In the court's view, nothing in this Court's precedent "barr[ed] tribal jurisdiction over nonmembers who knowingly and purposefully conduct business activities with Indian tribes, for example, from afar." *Ibid.*

3. Once petitioner had exhausted its remedies in tribal court, it filed this action against respondent Mueller, who presides over the case in the Cabazon Reservation Court, and respondent Doug Welmas, the chief judge who administers the tribal court. App., *infra*, 2a & n.1; see *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845, 856 (1985). Petitioner sought declaratory and injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), against respondents' continued exercise of jurisdiction over petitioner in connection with the Band's insurance claims. App., *infra*, 2a.

The district court granted summary judgment to respondents. App., *infra*, 6a-33a. The court first rejected respondents' argument that tribal judges are no longer proper defendants to an action challenging tribal-court jurisdiction following *Whole Woman's Health* v. *Jackson*, 595 U.S. 30 (2021). App., *infra*, 20a-24a. The court, however, dismissed the claims against respondent Welmas, reasoning that his duties in administering the tribal court were "too attenuated from the enforcement of tribal jurisdiction to establish standing." *Id.* at 26a. The court then held, as relevant here, that the tribal court could exercise jurisdiction over petitioner, even though it "never physically entered tribal land," because it "conducted activity on tribal land by providing insurance" to the Band. *Id.* at 30a-31a.

4. The Ninth Circuit affirmed. App., *infra*, 1a-5a.

The court of appeals first addressed whether *Whole Woman's Health* prevented nonmembers from suing tribal judges to restrain unlawful exercises of tribal-court jurisdiction. App., *infra*, 2a-3a. The court held that it was bound by circuit precedent approving such actions because *Whole Woman's Health* was not

"clearly irreconcilable." *Id.* at 3a (citation omitted); see *ibid.* (citing *Salt River Project Agricultural Improvement & Power District* v. *Lee*, 672 F.3d 1176, 1177 (9th Cir. 2012); *United States* v. *Yakima Tribal Court*, 806 F.2d 853, 857, 861 (9th Cir. 1986)). As the court 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)." *Ibid.* "*Whole Woman's Health* itself," the court continued, "recognized the possibility that its rationale does not foreclose *Ex parte Young* actions when a plaintiff seeks 'an injunction only to prevent the judge from enforcing a rule of her own creation,' rather than statutory law." *Ibid.* (quoting *Whole Woman's Health*, 595 U.S. at 42).

The court of appeals recognized that the lawfulness of tribal-court jurisdiction here had been "squarely" resolved in its recent decision in *Lexington Insurance Co.* v. *Smith*. App., *infra*, 4a. There, the Suquamish Tribe brought an insurance-coverage case against petitioner in the Suquamish Tribal Court. 94 F.4th at 876-877. Petitioner sued the Suquamish judges in federal court to restrain their unlawful exercise of tribal-court jurisdiction over a nonmember, and the Suquamish Tribe intervened as a defendant. *Id.* at 878. After the district court granted summary judgment to the Tribe, the Ninth Circuit affirmed. *Id.* at 878, 887. The Ninth Circuit recognized that "all relevant conduct occurred off the Reservation" and that "neither [petitioner] nor its employees were ever physically present there." *Id.* at 881. But the Ninth Circuit held that the *Montana* exceptions to the general rule against tribal-court jurisdiction over nonmembers could apply because petitioner's off-reservation conduct "relate[d] to tribal lands." *Id.* at 880. The Ninth

Circuit then upheld tribal-court jurisdiction under the first exception for consensual relationships with tribes, rejecting petitioner's argument that *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), required the Suquamish Tribe to demonstrate that the tribal regulation of the off-reservation practice of insurance flowed from an inherent sovereign interest. 94 F.4th at 883-886.

Here, the court of appeals recognized that *Lexington Insurance Co.* v. *Smith* presented "facts indistinguishable from the facts in this case." App., *infra*, 4a. The court also noted that the full Ninth Circuit had recently denied rehearing en banc. *Ibid.* (citing 117 F.4th at 1107). Accordingly, the court held that the Cabazon Reservation Court has jurisdiction over petitioner under the first *Montana* exception "[f]or the same reasons" as in *Lexington Insurance Co.* v. *Smith*. *Id.* at 5a.

ARGUMENT

In *Lexington Insurance Co.* v. *Smith*, 94 F.4th 870 (9th Cir. 2024), petition for cert. pending, No. 24-884 (filed Feb. 13, 2025), the Ninth Circuit held that the exceptions in *Montana* v. *United States*, 450 U.S. 544 (1981), to the general rule against tribal jurisdiction over nonmembers can apply to off-reservation conduct that "relates to tribal lands" or (said otherwise) "'bears some direct connection to tribal lands.'" 94 F.4th at 880 (citation and emphasis omitted). The Ninth Circuit also held that this Court's decision in *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), does not require an independent assessment whether the tribal regulation of nonmembers stems from an inherent sovereign interest. 94 F.4th at 886. For the reasons set forth in the petition for a writ of certiorari in *Lexington Insurance*

Co. v. *Suquamish Tribe*, the Ninth Circuit's decision upholding tribal-court jurisdiction over petitioner is erroneous and warrants this Court's review. 24-884 Pet. 12-35.

1. The Ninth Circuit created a split in extending the narrow *Montana* exceptions for tribal jurisdiction over "non-Indians *on* their reservations" to nonmembers who never set foot on the reservation. *Montana*, 450 U.S. at 565 (emphasis added). Three federal courts of appeals and two state supreme court have refused to apply the *Montana* exceptions to off-reservation conduct. See *Stifel, Nicolaus & Co.* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207-208 (7th Cir. 2015); *MacArthur* v. *San Juan County*, 497 F.3d 1057, 1071-1072 (10th Cir. 2007); *Hornell Brewing Co.* v. *Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998); see also *State* v. *Eriksen*, 259 P.3d 1079, 1083 (Wash. 2011); *In re J.D.M.C.*, 739 N.W.2d 796, 810-811 (S.D. 2007). The Ninth Circuit is an "outlier" that has put itself "at odds with every other circuit" on this question. *Lexington Insurance Co.* v. *Smith*, 117 F.4th 1106, 1130 (9th Cir. 2024) (Bumatay, J., dissenting from denial of rehearing en banc).

The Ninth Circuit's expansion of the *Montana* exceptions to cover off-reservation conduct also conflicts with this Court's decisions. Because tribal sovereignty is territorial in nature, the Montana framework applies only to "nonmember conduct *inside* the reservation." *Plains Commerce Bank*, 554 U.S. at 332 (emphasis altered). Nonmember conduct *outside* the reservation categorically exceeds the geographic scope of tribal authority. This Court recognized that territorial limitation in early decisions, *e.g.*, *Elk* v. *Wilkins*, 112 U.S. 94, 108 (1884), and has since reiterated that

tribal authority "reaches no further than tribal land," *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 653 (2001). The Ninth Circuit's application of the *Montana* exceptions to off-reservation conduct is "novel, unwarranted, and contrary to precedent." *Lexington Insurance Co.* v. *Smith*, 117 F.4th at 1114 (opinion of Bumatay, J.).

2. The Ninth Circuit also deepened another split concerning *Plains Commerce Bank*. There, this Court held that, even when a nonmember has consented to tribal regulation, such regulation "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." 554 U.S. at 337. Two courts of appeals have understood *Plains Commerce Bank* to require an independent assessment whether a given tribal regulation stems from one of those identified sovereign interests. See *Kodiak Oil & Gas (USA) Inc.* v. *Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019); *Jackson* v. *Payday Financial, LLC*, 764 F.3d 765, 783 (7th Cir. 2014). In contrast, the Fifth Circuit has discounted *Plains Commerce Bank* as mere "dicta" and refused to follow it. *Dolgencorp, Inc.* v. *Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014), aff'd by an equally divided Court, *Dollar General Corp.* v. *Mississippi Band of Choctaw Indians*, 579 U.S. 545 (2016) (per curiam). Recognizing this divide, the Ninth Circuit adopted the view that "aligns with that of the Fifth Circuit" and "departs from that of the Seventh Circuit." *Lexington Insurance Co.* v. *Smith*, 94 F.4th at 886 n.4; see *id.* at 886.

Again, the Ninth Circuit's decision to uphold tribal-court jurisdiction over off-reservation conduct by shunning consideration of inherent sovereign interests conflicts with this Court's decisions. The absence

of a sovereign interest at stake was the principal basis for the holding in *Plains Commerce Bank* that the tribal court lacked jurisdiction over a nonmember. 554 U.S. at 335-338. The Ninth Circuit's "evisceration of *Plains Commerce*" thus placed itself "on the wrong side of a circuit split." *Lexington Insurance Co.* v. *Smith*, 117 F.4th at 1115 (opinion of Bumatay, J.). And as Judge Bumatay recognized, "it's doubtful" that a tribe could "justify its authority over [such an] insurance suit" because petitioner's off-reservation conduct does not implicate the tribe's right to exclude nonmembers from tribal land, its project of self-governance, or its ability to control internal relations. *Id.* at 1130.

3. The question presented is important and (as this petition reflects) recurring. The Ninth Circuit contains three-quarters of the nearly 600 federally recognized tribes. Ninth Circuit Committee on Tribal and Native Relations, *Newsletter* 1 (Summer 2024), tinyurl.com/43mz4kzx. The ruling in *Lexington Insurance Co.* v. *Smith* could serve as a launching pad for tribal jurisdiction over all manner of nonmembers who do business with tribes or tribal members off the reservation, so long as the tribe can argue that the conduct "relates" to the tribe's or tribal member's own activities on tribal lands and that the nonmember now should have been "on notice" that such off-reservation commerce is a hook for tribal-court jurisdiction. 94 F.4th at 880, 884. And once in tribal court, nonmembers do not enjoy their usual rights because tribes possess "a sovereignty outside the basic structure of the Constitution." *Plains Commerce Bank*, 554 U.S. at 337 (citation omitted). The Ninth Circuit's sweeping and unprecedented decision should not escape review in this Court.

* * *

If the Court grants the petition in No. 24-884 and ultimately reverses or vacates the Ninth Circuit's judgment, that decision will undermine the Ninth Circuit's subsequent ruling in this case that upheld the Cabazon Reservation Court's jurisdiction over petitioner on the same theory. App., *infra*, 4a-5a. In that event, it will be appropriate to vacate the Ninth Circuit's decision in this case and to remand for further proceedings. Accordingly, because this Court's disposition of the petition in *Lexington Insurance Co.* v. *Suquamish Tribe* may affect the proper disposition of this case, this petition should be held pending the disposition of that petition and any further proceedings in this Court.

CONCLUSION

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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