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-Appeals from the United States District Court
for the Central District of California
Case No. 5:22-CV-00015 | The Honorable John W. Holcomb

LEXINGTON INSURANCE COMPANY'S SUPPLEMENTAL BRIEF

Richard J. Doren
Matthew A. Hoffman
Bradley J. Hamburger
Daniel R. Adler
Patrick J. Fuster
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000

Attorneys for Appellant Lexington Insurance Company

SUPPLEMENTAL BRIEF

Lexington submits this brief addressing the effect of the decision in *Lexington Insurance Co. v. Smith*, No. 22-35784, 94 F.4th 870 (9th Cir. 2024), on this appeal. On March 14, Lexington filed a petition for panel rehearing and rehearing en banc in *Smith*, which remains pending at this date.

Smith addressed whether the Suquamish Tribe had authority to regulate its contractual relationship with its off-reservation insurers, including Lexington. 94 F.4th at 876–77. After the Tribe and its corporate arm shut down tribal businesses during the COVID-19 pandemic, the Tribe sued Lexington in its tribal court on its coverage claims. *Id.* at 877–78. A panel of this Court held that the tribal court has jurisdiction under the first exception of *Montana v. United States*, 450 U.S. 544 (1981). The panel reasoned that Lexington's off-reservation conduct "relates to tribal lands" and could be equated with conduct on the reservation. 94 F.4th at 880–81. The panel also held that Lexington should have reasonably anticipated tribal-court jurisdiction because the property insurance policy "bore a direct connection to and could affect the Tribe's properties on trust land." *Id.* at 884.

The decision in *Smith*, if not modified upon further review, would establish in this case that tribal-court jurisdiction exists under *Montana*. As an off-reservation insurer that issued a policy related to tribal property on tribal land, Lexington stands in the same relation to the Cabazon Band as to the Suquamish Tribe. *See* Lexington Br. 7–9. Lexington also has made substantially the same arguments against the application of the first *Montana* exception in this case as in *Smith*. Although the district court here relied only on the Cabazon Band's right to exclude, 1-ER-21, the panel in *Smith* did not address the separate question of right-to-exclude jurisdiction, *see* 94 F.4th at 876. There is likewise no need in this appeal to address the right to exclude if the decision in *Smith* stands.

Because the Suquamish Tribe intervened as a defendant in *Smith*, the panel there did not address whether Lexington could have pursued its claims against only the Suquamish judges, who were initially named as defendants. 94 F.4th at 878. That jurisdictional issue remains ripe for resolution here, and the Court should reject the Cabazon judges' argument that they are not proper defendants because it is foreclosed by Circuit precedent and inconsistent with the lone Supreme Court decision,

Whole Woman's Health v. Jackson, 595 U.S. 30 (2021), on which they rely. *See* Lexington Response and Reply Br. 5–17.

Lexington respectfully suggests that an order deferring the resolution of this appeal would best preserve both the parties' and the Court's resources pending the disposition of Lexington's petition for rehearing in *Smith* and any additional proceedings, potentially including the filing of a petition for a writ of certiorari in the Supreme Court. The panel's decision extends tribal-court jurisdiction beyond the reservation's borders for the first time, needlessly creates a circuit split with the Seventh, Eighth, and Tenth Circuits, *e.g.*, *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 209 (7th Cir. 2015), and opens a vast frontier of tribal-court jurisdiction beyond its traditional and strictly territorial reach for nonmembers who engage in off-reservation commerce with tribes and tribal members. *See* Pet. for Reh'g, No. 22-35784 (Mar. 14, 2024). The panel also recognized that its treatment of *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), conflicts with Seventh Circuit precedent. 94 F.4th at 886 n.4 (citing *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 783 (7th Cir. 2014)). But if the Court is inclined to resolve the appeal

while *Smith* remains subject to further review, Lexington acknowledges that *Smith*, as it now stands, would call for the affirmance of the district court's decision in this case.

Dated: March 26, 2024

Respectfully submitted,

/s/ *Richard J. Doren*
Richard J. Doren

Attorneys for Appellant
Lexington Insurance Company

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit established by the Court's March 5, 2024 order because it contains 637 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 Rule 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 New Century Schoolbook font.

Dated: March 26, 2024

Respectfully submitted,

/s/ *Richard J. Doren*
Richard J. Doren