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 GLEN A. WHITE, INTERIM 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

BRIEF OF APPELLANTS

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SUMMARY OF THE CASE

Plaintiffs HCI Distribution Inc. ("HCID") and Rock River Manufacturing, Inc. ("Rock River") allege that Nebraska laws requiring cigarette manufacturers to deposit funds in escrow and be listed on a directory to sell cigarettes in the State unconstitutionally infringe upon tribal sovereignty and violate the Supremacy and Indian Commerce Clauses of the U.S. Constitution.

Granting summary judgment in part to Plaintiffs, the district court concluded that the escrow requirements as applied to Plaintiffs' cigarette sales on the Winnebago reservation unconstitutionally infringed upon tribal sovereignty. The escrow and directory requirements' application to on-reservation sales does not unconstitutionally infringe upon tribal sovereignty. This Court should reverse and vacate the district court's judgment and injunction against Defendants.

Defendants request oral argument allotting 15 minutes per side to address the complex constitutional issues raised in this case.

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INTRODUCTION

In 1998, Nebraska reached a settlement agreement with the largest cigarette manufacturers. Under that agreement, called the Master Settlement Agreement ("MSA"), the State released certain consumer protection and health claims in exchange for ongoing payments and restrictions on the manufacturers. Nebraska law requires any manufacturer whose cigarettes are sold in the State to either (1) agree to the MSA and its obligations or (2) place money into escrow based on cigarettes sold in the State and meet requirements to be placed on a statewide directory of tobacco product manufacturers. The State can seek the escrowed amounts only to satisfy a judgment or settlement against the manufacturer for violations of state law similar in kind to the released claims under the MSA. Otherwise, the escrowed funds are returned to the manufacturer either after 25 years, to the extent the deposits exceed the amounts that would have been paid under the MSA, or pursuant to early release provisions in an agreement between the State and the government of an Indian tribe.

Though HCID and Rock River manufacture and distribute cigarettes in Nebraska and across the country, they do not comply with

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Nebraska's escrow and directory requirements. HCID and Rock River contend that as companies formed under tribal law, they are insulated from Nebraska's escrow and directory statutes. In 2018, HCID and Rock River sued Nebraska's Attorney General and Tax Commissioner seeking a declaration that those escrow and directory requirements are unconstitutional as applied to them. The district court granted Plaintiffs partial summary judgment, holding that Nebraska law was unconstitutional as applied to sales on the Winnebago reservation.

Requiring HCID and Rock River to comply with escrow and directory requirements for sales to non-tribal members on the Winnebago reservation does not unconstitutionally infringe upon tribal sovereignty. HCID's and Rock River's conduct is largely outside the Winnebago reservation, subjecting them to generally applicable state laws like the escrow and directory requirements. HCID and Rock River have historically imported the cigarettes they sell. Rock River sources tobacco that is grown outside the reservation. The vast majority of HCID's and Rock River's cigarette sales are outside the reservation and outside of Nebraska. Due to the extensiveness of HCID's and Rock River's conduct outside of the reservation, the escrow and directory requirements apply

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to them. There is thus no need to balance the State's interests against the federal and tribal interests.

Balancing of the interests, even if required, strongly supports the State's regulation. The State has compelling interests in promoting public health, reducing the harms associated with tobacco sales and use, and protecting consumers from unlawful tobacco product manufacturer conduct. The federal interests, on the other hand, are minimal. No federal law or policy is implicated or impacted by the State's regulation. The tribal interest is also slight. Neither HCID nor Rock River have historically contributed monetarily to the Tribe. Nor have they been significant sources of employment for tribal members. HCID and Rock River are instead exploiting their non-compliance with state law at the expense of other tobacco product manufacturers and distributors. There is no valid tribal interest in maintaining such an advantage. The district court erred in its contrary holding.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered a final order and judgment granting in part Plaintiffs' motion for

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summary judgment and granting in part Defendants' motion for summary judgment. App. 632; R. Doc. 184; R. Doc. 185. On May 16, 2023, Plaintiffs moved to correct a clerical error in the judgment. R. Doc. 186. *See* Fed. R. Civ. P. 60(a). The court granted the motion and entered an amended judgment on May 17, 2023. R. Doc. 187; App. 643; R. Doc. 188. Defendants filed a timely notice of appeal on May 30, 2023. R. Doc. 189. *See* Fed. R. App. P. 4(a)(1), (a)(4).

STATEMENT OF THE ISSUES

1. Whether Plaintiffs are generally subject to the Escrow and Directory Statutes because their conduct is largely outside of the Winnebago reservation.

   Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)

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

2. Whether Plaintiffs met their burden to show that the Escrow and Directory Statutes are unreasonable and unrelated to state regulatory authority.

   White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129 (8th Cir. 1982)

3. Whether the balance of state, federal, and tribal interests under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) prohibits application of the Escrow and Directory Statutes to sales to non-members on the Winnebago reservation.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)

Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134 (1980)

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)

4. Whether the Directory Statute is a valid minimal burden on Plaintiffs that allows the State to collect valid excise taxes on cigarettes.

Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv., 425 U.S. 463 (1976)

STATEMENT OF THE CASE

I. Factual Background

A. Nebraska enters into the Master Settlement Agreement.

In 1998, Nebraska and 45 other States reached an agreement, called the Master Settlement Agreement ("MSA"), with certain tobacco product manufacturers ("Participating Manufacturers" or "PMs") that released them from past and future claims based on consumer protection

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and health laws. *See State of Nebraska v. R.J. Reynolds Tobacco Co., et al.*, Lancaster County District Court, docket 573, page 277 (Neb. 1998). In exchange, the manufacturers agreed to limit their advertising and make payments to the States in perpetuity. These payments support important state services that help mitigate tobacco's harmful effect on the State. Nebraska spends about $60 million annually in MSA funds on biomedical research, the provision of children's health insurance, and tobacco-use prevention and control. R. App. 28;[1] R. Doc. 130, at 21; R. Doc. 131-16.

Nebraska and other MSA-participating States also adopted model legislation regulating manufacturers that did not participate in the MSA ("Non-Participating Manufacturers" or "NPMs"). Those laws require NPMs to deposit money into escrow and generally requires tobacco product manufacturers to register with the State. *See Omaha Tribe of Nebraska v. Miller*, 311 F. Supp. 2d 816, 819 (S.D. Iowa 2004); *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 163 (2d Cir. 2005). These provisions prevent NPMs from avoiding payment for their future

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[1] References to the appendix begin with "App."; references to the restricted appendix begin with "R. App."

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violations of law and ensure they do not gain an artificial competitive advantage. Under the MSA, the PMs may drastically reduce their future payment obligations if the State does not diligently enforce the escrow statute. R. Doc. 131-10, at 36–37.

B. Nebraska enacts escrow and directory laws.

Nebraska enacted its escrow requirements in 1999 and its directory registration requirements in 2003. Under Nebraska Revised Statutes § 69-2703 (the "Escrow Statute"), a tobacco product manufacturer must either: (1) join the MSA as a participating manufacturer or (2) place money into escrow on a quarterly basis based on units sold. *Id.* § 69-2703(1), (2). Units sold means the number of cigarettes sold in Nebraska in packs required to bear a stamp. *Id.* § 69-2702(14). Manufacturers or distributors must prepay the cigarette tax and place a stamp on any cigarettes intended to be sold in Nebraska. *Id.* § 77-2603(1). Taxes prepaid on cigarettes sold to tribal members in their own Indian country are refunded. *Id.* § 77-2602.05(2)(b). By law, escrow deposits may not exceed what the manufacturer would have paid had it participated in the MSA. *Id.* § 69-2703(2)(b)(ii). In addition, manufacturers paying into escrow must post a bond of at least $100,000. *Id.* § 69-2707.01(2)(a). The

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State may execute upon the bond to recover delinquent escrow requirements. *Id.* § 69-2707.01(5).

Escrow funds can be released in several ways. Any escrow funds not used to pay a judgment or settlement for any released claim against the manufacturer are released to the manufacturer after 25 years. *Id.* § 69-2703(2)(b)(iii). NPMs collect interest on the amounts deposited in escrow. *Id.* § 69-2703(2)(b). Indian tribes can seek release of escrow for cigarettes sold on the tribe's Indian country to the tribe's members if the tribe has an agreement with the State. *Id.* § 77-2602.06(1). Such an agreement may provide for, among other things, the sale of cigarettes not included in the directory if certain conditions are met. *Id.* § 77-2602.06(4).

Nebraska's directory registration requirement ensures compliance with the Escrow Statute. The Directory Statute provides that every tobacco product manufacturer whose cigarettes are sold in Nebraska must be listed on Nebraska's Directory of Certified Tobacco Product Manufacturers and Brands. *Id.* § 69-2706. To be listed on the directory, an NPM must certify that it has complied with the Escrow Statute. *Id.* § 69-2706(1)(a).

The Escrow Statute is enforced by the Attorney General. The Attorney General may bring a civil action against any tobacco product manufacturer violating the escrow requirements. *Id.* § 69-2703(c). Cigarette importers and stamping agents may be secondarily liable for escrow deposits if an NPM fails to meet its obligations. *Id.* §§ 69-2703(2)(d), 69-2708.01. The Nebraska Attorney General and Tax Commissioner share in certain responsibilities for maintaining the directory. *Id.* § 69-2706.

C. HCID and Rock River violate the Escrow and Directory Statutes.

1. HCID and Rock River are subsidiaries of Ho-Chunk, Inc., a corporation formed under tribal law. R. App. 94; R. Doc. 131-4, at 73:14–17; R. Doc. 131-3, at 173:9–25. Plaintiffs are located in the reservation of the Winnebago Tribe of Nebraska (the "Tribe"). R. Doc. 131-3, at 40:22–42:6, 112:13–22; 87 Fed. Reg. 4,636, 4,640 (Jan. 28, 2022). Rock River is a cigarette manufacturer located in Winnebago, Nebraska. The company was founded in 2009 and began selling cigarettes no later than 2010. R. App. 161; R. 131-5, at 20:23–25, 21:1–4. Rock River employed 15 people from 2014 to 2022, only some of whom are Winnebago members. R. Doc. 131-7, at 4–5; R. Doc. 131-18, at 4. Among Rock River's

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three employees in 2022, two were Winnebago members and one was not. R. Doc. 131-7, at 4–5; R. Doc. 131-18, at 4. Of the fifteen people that had worked for Rock River, three had not been members of any tribe, one was a member of the Omaha and Winnebago Tribe, two were members of the Omaha Tribe, and nine were members of the Winnebago Tribe. R. Doc. 131-7, at 4–5; R. Doc. 131-18, at 4.

Rock River is not party to the MSA. R. App. 198; R. Doc. 131-5, at 167:4–7. From 2013 until 2017, Rock River sold predominantly imported cigarettes manufactured outside the United States. R. App. 184–85; R. Doc. 131-5, at 110:5–111:4, 114:9–115:8. Rock River moved manufacturing in house and has sold its own cigarettes since 2018. R. App. 184; R. Doc. 131-5, at 113:5-22. During that time, it sold cigarettes to HCID. Rock River purchases the tobacco for its cigarettes from an out-of-state and unaffiliated company called AllianceOne. R. Doc. 131-3, at 44:20–45:6; 47:10–19, 48:2–12. Rock River possesses a federal cigarette manufacturer license and a federal importer license. R. App. 177; R. Doc. 131-5, at 82:25–83:16.

HCID is a cigarette distributor located in Winnebago, Nebraska and was created in 1999. R. App. 116; R. Doc. 131-4, at 158:3–5; R. Doc.

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131-3, at 112:13–16; R. App. 94; R. Doc. 131-4, at 73:8–13. In 2022, HCID employed three people, each a member of a different tribe. R. Doc. 131-6, at 4; R. Doc. 131-21, at 3. From 2014 until 2022, HCID employed a total of 23 different people. R. Doc. 131-6, at 4–5; R. Doc. 131-21, at 9–10. Eleven of those people lived in Nebraska. R. Doc. 131-6, at 4–5; R. Doc. 131-21, at 9–10.

HCID sells the cigarettes it receives from Rock River to retail establishments, some of which are owned by Ho-Chunk Trading Group. R. App. 116; R. Doc. 131-3, at 129:23–130:22; R. Doc. 131-4 at 158:18–159:19; R. App. 187; R. Doc. 131-5 at 122:17–23. HCID sells Rock River's cigarettes to retail establishments around the country. Within Nebraska, HCID's cigarettes are sold on the Winnebago and Omaha reservations. R. Doc. 131-13; R. Doc. 131-15. Most of HCID's revenues from 2013 through 2021 came from cigarette sales to customers located outside of Nebraska. R. App. 88–90, 92–93; R. Doc. 131-4, at 47:9–55:25, 65:18–68:4.

2. Neither Rock River nor HCID have made any escrow deposits or posted bond for cigarettes sold on the Omaha and Winnebago reservations. R. App. 116; R. Doc. 131-4, at 160:3–21; R. App. 188; R.

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Doc. 131-5, at 128:25–129:14; R. Doc. 131-6, at 19–20. HCID and Rock River are not listed on the Nebraska directory of cigarette manufacturers. R. Doc. 131-3, at 223:1–5; R. App. 109; R. Doc. 131-4, at 133:8–14. Neither HCID nor Rock River has a Nebraska state license to apply cigarette excise tax stamps. R. App. 200; R. Doc. 131-5, at 174:6-18, 175:14–24. HCID and Rock River have never made any cigarette excise tax payments to the State of Nebraska for cigarettes sold in Nebraska. R. App. 110; R. Doc. 131-4, at 134:1–17; R. App. 200; R. Doc. 131-5, at 174:2–14.

Though Rock River has not complied with Nebraska law, it complies with the escrow and certification requirements of other States in which its cigarettes are sold. R. Doc. 131-3, at 215:25–216:11; R. Doc. 131-7, at 22. Rock River has an escrow account at the Bank of Oklahoma for the following States: Alaska, Alabama, Idaho, Kansas, New Mexico, Nevada, Oregon, and Washington. R. App. 189; R. Doc. 131-5, at 132:10–133:13. Rock River owns those accounts and maintains reversion rights to the deposited amounts and any interest. R. Doc. 131-3, at 253:3–10; R. App. 195; R. Doc. 131-5, at 156:11–23. As of May 2022, Rock River's escrow

accounts had a $1.1 million balance. R. App. 195; R. Doc. 131-5, at 156:11–23.

In April 2016, HCID and Rock River entered into a Universal Tobacco Settlement Agreement with the Winnebago Tribe. R. App. 198; R. Doc. 131-5, at 168:20-169:18; R. Doc. 131-6, at 22-23; R. Doc. 131-7, at 24-25. That agreement requires signatory tobacco manufacturers and distributors to make payments to the Tribe and imposes restrictions on the manufacturer's and distributor's activities. R. App. 198; R. Doc. 131-5, at 168:20–169:18; R. Doc. 131-6, at 22–23; R. Doc. 131-7, at 24–25.

II. Procedural History

On April 20, 2018, HCID and Rock River filed suit against the Nebraska Attorney General and Tax Commissioner. App. 1; R. Doc. 1. HCID and Rock River claimed that the escrow and directory requirements violated the Supremacy Clause and the Indian Commerce Clause of the United States Constitution.[2] HCID and Rock River also

[2] In the Complaint, Plaintiffs defined the escrow statute as Neb. Rev. Stat. §§ 69-2701 to 2703.1 and the directory statute as Neb. Rev. Stat. §§ 69-2704 to 2707. App. 9–10; R. Doc. 1, at 9–10. By citing Neb. Rev. Stat. § 2703.1, Plaintiffs appear to be referencing Neb. Rev. Stat. § 2703.01. Sections 69-2703 and 69-2706 provide the operative escrow requirement and directory requirement, respectively, challenged by Plaintiffs.

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alleged that the State's contractual arrangements with PMs targeted them and other Indian tribes in violation of the Equal Protection Clause of the Constitution. HCID and Rock River sought a declaration that the Escrow and Directory Statutes could not be applied to them for any activity in Indian Country. App. 17; R. Doc. 1, at 17. They also sought injunctive relief preventing enforcement of those laws against them, in addition to any other relief that the court deemed just and proper. App. 18; R. Doc. 1, at 18.

Defendants filed a motion to dismiss, which was granted in part on Plaintiffs' Equal Protection Clause claim. App. 139; R. Doc. 35, at 18. Following discovery, both parties moved for summary judgment. App. 169; R. Doc. 123; App. 620; R. Doc. 129. HCID and Rock River filed as an exhibit to their motion for summary judgment a declaration from Victoria Kitcheyan, the Chairwoman of the Tribal Council of the Winnebago Tribe of Nebraska. App. 295; R. Doc. 125-3. Included with that filing was a series of attachments including tribal resolutions, a Ho-Chunk Annual Report, and an economic study. App. 295; R. Doc. 125-3. Defendants moved to strike the declaration and attachments because HCID and Rock

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River never disclosed Chairwoman Kitcheyan as an individual likely to have discoverable information. App. 623–24; R. Doc. 154, at 1–2.

The district court denied in part and granted in part each party's motion for summary judgment. App. 667; R. Doc. 184, at 36. The district court determined that the escrow and bond requirements could be constitutionally applied to HCID's and Rock River's cigarettes sold outside the Winnebago reservation but within Nebraska. App. 656; R. Doc. 184, at 25. The district court concluded that the interests weighed in favor of the State because HCID and Rock River were selling outside the Winnebago reservation to non-members. App. 656; R. Doc. 184, at 25.

The district court granted Plaintiffs' motion as to any cigarettes sold within the Winnebago reservation. The district court first concluded that sales by HCID and Rock River through tribal retailers on the Winnebago reservation involve only tribal-member conduct on the reservation. App. 661; R. Doc. 184, at 30. As a result, the district court held that the escrow requirements could apply to sales on the Winnebago reservation only in "exceptional circumstances." App. 661; R. Doc. 184, at 30. The district court determined there were no exceptional

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circumstances in this case on the basis that the escrow requirements were punitive and constituted a significant burden. App. 662; R. Doc. 184, at 31. The district court therefore concluded that the Escrow Statute and bond requirements were unconstitutional as applied to HCID's and Rock River's sales on the Winnebago reservation. App. 666; R. Doc. 184, at 35. The district court did not rule on the constitutionality of the directory requirements as applied to HCID's and Rock River's sales on the Winnebago reservation.

Construing Defendants' motion to strike as "only directed at the affidavit of Victoria Kitcheyan, and not the underlying documents attached," the district court denied the motion to strike as moot because it did not rely upon the declaration itself. App. 667, R. Doc. 184, at 36 n.6. The district court noted that it "properly assessed" the information in the attached documents. App. 667; R. Doc. 184, at 36 n.6.

On May 17, 2023, the district court entered an amended judgment, permanently enjoining Defendants "from enforcing Neb. Rev. Stat. §§ 69-2703 and 69-2707.01 for past and future tobacco products sold by the plaintiffs on the Winnebago Reservation." App. 643; R. Doc. 188. The Defendants filed a timely notice of appeal on May 30, 2023. R. Doc. 189.

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SUMMARY OF ARGUMENT

The district court erroneously concluded that the Constitution required carving out HCID's and Rock River's cigarettes sold at retail on the Winnebago reservation from their escrow and directory obligations. In doing so, the district court failed to apply the basic principle that Indians going beyond their reservation subject themselves to generally applicable state laws. *See Mescalero Apache Tribe v. Jones* ("*Jones*"), 411 U.S. 145, 148 (1973). HCID and Rock River imported cigarettes from outside the reservation, sourced tobacco for manufactured cigarettes from outside the reservation, and sold a majority of their cigarettes outside of the Winnebago reservation and outside of Nebraska. Because their activities are largely outside the reservation, they are subject to nondiscriminatory state laws like the Escrow and Directory Statutes without resort to any interest balancing. By concluding otherwise, the district court put itself in direct conflict with a Ninth Circuit decision addressing materially the same issue. *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 993–94 (9th Cir. 2014). Affirming the district court's decision would thus create an unwarranted circuit split.

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The district court also erred in failing to require Plaintiffs to carry their burden to show that the Escrow and Directory Statutes are unreasonable and unrelated to state regulatory authority. *See White Earth Band of Chippewa Indians v. Alexander ("Alexander")*, 683 F.2d 1129, 1138 (8th Cir. 1982). At a minimum, the standard applies because the Escrow and Directory Statutes apply to both member and non-member conduct.

Even if *Bracker* balancing of the federal, tribal, and state interests were required, the state interests far outweigh the federal and tribal interests. There is a complete lack of applicable federal law and policy at issue. The tribal interest is also slight. HCID and Rock River contribute little to the Tribe in terms of money or employment. HCID and Rock River only gain an artificial competitive advantage by skirting state law. There is no valid tribal interest in that advantage. *See Washington v. Confederated Tribes of Colville Indian Rsrv. ("Colville")*, 447 U.S. 134, 155 (1980).

The district court compounded its error in the *Bracker* analysis by requiring a showing of extraordinary circumstances. That standard does not apply because the conduct at issue is not solely member conduct on

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the reservation. HCID's and Rock River's cigarettes are sold to non-tribal members on the reservation. HCID's and Rock River's conduct in importing cigarettes, sourcing tobacco, and selling cigarettes extends far outside the Winnebago reservation. The harms from those cigarettes do as well. Escrow deposits should be made to ensure future compensation for wrongdoing that occurs on or off the reservation.

Regardless, the Escrow and Directory Statutes are justified by extraordinary circumstances. As the district court recognized, the State's interest in regulating an extremely harmful product is compelling. The district court, however, misjudged the burden imposed by the escrow requirements. HCID and Rock River already comply with escrow requirements in other States. The purpose of the escrow requirements is not punitive. Rather, the purpose is to maintain the State's regulatory scheme and eliminate artificial competitive advantages for manufacturers not participating in the MSA.

Finally, the directory requirement is valid for the independent reason that it places only a minimal burden on tobacco product manufacturers. The requirement ensures the collection of valid state excise taxes on cigarette sales to non-tribal members. For all these

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reasons, this Court should reverse the district court, direct the district court to enter judgment in favor of Defendants, and vacate the injunction against Defendants.

STANDARD OF REVIEW

The Court "review[s] de novo the district court's resolution of cross-motions for summary judgment, viewing the evidence in the light most favorable to the nonmoving party and giving the nonmoving party the benefit of all reasonable inferences." *Dallas v. Am. Gen. Life & Accident Ins. Co.*, 709 F.3d 734, 736 (8th Cir. 2013) (quoting *Crawford v. Van Buren Cnty.*, 678 F.3d 666, 669 (8th Cir. 2012)). "Summary judgment is required 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *LaCurtis v. Express Med. Transporters, Inc.*, 856 F.3d 571, 576–77 (8th Cir. 2017) (quoting Fed. R. Civ. P. 56(a)).

ARGUMENT

I. HCID and Rock River Must Comply with the Escrow and Directory Statutes Because Their Activities Go Outside the Winnebago Reservation.

Because their conduct occurs largely outside of the Winnebago reservation, HCID and Rock River must obey generally applicable laws

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like the Escrow and Directory Statutes.[3] "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Jones*, 411 U.S. at 148–49. In *Jones*, the Supreme Court applied that principle to uphold a state tax on a tribe's ski resort located off the reservation. *Id.*

Applying *Jones*, the Ninth Circuit upheld the State of Washington's similar escrow and directory laws under materially the same circumstances. *King Mountain*, 768 F.3d at 993–94. The cigarette manufacturer in *King Mountain* grew tobacco on the reservation, sent it to another State where it was blended with other tobacco grown outside the reservation, and used the mixed tobacco to manufacture cigarettes on the reservation before selling it on the reservation and in other States. *Id.* at 994. The Ninth Circuit held that Washington's escrow statute did

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[3] Though the parties litigated the lawfulness of the Directory Statute, the district court's summary judgment order does not rule on the constitutionality of that provision. App. 667–68; R. Doc. 184, at 36–37; App. 643; R. Doc. 188. Plaintiffs, which sought and obtained an amended judgment on a separate point, did not seek an amended judgment addressing the Directory Statute. In an abundance of caution, Defendants address the constitutionality of the Directory Statute in addition to the Escrow Statute.

not violate the Constitution because the manufacturer's "activities [were] largely off-reservation." *Id.* In reaching that conclusion, the court cited the district court's factual findings that the tobacco manufacturer's "operations involve extensive off-reservation activity" and that the "products . . . are not principally generated from the use of reservation land and resources." *Id.* at 993–94. The court concluded that by going beyond the reservation, the manufacturer was subject to generally applicable state laws like the Washington escrow statute. *Id.* at 994.

The same conclusion should follow here. Like the manufacturer in *King Mountain*, HCID's and Rock River's activities are largely outside the reservation. There was no dispute at summary judgment that the tobacco used in Rock River's manufactured cigarettes comes from outside of the reservation. R. Doc. 131-3, at 44:20–45:6; 47:10–19. Rock River has also historically imported cigarettes from outside Nebraska. R. App. 184–85; R. Doc. 131-5, at 110:5–111:4, 114:9–115:8. From 2014 through 2017, the vast majority of HCID's cigarette sales were imported cigarettes. R. App. 86–87; R. Doc. 131-4, at 40:25–43:7. From 2013 through 2021, the vast majority of HCID's sales were to retailers outside of the Winnebago reservation, including on the Omaha reservation and

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in various other states. 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. The cigarettes Rock River manufactures or imports are not principally generated from the use of Winnebago land and resources. R. Doc. 131-3, at 44:20–45:6; 47:10–19. Because HCID and Rock River have gone beyond the reservation boundaries, they are subject to nondiscriminatory Nebraska laws requiring them to deposit money into escrow and register as a manufacturer on the Nebraska directory.

As a decision of a sister circuit, *King Mountain* "deserves great weight." *United States v. Auginash*, 266 F.3d 781, 784 (8th Cir. 2001) (quoting *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979)). This Court also "strive[s] to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket." *Id.* (quoting same). The district court's refusal to follow *King Mountain* rested on two faulty conclusions. *First*, the district court concluded that the Ninth Circuit incorrectly relied on *Jones*. On the contrary, the Ninth Circuit applied a long-accepted principle that *Jones* simply recognized: By going beyond reservation boundaries, the cigarette manufacturer exposed itself to generally

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applicable state laws. Other courts have applied this principle in similar circumstances when upholding state laws regulating tribal cigarette distribution. *See, e.g.*, *State ex rel. Wasden v. Native Wholesale Supply Co.*, 155 Idaho 337, 343 (Idaho 2013); *State ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, ¶¶ 45–47, 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 also interpreted *Jones* in a manner consistent with *King Mountain*'s analysis. In *Fond du Lac Band of Lake Superior Chippewa v. Frans*, this Court applied the principle that an "Indian[] going beyond reservation boundaries" is "subject to non-discriminatory state law" to uphold a State's attempt to tax a tribal member's pension that was received on the reservation but earned off it. 649 F.3d 849, 850, 852, 853 (8th Cir. 2011) (quoting *Jones*, 411 U.S. at 148–49). The fact that some of the relevant conduct occurred within the reservation—the receipt of the pension payment—did not shield the tribal member from generally applicable state laws. *See id.* at 852–53. The same is true here.

Second, the district court found that *King Mountain*'s holding was "inconsistent" with *California v. Cabazon Band of Mission Indians*

("*Cabazon*"), 480 U.S. 202, 215 (1987). App. 660; R. Doc. 184, at 29. In *Cabazon*, the Supreme Court held that California could not regulate high-stakes bingo games occurring on a reservation. 480 U.S. at 221–22. The district court noted that *Cabazon* still concluded that the bingo operation was solely on-reservation conduct even though the tribe's bingo operations likely used some off-reservation resources. App. 660–61; R. Doc. 184, at 29–30. As an initial matter, *Cabazon* made no on- or off-reservation findings because that issue was apparently never raised before the Court. Moreover, there was no suggestion that the tribe in *Cabazon* was operating outside of the reservation. For instance, there is no indication that the tribe was operating gaming rooms anywhere else or advertising its gaming rooms outside of the reservation. Contrary to both *King Mountain* and this case, the conduct at issue in *Cabazon* was a service rather than a product and was confined to the reservation. 480 U.S. at 205. Nothing in *Cabazon*'s analysis casts doubt on *Jones*'s applicability in this case or *King Mountain*'s analysis.

By going beyond the Winnebago reservation to import, manufacture, and distribute cigarettes, HCID and Rock River conducted themselves largely off-reservation. Such conduct exposed Plaintiffs to

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generally applicable state laws like the Escrow and Directory Statutes., and balancing is unnecessary. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112 (2005). This Court should avoid an unwarranted circuit split and recognize the applicability of the Escrow and Directory Statutes to Plaintiffs.

II. HCID and Rock River Did Not Meet Their Burden to Show that the Escrow and Directory Laws Are Unreasonable and Unrelated to State Regulatory Authority.

Bracker balancing is unnecessary for the additional reason that HCID and Rock River failed to show that the escrow and directory laws were unreasonable and unrelated to state regulatory authority. This Court requires this showing as a prerequisite to *Bracker* balancing. *Alexander*, 683 F.2d at 1138. In *Alexander*, a tribe challenged a district court's decision upholding a state law regulating non-members' hunting and fishing on the reservation. *Id.* at 1132. Although recognizing that the district court's interest balancing was deficient, this Court concluded that "a remand would serve no useful function here because the [tribe]

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has not met its burden of showing that the state's gaming laws were unreasonable and unrelated to its regulatory authority." *Id.* at 1138.

HCID and Rock River likewise failed to meet their burden, and the Escrow and Directory Statutes should have been upheld on that basis alone. The Escrow and Directory Statutes are reasonable and related to valid state interests in regulating tobacco product manufacturers and their products. As explained, the escrow requirements ensure that the State can collect on judgments against manufacturers that violate state law. *See* p. 8, *supra.* The escrow requirements also maintain a competitive tobacco marketplace by preventing an immediate windfall to manufacturers who do not participate in the MSA. *See* pp. 50–51, *infra.* The directory requirements assist with compliance of not only the escrow laws but also state tax and stamping laws. *See* pp. 52–54, *supra.*

The district court did not find that the Escrow and Directory Statutes were unreasonable or unrelated to state regulatory authority. Instead, it distinguished *Alexander* on the basis that the State in *Alexander* regulated non-member conduct. App. 645; R. Doc. 184, at 14. Nothing in *Alexander* places this limit on its rule. But, the escrow and directory requirements also implicate non-member conduct. The State is

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seeking escrow deposits for cigarettes sold to non-members on the reservation. Those escrow requirements enable the State to collect on harms to non-members committed by a manufacturer.

HCID and Rock River did not carry their burden to show that the Escrow and Directory Statutes are unreasonable and unrelated to lawful state regulatory interests. They did not, and *Bracker* interest balancing is unnecessary to uphold the Escrow and Directory Statute's application to sales to non-members on the Winnebago reservation.

III. The Escrow and Directory Statutes Are Constitutional Under *Bracker* Balancing.

Balancing of state, federal, and tribal interests under *Bracker*, if required, leads to the same result: The Escrow and Directory Statutes apply to HCID's and Rock River's sales to non-members on the Winnebago reservation. There are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). The first is that federal law pre-empts a state's attempt to regulate. *Id.* The second is that state law "may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

Invalidating a state law based on an infringement of tribal sovereignty is "disfavored." *See e.g.*, *Rice v. Rehner*, 463 U.S. 713, 720 (1983). "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1973).

Where a "State asserts authority over the conduct of non-Indians engaging in activity on the reservation," 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." *Bracker*, 448 U.S. at 144–45. The "focus" of the *Bracker* interest weighing is "on 'the extent of federal regulation and control, the regulatory and revenue-raising interests of states and tribes, and the provision of state or tribal services.'" *Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941, 945 (8th Cir. 2019) (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 707 (2012)).

A. The state interests are compelling.

The Escrow and Directory Statutes further critical state interests. The Escrow and Directory Statutes are part of a comprehensive scheme implemented to regulate tobacco product manufacturers and distributors after decades of consumer protection violations and adverse health effects. That scheme ensures that state excise taxes are collected, that the State is compensated for historical and ongoing harms to the public from tobacco use, and that tobacco company wrongdoing can be remedied and the harms compensated. The entire regulatory scheme depends on every tobacco product manufacturer and distributor being subject to state regulation, or else a single company could take advantage of a lack of regulation and the absence of conditions imposed on others. The scheme thus hinges on the Escrow and Directory Statutes to ensure a level playing field.

Maintaining that regulatory scheme is critical because it furthers a host of significant interests. *See Miller*, 311 F. Supp. 2d at 826–27. There is a recognized general state interest in enforcing tobacco laws. *See Dep't of Tax'n & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73 (1994); *Colville*, 447 U.S. at 151, 158–59. "Unquestionably, the State possesses a

legitimate public interest in the health of its citizens." *Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 942 (8th Cir. 2009). Courts have specifically recognized a powerful state interest in protecting public health and deterring and compensating for harms caused by tobacco use. *See, e.g.*, *id.*; *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 217 (2d Cir. 2003); *Ward v. New York*, 291 F. Supp. 2d 188, 205 (W.D.N.Y. 2003); *Native Wholesale Supply*, 2010 OK 58 ¶ 48, 237 P.3d at 216–17. The payments that the State receives through its agreements with participating manufacturers fund important state programs related to health and education. R. App. 28; R. Doc. 130, at 21; R. Doc. 131-16. Those expenditures are about $60 million annually and fund services to tribal members and non-members alike. *See* R. App. 28; R. Doc. 130, at 21. Nebraska thus has a "significant interest in raising revenue . . . to provide services to residents . . . and its 'separate sovereign interest in being in control of, and able to apply, its laws throughout its territory.'" *Haeder*, 938 F.3d at 946 (quoting *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 476 (2d Cir. 2013)). The State also has a strong sovereign interest in holding wrongdoers responsible regardless

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of whether the victim is a tribal or non-tribal member. *See Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2501–02 (2022).

Although the district court called the state's interests "important" (App. 650; R. Doc. 184, at 19) and "compelling" (App. 662; R. Doc. 184, at 31), it unreasonably discounted those interests. The district court first cast doubt on whether the State's interest in the escrow requirement is truly about securing potential judgments. The district court called the escrow deposits "punitive exactions" (App. 662; R. Doc. 184, at 31) meant to maintain the State's payments from participating manufacturers under the MSA. The district court's analysis unduly compartmentalizes aspects of the regulatory scheme without appreciating how those laws affect the State's entire regulation of the industry. Under the statute, a manufacturer can choose to either agree to the conditions of the MSA or comply with the state's escrow requirements. Rather than a solitary contractual arrangement, the MSA, on its own and its reflection in state tobacco laws across the country, is a critical piece of States' regulation of tobacco. The MSA payments and the restrictions it places upon participating manufacturers promote public health and compensate for prior and future harms. The Escrow and Directory Statutes recognize

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that whether a manufacturer participated in the MSA or not, its conduct and its products impose the same social costs. The escrow deposits as a result are meant to ensure that the non-participating manufacturer neither unfairly avoids punishment down the road nor reaps artificial competitive benefits by skirting such regulation.

B. The federal interests are slight.

The federal and tribal interests are comparatively low in this context. The federal government has not tried to regulate this area of cigarette manufacturing or sales. As the district court recognized, there is a noticeable absence of relevant federal law and policy concerning tribal cigarette manufacturing and distribution. App. 652; R. Doc. 184, at 21. This is not a case in which the State is regulating in an area "in which the Federal Government has undertaken to regulate the most minute details." *Cf. Bracker*, 448 U.S. at 149. Instead, "Congress has repeatedly refused to regulate the entire field of tobacco." *Miller*, 311 F.Supp.2d at 823. To the extent the federal government has spoken on the issue, it has "generally been supportive of *state* regulation of cigarette sales." *Ward*, 291 F. Supp. 2d at 204. For example, federal law prohibits anyone from trafficking in cigarettes without complying with applicable

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state tax and stamping laws. 18 U.S.C. §§ 2341, 2342. Congress has also required anyone shipping cigarettes in interstate commerce to file reports with state tobacco tax administrators. 15 U.S.C. § 376. HCID indeed has submitted the reports required under that statute. R. Doc. 131-13; R. Doc. 131-15. The federal government also requires States to ban cigarette sales to persons under the age of 21 to receive certain federal aid. 42 U.S.C. § 300x-26. Due to the lack of federal law or policy applicable to this case, there is no basis to strike the State's regulation.[4]

The district court concluded that "[t]he federal government has repeatedly demonstrated, and courts have consistently recognized, a firm commitment to policies which protect tribal sovereignty and encourage tribal businesses and self-sufficiency." App. 651; R. Doc. 184, at 20. The district court should have given more weight to the absence of any federal law or policy involved in this case. The inquiry whether a State's regulation unconstitutionally infringes on tribal sovereignty must be guided by "the applicable treaties and statutes which define the limits of

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[4] Defendants are not arguing that state law applies in the absence of any congressional statement to the contrary. *See Bracker*, 448 U.S. at 150-51. Rather, as established throughout Supreme Court case law on the subject, federal interest is determined by reference to the law and policy of the federal government in the area to be regulated.

state power," not "platonic notions of Indian sovereignty." *McClanahan*, 411 U.S. at 172. *See generally* Restatement of the Law of American Indians § 29. Tribal sovereignty simply "provides a backdrop against which the applicable treaties and federal statutes must be read." *McClanahan*, 411 U.S. at 172. Here, there is a lack of applicable federal law for tribal sovereignty principles to even serve as a backdrop. Nor is there a basis to resort to any implied federal interest in "tribal self-sufficiency and economic development" where HCID and Rock River contribute little to the Tribe in terms of revenue or employment. *Cf. Bracker*, 448 U.S. at 143.

As the district court recognized (App. 652; R. Doc. 184, at 21), there was direct and explicit federal involvement in the areas sought to be regulated by the State in *Cabazon* and *New Mexico v. Mescalero Apache Tribe* ("*Mescalero*"), 462 U.S. 324 (1983). In *Cabazon*, the tribe was conducting the bingo games "pursuant to an ordinance approved by the Secretary of the Interior." 480 U.S. at 204–05. The Supreme Court found the federal interests "important" because the "Secretary of the Interior ha[d] approved tribal ordinances establishing and regulating the gaming activities involved." *Id.* at 217–18. That explicit federal

involvement "demonstrat[ing] the [Federal] Government's approval and active promotion of tribal bingo enterprises" was "of particular relevance" to the Court's analysis. *Id.* at 218. Under those circumstances, the state regulation would have interfered with an explicit federal policy.

The Court in *Mescalero* likewise vindicated an express federal policy. There, the Court rejected the State's attempt to regulate hunting and fishing on tribal land because several laws and treaties gave the tribe rights to regulate the use of its resources on the reservation. *Mescalero*, 462 U.S. at 337–38. In contrast to the active federal approval and promotion in *Cabazon* and *Mescalero*, the federal government has been silent on cigarette manufacturing and distribution on tribal land. The minimal "extent of federal regulation and control" in this area suggests a lack of federal, and thus tribal, interest. *Flandreau Santee Sioux Tribe*, 938 F.3d at 945.

C. The tribal interests are slight.

1. The Winnebago Tribe has a minimal interest. HCID and Rock River contribute very little, if anything, economically to the Tribe. They generate a small proportion of Ho-Chunk's revenue, and they have historically incurred losses. R. Doc. 131-6, at 6–9; R. Doc. 131-7, at 8–10;

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R. Doc. 131-20. Because of those losses, Rock River and HCID have not been a source of the funds that Ho-Chunk provided to the Tribe. HCID and Rock River also have not been significant sources of employment for tribal members. R. Doc. 131-6, at 4–5; R. Doc. 131-7, at 4–5; R. Doc. 131-18; R. Doc. 131-21. As the district court accurately noted, "the plaintiffs appear to have been minimally staffed by Winnebago members since 2014." App. 654; R. Doc. 184, at 23 n.4. Rock River has historically imported cigarettes for resale, providing little additional value and evading Nebraska's tax, escrow, and directory laws. Neither Rock River nor HCID have made any charitable or social contributions of any significant monetary size. R. Doc. 131-6, at 6; 131-7, at 6; 131-19.

2. The district court overvalued the Tribe's interest. The district court improperly equated this case to *Cabazon* in weighing the tribal interest. The tribal interest in *Cabazon* was much greater because the gaming was the tribe's "sole source of revenues" and the games were "the major sources of employment on the reservations." 480 U.S. at 218–19. In contrast to *Cabazon*, the undisputed facts on summary judgment were that neither HCID nor Rock River were a source of revenues for the tribal government. R. Doc. 131-6, at 6–9; R. Doc. 131-7, at 8–10; R. Doc. 131-

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20. If anything, by incurring historical losses, HCID and Rock River were subtracting from potential payments to the Tribe. HCID and Rock River are also an insignificant source of employment for Winnebago tribal members, unlike the bingo games in *Cabazon*.

The district court believed that tribal law was already furthering an interest similar to the State's through its own agreement that mirrors the MSA, called the Universal Tobacco Settlement Agreement. *See* R. Doc. 1-2; R. App. 198; R. Doc. 131-5, at 168:20–169:18. However, there was no evidence properly in the record that any payments were ever made to the Tribe pursuant to that agreement.[5] There is no basis to consider this interest without evidence of payments. In any event, the fact that there may be overlap between tribal and state regulation does

[5] The only evidence Plaintiffs submitted was a bare assertion in the Kitcheyan Declaration that certain payments were made to the Tribe in 2017. App. 272; R. Doc. 125-3 at 4. However, Defendants sought to strike that declaration and its attachments because Plaintiffs never identified Chairwoman Kitcheyan in the discovery process as someone with potentially relevant information. App. 623–24; R. Doc. 154, at 1–2. The district court noted that it did not rely upon any information in the declaration itself. App. 667; R. Doc. 184, at 36 n.6. The declaration and its attachments could not be used to "supply evidence" for the summary judgment motion. Fed. R. Civ. P. 37(c)(1).

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not mean that state regulation is preempted. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186, 189 (1989); *Colville*, 447 U.S. at 157.

3. The district court also improperly accepted facts about the economic benefits HCID and Rock River provide that were either disputed material facts or facts contained in material that was subject to an unresolved request to strike. Assessing the tribal interest, the district court relied upon information from attachments to a declaration from Victoria Kitcheyan, which together with those attachments was filed as an exhibit to Plaintiffs' summary judgment motion. App. 295; R. Doc. 125-3. Although Defendants challenged both the declaration and its attachments because Plaintiffs failed to disclose in discovery Chairwoman Kitcheyan as someone with discoverable information, the district court misconstrued the motion as directed only at the declaration itself. App. 667; R. Doc. 184, at 36 n.6. The district court still considered the attached documents, including tribal resolutions, a Ho-Chunk Annual Report, and an economic study, without properly resolving the motion to strike. App. 667; R. Doc. 184, at 36 n.6.

The consideration of those documents tainted the district court's analysis of the tribal interest. Apparently relying on the information in

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those documents (*see e.g.*, App. 637–38; R. Doc. 184, at 6–7), the district court found that the Tribe had an economic interest in the operation of HCID and Rock River. App. 654; R. Doc. 184, at 23. However, the district court could not properly rely upon that information, and its conclusion about the economic contributions of HCID and Rock River to the Tribe thus lacks support in the record. *See* Fed. R. Civ. P. 37(c)(1). The record instead reflects that HCID and Rock River historically incurred losses, did not recently contribute to any dividend that Ho-Chunk paid to the Tribe, and were not a significant source of employment for tribal members.

4. There is no legitimate tribal interest in an artificial advantage gained from non-compliance with state law. *See Colville*, 447 U.S. at 155. Ultimately, the tribal interest at stake is HCID's and Rock River's advantage gained from avoiding state cigarette regulations. The district court concluded otherwise despite the record before it. For example, the vast majority of cigarettes historically sold by HCID and Rock River were imported from outside of the reservation and outside of Nebraska. R. App. 86–87; R. Doc. 131-4, at 40:25–43:7; R. App. 184; R. Doc. 131-5, at 110:5–111:4. *Cabazon* recognized that such "importing a product onto

the reservations for immediate resale to non-Indians" would suggest that the tribal member was merely marketing an exemption from state law. 480 U.S. at 219. The district court reasoned that HCID and Rock River were not "*merely* importing" cigarettes "for *immediate resale*" because the imported cigarettes were stamped in compliance with state and federal law when passed through HCID before being sold at retail. App. 654–55; R. Doc. 184, at 23–24 (emphasis original) (quoting *Cabazon*, 480 U.S. 219).

It was undisputed however that neither Rock River nor HCID ever stamped their cigarettes sold in Nebraska in compliance with state or federal law. App. 186; R. Doc. 124, at 15. Even if they did, there is no basis to conclude that stamping somehow added any economic value to the cigarettes. Likewise, passing cigarettes through HCID adds nothing of value. To conclude otherwise elevates form over economic substance. Rock River's importation of cigarettes for resale to non-tribal members on the Winnebago reservation is precisely the conduct *Cabazon* suggested would be an impermissible basis to find a tribal interest.

5. Aside from the imported cigarettes, the district court noted that the business reflected a "sophisticated vertically integrated business

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which capitalizes on all stages of the tobacco product market." App. 655; R. Doc. 184, at 24. The record, however, cannot support such an inflated characterization. Even for non-imported cigarettes, Rock River purchases tobacco grown elsewhere, rolls it into a cigarette, and then passes those cigarettes to HCID for distribution. To the extent the district court's conclusion in this respect rested on information from the Kitcheyan Declaration attachments, that reliance was inappropriate absent a ruling on the motion to strike those attachments from evidence.

There is an absence of a federal policy or interest, and the Tribe's minor legitimate interests pale in comparison to the State's compelling interests. Under a proper *Bracker* analysis, the Escrow and Directory Statutes were valid regulations of sales to non-members on the Winnebago reservation.

D. The district court erred by concluding exceptional circumstances were not present.

The district court also erred in its *Bracker* analysis by holding that exceptional circumstances did not justify the Escrow and Directory Statutes. A State may regulate "on-reservation activities of tribal members" only in "exceptional circumstances." *Mescalero*, 462 U.S. at 331–32. In that circumstance, "the State's regulatory interest is likely to

be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, 448 U.S. at 144.

This heightened standard for *Bracker* balancing does not apply because the statutes do not regulate solely on-reservation conduct of Indians. Even if it did, Defendants made a showing of exceptional circumstances because the Escrow and Directory Statutes are critical tools in the State's response to the danger of tobacco use.

1. The heightened exceptional circumstances requirement does not apply.

The district court concluded that the Escrow and Directory Statutes regulate solely member conduct on the reservation and as a result required exceptional circumstances to justify the State's regulation. However, this case does not involve solely "on-reservation conduct involving only Indians" where the Supreme Court said a State's "regulatory interest is likely to be minimal." *Bracker*, 448 U.S. at 144. Instead, the State is regulating conduct involving non-tribal members, and the relevant activities are not solely on the reservation.

The conduct at issue does not "invol[ve] only Indians." *Id.* Rock River cigarettes are available for sale to non-Winnebago members on the Winnebago reservation. *See* R. Doc. 131-3, at 231:8–232:13; R. App. 207;

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R. Doc. 131-5, at 203:16-21. A sale to a non-member implicates an even stronger state interest. It is well-established that the location and tribal identity of consumers are relevant considerations. For example, the validity of state taxation of cigarettes sales on the reservation turns on whether the purchaser is a member or not. *See, e.g.*, *Colville,* 447 U.S. at 159. In *Cabazon*, the Court considered that the gaming involved non-members, recognizing that the State was regulating "tribal Indians in the context of their dealings with non-Indians." 480 U.S. at 216.

The district court construed the Escrow Statutes as solely regulating the manufacturer's conduct. That conclusion, however, ignores the reality that at the other end of every sale is a purchaser, and that purchaser could be a member or non-member. For sales to non-tribal members, the State is necessarily asserting authority over conduct involving a member (the manufacturer) *and* a non-member (the purchaser at retail), requiring the usual *Bracker* balancing.

That the Escrow and Directory Statutes are not addressed solely to member conduct on the reservation is illustrated by the statutory scheme itself. The amount of escrow required depends on a manufacturer's units sold. Neb. Rev. Stat. § 69-2703(2)(a). Units sold are the number of

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cigarette packs sold in the state for which state tax must be paid. *Id.* § 69-2702(14). However, sales by a tribal member to a tribal member on a reservation are exempted from state excise taxes.[6] Nebraska law also exempts the holding of escrow deposits for sales to tribal members on the reservation with a compact agreement. *Id.* § 69-2703(2)(b)(iv). Finally, the State's diligent enforcement obligation under the MSA does not apply to certain sales to tribal members in their own Indian Country. R. Doc. 131-11, at 59.

Cabazon does not support the district court's conclusion that the activities here are solely member conduct on the reservation. *Cabazon* never concluded that the state laws at issue applied only to on-reservation conduct of members. Instead, *Cabazon* framed the "question" it was answering as "whether the State may prevent the Tribes from making available high stakes bingo games to *non-Indians coming from outside the reservations*." 480 U.S. at 215 (emphasis added). The same essential question is presented here: whether Nebraska may require

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[6] Although a tribal manufacturer has to prepay the excise tax, it is entitled under state law to a refund of the tax prepayments for any sales to members on the reservation. Neb. Rev. Stat. § 77-2602.05(1), (2)(b).

escrow deposits be made for sales to non-members on the Winnebago reservation.

Because *Cabazon* never concluded that the California statutes involved only member conduct, it did not purport to apply the "exceptional circumstances" test. Indeed, its only mention of "exceptional circumstances" is in describing the general legal principles applicable to state regulation of tribal conduct: "'[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.'" *Id.* at 216 (quoting *Mescalero*, 462 U.S. at 331–32). Rather, the Supreme Court explained that its decision "turn[ed] on" the usual *Bracker* balancing, and it weighed and balanced the relevant tribal, federal, and state interests without applying a heightened requirement. *Id.* at 216.

What is at issue is not solely "on-reservation conduct." *Bracker*, 448 U.S. at 144. Much of HCID's and Rock River's activities involve conduct outside of the Winnebago reservation. *See* pp. 22–23, *supra*. Rock River historically imported cigarettes. Rock River obtains tobacco grown outside of the Winnebago reservation. The vast majority of HCID's and

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Rock River's cigarettes are sold outside the Winnebago reservation. Despite these facts, the district court concluded that the place of retail sale, regardless of a purchaser's tribal identity, controlled its analysis. However, that conclusion is incongruent with the district court's other conclusion that only the manufacturer is regulated: The fact that the Escrow and Directory Statutes place responsibilities on the manufacturer suggests that the State is at least in part regulating the *manufacture* of cigarettes. That the amounts of escrow deposits depend on a manufacturer's "unit[s] sold," Neb. Rev. Stat. § 69-2703(2)(a), does not mean that the State is solely regulating tobacco sales. Rather, deposits based on units sold are a way to approximate a manufacturer's potential liability if State laws are violated. Moreover, although based on "units sold," the escrow deposit amounts are statutorily limited to what the manufacturer would have paid if it was a party to the MSA. *See* Neb. Rev. Stat. § 69-2703(2)(b)(ii).

The district court's analysis also neglects the entire regulatory scheme and the purposes behind the directory and escrow requirements. One purpose of those requirements is to ensure manufacturers can be held responsible for violating state laws. In that respect, the escrow and

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directory requirements are also regulations related to the State's health and consumer protection laws. Violations of those laws could occur at any point between the procurement of tobacco through the use of cigarettes. For example, tobacco product manufacturers could violate state antitrust laws in the procurement of tobacco or violate state consumer protection laws in their advertising. A manufacturer's escrow balance is available to compensate for the harms inflicted by those violations. The economic and legal realities of the State's regulation of tobacco products cannot support the cramped view that escrow and directory requirements are regulating only the manufacturer and only the sale of the cigarettes. The district court thus erred by applying the exceptional circumstances requirement to sales of cigarettes on the Winnebago reservation.

2. Even if required, exceptional circumstances justify the State's regulation.

Even if the exceptional circumstances were necessary to uphold the State's regulation, exceptional circumstances are present here. The State's interest in protecting public health, and the Escrow and Directory Statutes' role in accomplishing that goal, are exceptional circumstances justifying the application of the Escrow and Directory Statutes to HCID

and Rock River on the Winnebago reservation. In regulating tobacco product manufacturers, the Nebraska Legislature sought to "safeguard the Master Settlement Agreement, the fiscal soundness of the state, and the public health." Neb. Rev. Stat. § 69-2704. The negative effects of cigarette sales and use on the public health are severe and well-known. Those harmful effects are not limited to the reservation. And as the Supreme Court has recognized, "[w]hen . . . state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." *Nevada v. Hicks*, 533 U.S. 353, 362 (2001).

There is a unique and detailed regulatory framework in place to combat the costs that cigarette sales and use impose on society. The escrow and directory requirements are critical elements of that framework. The purposes of the Escrow and Directory Statutes are to compensate the State for those serious adverse health effects and the costs associated with them. The district court understood that the state interests are "compelling." App. 662; R. Doc. 184, at 31. The district court even acknowledged that the federal and tribal interests in this case are "less weighty than those in *Cabazon* or *Mescalero Apache Tribe*." App. 662; R. Doc. 184, at 31. Such a balancing necessarily reflects

extraordinary circumstances. Yet, the district court concluded that the burden of the escrow requirements tipped the balancing toward HCID and Rock River.

Improperly characterizing the burdens on the manufacturers, the court considered the escrow requirements "punitive exactions" simply meant to create "price parity" with participating manufacturers in the MSA. App. 662–63; R. Doc. 184, at 31–32. Such a narrow conception is incongruent with how cigarette manufacture and use is regulated. The MSA was reached by nearly every State and the largest manufacturers to regulate manufacturer conduct and obtain redress for the historical and future harms cause by cigarette use and sales. As a result, it is a key part of the cigarette regulatory framework of not only Nebraska but numerous States. To ensure that hard-won regulation is maintained, States have passed other cigarette-related laws including escrow and directory requirements.

The point of the escrow requirements therefore is not to punish the non-participating manufacturer or create "price parity." App. 663; R. Doc. 184, at 32. Rather, it prevents a non-participating manufacturer from receiving an unearned advantage by not participating in the MSA.

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That is why Nebraska law gives a tobacco product manufacturer the option to either agree to the MSA or comply with other requirements, including depositing escrow. Neb. Rev. Stat. § 69-2703. The Escrow Statute also ensures that a non-participating manufacturer is not worse off by limiting the maximum escrow deposit obligation to what the manufacturer would have paid had they participated in the MSA. *Id.* § 69-2703(2)(b)(ii). The State's regulation of cigarettes would be toothless and a dead letter if manufacturers could simply opt out of regulation. The escrow requirements therefore prevent regulatory windfalls and ensure effective regulation of tobacco product manufacture and sales. The State's interest thus is not a bare financial interest in "continued MSA payments" (App. 663; R. Doc. 184, at 32); rather, it's the maintenance of a hard-won regulatory scheme of a historically destructive product.

The burden on a manufacturer like Rock River, on the other hand, is minimal. This Court has concluded in the due-process context that a State's interest in reducing smoking-related healthcare costs outweighed the burden of escrow requirements. *See Grand River Enters.*, 574 F.3d at 945. The manufacturer keeps ownership of escrow deposits, receives

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interest on the amounts deposited, and receives release of the funds if it does not violate the law. HCID and Rock River already comply with escrow and directory laws in numerous States (R. App. 189–190; R. Doc. 131-5, at 132:10–135:12; R. Doc. 131-7, at 22) and have made no claim that they are uncompetitive in those States on account of state directory and escrow laws. Even if this Court finds that the escrow and directory laws regulate solely on-reservation conduct involving tribal members, exceptional circumstances exist to warrant the State's regulation through the Escrow and Directory statutes.

IV. The Directory Requirement is a Valid Minimal Burden on HCID and Rock River.

Regardless of the outcome of *Bracker* balancing, a State may impose on a tribal member 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 Statute meets this standard.[7] The directory requirement functions as a licensing requirement to sell cigarettes in

[7] Although defendants argued on summary judgment that both the escrow and directory requirements were minimal burdens (R. App. 52,

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Nebraska and assists the State in enforcing its valid cigarette tax laws. Courts have consistently upheld such licensing requirements because they further valid state interests in preventing tax evasion and do not infringe upon tribal sovereignty. In *Rice*, the Supreme Court upheld a California law requiring a tribal general store selling liquor to obtain a liquor license. 463 U.S. at 720. *Rice* recognized that prior Supreme Court case law "foreclosed" the trader's contention that "the licensing requirements infringe upon tribal sovereignty" because the trader sold liquor to non-tribal members. *Id.* This Court has likewise upheld a State's alcohol license requirement as reasonably necessary to further a legitimate interest in tax collection. *See Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 938–39 (8th Cir. 2019).

The Tenth Circuit applied *Rice* in the tobacco license context, rejecting a tribe's contention that Oklahoma's licensing requirements for cigarette wholesalers and distributors unconstitutionally infringed upon tribal sovereignty. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159,

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56; R. Doc. 30, at 45, 49), the district court addressed only whether the escrow requirements were a minimal burden. App. 658, 663; R. Doc. 184, at 27, 32. The district court therefore did not address whether the Directory Statute qualified as a minimal burden attendant to tax collection. *See* p. 21 n.3, *supra*.

1177 (10th Cir. 2012). The Tenth Circuit explained that the Supreme Court recognized that the licensing requirements "protect the State's valid interest in preventing evasion of its valid cigarette tax" and did not infringe upon tribal self-government. *Id.* Nebraska's directory requirement does the same. To be listed on the directory, a manufacturer must certify that it has complied with state stamping and tax-collection requirements. Neb. Rev. Stat. §§ 69-2706(4), 77-2603. The directory requirements therefore assist the State's enforcement of its valid tax laws. This case illustrates the importance of the directory in collecting valid state excise taxes. By never registering on the State's directory, Rock River has evaded Nebraska's stamping and excise tax laws for cigarettes. App. 293; R. Doc. 125-2, at 5; R. App. 199–200; R. Doc. 131-5 at 173:23–176:3. Supreme Court case law definitively supports the applicability of the directory statutes for any cigarette manufacturer selling its cigarettes to non-tribal members.

CONCLUSION

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

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Respectfully submitted,

Dated: August 21, 2023

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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 10,923 words as determined by the word-counting feature of Microsoft Word 2016.

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/s/ Eric J. Hamilton
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CERTIFICATE OF SERVICE

I certify that on August 21, 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.

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