CASE NO. 23-2311

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HCI DISTRIBUTION, INC. AND ROCK RIVER MANUFACTURING, INC.,
Plaintiffs-Appellees,
v.
MICHAEL T. HILGERS, NEBRASKA ATTORNEY GENERAL AND JAMES R. KAMM, NEBRASKA TAX COMMISSIONER,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Nebraska,
The Honorable District Court Judge John Gerrard
Case No. 8:18-cv-173

REPLY BRIEF OF APPELLANTS

MICHAEL T. HILGERS
Attorney General
ERIC J. HAMILTON
Solicitor General
JOHN J. SCHOETTLE
Assistant Solicitor General
DANIEL J. MUELLEMAN
JOSHUA E. DETHLEFSEN
Assistant Attorneys General
OFFICE OF THE NEBRASKA
ATTORNEY GENERAL
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
John.Schoettle@nebraska.gov

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

The district court erred in granting partial summary judgment to HCI Distribution, Inc. (HCID) and Rock River Manufacturing, Inc. (Rock River).[1] Nothing in the Constitution prevents Nebraska from requiring HCID and Rock River to: (1) deposit funds into an escrow account for cigarettes sold on the Winnebago Reservation under Neb. Rev. Stat. § 69-2703 (the "Escrow Statute") and (2) meet the requirements to be listed on the State's directory of tobacco manufacturers under Neb. Rev. Stat. § 69-2706 (the "Directory Statute").

Tribal sovereignty does not bar state law here because HCID and Rock River operate largely outside of the Winnebago Reservation, which exposes them to the State's regulation. The district court's reasoning, if accepted, would create an unwarranted circuit split. In addition, HCID and Rock River have not made the requisite showing that the escrow and directory requirements are unreasonable. HCID and Rock River

[1] On appeal, HCID and Rock River treat their entities as one and the same with, and economic development arms of, the Winnebago Tribe. *See, e.g.*, Appellees' Br. 2, 11, 24, 26. The Nebraska Attorney General and Tax Commissioner continue to dispute that conclusion, as they did in the district court. *See* R. App. 37–51; R. Doc. 130, at 30–44. That question, however, does not affect the issues presented in this appeal.

erroneously claim that burden does not apply here because the State is regulating only tribal members. But the challenged statutes regulate sales to non-members on the Winnebago Reservation.

Even if warranted, balancing of the state, federal, and tribal interests confirms the Escrow and Directory Statutes' constitutionality. As HCID and Rock River recognize, the State has a compelling interest in protecting public health. The federal interests in contrast are weak. HCID's and Rock River's reliance on an abstract federal and tribal interest in tribal self-government and economic development cannot overcome the State's interest. The escrow and directory requirements do not impede or interfere with federal and tribal interests. HCID's and Rock River's operations do not represent a significant economic interest for the Tribe.

HCID and Rock River wrongly ask the Court to require exceptional circumstances to uphold the State's regulation. The Escrow and Directory Statutes are not regulating solely member conduct on the Winnebago Reservation. HCID and Rock River do not dispute that their cigarettes are sold to non-members or that they are going beyond the reservation to procure materials and sell cigarettes. Regardless,

exceptional circumstances are present. Like the district court, HCID and Rock River mischaracterize the escrow and directory requirements as punitive to overcome the State's compelling interest. However, escrow deposits simply ensure that tobacco product manufacturers do not gain a regulatory windfall by avoiding state regulation. The directory requirement is alternatively a valid minimal burden designed to assist in the collection of cigarette excise taxes. HCID and Rock River do not show how the directory requirement by itself imposes more than a minimal burden. The district court's partial grant of summary judgment to HCID and Rock River should be reversed and the injunction vacated.

ARGUMENT

I. HCID and Rock River Are Subject to Generally Applicable Escrow and Directory Requirements.

Because HCID's and Rock River's activities extend beyond the reservation, they are subject to generally applicable laws like the escrow and directory requirements. Both the Supreme Court and a circuit court have upheld state regulation because of off-reservation activity. *See Mescalero Apache Tribe v. Jones* ("*Jones*"), 411 U.S. 145, 148–49 (1973);

King Mountain Tobacco Co. v. McKenna, 768 F.3d 989, 993 (9th Cir. 2014).

HCID's and Rock River's attempts to limit *King Mountain* fail. Appellees' Br. 14. First, *King Mountain*'s holding applied to the manufacturer's sales on and off the reservation. The district court in *King Mountain* granted summary judgment in full to the State, holding that "[e]scrow is required for all non-exempt sales subject to the State's cigarette taxes, regardless [of] whether those sales occur on or off the reservation." *King Mountain Tobacco Co. v. McKenna*, No. CV-11-3018-LRS, 2013 WL 1403342, at *8 (E.D. Wash. Apr. 5, 2013). Recognizing that the manufacturer sold cigarettes "on the reservation," the Ninth Circuit affirmed that grant of summary judgment in whole. *King Mountain*, 768 F.3d at 991, 998.

HCID and Rock River also argue that *King Mountain*'s analysis is inconsistent with *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). HCID and Rock River assume, like the district court, that the gaming rooms at issue in *Cabazon* must have used resources outside of the reservation. The Supreme Court in *Cabazon*, however,

never made such a finding. Nor was there any indication that the tribe in *Cabazon* provided its services or acted outside of the reservation.

Finally, HCID and Rock River erect a straw man by claiming that applying *Jones* and *King Mountain* here would require complete vertical integration on the reservation and sales to only tribal members on the reservation. Appellees' Br. 15, 26. According to HCID and Rock River, that would "mean that tribes have no sovereign interest in economic determination." Appellees' Br. 15. Neither *Jones* nor *King Mountain* call for such a result. The level of off-reservation activity is clearly relevant to the analysis. In contrast to the tribal services on the reservation in *Cabazon* and similar to the manufacturer in *King Mountain*, HCID and Rock River obtain their tobacco outside of the reservation, are minimally staffed by tribal members, and sell cigarettes throughout the country. Indeed, in this case, the cigarettes that HCID historically imported from outside the reservation for sale are products entirely made outside of the reservation. Even the cigarettes Rock River manufactures use inputs from off-reservation. HCID and Rock River do not dispute those facts.

King Mountain is not an outlier. Other courts have also applied this principle in similar circumstances to uphold state regulation of tobacco

products on reservations. *See, e.g.*, *State ex rel. Wasden v. Native Wholesale Supply Co.*, 312 P.3d 1257, 1263 (Idaho 2013); *State ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, ¶ 45, 237 P.3d 199, 216, *abrogated on other grounds by Montgomery v. Airbus Helicopters, Inc.*, 2018 OK 17, ¶ 34, 414 P.3d 824, 833. This Court has likewise held that relevant conduct largely outside the reservation is subject to state laws, upholding a state tax on a pension received but not earned on the reservation. *Fond du Lac Band of Lake Superior Chippewa v. Frans*, 649 F.3d 849, 850, 853 (8th Cir. 2011). This Court should decline HCID's and Rock River's invitation to create a circuit split.

II. HCID and Rock River Fail to Show that the Escrow and Directory Laws Are Unreasonable and Unrelated to State Regulatory Authority.

This Court's precedent requires HCID and Rock River to show that the escrow and directory requirements are unreasonable and unrelated to Nebraska's regulatory authority. *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1138 (8th Cir. 1982). HCID and Rock River did not meet their burden. The escrow and directory requirements are reasonable and related to the State's regulation of tobacco products. Among other things, the escrow and directory

requirements assist with cigarette tax collection, ensure that tobacco product manufacturers can pay judgments, and prevent non-participating manufacturers from gaining an artificial competitive advantage. Rather than meet their burden, HCID and Rock River claim *Alexander* does not apply here because the escrow and directory requirements are regulating solely member conduct on the reservation. Appellees' Br. 16. But the escrow and directory requirements are regulating non-member purchases of cigarettes on the reservation, not solely member conduct. *See* Appellants' Br. 27–28, 43–44. HCID and Rock River have failed to meet their burden, and the Court should uphold the escrow and directory requirements without interest balancing.

III. The District Court Improperly Weighed Federal, Tribal, and State Interests Under *Bracker*.

When *Bracker* applies, a court must conduct "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). If this case requires *Bracker* balancing, the state, federal, and tribal interests implicated here

permit the application of the Escrow and Directory Statutes to sales to non-members on the Winnebago Reservation.

A. The Escrow and Directory Statutes advance important state interests.

The district court correctly recognized that the State's interests were "important" (App. 650; R. Doc. 184, at 19) and "compelling" (App. 662; R. Doc. 184, at 31). HCID and Rock River do not dispute that the State's interest in protecting the public health is strong. Appellees' Br. 17. However, like the district court, HCID and Rock River attempt to minimize the interests served by the escrow and directory laws as giveaways to self-interested manufacturers which have agreed to the Master Settlement Agreement. HCID and Rock River improperly focus, like the district court, on a presumed private party interest in the application of the escrow and directory requirements. But *Bracker* requires considering the interest from the *State's* viewpoint. *See* 448 U.S. at 144–45. HCID and Rock River dispute that the MSA is an important piece of state regulation of tobacco product sales and use. The MSA, however, is a "landmark" agreement with the largest cigarette manufacturers and dozens of others banning certain advertising, restricting lobbying, and requiring billions of dollars in payments for

harms caused by cigarette use. *See Grand River Enters. Six Nations v. Beebe*, 574 F.3d 929, 933 (8th Cir. 2009). The State has an obvious and widely recognized interest in remedying the problem posed by non-participating manufacturers escaping state regulation and obtaining an artificial competitive windfall. *See id.* at 934, 942; *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1164 (10th Cir. 2012); *Omaha Tribe of Nebraska v. Miller*, 311 F. Supp. 2d 816, 818 (S.D. Iowa 2004).

HCID and Rock River claim that the Nebraska Attorney General and Tax Commissioner (the "State Defendants") "argue, for the first time on appeal, that the escrow requirement serves [the State's] interest in collecting excise taxes." Appellees' Br. 18. Not so. The State Defendants argued numerous times, and at length, that the escrow and directory obligations assisted with the collection of excise taxes. At summary judgment, the State Defendants explained that the Escrow and Directory Statutes "are regulations attendant to the lawful cigarette excise tax," which "protect[] the public treasury." R. App. 67; R. Doc. 130, at 60. HCID and Rock River further argue that the State Defendants "fail to explain how this interest outweighs the sovereign interests of the Tribe." Appellees' Br. 18. However, as the State Defendants explained

(Appellants' Br. 27, 52 –54), courts have upheld regulations that assist in the collection of state taxes. *See, e.g.*, *Rice v. Rehner*, 463 U.S. 713, 720 n.7 (1983). The state interests in applying the escrow and directory laws are compelling.

B. The federal interests are weak.

Compared to the State's interest, the federal interests here are slight. There is a notable lack of federal regulation of tribal cigarette manufacturing and distribution. *See Miller*, 311 F.Supp.2d at 823. "In fact, the federal government has been generally supportive of *state* regulation of cigarette sales." *Ward v. New York*, 291 F. Supp. 2d 188, 204 (W.D.N.Y. 2003) (emphasis original). HCID and Rock River, like the district court, do not meaningfully dispute the lack of an explicit federal policy in this case. There is also no dispute that the federal interest here is "not as strong" as in other cases prohibiting state regulation. Appellees' Br. 18. *Cf. Cabazon*, 480 U.S. at 217–18; *New Mexico v. Mescalero Apache Tribe* ("*Mescalero*"), 462 U.S. 324, 341–42 (1983). Instead, HCID and Rock River appeal to a general federal interest in tribal sovereignty and economic development. That interest, however, must be considered against "the applicable treaties and statutes which define the limits of

state power," which are noticeably absent in this case. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973).

Even if it is proper to consider such an untethered economic interest, the State's regulation here has comparatively little impact on that interest. Whereas the state regulations in *Cabazon* sought to reduce the tribal gaming to charitable operations staffed by unpaid volunteers, *Cabazon*, 480, U.S. at 205–06, the Escrow and Directory Statutes do not prohibit the for-profit business operations of Rock River and HCID. The State merely seeks that HCID and Rock River make escrow deposits for sales of cigarettes to non-members and certify compliance with that requirement. Also in contrast to the economic importance of the gaming operations to the tribe in *Cabazon*, HCID and Rock River on their own contribute little to the Tribe's employment and revenue. *See* R. Doc. 131-6, at 4–9; R. Doc. 131-7, at 4–5, 8–10; R. Doc. 131-18; R. Doc. 131-21.

In the absence of any express federal law or policy implicated in this case, the federal interests are at best modest.

C. The tribal interests are slight.

The Winnebago Tribe's interests in HCID's and Rock River's operations are slight. Neither entity has been a significant source of

funds or employment for the Tribe. *See* R. Doc. 131-6, at 4–9; R. Doc. 131-7, at 4–5, 8–10; R. Doc. 131-18; R. Doc. 131-20; R. Doc. 131-21. Any artificial competitive advantage that HCID and Rock River gain from non-compliance with state law is not a legitimate tribal interest. *See Washington v. Confederated Tribes of Colville Indian Rsrv.* (*"Colville"*), 447 U.S. 134, 155 (1980).

HCID and Rock River first claim that the Tribe has an interest in activity conducted within its own boundaries without state regulation. The Supreme Court's case law, however, "make[s] clear" that a tribe's "right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). That "principle of tribal self-government" is reflected in the interest balancing, "seek[ing] an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Colville*, 447 U.S. at 156. States may, for example, impose cigarette excise taxes on non-member sales on the reservation, *id.* at 155–56, require tribal retailers to collect those taxes, *id.* at 159, and require cigarette and alcohol sellers to be licensed, *see Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 938–39 (8th Cir.

2019); *Pruitt*, 669 F.3d at 1177. The tribal interest is also weak because the State seeks to regulate sales of cigarettes to non-members. *See Bracker*, 448 U.S. at 144–45.

HCID and Rock River further argue that "[t]he Tribe has a strong interest in the health and safety of its own members." Appellees' Br. 20. But the question is whether the state's regulation "interferes with or is incompatible with" that interest. *Mescalero*, 462 U.S. at 334. HCID and Rock River have not shown how the Escrow and Directory Statutes interfere with the Tribe's interest in the health and safety of its members. Instead, the State is acting to promote the health and safety of all its citizens.

HCID and Rock River incorrectly frame the Tribe's choice as "collecting funds from Rock River" or "having Rock River pay them into escrow with the State." Appellees' Br. 21. They offer no reason why HCID and Rock River cannot comply with both state and tribal law. The mere overlap of regulation reflects that HCID and Rock River "are located in an area where two governmental entities share jurisdiction." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 189 (1989). Courts have repeatedly upheld such non-conflicting concurrent regulation. *See, e.g.*,

id.; *Colville*, 447 U.S. at 158–59. Anyway, there is no evidence properly in the record that HCID and Rock River are complying with two separate requirements. The only evidence bearing on that question was offered in a Declaration of Victoria Kitcheyan, which described payments made to the Tribe for only one year, 2017, under the Universal Tobacco Settlement Agreement (UTSA). App. 298; R. Doc. 125-3, at 4. The district court, however, expressly did not consider and rely upon any evidence in that declaration, which was subject to the State Defendants' motion to strike. App. 667; R. Doc. 184, at 36.

HCID and Rock River claim that the same information was available in a second declaration of Lance Morgan. R. App. 498; R. Doc. 173-1, at 3. The State Defendants, however, sought to strike that proposed "substitution" for the Kitcheyan Declaration. App. 630; R. Doc. 171, at 5; R. Doc. 179, at 4. And the district court never accepted that substitution, instead opting not to rely on the Kitcheyan Declaration. App. 667; R. Doc. 184, at 36. HCID and Rock River do not challenge that decision.

HCID and Rock River do not dispute that their profits were not significant historically. Instead, HCID and Rock River reiterate the

district court's conclusion that their cigarettes were not imported for immediate resale. But historically, they were. From 2013 until 2017, HCID and Rock River predominantly sold cigarettes that had been imported onto the reservation. R. App. 86–87; R. Doc. 131-4, at 40:25–43:7; R. App. 184–85; R. Doc. 131-5, at 110:5–111:4, 114:9–115:8. That is precisely the "importing [of] a product onto the reservations for immediate resale" warned about by the Supreme Court in *Cabazon*. 480 U.S. at 219.

Echoing the district court, HCID and Rock River attempt to distinguish their conduct on the basis that the cigarettes filtered through Rock River before HCID distributed them. However, passing a product from one entity to another adds no value. To conclude otherwise would leave the application of state regulation in this context subject to manipulation. HCID and Rock River further suggest that simple vertical integration of commercial activities creates value and supports tribal employment and economic development. Yet, the economic reality in this case is that both entities not only have been "minimally staffed" (App.

654, R. Doc. 184 at 23, n.4) but also have not provided significant monetary contributions to the Tribe.

Contrary to HCID's and Rock River's arguments, the State Defendants moved to strike the Kitcheyan Declaration and its attachments, asking for an "Order striking Filing 125-3." App. 624; R. Doc. 154, at 2. That filing includes both the declaration *and* its attachments. App. 295; R. Doc. 125-3. Requesting that the attachments be stricken makes sense in light of the local court rules requiring an affidavit to "identify and authenticate any documents offered as evidence" in a motion for summary judgment. D. Neb. Civ. R. 7.1(a)(2)(C). The district court failed to rule on the request to strike the attachments at all before entering partial summary judgment in HCID's and Rock River's favor. Failing to resolve an evidentiary dispute before entering summary judgment is a legal error under any standard of review.

HCID and Rock River finally ask that the Court find the Escrow and Directory Statutes preempted on an alternative ground not addressed by the district court: that their "value-added products are exempt from state regulation." Appellees' Br. 22. HCID and Rock River claim that a "*Cabazon-Colville* line of cases" creates this free-floating

exemption from state regulation. Appellees' Br. 22. But neither case does so. *Cabazon* considered the question of the value added by the gaming rooms in quantifying the tribal interest and balancing it against the other interests. 480 U.S. at 220. *Colville* likewise considered the lack of value added by the smokeshops to discount the tribal interest and explain that there is no tribal interest in marketing an exemption to state law. *See* 447 U.S. at 155–57. HCID's and Rock River's argument then simply rehashes the same unsupported argument that their businesses provide the Tribe with substantial economic benefits. Instead, the record shows that their operations have been historically unprofitable, have employed few tribal members, and have not been a source of funds for the Tribe.

Under the circumstances, the tribal interest is weak.

D. Even if required, exceptional circumstances warrant the State's regulation.

The district court improperly applied a heightened extraordinary circumstances requirement in its *Bracker* balancing. Extraordinary circumstances are not required, however, because the Escrow and Directory Statutes do not regulate only member conduct solely on the reservation. *See Mescalero*, 462 U.S. at 331–32. The cigarettes are offered for sale to members and non-members alike on the Winnebago

Reservation. *See* R. Doc. 131-3, at 231:8–232:13; R. App. 207; R. Doc. 131-5, at 203:16–21. Rock River obtains raw materials outside of the reservation, and HCID's and Rock River's sales predominantly occur outside of the reservation. R. Doc. 131-3, at 44:20–45:6; 47:10–19, 48:2–53:25; R. App. 88–90, 92–93; R. Doc. 131-4, at 47:9–17; 48:2–16; 49:16–50:12; 51:2–51:16; 52:4–15; 53:2–56:25; 65:18–68:4. A judgment paid by escrow funds could arise from any step in the procurement, production, and distribution process for cigarettes.

Nevertheless, even if required, extraordinary circumstances are present here. The State has a compelling interest in protecting public health and ensuring that funds are available to compensate for wrongdoing. The Escrow and Directory Statutes are a critical piece in furthering that interest. The district court understood the compelling nature of the State's interest here but found the escrow requirement punitive. App. 662; R. Doc. 184, at 31. The purpose of the law, however, is to ensure that non-participating manufacturers do not skirt state law and gain an artificial advantage in the market. Without the Escrow and Directory Statutes, a cigarette manufacturer could simply opt out of the State's regulation. The burdens on a manufacturer like Rock River are

minor. HCID and Rock River already comply with other state escrow and directory laws, and the escrow and directory laws simply put them on more even footing with every other cigarette manufacturer.

HCID and Rock River mischaracterize the burden imposed by the Escrow and Directory Statutes. Escrow is not deposited into a State-controlled investment account (Appellees' Br. 6); the escrow deposits go into an account owned and controlled by the manufacturer, which is otherwise entitled to investment returns. Neb. Rev. Stat. §§ 69-2703(2)(b), 69-2706(1)(d). This is not a novel arrangement. Rock River has escrow accounts in other states with similar rights and control. R. App. 22; R. Doc. 130, at 15; R. App. 330; R. Doc. 149, at 2.

HCID and Rock River inaccurately describe the escrow bond required to be posted by Neb. Rev. Stat. 69-2707.01 as something a non-participating manufacturer "pay[s]." Appellees' Br. 7. But a manufacturer does not post the bond, and the full amount of the bond is not being paid to the State. The statutory scheme requires only a surety bond in the statutorily required amount. A bond is simply "[a] written promise to pay money or do some act if certain circumstances occur or a certain time elapses." *Bond*, Black's Law Dictionary (11th ed. 2019). The

surety, not the manufacturer, is posting the bond, under Neb. Rev. Stat. § 69-2707.01(1), typically in exchange for a fee. And a tribe does not forfeit the bond by reaching a compact with the State under Neb. Rev. Stat. § 69-2703(2)(b)(iv). That statute concerns the "[a]mounts the state *collects* on a bond under section 69-2707.01"—i.e. the money the state collects *after* the manufacturer fails to make required escrow deposits. Neb. Rev. Stat. § 69-2703(2)(b)(iv) (emphasis added).

HCID and Rock River erroneously argue that the "relevant legal standard" for "exceptional circumstances" is whether "the involved state regulation serves as an important adjunct to independently valid regulation of nonmember activity, where specific statutory or treaty provisions apply, or where very significant state interests are immediately implicated." Appellees' Br. 23 (citing App. 662; R. Doc. 184, at 31). That standard comes from a secondary source. *See* App. 662; R. Doc. 184 at 31 (quoting American Indian Law Deskbook § 5:20). The Supreme Court, however, sets the relevant standard. Notably, neither *Cabazon* nor *Mescalero* ever purported to apply an exceptional circumstances requirement to uphold the state regulations, let alone

determine whether those circumstances existed. *See* 480 U.S. at 216; 462 U.S. at 338–42.

Even if HCID's and Rock River's proposed legal standard were correct, the circumstances here qualify as exceptional. The escrow and directory requirements are important adjuncts to the State's tobacco regulation through the MSA and in collecting valid cigarette taxes on sales to non-members. There are also critical immediate state interests implicated in the regulation. The State's MSA settlement and ensuing escrow and directory requirements arose out of a historical public health crisis and flagrant violations of consumer protection laws by tobacco product manufacturers. *See Grand River Enters.*, 574 F.3d at 933. Given the historical backdrop and the negative health effects from tobacco product distribution and use, it is hard to think of a more exceptional circumstance to justify the State's regulation.

Even if the Court determines that the escrow and directory requirements regulate solely member conduct confined to the

reservation, the exceptional circumstances requirement is met in this case.

IV. The Directory Requirement is a Valid Minimal Burden.

The Directory Statute is a valid minimal burden that can be upheld without balancing the interests. The Directory Statute imposes a "minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 483 (1976). The directory requirement assists the State in collecting valid cigarette taxes for sales to non-members on the Winnebago Reservation. This Court and others have upheld similar licensing requirements as necessary to enforce state tax laws. *See Noem*, 938 F.3d at 938–39, *Pruitt*, 669 F.3d at 1177.

HCID and Rock River mistakenly apply the district court's reasoning for concluding the escrow requirement was not a minimal burden to the directory requirement. *See* Appellants' Br. 52–53 n.7. But the escrow and directory requirements are conceptually different. The Directory Statute is an effective licensing requirement whereby tobacco product manufacturers certify compliance with various state

requirements. The Escrow Statute imposes an obligation to make certain deposits that are returned if the specified conditions are met. HCID and Rock River argue that escrow deposits impose more than a minimal burden but do not address whether the Directory Statute is more than a minimal burden on its own.

The directory requirement imposes only a minimal burden designed to assist in the State's valid excise tax collection on sales of cigarettes on the Winnebago Reservation.

CONCLUSION

For the reasons explained above, Defendants respectfully request that this Court vacate the judgment in favor of Plaintiffs and direct the grant of summary judgment in full to the Defendants.

Respectfully submitted,

Dated: December 5, 2023

MICHAEL T. HILGERS
Attorney General
ERIC J. HAMILTON
Solicitor General

/s/John J. Schoettle
JOHN J. SCHOETTLE
Assistant Solicitor General
DANIEL J. MUELLEMAN
JOSHUA E. DETHLEFSEN
Assistant Attorneys General
OFFICE OF THE NEBRASKA
ATTORNEY GENERAL
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
John.Schoettle@nebraska.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 4,445 words as determined by the word-counting feature of Microsoft Word 2016.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2016 in 14-point proportionally spaced Century Schoolbook font.

And this brief complies with the electronic-filing requirements of Local Rule 28A(h)(2) because it was scanned for viruses using Windows Defender and no virus was detected.

/s/ John J. Schoettle
John J. Schoettle

CERTIFICATE OF SERVICE

I certify that on December 5, 2023, I electronically filed the foregoing brief with the Clerk of the Court by using the CM/ECF system, and that the CM/ECF system will accomplish service on all parties represented by counsel who are registered CM/ECF users.

/s/ John J. Schoettle
John J. Schoettle