No. 23-2311

**IN THE 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 Task Commissioner

Defendant-Appellants.

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

BRIEF OF APPELLEES

Calandra S. McCool
Big Fire Law & Policy Group
1905 Harney Street, Suite 300
Omaha, Nebraska 68102
(531) 466-8725
cmccool@bigfirelaw.com

Andre R. Barry
Cline Williams Wright Johnson &
Oldfather, LLP
1900 US Bank Bldg.
233 S 13th Street
Lincoln, NE 68508
(402) 474-6900
abarry@clinewilliams.com

Counsel for Plaintiffs - Appellees

SUMMARY OF THE CASE

Appellees Rock River and HCID are entities owned by the Winnebago Tribe of Nebraska. Rock River manufactures cigarettes and other tobacco products on the Tribe's Reservation. HCID distributes those products on the Tribe's Reservation and other reservations. In a thorough and well-reasoned decision, the District Court granted summary judgment on Appellees' request for declaratory judgment, applying the Supreme Court's decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). The District Court held that under *Bracker*, the State of Nebraska may not require Rock River and HCID to pay amounts into escrow and post a bond with the State based on sales of cigarettes on the Tribe's own reservation. The District Court permanently enjoined Appellants from enforcing escrow and bond posting requirements for sales by Appellees on the Reservation.

Defendants-Appellants, the State's Attorney General and Tax Commissioner, ask this Court to reverse and vacate the district court's determination, primarily on the grounds that the Tribe purchases materials used to manufacture cigarettes off its Reservation and some people who purchase the cigarettes are not tribal members, even though the cigarettes at issue are manufactured and sold by tribal entities within the boundaries of the Reservation. The District Court properly rejected these arguments as inconsistent with the controlling decisions of the Supreme Court.

Appellees respectfully suggest that 15 minutes per side is appropriate for oral argument.

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CORPORATE DISCLOSURE STATEMENT

Appellees Rock River Manufacturing, Inc. ("Rock River") and HCI Distribution, Inc. ("HCID"), state that they are subsidiaries of Ho-Chunk, Inc., a tribally owned development corporation, and that no publicly held corporation owns 10% or more of either Appellee's stock.

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STATEMENT OF THE ISSUES

1. Does federal law limit the State's power to regulate the economic activity of the Tribe's wholly owned development entities on tribal land?

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

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

2. Do the tribal development entities' purchases of inputs off-reservation or sales of some products off-reservation allow the State to impose its escrow and bond-posting requirements to those entities' sales of tobacco products on the Tribe's reservation?

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

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

3. Does the State's proposed enforcement of escrow and bond-posting requirements based on the on-reservation sales of tobacco products by tribal development companies infringe on the Tribe's sovereignty under the *Bracker* balancing test and general principles of tribal sovereignty?

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

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

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STATEMENT OF THE CASE

I. HCI DISTRIBUTION AND ROCK RIVER

The Tribe is a federally recognized Indian tribe located in northeastern Nebraska and northwestern Iowa. App. 634; R. Doc. 184, at 3; *see also* 25 U.S.C. § 5123.[1] Rock River and HCID are wholly owned subsidiaries of Ho-Chunk, Inc. ("HCI"), the economic development arm of the Winnebago Tribe of Nebraska. R. App. 9; R. Doc. 130, at 2. HCI is a tribal company, incorporated under the laws of and is wholly owned by the Winnebago Tribe of Nebraska. R. Doc. 124, at 10. Rock River is a tobacco products manufacturer, and HCID distributes Rock River's products to retailers exclusively in Indian Country, including within the Winnebago Reservation. App. 259-60; R. 125-1, at 5-6.

The Tribe's government is organized under Section 16 of the Indian Reorganization Act. App. 637; R. Doc. 184, at 6; *see also*, 25 U.S.C. § 5123. By its own authority, the Tribe has created its own constitution and laws, including a Business Corporation Code. App 181; R. Doc. 124, at 10. One of the powers of the Tribe is the "power to form wholly owned tribal companies;" the Tribe exercised this power to create HCI in 1994. App. 637; R. Doc. 184, at 6; App. 175-81; R. Doc. 124, at 4-10.

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[1] References to the appendix will be indicated with "App."; references to the restricted appendix will be indicated with "R. App." More specifically, citations to the opinion of the district judge are cited as R. Doc. 184.

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HCI's purpose is to act as the main economic development engine for the Tribe, with the goal of generating "a sustainable, long-term income stream large enough for the Tribe to reach economic self-sufficiency." App. 511; R. Doc. 125-2 at 217. HCI's business model "optimizes legal and economic benefits from the Tribe's unique sovereign status and from federal government programs like the 8(a) Business Development Program, 15 U.S.C. § 637(a)." App. 503; R. Doc. 125-3, at 209; R. App. 702; R. Doc. 173-1, at 207.

Rock River and HCID are two of HCI's many subsidiaries and business ventures. App. 637; R. Doc. 184, at 6. "From its net revenue, combined from all its subsidiaries, [HCI] pays the Tribe an annual 25 percent dividend. App. 638; R. Doc. 184, at 7; App 516; R. Doc 125-3, at 222; R. App. 715; R. Doc. 173-1, at 220. "HCI also donates to tribal community programs, such as educational scholarships and the Down Payment Assistance Program, which provides financial support to tribal members purchasing homes on the Winnebago Reservation . . . in a planned community which [HCI] helped develop." App. 638; R. Doc. 184, at 7; App 514-5; R. Doc 125-3, at 220-1; R. App. 715-16; R. Doc. 173-1, at 218-19. HCI employs tribal members and pays taxes to the Winnebago tribal government. App. 638; R. Doc. 184, at 7; App 516; R. Doc 125-3, at 222; R. App. 715; R. Doc. 173-1, at 220.

Rock River is HCI's federally licensed cigarette manufacturer that is compliant with federal tobacco regulations. App. 638; R. Doc. 184, at 7; App. 187; R. Doc. 124, at 16. "Rock River currently manufactures all its own cigarettes in its facility on the

[Winnebago] Reservation." App. 638; R. Doc. 184, at 7; App. 187; R. Doc. 124, at 16. Rock River manufactures cigarettes from components shipped to the factory on the Reservation. App. 638; R. Doc. 184, at 7; App. 188-9; R. Doc. 124, at 17-8. Since 2014, Rock River has employed fifteen people, nine of whom were members of the Winnebago Tribe. R. App. 10; R. Doc. 130, at 3.

HCID is HCI's tobacco distributor that provides Rock River products to tribally owned retailers. App. 185; R. Doc. 124, at 14. "Ho-Chunk Winnebago owns Pony Express and other convenience stores on the Winnebago Reservation" where Rock River products are sold. App. 185; R. Doc. 124, at 14. During the first three quarters of 2022, HCID reported 4,709,800 cigarettes were sold on the Winnebago Reservation. App. 639; R. Doc. 184, at 8; R. App. 25; R. Doc. 130, at 18.

Cigarette profits are measured in pennies. A standard pack contains 20 cigarettes; and a carton contains 200. R. App. 16; R. Doc. 130, at 9. It costs Rock River approximately $3.7654 per cigarette carton in materials, and approximately $1.6161 per carton for labor. R. Doc. 124, at 17. "Federal and freight taxes cost Rock River approximately $10.86235 per carton." App. 189; R. Doc. 124, at 18. Rock River then makes a profit of $1.11 when it sells HCID Silver Cloud cigarettes at $17.35 per carton, which are then sold at stores owned by the Winnebago Tribe for $20.64, for a $3.29 profit. R. App. 337; R. Doc. 149, at 9. The current carton cost "does not include the value of the [Nebraska] cigarette escrow or state excise tax," but does include all required remittances to the Winnebago Tribe. R. App. 20; R. Doc. 130, at 13. If Rock

River were required to comply with assessments, it would impose additional costs on Rock River and HCID. App. 639; R. Doc. 184, at 8.

A. State Statutory Framework

Nebraska, like most states, promulgated MSA laws as part of a settlement with major tobacco companies in the 1990s and early 2000s. *Grand River Enterp. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 933 (8th Cir. 2009) ("To protect the market share of all [Participating Manufacturers], the MSA allows settling states to enact a statute which forces [Non-Participating Manufacturers] to place money into escrow each year to settle future judgments."). Nebraska's MSA laws include a set of escrow statutes, codified as Neb. Rev. Stat. §§ 69-2701 to 69-2703.01, and a set of directory statutes, codified as Neb. Rev. Stat. §§ 69-2704 to 69-2707.01. App. 125, R. Doc. 35, at 4. *See* App. 126, R. Doc. 35, at 5. As Appellants admit, the State's directory requirements are tied to the escrow requirements; to be included in the directory, a manufacturer must remit the required escrow payments. Neb. Rev. Stat. § 69-2706(1)(a).

These statutory requirements are the result of contractual obligations the State owes to tobacco manufacturers who signed the MSA. *See Nebraska v. R. J. Reynolds Tobacco Co.*, Lancaster County District Court, docket 573, page 277 (Neb. 1998). The purposes of the statutes are "to enforce the Master Settlement Agreement and to investigate and litigate potential violations of **state tobacco laws**." Neb. Rev. Stat. § 69-2701(2) (emphasis added). The Nebraska Legislature also found violations of the

escrow statutes "threaten the integrity of the tobacco Master Settlement Agreement, the fiscal soundness of the state, and the public health." Neb. Rev. Stat. § 69-2704.

The Nebraska MSA laws require all manufacturers within the state who are not participating in the MSA ("NPMs") to deposit a certain amount of money (the present rate is $0.0188482 per cigarette) on a quarterly basis into an escrow account. Neb. Rev. Stat. § 69-2703 (2)(a); *see* §§ 69-2706, 69-2707.1. The statute requires that "[a]ny money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act. *Id.* While the interest on escrow funds is available to the NPM, the escrow funds are otherwise only released if one of four things occur: (i) twenty-five years have elapsed since deposit; (ii) a different release interval is negotiated as part of a tribal-state agreement; (iii) the funds are used to pay a settlement or judgment; or (iv) a discrepancy between NPM and Participating Manufacturer payments. Neb. Rev. Stat. § 69-2703 (b)(i)-(iv).

The MSA laws also impose a punitive bond requirement. The purpose of the bond is "first to recover delinquent escrow, . . . and then to recover civil penalties and costs authorized under such section." Neb. Rev. Stat. § 69-2707.01(5). The minimum bond requirement for NPMs is $100,0000, or the "greatest escrow amount due" from that manufacturer in the last twenty quarters. Neb. Rev. Stat. § 69-2707.01(2). If the Attorney General believes an NPM poses "an elevated risk of non-

compliance," the State can require that the NPM pay the "greatest required annual total of quarterly escrow deposits" paid in the last five years. *Id.*

While Nebraska's MSA laws provide for the alternative of tribal-state tobacco agreements, the provisions required by statute are essentially the same as those in the State's MSA laws. Specifically—

> The agreement shall specify (a) Its duration; (b) Its purpose; (c) Provisions for administering, collecting, and enforcing the agreement and for the mutual waiver of sovereignty immunity objections with respect to such provisions; (d) **Remittance of taxes and escrow collected; (e) the division of the proceeds of the tax and escrow between the parties . . .**.
>
> (2) The agreement shall require tribal taxes to be imposed equally on all cigarettes and other tobacco products regardless of manufacturer or brand; (3) The agreement shall require that all packages of cigarettes bear either a [Nebraska] stamp . . . or a tribal stamp under section 77-2603.01

Neb. Rev. Stat. §§ 77-2602.06 (1)(a)-(e); 77-2602.06 (2)-(3) (emphasis added).

This structure imposes heavier burdens on tribes than other NPMs. Only tribes forfeit their bond payments without cause. Tribal agreement provision of section 69-2703 states that the "[a]mounts the state collects on a bond under section 69-2707.01 **shall not be subject to release**," meaning that tribes must forfeit the bond amount. Neb. Rev. Stat. § 69-2703(b)(iv)(emphasis added). Forfeiture only applies to other NPMs if they fail to make an escrow payment. Neb. Rev. Stat. § 69-2705(19).

B. Tribal Statutory Framework

Unwilling to concede to the State's regulatory structure, the Tribe drafted its own manufacturer settlement agreement, called the Universal Settlement Agreement, joined

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by Rock River and HCID in April 2016. App. 639; R. Doc. 184, at 8; App. 460-473; R. Doc. 125-3, at 166-180; *see also* R. App. 657-670; R. Doc. 173-1, at 162-75.

The Tribe's Universal Settlement Agreement addresses public health and consumer protection concerns included in state MSAs. App. 461-68; R. Doc. 125-3, at 167-74; *see also* R. App. 658-65; R. Doc. 173-1, at 163-70. The Tribe's settlement agreement bars "certain marketing practices, such as using advertising tailored to minors," and Rock River and HCID "must pay a certain amount to the Tribe for each cigarette sold." App. 639; R. Doc. 184-85, at 8-9; *see* App. 461-68; R. Doc. 125-3, at 167-74; *see also* R. App. 658-65; R. Doc. 173-1, at 163-70. Paralleling the state MSA releases, the Tribal settlement also released Rock River and HCID for "past and future claims arising out of the use, sale, distribution, manufacture, development, advertising, marketing, health effects, or the exposure to cigarettes." App. 465; R. Doc. 125-3, at 171; *see also* R. App. 662; R. Doc. 173-1, at 167. The Tribe also taxes Rock River cigarettes sold on the Reservation. App. 639; R. Doc. 184, at 8.

On the Winnebago Reservation, Tribal entities have conducted cigarette manufacturing and distribution pursuant to the regulatory structure imposed on the Reservation by the tribal government. App. 461-68; R. Doc. 125-3, at 167-74; *see also* R. App. 658-65; R. Doc. 173-1, at 163-70. Rock River and HCID challenged the State's efforts to displace Tribal regulation and burden Tribal activity on the Winnebago Reservation by seeking to apply state regulations to the manufacture and distribution of Rock River tobacco products within the boundaries of the Winnebago Reservation.

They also challenged the State's efforts to apply its statutes to sales of Rock River's tobacco products on the bordering Omaha Reservation.

II. PROCEDURAL HISTORY

On April 20, 2018, Appellees, HCID and Rock River, filed a complaint against the Nebraska Attorney General and Tax Commissioner. App. 1; R. Doc. 1. HCID and Rock River claimed that Nebraska's application of its MSA laws violated the Supremacy Clause and the Indian Commerce Clause of the United States Constitution. HCID and Rock River sought declaratory and injunctive relief that the State could not enforce its MSA laws against HCID and Rock River's on-reservation activity. App. 17-8; R. Doc. 1, at 17-8.

On December 19, 2018, the district court granted the State's motion to dismiss HCID and Rock River's equal protection claims, no longer at issue here. *See* App. 139; R. Doc. 35, at 18. The court further directed the parties to establish a factual foundation for a *Bracker* analysis of the challenged statutory provisions. App. 139; R. Doc. 35, at 18. Following extensive discovery, each party moved for summary judgment. App. 169; R. Doc. 123; App. 620; R. Doc. 129. HCID and Rock River established multiple sources supporting the value of the tobacco enterprises to the Tribe, including exhibits attached to a declaration from Chairwoman Victoria Kitcheyan. App. 295; R. Doc. 125-3. Those attachments included tribal resolutions, a Ho-Chunk Annual Report, and an economic study. App. 295; R. Doc. 125-3. Defendants moved to strike Chairwoman Kitcheyan's declaration on the grounds that they had no notice that the Chairwoman of the Tribe

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might be an individual likely to have useful information. App. 623-24; R. Doc. 154, at 1-2.

In their response, HCID and Rock River submitted the materially identical declaration and identical exhibits of Lance Morgan, CEO of Ho-Chunk, Inc. *See* R. App. 493-93; R. Doc. 173; R. App. 496-760; R. Doc. 173-1. Thus, any information from Chairwoman Kitcheyan's Declaration and Exhibits is fully duplicated in the record. *See generally* R. Doc. 125-3; R. Doc. 173-1. In his final order, the district judge denied the State's motion to strike as moot, because he had not relied on statements in Kitcheyan's Declaration. App. 667, R. Doc. 184, at 36, n.6. He did not have to, both because Appellants did not move to strike the attachments to Kitcheyan's Declaration and because those same attachments were in the record through Morgan's Declaration.

The State appeals the district court's partial grant of summary judgment in favor of HCID and Rock River, which held that the State lacked jurisdiction to regulate the sale of tribally manufactured cigarettes within the Winnebago Reservation. App. 667; R. Doc. 184, at 36.

The district court determined that the State failed to demonstrate the "exceptional circumstances" necessary to justify application of punitive state escrow and bond requirements which would have constituted an impermissible burden on tribal conduct within the Reservation. App. 661-62; R. Doc. 184, at 30-1. The Escrow Statute and bond requirements were therefore unconstitutional as applied to HCID's and Rock River's sales of tribally manufactured products on the Winnebago

Reservation. App. 666; R. Doc. 184, at 35.

On May 17, 2023, the district court entered an amended judgment, permanently enjoining appellants "from enforcing Neb. Rev. Stat. §§ 69- 2703 and 69-2707.01[2] for past and future tobacco products sold by the plaintiffs on the Winnebago Reservation." App. 643; R. Doc. 188. The Appellants filed a timely notice of appeal on May 30, 2023. R. Doc. 189.

SUMMARY OF THE ARGUMENT

Appellants seek to directly regulate the economic activities of the Tribe's development companies on the Tribe's own Reservation. Controlling decisions of the Supreme Court make clear that such regulation runs counter to federal policy and violates tribal sovereignty. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976). The District Court correctly applied this principle and the balancing test required by *Bracker* in holding that the Tribe's sovereignty prevented the State from applying its escrow and bond requirements to Rock River and HCID.

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[2] There may have been confusion regarding the proper numbering of the Nebraska escrow and directory statutes. The district court ruling, R. Doc. 184, supplying on the correct citation, cures any superficial errors.

Appellants argue that the District Court should be reversed, among other reasons, because Rock River and HCID incorporated materials purchased off-reservation into their products and because non-members may purchase those products on the Tribe's reservation. The Supreme Court's precedents, however, do not support diminishing tribal sovereignty for either of these reasons. Moreover, as the District Court recognized, "the State's interest in enforcing these escrow laws is less about the satisfaction of a potential judgment and more about creating price parity between the tribal tobacco manufacturers and tobacco product manufacturers to the MSA." App. 662-63; R. Doc. 184, at 31-2. The record does not support Appellants' effort to regulate the on-reservation activities of Appellees.

STANDARD OF REVIEW

The State's brief correctly recites that the standard of review of a district court's grant of summary judgment is de novo, "viewing the evidence in light most favorable to the nonmoving party and giving the nonmoving party the benefit of all reasonable inferences.'" Appellants' Br. at 20 (quoting *Dallas v. Am. Gen. Life & Accident Ins. Co.*, 709 F.3d 734, 736 (8th Cir. 2013).

The District Court's denial of Appellants' Motion to Strike Chairwoman Kitcheyan's Declaration is subject to a different standard. That denial must stand absent a "clear and prejudicial" abuse of discretion. *King v. Ahrens,* 16 F. 3rd 265, 268 (8th Cir. 1994); *Nationwide Ins. Co. v. Cent. Missouri Elec. Co-op., Inc.*, 278 F.3d 742, 748 (8th Cir. 2001).

ARGUMENT

I. Federal law restricts state authority to regulate tribal activities on tribal land.

"Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). Tribal sovereignty "is dependent on, and subordinate to, only the Federal Government, not the States. *Id.* (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980)). In the absence of clear Congressional intent, a state may only assert jurisdiction over the on-reservation activities of tribal members in "exceptional circumstances." *Cabazon*, 480 U.S. at 215.

"When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for 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. The proper analysis depends upon whose behavior is to be regulated, and where that behavior occurs. When a state asserts authority over 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." *Id.* at 145. This inquiry involves two broad components: (1) whether state regulation is preempted by federal law, and (2) whether that regulation unconstitutionally infringes on tribal sovereignty. *Id.* at 142.

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II. The District Court correctly found that the State's regulation infringes on the Tribe's sovereignty.

The court based its decision on the second prong of this test. Tribal sovereignty protects "the right of reservation Indians to make their own laws and be ruled by them." *Bracker*, 448 U.S. at 142 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959). *Bracker* requires courts addressing this issue to undertake a "particularized inquiry" balancing the state, federal, and tribal interests at stake. *See White Earth Band of Chippewa Indians v. Alexander*, 63 F.2d 1129, 1138–39 (8th Cir. 1982). The District Court conducted a careful balancing of these factors in determining that the State's interests did not justify regulation of the Tribe's development entities.

A. Appellees' purchase of off-reservation tobacco for its cigarettes does not make *Bracker* inapplicable.

Appellants argue, incorrectly, that the *Bracker* balancing test is inapplicable because the Tribe imports tobacco for its cigarettes and other products from outside the reservation. Their argument relies on their reading of *King Mountain v. McKenna*, 768 F.3d 989 (9th Cir. 2014), in which a company owned by a member of a tribe (not a tribal development corporation) sought a categorical exemption from Washington's escrow statute for cigarettes made on the reservation from tobacco largely grown and processed off the reservation, which were sold in Washington and sixteen other states. *Id.* at 993–94. The Ninth Circuit was not asked to determine whether the State of Washington could constitutionally apply its escrow requirement to on-reservation sales of the cigarettes. *Id.*

The District Court was unpersuaded by the reasoning in *McKenna*. *McKenna* relied on a Supreme Court decision that involved a ski resort located wholly off reservation land. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). As the District Court noted, there is no legal support "for the Ninth Circuit's extension of *Jones* to hold that a tribal business must generate its products principally from reservation land and resources." App. 660; R. Doc. 184, at 29. Certainly nothing in *Bracker* suggests that its test for tribal sovereignty only applies in such cases.

Moreover, to read *McKenna* as making the *Bracker* balancing test irrelevant when a tribal development corporation imports inputs for on-reservation manufacturing defies Supreme Court precedent, federal policy, and common sense. As the District Court noted, the Supreme Court in *Cabazon* upheld tribal sovereignty against state regulation of a bingo operation that required "off-reservation" resources. App. 660-61; R. Doc. 184, at 29-30. Federal policy "supports Tribal sovereignty and self-determination." Uniform Standards for Tribal Consultation, 87 Fed. Reg. 74479 (Nov. 30, 2022). In a modern economy, it is difficult to imagine any meaningful commercial activity which a tribe could conduct that would not involve the purchase of inputs or services from outside a reservation. To argue that a tribe's right to self-determination requires it to vertically integrate all its economic activity within its Reservation, from the growing of crops or extraction of raw materials, all the way through the production and retail sale of a finished product, would effectively mean that tribes have no sovereign interest in economic self-determination.

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This is not a case in which the State seeks to tax or regulate conduct that occurs off reservation. To the contrary, the State seeks to directly regulate the sale of cigarettes manufactured by a tribal development corporation on the Tribe's Reservation and sold by a different tribal development corporation within the boundaries of the Reservation. This is "on-reservation conduct" which implicates the Tribe's sovereignty and requires application of the *Bracker* balancing test.

B. Appellees were not required to prove that the State regulations were unreasonable and unrelated to state regulatory authority.

Contrary to Appellants' arguments, *Bracker* does not require that regulation of the Tribe be "unreasonable and unrelated to state regulatory authority" before the balancing test is undertaken. Appellants cite *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129 (8th Cir. 1982), a case that involved state regulation of non-members' hunting and fishing on regulation lands. The District Court properly distinguished *Alexander* on the grounds that it involved regulation of non-members, not the regulation of Tribes or tribal members. App. 645-46; R. Doc. 184, at 14-5. If Appellants were correct, the *Bracker* balancing test would serve no purpose. The first factor to be considered under that test is the state's interest. Under Appellants' argument, if the court finds a state's regulation is reasonable, there is no basis to undertake the rest of the balancing test, even when a State proposes directly to regulate a tribe. This result would contradict the whole purpose of the balancing test.

C. The District Court properly applied the *Bracker* balancing test.

Contrary to Appellants' arguments, the District Court carefully and properly evaluated the relevant factors under *Bracker* and correctly found that this is not the exceptional case in which a state may regulate a tribe's on-reservation activity.

1. The District Court did not discount the State's interest.

In one respect—protection of public health—the District Court found the State's interest to be "strong." App. 650; R. Doc. 184, at 19. At the same time, the District Court also recognized that the State has a contractual obligation to tobacco companies, under the MSA, to enforce its escrow laws. App. 650; R. Doc. 184, at 19.

While Appellees doubt that the State's primary interest in this matter is protection of the public health, they do not dispute that this interest is strong and important, and the District Court properly weighed that interest here.

Appellants argue, unconvincingly and without any factual or legal citation, that the MSA "is a critical piece of States' regulation of tobacco." Appellants' Br. at 32. The tobacco companies who signed the MSA have an obvious interest in seeking to require other tobacco companies to assume the same financial burdens. Thus, the MSA requires that States attempt to enforce escrow requirements against those other companies. The District Court properly found that this private interest of tobacco companies is not an important or compelling governmental interest.

Appellants also argue, for the first time on appeal, that the escrow requirement serves its interest in collecting excise taxes. Appellants' Br. at 30; 45. This argument was not raised below and has been waived. Even if it had not been waived, it would not change application of the balancing test, because Appellants fail to explain how this interest outweighs the sovereign interests of the Tribe.

2. The District Court did not overstate the federal interest.

The District Court properly recognized that federal policy supports tribal sovereignty and economic self-determination. Thus, as the District Court held, "[o]n-reservation businesses are entitled to some level of federal protection from state interference." App. 652; R. Doc. 184, at 21(citing *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452, 2476 (2020)). Appellants contend that the level of protection warranted here is less than in areas, such as gaming, hunting, or fishing, where Congress has enacted laws to protect specific types of tribal activity. *See* Appellants' Br. at 34-6. But in this respect, they only reiterate what the District Court also recognized. App. 651-52; R. Doc. 184, at 20-1.

The fact that federal interests are not as strong here as in other cases does not mean that there are no federal interests at stake. There are clear federal interests in tribal sovereign and tribal self-determination, both of which are impaired by the State's efforts to burden the Tribe's on-reservation economic activity. The District Court did not err in weighing these interests as part of the *Bracker* balancing test.

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3. The Tribe's interests are strong.

The District Court identified three distinct interests of the Tribe: (1) selling cigarettes free of state regulation within its own boundaries; (2) relying on the Universal Tobacco Settlement Agreement, rather than the MSA, to protect its own members; and (3) using its businesses to promote economic self-development. App. 653-54; R. Doc. 184, at 22-3.

a. The Tribe has a strong interest in conducting activity within its own boundaries from free state regulation.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in our Nation's history." *McGirt*, 140 S. Ct. at 2476 (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)). As the District Court found, "***the Tribe*** and the federal government . . . have a strong policy incentive to promote tribal businesses and tribal economic development." App. 654, R. Doc. 184, at 23 (citing *Cabazon*, 480 U.S. at 218-19) (emphasis added). Appellants do not contest that the Tribe has an interest in conducting its own affairs free from state regulation within its own boundaries. Indeed, it would be odd for State officers who routinely and broadly invoke sovereign immunity to protect the sovereignty of the State to dispute the Tribe's interest in protecting its own sovereignty. The Tribe's interest in freedom from state regulation on its own lands is strong.

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b. The Tribe has a strong interest in the health and safety of its own members.

Counterintuitively, Appellants dispute that the Tribe has an interest in protecting the health and safety of its own members. Appellants' Br. at 38-40. More specifically, they appear to argue that Rock River has not advanced this interest, because there is no evidence that it has made payments to the Tribe in accordance with the Universal Tobacco Settlement Agreement to date. *Id.* However, the attachments to the Declaration of Victoria Kitcheyan and the Declaration of Lance Morgan and its attachments, all of which are part of the record, showed both payments under the Universal Tobacco Settlement Agreement and other contributions to the Tribe by Appellants and their parent, Ho-Chunk, Inc. App. 298; R. Doc. 125-3 at 4; R. App. 498; R. Doc. 173-1, at 3.

Appellants contend that the District Court should have granted their Motion to Strike the Declaration of Victoria Kitcheyan. Appellants' Br. at 38-40. The District Court denied that Motion as moot, because, it held, Appellants had not moved to strike the attachments. App. 667; R. Doc. 184, at 36. Appellants do not argue that the District Court abused its discretion in considering those attachments. Nor do they address that Appellees supplied the Declaration of Lance Morgan with the same attachments, which they did not move to strike. *See generally,* R. Docs. 173, 173-1. The District Court was thus entitled to consider that Rock River made payments to the Tribe as part of its analysis.

In addition, even if such evidence were absent from the record, the Court still had the University Tobacco Settlement Agreement before it. The existence of that agreement shows that the Tribe has an ***interest*** in the health and safety of its members in this area and in collecting funds from Rock River, rather than having Rock River pay them into escrow with the State.

Appellants also argue that tobacco sales by Rock River and HCID were not significant historically, particularly as compared to the facts of *Cabazon*. Appellants' Br. at 37-40. But here, again, Appellants are merely reciting what the District Court understood and properly distinguished, finding that "[t]he Tribe's interests here are not as strong as in *Cabazon*, but there is still an economic interest which weighs in the plaintiffs' favor." App. 654; R. Doc. 184, at 23. Likewise, the District Court correctly recognized that the Tribe does not have a legitimate interest in securing a competitive advantage by not having to account for escrow deposits, but the District Court held, again correctly, that Rock River and HCID are not merely importing for immediate resale, which the Court warned against in *Cabazon*. App. 653; R. Doc. 184, at 22. Rather, as the Court found, both Rock River and HCID are selling cigarettes which have been manufactured on the Tribe's Reservation. Similarly, in past years, when Rock River imported cigarettes rather than manufacturing them on the Reservation, it still distributed them through HCID. Tobacco products shipped by HCID to customers have tribal or state tax stamps affixed in accordance with tribal law. App. 187; R. Doc. 124, at 16.

Regardless of Appellants' attempt to minimize the economic activities of Rock River and HCID, it is clear these entities are engaged in a vertically integrated business, which the District Court found to be sophisticated, one which does not merely import products for resale, and which supports jobs and business for the development and autonomy of the Tribe and its members. While Appellants argue that Rock River's sale of cigarettes to HCID for distribution through its affiliated convenience stores on the reservation "adds nothing of value," this argument ignores the value of distribution and retail sale, which are themselves reflected in the increased prices charged at these steps of the process. The District Court properly weighed the economic benefits of manufacture, distribution, and sale by tribal entities as part of its analysis.

In addition, the Court may affirm the District Court's decision because value-added products are exempt from state regulation. While the District Court did not substantively address this argument, this court may affirm summary judgment "on any grounds supported by the record." *Food Market Merchandizing, Inc. v. Scottsdale Indemnity Co.*, 857 F.3d 783, 786 (8th Cir. 2017) (citation omitted). The *Cabazon-Colville* line of cases holds that value added to a product or to an activity by tribes within their reservation also preempts state regulatory authority. 480 U.S. at 219-21; *Colville*, 447 U.S. at 155; App. 570; R. Doc. 125-4, at 9. In other words, "[w]here the value is generated on the reservation by an Indian or tribe under tribal jurisdiction, states lack jurisdiction to impose" regulatory authority on that activity because it would 'infringe upon the right of reservation Indians to make their own rules and be governed by

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them.'" App. 228; R. Doc. 124, at 57 (quoting *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164, 181 (1973)).

4. There are no exceptional circumstances to warrant regulation of the Tribe.

As the District Court held, "[e]xceptional circumstances 'are likely to be found only when 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.'" App. 662; R. Doc. 184, at 31(citations omitted). Appellants do not dispute the District Court's statement of the relevant legal standard.

The District Court found that the escrow requirements apply directly to member activity, *i.e.*, the on-reservation sales of Rock River. In this respect, it distinguished the escrow requirements from a cigarette tax. Unlike a cigarette tax, the District Court held, "the escrow and bond requirements are imposed on the manufacturer." App. 658; R. Doc. 184, at 27. "The tobacco product manufacturer, *and no one else*, is responsible for making the escrow deposits and posting a bond." App. 659; R. Doc. 184, at 28

Appellants argue that non-members who buy cigarettes on the Reservation are indirectly subject to regulation. But as the District Court noted, this does not change the result. App. 661; R. Doc. 184, at 30. The fact that non-members came onto the reservation in *Cabazon* to engage in tribal bingo did not enable the state to regulate tribal activity. *Id.* Appellants argue that *Cabazon* did not articulate or apply the exceptional

circumstances test. Appellants' Br. at 45-6. Even if *Cabazon* did not use the term "exceptional circumstances," the Court was applying the same principle to invalidate a state's attempt to regulate on-reservation conduct by a tribe with respect to non-members. And if Appellants were correct and *Cabazon* applied a simple balancing test without such a standard, then it would indicate that Appellants' efforts to regulate Appellees are unconstitutional even under a more lenient test.

In any event, contrary to Appellants' arguments, there are no exceptional circumstances that could warrant direct regulation of the on-reservation actions of the Tribe's development companies. The District Court detailed the reasons why there are no "exceptional circumstances." App. 661-66; R. Doc. 184, at 30-5. Appellants do not dispute any of these reasons on appeal.

Instead, to attempt to establish exceptional circumstances, Appellants make a self-contradictory argument trying to deny escrow requirements exist for the benefit of signatories to the MSA:

> The point of the escrow requirements therefore is not to punish the non-participating member or create "price parity." App. 633; R Doc. 184, at 32. Rather it prevents a non-participating manufacturer from receiving an unearned advantage by not participating in the MSA.

Appellants Br. at 50. In other words, it's not about protecting big tobacco, it's about protecting big tobacco. As the District Court held, the State's interest in promoting the private interests of tobacco companies that signed the MSA is "decidedly unexceptional."

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III. The directory requirement is not a valid minimal burden.

The District Court also properly rejected Appellants' arguments that the regulations at issue would impose a "minimal burden." The District Court expressly held that a substantial burden is imposed by the escrow laws mandated by the MSA. Citing decisions of other federal courts which have analyzed the MSA, it wrote—

> This is, actually, the point. The State must require these laws or else the market share of the manufacturers who participate in the MSA is in jeopardy, contrary to the promises of the MSA. . . . The burden of the escrow is not incidental—it is direct, and intentional. It is intended to burden tobacco product manufacturers to reduce any market advantage obtained by not participating in the MSA.

App. 663, R. Doc. 184 at 32. Appellants do not argue that the District Court erred in this respect.

Appellants argue, instead, that the State's "directory requirement" should survive because it imposes only a minimal burden. Appellants' Br. at 52–54 & n.7. But Appellants concede that to satisfy the "directory requirement," a manufacturer must also comply with the "escrow requirement." *Id.* at 8. In other words, the directory requirement serves the same purpose as the escrow requirement. Thus, the District Court's reasoning on the escrow requirement, which Appellants do not challenge, applies equally to the directory requirement.

Rock River and HCID brought this action to protect their right to do business within the Tribe's Reservation under tribal laws and without state punitive regulation. While the Tribal regulations adequately serve the valid public interests claimed by the State, such as the protection of health and safety, the State's regulatory requirements

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overtly penalize tribal entities without serving the underlying regulatory goal—except the extraction of tribal payments. If permitted to be enforced, State law would require tribes to contribute escrow to support state enforcement of regulations that do not apply to on-reservation activities, in addition to requiring punitive forfeiture of bond funds that only apply to tribes. These are not the type of minimal, incidental burdens in the cases cited by Appellants that could be held not to offend tribal sovereignty.

IV. The Tribe's off-reservation sales do not affect the result in this case.

Appellants argue that federal and tribal interests in autonomy and self-determination not only stop at the boundaries of the Reservation, but that if a tribe ventures off reservation boundaries in any way, it invites state regulation within its own boundaries—even of commercial activity which takes place entirely on the Reservation. According to Appellants, if the Tribe imports materials or welcomes visitors from outside its Reservation, then its sovereign interests are destroyed. Similarly, Appellants argue that if the Tribe's development corporations sell products off the Reservation—even in reservations or states outside Nebraska—then Nebraska can directly regulate sales of products on the Reservation. The minimalist approach to tribal sovereignty proposed by Appellants is inconsistent with the concept of encouraging tribes to support themselves and control their own destinies and finds no support in the governing precedents of the Supreme Court and this Court.

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CONCLUSION

For the foregoing reasons, the decision of the District Court granting summary judgment to Appellees should be affirmed.

DATED this 23rd day of October 2023

Respectfully submitted,

s/ *Calandra S. McCool*

Calandra S. McCool
Big Fire Law & Policy Group LLP
1905 Harney Street, Suite 300
Omaha, Nebraska 68102
(531) 466-8725
cmccool@bigfirelaw.com

and

Andre R. Barry
Cline Williams Wright Johnson &
Oldfather, L.L.P.
1900 U.S. Bank Bldg.
233 South 13th Street
Lincoln, NE 68508
(402) 474-6900
abarry@clinewilliams.com

Counsel for Plaintiff-Appellees HCI Distribution Inc. and Rock River Manufacturing, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains fewer than 7,416 words. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in proportionally spaced type face using Microsoft Word for Microsoft 365 in 14-point Garamond font. The electronic version of the brief and addendum have been scanned for viruses and are virus free.

s/ *Calandra S. McCool*
Calandra S. McCool

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 23, 2023, a copy of the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system. The electronic filing system prompted service of the filing to all counsel of record in this case who have obtained CM/ECF passwords.

s/ *Calandra S. McCool*
Calandra S. McCool

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