Nos. 23-55144, 23-55193

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEXINGTON INSURANCE COMPANY,
Plaintiff-Appellant-Cross-Appellee,

v.

MARTIN A. MUELLER and DOUG WELMAS,
Defendants-Appellees-Cross-Appellants.

ON CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT CASE NO. 5:22-CV-00015

HON. JOHN W. HOLCOMB, DISTRICT JUDGE, PRESIDING

SUPPLEMENTAL BRIEF OF DEFENDANTS MUELLER AND WELMAS

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INTRODUCTION

The Court has asked for supplemental briefing regarding the impact of *Lexington Insurance Co. v. Smith* on this case. 94 F.4th 870 (9th Cir. 2024).

As an initial matter, *Smith* did not address the issue raised in the cross-appeal of Defendant tribal court judges Welmas and Mueller ("Defendants"). In their cross-appeal, Defendants asked this Court to hold that the case be dismissed in its entirety on the basis of *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021). Under the reasoning of *Whole Woman's Health*, *Ex parte Young*-based suits against tribal court judges are impermissible because they fail to assert an Article III case or controversy. As this issue goes to the "threshold matter" of the Court's jurisdiction, it must be addressed before the Court can reach the merits of the parties' dispute concerning whether the Cabazon Reservation Court has jurisdiction over Plaintiff Lexington Insurance Company ("Lexington"). *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). However, if the Court reaches the merits of Lexington's claims, the *Smith* case is dispositive: the Cabazon Reservation Court does have jurisdiction over Lexington, and the district court's ruling should be affirmed.

ARGUMENT

I. *SMITH* DID NOT RAISE OR CONSIDER THE *WHOLE WOMAN'S HEALTH* ISSUE

The *Whole Woman's Health* issue present in this case was not presented in *Smith*. In *Smith*, the Suquamish Tribe moved to intervene as a defendant, which the district court granted. *Lexington Ins. Co. v. Smith*, 627 F. Supp. 3d 1198, 1203 (W.D. Wash. 2022). Thereafter, Lexington and the Suquamish Tribe filed cross-motions for summary judgment, after which the district court granted the Suquamish Tribe's motion and denied Lexington's motion. *Id.* at 1200, 1203. The Suquamish Tribe, not its tribal court judges, litigated *Smith*. Under those circumstances, no Article III case or controversy issue arose between the Suquamish Tribe and Lexington.

Additionally, no party in *Smith* asserted that the tribal court judge defendants were inappropriate parties for suit under *Whole Woman's Health*. Because no party raised that issue in *Smith*, the Court ruled without considering the jurisdictional issue presented here—whether an Article III case or controversy exists between litigants and tribal court judges. This case, however, squarely presents that specific jurisdictional issue for the first time and prior decisions of this Court that did not consider that issue, including *Smith*, do not bar this Court from considering it here. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 (1984); *Ordonez v. United States*, 680 F.3d 1135, 1139 (9th Cir. 2012).

For the reasons advanced in prior briefing and at oral argument, *Whole Woman's Health* bars Lexington's suit here against Defendant tribal court judges and the case should therefore be dismissed on that ground.

II.
IF THE COURT REACHES LEXINGTON'S JURISDICTIONAL ARGUMENTS, *SMITH* IS DISPOSITIVE

With respect to Lexington's appeal, the decision in *Smith* is determinative as to the propriety of the Cabazon Reservation Court's jurisdiction. The undisputed material facts in this case are indistinguishable from those upon which *Smith* affirmed the Suquamish Tribal Court's jurisdiction. As in *Smith*, Lexington entered a consensual relationship through its insurance contract with the Cabazon Band of Mission Indians ("Cabazon"), satisfying the first exception under *Montana v. United States*, 450 U.S. 544 (1981). *See Smith*, 94 F.4th at 886–87; 2-ER-125, No. 71. In both cases, Lexington was the insurer and the Indian tribe was the insured. *Smith*, 94 F.4th at 883; 2-ER-125, No. 71. In addition, a clear nexus exists between this consensual relationship and the conduct that Cabazon sought to regulate—the scope of the insurance coverage that Lexington was bound to provide under that contract. *See Smith*, 94 F.4th at 884–85. Lexington also should have reasonably anticipated that its interactions with Cabazon "might 'trigger' tribal authority." *See id.* at 884 (citations omitted). Not only did Lexington issue its policy to Cabazon through the Tribal Property Insurance Program, a program marketed specifically to tribes (the

same program under *Smith*), but Lexington also knew it was contracting with Cabazon to provide insurance coverage for businesses and properties located on tribal trust land. *See id.* at 884, 886; 2-ER-123, Nos. 1–4, 8, 10, 14, 15; 2-ER-125, No. 71. Based on these facts, *Smith* held that, under the first *Montana* exception, the Suquamish Tribal Court had jurisdiction over the Suquamish Tribe's coverage dispute with Lexington. *Smith*, 94 F.4th at 886–87. Because the operative facts in this case are identical, *Smith* compels the same result here.

Even though the district court did not address *Montana*, this Court may affirm dismissal of Lexington's complaint on any ground supported by the record. *Hansen v. Dep't of Treasury*, 528 F.3d 597, 600 (9th Cir. 2007). This is particularly appropriate here, given that the parties fully addressed *Montana* in their briefing and at oral argument before this Court.

CONCLUSION

In sum, *Smith* did not consider or address the *Whole Woman's Health* issue raised in Defendants' cross-appeal. For the reasons stated above, in prior briefing, and at oral argument, the Court should reverse the district court's denial of Defendants' motion to dismiss and instruct the district court to enter an order granting that motion. If the Court reaches Lexington's tribal court jurisdictional arguments though, *Smith* is dispositive for the reasons set forth above and the Court should affirm summary judgment in favor of Defendants based on *Smith* and dismiss the action.

Dated: March 26, 2024

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of the Court's March 5, 2024, order because it contains 892 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5)(A) and (a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14 point Times New Roman font.

Dated: March 26, 2024

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using appellate CM/ECF system on March 26, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 26, 2024

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