No.

In the Supreme Court of the United States

HCI DISTRIBUTION INC., AND ROCK RIVER MANUFACTURING, INC., PETITIONERS

v.

MICHAEL T. HILGERS, Nebraska Attorney General and GLEN A. WHITE, Interim Nebraska Tax Commissioner, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Under this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), may a state directly regulate commerce between tribal economic development entities on the tribe's own reservation lands without a showing of exceptional circumstances?

II. In conducting the balancing test under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), may a court discount a tribe's interests in self-determination and self-sufficiency based upon the court's view of the significance of the tribe's economic development activities?

III. Did the Eighth Circuit's modification of the District Court's injunction effectively rewrite Nebraska's escrow and bond statutes, substituting the court's decision for that of the state legislature, in violation of the standards set forth in *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320 (2006) and other precedents of this Court?

PARTIES TO THE PROCEEDING

Petitioners HCI Distribution Inc. and Rock River Manufacturing Inc. are wholly owned subsidiaries of Ho-Chunk Inc., which is itself a wholly owned subsidiary of the Winnebago Tribe of Nebraska.

Respondents are Michael Hilgers, Nebraska Attorney General, who was substituted for former Nebraska Attorney General Douglas Peterson, and Glen A. White, Interim Nebraska Tax Commissioner, who was substituted for former Nebraska Tax Commissioner Tony Fulton.

RELATED PROCEEDINGS

HCI Distribution, Inc. v. Hilgers, No. 8:18-cv-173, U.S. District Court for the District of Nebraska. Judgment entered April 27, 2023.

HCI Distribution, Inc. v. Peterson, No. 23-2311, U.S. Court of Appeals for the Eighth Circuit. Judgment entered August 2, 2024.

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HCI Distribution, Inc. v. Hilgers, 670 F. Supp. 3d 896 (D. Neb. 2023), *rev'd in part sub nom. HCI Distribution, Inc. v. Peterson*, 110 F.4th 1062 (8th Cir. 2024).

HCI Distribution, Inc. v. Peterson, 110 F.4th 1062 (8th Cir. 2024).

STATEMENT OF JURISDICTION

The Eighth Circuit Court of Appeals denied Petitioners' petition for rehearing and rehearing *en banc* on September 6, 2024. App. at 92a–93a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The relevant provisions of Neb. Rev. Stat. § 69-2703, are reproduced in the appendix to this petition. App. 94a.

STATEMENT OF THE CASE

The Eighth Circuit held Nebraska may regulate a tribally owned manufacturer's sales of cigarettes to a tribally owned distributor, if the cigarettes sold at wholesale are later purchased by nonmembers, even when every purchase and sale occurs within the boundaries of the tribe's own reservation. The decision below runs counter to this Court's holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), creating a split with circuits which have correctly read and applied *Cabazon*. It also strikes at the heart of tribal sovereignty by subjecting tribes to state regulation within their own boundaries and crippling the tribal economic development efforts which strong and unmistakable federal policy clearly supports.

A. Economic Development by the Tribe.

Federal and tribal policy strongly favor economic development and self-sufficiency as an alternative to the dependency which at one time characterized the tribes' relations with the federal government and states. This case concerns the economic development activities of entities founded by the Winnebago Tribe of Nebraska (the Tribe): Ho-Chunk, Inc. (HCI) and two of its subsidiaries, Rock River Manufacturing, Inc. (Rock River), which manufactures cigarettes on the Winnebago Reservation, and HCI Distribution, Inc. (HCID), which sells those cigarettes to convenience stores on the Reservation. Neither Rock River nor HCID sells cigarettes to retail customers.

While Rock River and HCID are only part of the Tribe's overall efforts to promote economic development and tribal self-reliance, they both play an integral role in those efforts. App. at 29a–31a.

Through its subsidiaries, including Rock River and HCID, HCI has achieved tremendous success in helping the Tribe achieve economic development and self-sufficiency, as measured by revenue generated, jobs created, and funds returned to the Winnebago people. App. at 30a–31a. In 2018, for example, HCI's payments to the tribe through dividends and donations totaled over $180 million. App. at 30a.

B. Nebraska's Statutory Framework.

In the 1990s, Nebraska, and 45 other states, brought lawsuits against the major tobacco manufacturers seeking compensation for healthcare costs associated with tobacco use. These lawsuits resulted in a Master Settlement Agreement (MSA) which bans cigarette manufacturers from certain advertising practices, restricts lobbying, and requires cigarette manufacturers "to make payments to the settling states for all future cigarette sales in perpetuity." *Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 933 (8th Cir. 2009).

In the negotiations which led to the MSA, incumbent tobacco manufacturers took care not to create a competitive disadvantage as compared to manufacturers who were not parties to the MSA: they drafted the MSA to require Nebraska and the other settling states to enact legislation requiring all cigarette manufacturers to either: (1) join the MSA

or (2) deposit funds in escrow based on the number of cigarettes sold at retail. Neb. Rev. Stat. § 69-2703, *et seq*. Manufacturers who do not join the MSA must also post a bond of at least $100,000. Neb. Rev. Stat. § 69-2701.01. These requirements are intended to achieve price parity between the tobacco manufacturers who are signatories to the MSA and non-signatory tobacco manufacturers.

Rock River has not joined the MSA. It has, however, entered into the Universal Tobacco Settlement Agreement with the Tribe, which requires Rock River to pay into escrow for the benefit of the Tribe.

C. Nebraska's Enforcement of its Statutory Scheme.

Nebraska seeks to impose its own escrow and bond requirements on cigarettes manufactured and sold on the Winnebago Reservation.

As noted above, Rock River does not sell cigarettes at retail. App. at 26a. It sells cigarettes to the tribal distribution company, HCID. HCID sells to retailers (convenience stores) which in turn sell cigarettes to retail consumers. *Id*. Since the escrow requirement applies to Rock River, and Rock River sells only to HCID, the only cigarettes sales at issue take place on the Winnebago Reservation between tribally owned entities. Rock River does not maintain records of the tribal status of the people who purchase its cigarettes at retail. R. 337.

The application of Nebraska's regulations has drastically and negatively impacted Rock River's profitability. By the time it filed suit to challenge the escrow and bond requirements, Rock River's profitability had declined to between 25% and 33% of its former levels. R. 338–40.

D. The Decisions Below.

Rock River and HCID filed this suit, seeking a declaration that Nebraska's escrow and bond requirements do not apply to cigarettes manufactured in Indian Country. The District Court ruled against Rock River and HCID as to off-reservation sales, but in their favor as to cigarettes ultimately sold to consumers on the Tribe's Reservation. App. 52a–66a.

In reviewing the District Court's decision, the Eighth Circuit panel, relying on this Court's opinion in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), correctly held that "for on-reservation sales to members, Nebraska must show exceptional circumstances to overcome the tribal and federal interests." App. at 11a–12a, citing *Cabazon*, 480 U.S. at 215. However, the panel read *Cabazon* to have "eschewed a test that would have required the State to show 'exceptional circumstances' to assert its authority over the on-reservation conduct of tribal members because the laws burdened the Tribes 'in the context of their dealings with non-Indians.'" App. at 11a.

The panel majority went on to conduct the balancing test required by *White Mountain Apache*

Tribe v. Bracker, 448 U.S. 136 (1980), without an exceptional circumstances requirement for the State's attempt to regulate on-reservation conduct. It held that for sales to nonmembers on the Winnebago Reservation, the State's interests in enforcing its escrow and bond requirements outweigh federal and tribal interests, including interests in economic development and self-sufficiency. In doing so, the panel downplayed the significance of the Tribe's cigarette business because, it said, that business does not contribute as much to the Tribe's development efforts as other units of HCI's business. App. at 14a–15a.

The panel recognized a practical problem with its ruling: on its face, Nebraska's statute does not distinguish between sales to members and nonmembers. The panel sought to address this problem by tailoring the injunction to apply only to cigarettes Rock River and HCID sell, and have sold, on the Winnebago Reservation to members of the Winnebago Tribe. It expressed confidence this approach "leaves in place a workable, independently enforceable plan that is not contrary to legislative intent." App. at 18a.

However, the panel majority failed to address key issues related to workability and legislative intent, such as the fact that Rock River itself does not sell any cigarettes to nonmembers; the fact that Nebraska's statute does not require, or explain how, a manufacturer such as Rock River will be required to determine whether cigarettes are purchased by members or nonmembers; the fact that Rock River has not collected information on the identity of retail

customers in the past; the burdens such requirements would impose on tribal entities and retail customers; and—most importantly—whether the Nebraska Legislature would intend to impose such burdens.

The panel noted that Nebraska's statute provides that a tribal manufacturer may apply for a refund of amounts paid into escrow on cigarettes purchased by tribal members. App. at 18a. Of course, the ability to apply for a refund is permissive; it does not create any legal obligation on the part of a tribal manufacturer to collect information on who ultimately purchases cigarettes it makes. The statute also does not require the State to issue a refund of escrow under any circumstances. Neb. Rev. Stat. § 69-2703(2)(b)(iv). Nor does it provide any mechanism for a tribe to apply for a refund of a bond. *Id.*

In dissent, Judge Erickson noted this Court has recognized a "firm federal policy promoting tribal self-sufficiency and economic development", App. at 19a–20a, citing *Bracker*, 448 at 136, and that a state may only enforce its laws against member conduct on a reservation in "exceptional circumstances," *id.*, citing *New Mexico v. Mescalaro Apache Tribe* 462 U.S. 324, 331–32 (1983). Judge Erickson also correctly noted "there is nothing in Supreme Court precedent that diminishes federal and tribal interests in self-determination and economic development if a company is operating at a loss," and that the panel's rule "invites further state regulation of activities on the reservation and chips away at tribal sovereignty" App. at 21a.

REASONS THE PETITION SHOULD BE GRANTED

I. Nebraska's Invasion of Indian Sovereignty Merits this Court's Review.

This case presents a question of exceptional importance to tribes and tribally owned development companies throughout the country. The very core of tribal sovereignty—a tribe's ability to conduct its own affairs within its own borders—is at stake. Only this Court can clarify its decisions and restore the proper balance of sovereign interests.

A. The Decision Below Conflicts with Multiple Decisions from this Court and Two Federal Circuit Courts.

"Indian tribes retain attributes of sovereignty over both their members and their territory, and [ ] tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Cabazon*, 480 U.S. 202 at 207 (internal citations omitted).

This Court has long held that a State may only regulate the on-reservation activities of tribal members in "exceptional circumstances." *Id.* at 215 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331–32 (1983)). This case involves a state's attempt to do just that—to impose escrow and bond requirements on sales of cigarettes by a tribally owned manufacturer to a tribally owned distributor within the boundaries of the Tribe's own reservation.

Exceptional 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." American Indian Law Deskbook § 5:20; *Mescalero Apache Tribe*, 462 U.S. at 331-32 n.15 (citing *Puyallup Tribe*, 433 U.S. at 175); *see also Hicks*, 533 U.S. at 362. Both the Eighth Circuit panel and the District Court determined that the State's interests do not amount to exceptional circumstances. App. at 16a; *see also* App. at 64a–66a.

However, the Eighth Circuit also found the "exceptional circumstances" test did not apply to all sales between Rock River and HCID. It read this Court's decision in *Cabazon* to have "eschewed a test that would have required the State to show 'exceptional circumstances' to assert its authority over the on-reservation activities of tribal members because the laws burdened the Tribes 'in the context of their dealings with non-Indians.'" *Id.*, citing *Cabazon*, 480 U.S. at 214–16. Thus, it found that escrow and bond requirements could constitutionally be applied to sales of cigarettes by Rock River to HCID if those same cigarettes are later purchased at retail by nonmembers.

This analysis ignores the text of Nebraska's escrow and bond requirements, which apply only to manufacturers, and the fact that the only tribal manufacturer here sells solely to a tribal distributor. Nebraska's escrow and bond requirements do not

apply at the point of sale between a tribally owned retailer and a nonmember.

Even if the identity of downstream retail customers made a difference to Nebraska's statute, the Eighth Circuit's reading of *Cabazon* is wrong. Contrary to the Eighth Circuit's majority opinion, *Cabazon* did not hold exceptional circumstances are only required when the effects of tribal conduct are limited to nonmembers. All the cases this Court cited in *Cabazon* to illustrate when exceptional circumstances are required involved state attempts to regulate tribal members where nonmembers were also involved.

To that point, the principal case *Cabazon* cited for the "exceptional circumstances" requirement was *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), which involved a state's attempt to enforce its own game laws ***as to non-Indians*** on a tribe's reservation.

Cabazon also discussed two additional cases to illustrate the exceptional circumstances requirement. Both cases involved state attempts to regulate a tribe in dealing with nonmembers—specifically, requirements that the tribe collect valid state taxes owed by non-Indians. *See Cabazon*, 480 U.S. at 215 (citing *Moe v. Confederated Salish and Kootenai Tribes*, 42 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)).

The *Cabazon* Court did not distinguish California's attempt to regulate on-reservation

gaming from those cases in which exceptional circumstances were required. Instead, it noted that the facts before it, like those cases, "***also*** involves a state burden on tribal Indians in the context of their dealings with non-Indians." *Id.* (emphasis added). In other words, *Cabazon* did not undertake balancing as an alternative to the rule that exceptional circumstances are required for a state to regulate a tribe's on-reservation activities. To the contrary, it recognized exceptional circumstances are required to justify state regulation of a tribe's on-reservation conduct, even when non-Indians are involved. It then applied that rule to invalidate California's regulation of tribal bingo games on the tribe's own reservation.

The panel's reading of *Cabazon* to reject the "exceptional circumstances" test for on-reservation dealings between a tribe and nonmembers is thus incorrect.

The Eighth Circuit's decision also creates a circuit split. Federal courts, including the Ninth and Tenth Circuits, the District of Wisconsin, and the District of New Mexico, have all correctly read *Cabazon* as using an "exceptional circumstances" test to strike down California's attempt to apply its gaming regulations to the tribes' on-reservation conduct, even where those games were played predominantly by nonmembers. *See Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1180 n.10 (10th Cir. 2012); *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003); *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908, 924 (E.D. Wis. 2008); *Pueblo of Santa Ana v.*

Kelly, 932 F. Supp. 1284, 1289 (D.N.M. 1996). The Eighth Circuit's decision conflicts with courts which have correctly read and applied *Cabazon*. The Eighth Circuit did correctly find that Nebraska's interests—primarily, helping guarantee price parity for big tobacco—do not provide exceptional circumstances required in *Cabazon*. Thus, a proper application of this Court's holding in *Cabazon* compels the conclusion that the Tribe remains sovereign within the boundaries of its reservation, and that Nebraska cannot constitutionally enforce its escrow and bond requirements to on-reservation sales of cigarettes by Rock River to HCID, where those cigarettes are also purchased at retail within the boundaries of the Winnebago Reservation.

B. The Eighth Circuit's Decision Endorses a Return to Paternalism in Violation of the Strong Federal Policy Promoting Tribal Self-Determination.

"It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973). "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Cabazon*, 480 U.S. at 219.

Congress enacted the Indian Reorganization Act "to rehabilitate the Indian's economic life and to

give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero*, 411 U.S. at 152. By casting aside the exceptional circumstances test, the Eighth Circuit's decision threatens the economic development efforts of tribes across the country and presages a return to the paternalism Congress has rejected.

The Eighth Circuit panel acknowledged Rock River and HCID "do more than sell a chance to evade state law," *i.e.*, they "generate on-reservation value by transforming raw materials into finished products by capitalizing on different links in the supply chain." App. at 14a. Tribal interests in self-determination are at their "strongest" in these circumstances. *Washington v. Confederated Tribes of Colville Indian Rsvn.*, 447 U.S. 134, 156 (1980); *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 936-37 (8th Cir. 2019).

The two-judge panel majority downplayed these tribal interests because the tribal businesses "employ only a handful of tribal members and have been operating at a loss for years." App. at 14a–15a. But the Eighth Circuit cited no case law to support this approach. A tribe's interest in managing its own economic affairs within its own boundaries, unburdened by state regulation, does not depend on the number of employees or profitability of the tribal enterprise. If self-sufficiency and tribal sovereignty mean anything, they must include the Winnebago Tribe's ability to organize and run its businesses as it sees fit. That would include, if the Tribe chooses, to operate a business as a loss leader or to take a bet on a business that may have difficulty turning a profit

at first but may eventually serve as a significant source of revenue, employment, and other economic benefits for the Tribe.

Perhaps the most troubling aspect of the Eighth Circuit's decision is that it creates an incentive for states to strangle tribal economic development in infancy, before those efforts can mature into a robust engine of self-sufficiency. Having used regulations to wound a tribal business, the State can argue the business is too weak to warrant legal protection, thus ensuring that the wound is fatal. The Eighth Circuit's approach runs directly counter to federal policy in this area.

II. The Eighth Circuit's Proposed Injunction Also Merits this Court's Review.

The Eighth Circuit also misapplied the precedent of this court in modifying the injunction that had been entered by the District Court.

As this Court has explained, "mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewrit[ing] state law to conform it to constitutional requirements' even as we strive to salvage it." *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320 (2006). Where severing a portion of a statute entails quintessentially legislative work, courts must reject the temptation to invade the legislative domain. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995) ("[o]ur obligation to avoid judicial legislation also persuades us to reject the

Government's second suggestion—that we modify the remedy by crafting a nexus requirement for the honoraria ban.").

In modifying the injunction—and thus assuming the Nebraska Legislature would have wanted to impose escrow and bond requirements on sales to nonmembers—the panel effectively wrote those requirements into a statute which, as enacted by the Nebraska Legislature, applies without regard to the tribal membership of who purchases cigarettes.

Moreover, the Eighth Circuit's proposed regulatory scheme fails to account for the fact that Rock River is a manufacturer, not a retailer. The statute imposes the escrow and bond requirements on manufacturers when they sell their products. Rock River only sells its products to another tribal entity, HCID. Accordingly, the regulated sales *are* member to member.

The Eighth Circuit's modification of the District Court's injunction also results in a regulatory scheme that is unworkable. To pay escrow and post bond on cigarettes sold ultimately to nonmembers, Rock River will need to track the tribal membership status (or nonmember status) of each consumer who purchases cigarettes on the Winnebago Reservation. The existing statute provides no requirements or even guidance as to how this would be done. Will Rock River be required to collect information from retailers on who buys cigarettes? If so, how will retailers collect this information? Will purchasers be required to prove

tribal membership? How? Because Rock River is a manufacturer, not a retailer, it has no access to retailer customer data, and the Eighth Circuit does not tell Rock River how to acquire it.

In addition, the panel's injunction works retroactively as well as prospectively, applying to prior sales. The appellate record does not reveal how many cigarettes were sold in the past to members versus nonmembers. This cannot be done for prior sales, because records do not exist.

Thus, even if the Eighth Circuit's erroneous application of *Cabazon* is allowed to stand, the portion of its decision modifying the District Court's injunction should be vacated with instructions to return the case to the District Court for an evidentiary hearing on whether it is possible to craft a workable injunction without substituting the courts' judgment on policy for the judgment of the state legislature.

CONCLUSION

Petitioners respectfully request that this Court issue a writ of certiorari.

Dated this 2nd of December, 2024.

HCI DISTRIBUTION INC. and ROCK RIVER MANUFACTURING, INC., Petitioners

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

No: 23-2311

HCI Distribution, Inc.; Rock River Manufacturing, Inc.

Plaintiffs – Appellees

v.

Douglas Joseph Peterson, Nebraska Attorney General; Tony Fulton, Nebraska Tax Commissioner,

Defendants

Michael Hilgers, Nebraska Attorney General; Glen A. White, Interim Nebraska Tax Commissioner,

Defendants – Appellants

Appeal from United States District Court for the District of Nebraska - Omaha

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Submitted: March 12, 2024
Filed: August 2, 2024

Before BENTON, ERICKSON, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

The State of Nebraska requires tobacco product manufacturers to join a Master Settlement Agreement or put money in escrow based on the number of cigarettes they sell. Two tribal companies sued, arguing that the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, bars the State from enforcing this requirement, among others, against cigarettes they sell in Indian country. The district court enjoined enforcement for cigarettes sold on the Tribe's reservation. Nebraska appeals, and we reverse in part and remand with instructions to tailor the injunction.

I.

In the 1990s, nearly every state (including Nebraska) sued the largest cigarette manufacturers to recoup healthcare costs caused by tobacco-related illnesses. *Star Sci., Inc. v. Beales*, 278 F.3d 339, 343 (4th Cir. 2002). These lawsuits ended in a Master Settlement Agreement (MSA). *Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 933 (8th Cir. 2009). The MSA bans certain advertising practices, restricts lobbying, and requires cigarette manufacturers "to make payments to the settling states for all future cigarette sales in perpetuity." *Id.* In exchange, the settling states released their pending claims and any similar future ones. *Id.*

Since then, dozens of cigarette manufacturers have joined the MSA, agreeing to the restrictions in exchange for the releases. *Id.* Participating manufacturers shoulder higher costs, of course, because they pay the settling states based on their "relative national market share." *Id.* To protect the manufacturers' market share and profitability, the states agreed to enact statutes that neutralize the MSA's cost disadvantages. *Star Sci.*, 278 F.3d at 345–46.

Nebraska did just that. Its Escrow Statute requires tobacco product manufacturers to either join the MSA or place money in escrow for each cigarette sold—an option designed to track the MSA's costs. Neb. Rev. Stat. §§ 69-2703(1)–(2)(a), (2)(b)(ii), 69-2702(14). Under the escrow option, the manufacturer receives the interest that accrues on its funds, and the funds are generally returned after 25 years. *See* § 69-2703(2)(b), (b)(iii). But the money may also be paid out to satisfy a judgment or settlement on any claim (of the kind released in the MSA) Nebraska brings against the manufacturer. § 69-2703(2)(b)(i). In addition to making the escrow payments, manufacturers must post a bond of $100,000 or the highest escrow amount due from the manufacturer over the past 20 calendar quarters—whichever is greater. § 69-2707.01(1)–(2). The State may draw from the bond to recover delinquent payments. § 69-2707.01(5). Although Indian tribes may "seek release of escrow [funds] deposited ... on cigarettes sold on an Indian tribe's Indian country to its tribal members" by entering into an agreement with the State, these agreements do not eliminate their bond obligations. § 69-2703(2)(b)(iv).

Nebraska also requires tobacco product manufacturers to be listed in its Directory of Certified Tobacco Product Manufacturers and Brands. § 69-2706(1)(a). To be listed, manufacturers must certify that they have complied with the Escrow Statute, § 69-2706(1)(a), and manufacturers that choose not to join the MSA must also certify that they have posted the appropriate bond,[1] § 69-2706(d)(vi).

With this statutory framework in mind, we turn to the Winnebago Tribe of Nebraska, a federally recognized Indian Tribe that governs itself under the Indian Reorganization Act of 1934, 25 U.S.C. § 5123. In the mid-1990s, the Tribe founded Ho-Chunk, Inc., to diversify its revenue stream and develop economic opportunities for its members. Two of Ho-Chunk's wholly owned subsidiaries are the plaintiffs, Rock River Manufacturing, Inc., and HCI Distribution, Inc.

Rock River is a cigarette manufacturer that purchases an off-reservation tobacco blend and then rolls and packages it on-reservation. Historically, it has also imported cigarettes from other manufacturers. It employs a handful of tribal members, plus a few nonmembers, and has been

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[1] The tribal companies challenge the Directory Statute insofar as it is tied to the escrow and bond requirements. The district court did not separately evaluate that statute, nor does the injunction mention it. We chart the same course and note that the companies' escrow and bond obligations as modified by the injunction are the obligations they must certify their compliance with under the Directory Statute.

operating at a loss for nearly a decade. HCI Distribution purchases cigarettes from Rock River and sells them to tribal retailers (casinos and convenience stores) as well as others throughout the country. It too employs only a few tribal members and operates at a loss. In 2016, the companies entered into a Universal Tobacco Settlement Agreement with the Tribe, much of which parallels the MSA.

To fend off the threat of state enforcement, Rock River and HCI Distribution sued Nebraska,[2] seeking an injunction barring it from enforcing its escrow and bond requirements as to cigarettes they sell in Indian country (on its reservation and the Omaha Tribe of Nebraska's reservation). They argued that these requirements infringe on the Tribe's sovereignty, which is protected by the Indian Commerce Clause. After extensive discovery, the parties filed cross motions for summary judgment. The district court granted them in part and denied them in part: it balanced the state, tribal, and federal interests at stake under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), and concluded that Nebraska could enforce its escrow and bond requirements against Rock River and HCI Distribution for cigarettes they sell on the Omaha Reservation but not for the ones they sell on their own reservation. Only Nebraska appeals.

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[2] The named defendants are Nebraska officials tasked with enforcing the challenged laws.

II.

"We review de novo a district court's ruling on cross motions for summary judgment." *Green v. Byrd*, 972 F.3d 997, 1000 (8th Cir. 2020). Nebraska asks us to direct the entry of summary judgment in its favor, which we may do if there is "no genuine dispute as to any material fact" and it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A.

This case puts us at the crossroads of state regulatory authority and tribal self-government. Early in our Nation's history, the Supreme Court viewed Indian country as distinct from state territory and thus free from the force of its laws. *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962) (discussing the "general notion" in the early to mid-1800s). But that view has long since "yielded to closer analysis." *Id*. "Since the latter half of the 1800s, the Court has consistently and explicitly held that Indian reservations are part of the surrounding State," *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 636, 142 S.Ct. 2486, 213 L.Ed.2d 847 (2022) (cleaned up) (citation omitted), and that state law may apply "even on reservations," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). That is not to say that state law applies to the same degree on a reservation as it does off it. *Nevada v. Hicks*, 533 U.S. 353, 362, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001). After all, "Indian tribes retain attributes of sovereignty over both their members and their territory." *Bracker*, 448 U.S. at 142, 100 S.Ct. 2578 (cleaned up) (citation omitted).

The "anomalous" and "complex character" of Indian tribes' "semi-independent position" as well as Congress's "broad power to regulate tribal affairs under the Indian Commerce Clause" have resulted in two related barriers to state regulatory authority. *Id.* (citation omitted). Federal law may expressly preempt state law, or it may impliedly preempt it if exercising state law would "unlawfully infringe" on tribal self-government. *Flandreau Santee Sioux Tribe v. Houdyshell*, 50 F.4th 662, 667 (8th Cir. 2022) (cleaned up) (citation omitted); *accord Castro-Huerta*, 597 U.S. at 649, 142 S.Ct. 2486.

The extent of a state's regulatory power turns on the location of ("where") and participants in ("who") the targeted conduct. *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 113 (2d Cir. 2014). "Indians going beyond reservation boundaries" are generally subject to state law. *Jones*, 411 U.S. at 148–49, 93 S.Ct. 1267. But once a state reaches into a reservation, its power weakens. *Otoe-Missouria Tribe*, 769 F.3d at 113; *see also Bracker*, 448 U.S. at 144–45, 100 S.Ct. 2578. That's when the "who" comes in.

"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." *Hicks*, 533 U.S. at 362, 121 S.Ct. 2304 (quoting *Bracker*, 448 U.S. at 144, 100 S.Ct. 2578). Only in "exceptional circumstances" may a State regulate the "on-reservation activities of tribal members." *New Mexico v. Mescalero Apache Tribe*,

462 U.S. 324, 331–32, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983). The State's power increases, though, when its law targets the conduct of nonmembers,[3] *see Bracker*, 448 U.S. at 144–45, 100 S.Ct. 2578, or members' "dealings" with nonmembers, *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). These "[m]ore difficult" cases call for 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, 100 S.Ct. 2578.

B.

We first nail down the "who" and "where," starting with the "where." Nebraska argues that Rock River's cigarette manufacturing reaches beyond reservation borders, so the companies are subject to Nebraska's escrow and bond requirements—no Bracker balancing required. Because Rock River imports its tobacco, has historically imported cigarettes, and uses some nonmember labor, Nebraska says that Rock River operates largely off-reservation and that its products are not principally generated from the Tribe's resources.

Nebraska points to *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). In that case, the Ninth Circuit held that a member-owned,

[3] We use the term "nonmember" instead of "non-Indian" because members of other tribes generally "stand on the same footing" as non-Indians. *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 161, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

on-reservation manufacturer had to comply with the State's escrow statute because it had engaged in "largely off-reservation," "tobacco-related activities" by shipping its crop off-reservation to be threshed and blended with more tobacco and by selling its cigarettes in about 17 states. *Id.* at 994, 998. The Ninth Circuit relied on *Jones*, *id.* at 994, where the Supreme Court held that New Mexico could tax the gross receipts of an off-reservation, tribally owned ski resort, *Jones*, 411 U.S. at 146, 157–58, 93 S.Ct. 1267.

King Mountain is easily distinguished. Based on the undisputed facts at summary judgment, the district court there found that the manufacturer's "operations involve[d] extensive off-reservation activity" and that its products were "not principally generated from the use of reservation land and resources." 768 F.3d at 993. Key to *King Mountain*'s holding was that those findings were not clearly erroneous. *See id.* at 994 (noting appellants did not argue that the findings "were clearly erroneous" and seeing "no support for [their] implied argument that the district court clearly erred" by making them). By contrast, the district court here did not find that Rock River's tobacco-related activities are largely off-reservation or that its cigarettes aren't principally generated from reservation resources. Nor may we draw these inferences in favor of Nebraska, the party seeking summary judgment.[4] *Cox v. First Nat'l*

[4] Nebraska does not say whether it is appealing the district court's partial grant of summary judgment to the tribal companies or partial denial to it—or both. *See United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 751 F.3d 880, 886–87 (8th Cir. 2014) ("[W]hen a party appeals both the denial of its

Bank, 792 F.3d 936, 938 (8th Cir. 2015) (quoting *Tolan v. Cotton*, 572 U.S. 650, 656–57, 660, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014) (per curiam)).

Nebraska's escrow and bond requirements are triggered by—and measured by—cigarette sales. *See* §§ 69-2703(2)(a), 69-2707.01(1)–(2). Because cigarette sales are the targeted conduct and the sales at issue here are the ones on the Winnebago Reservation, the reservation is the "where" for our analysis. *Cf. Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99, 105–06, 126 S.Ct. 676, 163 L.Ed.2d 429 (2005) (holding that the "where" of Kansas's motor fuel tax, which was triggered at the point of first receipt, was "off-reservation" in a case involving non-Indian distributors who received the fuel off-reservation and then delivered it to an on-reservation, Indian-owned gas station).

Now the "who." Nebraska does not dispute that its escrow and bond requirements fall on a tribal member in this case. Nor could it. Its laws expressly say that tobacco product manufacturers must either join the MSA or put money in escrow based on the number of cigarettes they sell and post a bond, §§ 69-2703(1)–(2)(a), 69-2707.01(1), and Rock River is a

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motion for summary judgment and the grant of summary judgment ..., we may review both orders" because the denial "merges into the final order granting summary judgement," and we may, "if appropriate, direct the entry of summary judgment" in the appellant's favor. (cleaned up) (citation omitted)). Regardless, Nebraska asks us to award it summary judgment, so it must shoulder the movant's burden. *See Hawkeye Nat'l Life Ins. Co. v. AVIS Indus. Corp.*, 122 F.3d 490, 496 (8th Cir. 1997).

tobacco product manufacturer wholly owned by the Tribe, *see Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1180, 1183 (10th Cir. 2012) (similar Oklahoma laws "regulate tobacco product manufacturers"). But that is not the end of the "who."

Even when a law directly regulates a tribal member, it matters whether the other participants in the targeted conduct are members or nonmembers. In *Cabazon*, for example, California tried to regulate the Tribes' on-reservation bingo games, which were "played predominantly by non-Indians coming onto the reservations." 480 U.S. at 205, 107 S.Ct. 1083. Even though the laws directly regulated the Tribes that ran the games, the Supreme Court eschewed a test that would have required the State to show "exceptional circumstances" to assert its authority over the on-reservation activities of tribal members because the laws burdened the Tribes "in the context of their dealings with non-Indians." *See id.* at 214–16, 107 S.Ct. 1083 (citation omitted). The Court instead used a traditional Bracker balancing analysis, asking whether the State's interests justified its assertion of regulatory authority over the games in light of the tribal and federal interests supporting them. *Id.* at 216–22, 107 S.Ct. 1083; *see also Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 933 (8th Cir. 2019) (construing Cabazon as holding that the "federal and tribal interests in promoting Indian gaming outweighed the State's interest in preventing organized crime").

In this case, Nebraska's escrow and bond requirements target two transactions with very different implications for the Tribe's sovereignty. To

assert its regulatory authority over the tribal companies' on-reservation cigarette sales to nonmembers, Nebraska's interests must "outweigh" the tribal and federal interests at stake. *See Noem*, 938 F.3d at 935. But for on-reservation sales to members, Nebraska must show exceptional circumstances to overcome the tribal and federal interests.[5] *See Cabazon*, 480 U.S. at 215, 107 S.Ct. 1083.

C.

Our balancing of the state, federal, and tribal interests is "designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145, 100 S.Ct. 2578. "[W]e focus 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) (opinion of Loken, J.) (quoting Felix S. Cohen, Handbook of Federal Indian Law 707 (2012)).

We start with the federal interests. No one has identified a federal law or policy taking a position on tribal cigarette manufacturing or state regulation of it. This stands in sharp contrast to *Cabazon*, where the Federal Government had implemented policies to promote tribal bingo enterprises and provided

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[5] In a last-ditch effort to avoid Bracker balancing, Nebraska argues that *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129 (8th Cir. 1982), requires a Tribe to first show that a challenged law is unreasonable and unrelated to state regulatory authority. But Alexander created no such prerequisite. See id. at 1138.

financial assistance, demonstrating its "approval and active promotion" of them, 480 U.S. at 217–18, 107 S.Ct. 1083, and *Mescalero Apache Tribe*, where it financed and supervised the Tribe's development and management of the wildlife resources that the State wanted to regulate, 462 U.S. at 325, 327–28, 103 S.Ct. 2378. But nor is it like *Rice v. Rehner*, where the Federal Government "authorized, rather than pre-empted, state regulation over Indian liquor transactions" through a historical tradition of concurrent state and federal regulation. 463 U.S. 713, 726, 728–29, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983) (emphasis added).

This is not to say that there are no federal interests at stake. The *Bracker* preemption analysis proceeds against a "backdrop" of tribal sovereignty, *Mescalero Apache Tribe*, 462 U.S. at 334, 103 S.Ct. 2378 (quoting *Bracker*, 448 U.S. at 143, 100 S.Ct. 2578), including Congress's "overriding goal of encouraging tribal self-sufficiency and economic development," *Cabazon*, 480 U.S. at 216 & n.19, 107 S.Ct. 1083 (cleaned up) (citation omitted); *see also Mescalero Apache Tribe*, 462 U.S. at 334–35 & 335 n.17, 103 S.Ct. 2378 (collecting "numerous federal statutes" embodying these goals, such as the Indian Reorganization Act). "These are important federal interests," *Cabazon*, 480 U.S. at 217, 107 S.Ct. 1083, threatened by Nebraska's regulatory framework that economically burdens tribal cigarette manufacturing. So the federal interests tilt in favor of preemption, though not nearly as strongly as in cases where the Federal Government has blessed the Tribe's venture.

Next, the Tribe's interests. A tribe's interests in "[s]elf-determination and economic development" peak when it has significantly invested in a venture that serves as a major source of tribal funds or employment. *See id.* at 218–20, 107 S.Ct. 1083; *see also Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 156–57, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). In *Cabazon*, for example, the Tribes had a "substantial interest" in their bingo games, which "provide[d] the sole source of revenues for the operation of the tribal governments and the provision of tribal services," were the "major sources of employment on the reservations," and were played in "modern facilities" they had built. 480 U.S. at 218–20, 107 S.Ct. 1083. Similarly, in *Mescalero Apache Tribe*, the Tribe had "engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources," which "generate[d] funds for essential tribal services and provide[d] employment for members." 462 U.S. at 341, 103 S.Ct. 2378. A tribe's interests bottom out when its venture adds little to no on-reservation value. Take *Colville*, where the Tribes merely imported cigarettes for resale, and it was "painfully apparent" that they were selling a chance to evade state taxes, not value "generated on the reservations." 447 U.S. at 144–45, 155, 100 S.Ct. 2069.

This case is somewhere in between. The tribal companies do more than sell a chance to evade state law, that much is true. They generate on-reservation value by transforming raw materials into finished products and by capitalizing on different links in the supply chain. But they employ only a handful of

tribal members and have been operating at a loss for years. If they were profitable, they would remit some funds to the Tribe, yet in the companies' own words, every dollar they lose "deprives the Tribe of operating funds." Even when HCI Distribution was profitable, it remitted only about $1.5 million over a few years to the Tribe. Contrast that with its parent company, Ho-Chunk, which has seen great economic success. In 2018, for example, a year that Rock River and HCI Distribution lost money, Ho-Chunk gave the Tribe over $180 million in dividends and donations. The parent's success, though, is not its subsidiaries' to claim. Cigarette manufacturing is hardly a source of employment or revenue for tribal services, so the Tribe's self-determination and economic development interests are not strong.

That said, the Tribe has an interest in applying its own regulatory scheme—the Universal Tobacco Settlement Agreement—to tribal cigarette manufacturing. And most importantly here, it has a strong interest in protecting the health of its members who may be harmed by tribally manufactured tobacco products. As the district court found, the "Tribe, not the State, carries the burden of protecting its members who may be harmed by products manufactured by a tribal business." Part of why the Tribe entered into the Agreement in the first place was because it had "struggled financially to care for [its] tribal members made ill from the direct and indirect inhalation of cigarette smoke" and had received no compensation from the State. Entering into the Agreement, it hoped, would "provid[e] a true and significant benefit to tribal members in need of assistance."

Now to the State's interests. Like the Tribe, Nebraska has a "separate sovereign interest in being in control of, and able to apply, its laws throughout its territory," *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 476 (2d Cir. 2013) (citing Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 188, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989)), which includes the Winnebago Reservation, *see Castro-Huerta*, 597 U.S. at 655, 142 S.Ct. 2486. The State also has a strong interest in protecting the health of its citizens—members and nonmembers alike. *See Grand River*, 574 F.3d at 942 ("Unquestionably, the State possesses a legitimate public interest in the health of its citizens."); *cf. Castro-Huerta*, 597 U.S. at 651, 142 S.Ct. 2486 (State's interest in public safety covers both Indians and non-Indians). Nebraska enacted its escrow and bond requirements to "safeguard the [MSA], the fiscal soundness of the state, and the public health," § 69-2704, and these requirements further those interests by ensuring the State can secure judgments against wrongdoers who harm its citizens and drain its fisc by causing public health expenditures.

On balance, for on-reservation cigarette sales to nonmembers, the State's strong interest in protecting public health and redressing harm outweighs the Tribe's and Federal Government's comparatively minimal interests. But the tables are turned when it comes to cigarette sales to members. In these transactions, the Tribe bears the brunt of protecting the buyers' health and recovering public health costs. So the State's interests do not outweigh the Tribe's and Federal Government's—let alone amount to exceptional circumstances. Because the

State's interests do not justify asserting its regulatory authority over the tribal companies' on-reservation, member-to-member cigarette sales, federal law preempts Nebraska's escrow and bond requirements for those sales.

D.

One final issue: the proper scope of relief. We hold that Nebraska's escrow and bond requirements run afoul of the Indian Commerce Clause as applied to the tribal companies' on-reservation, member-to-member cigarette sales. So in crafting a remedy, we must ask whether the Nebraska Legislature would have preferred to apply what is left of those requirements or nothing at all. *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) ("After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?").

The general rule is that "when confronting a constitutional problem in a law, courts should 'limit the solution' by enjoining enforcement of 'any problematic portions while leaving the remainder intact.' " *Sisney v. Kaemingk*, 15 F.4th 1181, 1194 (8th Cir. 2021) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010)). But the tribal companies take an all-or-nothing approach, insisting that crafting an injunction to cover only on-reservation, member-to-member sales would be legislating from the bench. We disagree. It is our job "not to nullify more of a legislature's work than is

necessary" so that we preserve, as best we can, what the people's democratically elected officials wanted. *Ayotte*, 546 U.S. at 329, 126 S.Ct. 961.

We craft a solution tailored to the problem. Under Nebraska law, part of a statute "is severable if a workable plan remains after severance, the valid portions are independently enforceable, the invalid portion did not serve as such an inducement to the valid parts that the valid parts would not have passed without the invalid part, and severance will not violate the [Legislature's] intent." *Jones v. Gale*, 470 F.3d 1261, 1271 (8th Cir. 2006) (cleaned up) (quoting *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858, 873 (1992)). We are confident that enjoining Nebraska from enforcing its escrow and bond requirements against member-to-member sales on the Winnebago Reservation leaves in place a workable, independently enforceable plan that is not contrary to legislative intent. After all, the Nebraska Legislature itself enacted a materially similar regulatory carve out: tribes may "seek release of escrow [funds] deposited ... on cigarettes sold on an Indian tribe's Indian country to its tribal members" by agreement with the State. § 69-2703(2)(b)(iv). Our remedy simply allows the tribal companies to hold onto these funds at the outset.

III.

"It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *McClanahan v. Arizona Tax Comm'n*,

411 U.S. 164, 172, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). The Winnebago Tribe's sovereignty bars Nebraska's escrow and bond requirements for the tribal companies' on-reservation, member-to-member cigarette sales. But Nebraska may enforce those requirements against the companies' cigarette sales to nonmembers.

We reverse in part and remand with instructions to tailor the injunction: Nebraska is enjoined from enforcing §§ 69-2703 and 69-2707.01 against Rock River and HCI Distribution as to cigarettes they sell, and have sold, on the Winnebago Reservation to members of the Winnebago Tribe.

ERICKSON, Circuit Judge, concurring in part and dissenting in part.

The Winnebago Tribe of Nebraska is a federally recognized Indian Tribe that, through a holding company, owns Rock River Manufacturing, Inc. and HCI Distribution, Inc. Rock River has a production facility on the Reservation where it employs some tribal members to manufacture tobacco products. HCI Distribution purchases Rock River's tobacco products and distributes them to, among other places, the Tribe's casinos. The issue before the Court is whether the State of Nebraska may enforce its cigarette escrow and bond laws against these tribal companies for conduct occurring solely on the Winnebago reservation.

The Supreme Court has repeatedly recognized "a firm federal policy of promoting tribal self-sufficiency and economic development." *White*

Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). No express congressional statement of preemption is required for a court to determine that a state law is preempted when it infringes on tribal sovereignty. *Id*. at 144, 100 S.Ct. 2578. State law is typically preempted when applied to the conduct of tribal members on the reservation. Id. Only in "exceptional circumstances" may a state enforce its laws against member conduct on the reservation. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

The majority agrees with the district court that the State's escrow and bond requirements apply directly to the manufacturers of tobacco products. The State provided no exceptional circumstance justifying the application of these laws to member activity on the Reservation, so the district court correctly granted an injunction against enforcement of the laws on member purchases of tobacco products.

This leaves nonmember purchases of tobacco products on the Reservation. Determining the validity of state law over nonmember activity requires a "particularized inquiry into the nature of the state, federal, and tribal interests at stake ... to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145, 100 S.Ct. 2578. The federal government and the Tribe have parallel interests in tribal self-determination and economic development on the reservation. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987).

Rock River has a facility on the Reservation, manufactures goods, and employs some tribal members. See id. (finding a facility on the reservation and employment of tribal members relevant to the economic development interest). HCI Distribution employs some tribal members and distributes the tobacco products to the Tribe's casinos where they are sold as goods ancillary to the gambling experience. *See Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 936 (8th Cir. 2019) (noting the sale of goods and services at the Casino contributes to the success of the gaming operation).

Rock River and HCI Distribution are part of a sophisticated vertically integrated business, so their activities support other tribal companies operating on the Reservation. While the overall business operation provides significant income to the Tribe, Rock River has operated at a loss since 2016, and HCI Distribution started operating at a loss after this lawsuit commenced. The majority uses these operating losses to discount the Tribe's interest. However, there is nothing in Supreme Court precedent that diminishes the federal and tribal interests in self-determination and economic development if a company is operating at a loss. Such a rule invites further state regulation of activities on the reservation and chips away at tribal sovereignty.

In contrast, the State's interest is in protecting public health in the event a tobacco product manufacturer causes harm. This interest is undercut in part by the Tribe's own tobacco settlement agreement with Rock River and HCI Distribution, which includes protections for the public health and

requires them to make payments to the Tribe. The Tribe uses this money to improve the public health and wellness of tribal members. On balance, I find the federal and tribal interests outweigh the State's interest.

Based on the foregoing, I agree with the district court's thorough and well-reasoned decision and would affirm.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

HCI DISTRIBUTION, INC. and ROCK RIVER MANUFACTURING, INC., Plaintiffs, vs. MIKE HILGERS, Nebraska Attorney General, and GLEN A. WHITE, Interim Nebraska Tax Commissioner,[1] Defendant.	8:18-CV-173 MEMORANDUM AND ORDER Filed April 27, 2023.

This case is about the constitutionality of some of the State of Nebraska's tobacco-related statutes as applied to the plaintiffs. The plaintiffs are wholly owned subsidiaries of an economic development company entirely controlled by a federally recognized Native American tribe, and they seek a declaration of rights pursuant to 28 U.S.C. § 2201 and injunctive

[1] Mike Hilgers, Nebraska Attorney General, and Glen A. White, Interim Tax Commissioner, are substituted for Doug Peterson and Tony Fulton as defendants in this action, pursuant to Fed. R. Civ. P. 25(d)(1).

relief pursuant to 28 U.S.C. § 2202. The defendants are the duly elected state officers whose offices are charged with enforcement of the statutes from which the plaintiffs seek relief.

This matter comes before the Court on the parties' cross-motions for summary judgment. Filing 123; filing 129. Both motions will be granted in part and denied in part. For tobacco products sold on the Winnebago Reservation, the Court will grant the relief sought by the plaintiffs. But, for tobacco products sold anywhere else in Nebraska, including on the Omaha Reservation, the State may enforce its tobacco regulations.

I. STANDARD OF REVIEW

Summary judgment is proper if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). The movant bears the initial responsibility of informing the Court of the basis for the motion, and must identify those portions of the record which the movant believes demonstrate the absence of a genuine issue of material fact. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). If the movant does so, the nonmovant must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial. *Id.*

On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as

to those facts. *Id*. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the evidence are jury functions, not those of a judge. *Id*. But the nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts. *Id*. In order to show that disputed facts are material, the party opposing summary judgment must cite to the relevant substantive law in identifying facts that might affect the outcome of the suit. *Quinn v. St. Louis Cty.*, 653 F.3d 745, 751 (8th Cir. 2011). The mere existence of a scintilla of evidence in support of the nonmovant's position will be insufficient; there must be evidence on which the jury could conceivably find for the nonmovant. *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 791-92 (8th Cir. 2011). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Torgerson*, 643 F.3d at 1042.

II. BACKGROUND

The issue in this case is whether the State of Nebraska can enforce certain tobacco product regulations against the plaintiffs. The plaintiffs, HCI Distribution, Inc. (HCID) and Rock River Manufacturing, Inc., are wholly owned subsidiaries of Ho-Chunk, Inc. Filing 130 at 2, 6. Ho-Chunk is a tribal company, meaning it is incorporated under the laws of and is wholly owned by the Winnebago Tribe of Nebraska, a federally recognized Native American tribe. Filing 124 at 10; filing 125-1 at 12; see also 25 U.S.C. § 5123; Restatement of the Law of American Indians § 50(d) (Am. L. Inst. 2022); Winnebago

Tribal Code § 11B-108 (filing 125-3 at 131). Rock River manufactures and imports tobacco products, mostly cigarettes, and HCID purchases Rock River's products and distributes them to retailers on the Winnebago Reservation, other Native American reservations in Nebraska, and in other states. Filing 130 at 2, 9; filing 124 at 14-15, 17.

Statutory Framework

Specifically, the parties disagree about whether the plaintiffs are required to pay deposits into a qualified escrow fund pursuant to Neb. Rev. Stat. § 69-2703 and post a bond securing such payments under Neb. Rev. Stat. § 69-2707.01 for tobacco products sold in Indian country, as defined by Neb. Rev. Stat. § 69-2702.[2] The State promulgated these regulations as part of its obligations under a 1998 settlement agreement. In this Master Settlement Agreement (MSA), Nebraska and 45 other states agreed to release some tobacco product manufacturers from past and future claims involving consumer protection, advertising, and adverse health effects of cigarettes, and the tobacco product manufacturers agreed to restrict the types of advertisements they used, and agreed to make annual settlement payments to the states in perpetuity. Nebraska relies on the MSA payments to support critical state services, such as the Health Care Cash Fund, which provides $60 million per year for state services like biomedical research, children's

[2] The state's definition of Indian country is identical to the federal definition, 18 U.S.C. § 1151.

health insurance, tobacco prevention and control, and more. Filing 130 at 21.

As part of the MSA, the participating manufacturers were concerned about losing their share of the market because the perpetual settlement payments would increase their costs and would thus increase the price of cigarettes, and non-participating manufacturers would not incur these costs. The settling states agreed to enact model legislation intended to negate any competitive advantage earned by manufacturers who chose not to participate in the MSA. *See Omaha Tribe of Nebraska v. Miller*, 311 F.Supp.2d 816, 817 (2004); *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d. 158, 163 (2d Cir. 2005). Nebraska law requires manufacturers to either, (1) join the MSA as participating manufacturers and make the required settlement payments, or (2) agree to make deposits into an escrow account based on the number of tobacco product sales within the state. Neb. Rev. Stat. § 69-2703. The amount of the escrow deposit per cigarette is intended to match the cost of the MSA settlement payments. *See* § 69-2703(b)(ii). Additional legislation was later enacted by the settling states, including Nebraska, to aid in enforcing the escrow payments. § 69-2704; *see Pryor*, 425 F.3d at 164.

Before selling cigarettes in Nebraska, tobacco product manufacturers must be listed in the Directory of Certified Tobacco Product Manufacturers and Brands. § 69-2706; *see also* http://bit.ly/3H9HXD8. To be listed in the directory, non-participating tobacco product manufacturers

must certify their compliance with the escrow statutes. §§ 67-2706(1)(a) and 69-2703. The non-participating manufacturer must also post a bond "for the benefit of the state" of at least $100,000. § 69-2701.01. The escrow ensures that the State can collect judgment or settlement money for claims from which the participating manufacturers were released. And the bond further ensures such collection in the event the manufacturer does not make proper escrow payments.

The non-participating manufacturer is entitled to interest on the escrow, and the funds will revert back to the manufacturer after 25 years. The escrow funds may be released if the State secures a judgment or settlement against the manufacturer for claims related to: "(A) the use, sale, distribution, manufacture, development, advertising, marketing, or health effects of, (B) the exposure to, or (C) research, statements, or warnings regarding" tobacco products "manufactured in the ordinary course of business." §§ 69-2703(2)(b)(i), 69-2702(11); Master Settlement Agreement part II, cl. nn. Escrow payments may also be released if the escrow deposit amount exceeds the amount paid by participating manufacturers pursuant to the MSA.

The statute also contemplates releasing escrow deposits for "cigarettes sold on an Indian tribe's Indian country to its tribal members," but only if a tribe enters into an agreement with the State. Neb. Rev. Stat. § 69-2703(2)(b)(iv). As part of the agreement, both a tribe and the State waive sovereign immunity objections with respect to the agreement, divide the proceeds of the tax and escrow,

and provide for reporting and auditing requirements and "other necessary and proper matters." § 77-2602.06. The plaintiffs attempted to negotiate such an agreement, but ultimately, those negotiations failed, in part because the parties could not agree on the scope of the waiver of sovereign immunity. Filing 124 at 23; filing 125-1 at 29-30.

The Plaintiffs

Now, the plaintiffs argue that their status as subsidiaries of the Winnebago Tribe prevents State enforcement of the escrow laws. The Tribe is organized under Section 16 of the Indian Reorganization Act. *See* filing 125-1 at 12; 25 U.S.C. § 5123. Under this Act, the Tribe created its constitution and laws to be governed by, including a Business Corporation Code. The Tribe has the power to form wholly owned tribal companies, and it founded Ho-Chunk under its tribal code in 1994. Filing 124 at 10; Winnebago Tribal Code § 11B-108 (filing 125-3 at 131). The mission of Ho-Chunk is to create economic development and jobs for tribal members, and to "generate a sustainable, long-term income stream large enough for the Tribe to reach economic self-sufficiency." Filing 125-3 at 217.

Ho-Chunk'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). *See id.*; filing 125-3 at 209. Ho-Chunk's ventures include manufacturing and selling tobacco products, government contracting, construction, owning and operating

convenience stores, selling used cars, leasing storage units, managing real estate, and retailing traditional Native American products such as foods, gifts, and health and beauty products. To operate in all these industries, Ho-Chunk created several wholly owned subsidiaries pursuant to various Winnebago Tribal Code provisions. Filing 124 at 10-11. These wholly owned subsidiaries include the plaintiffs, as well as All Native, Inc., Ho-Chunk Capital Company, Pony Express convenience stores, Ho-Chunk Farms, Sweet Grass Trading Company, Titan Motors, Titan Storage, WarHorse Gaming, LLC, and more. *See* filing 125-3 at 230-35.

From its net revenue, combined from all its subsidiaries, Ho-Chunk pays the Tribe an annual 25 percent dividend. Filing 125-3 at 212. Ho-Chunk 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 Winnebago, Nebraska, in a planned community which Ho-Chunk helped develop. Filing 125-3 at 220-21. In 2018, Ho-Chunk's payments to the Tribe through dividends and donations totaled $181,900,000. Filing 125-3 at 222. Ho-Chunk provides jobs and wages to tribal members and contributes tax dollars to the Winnebago tribal government. *Id*.

Rock River is a federally licensed cigarette manufacturer and it complies with federal tobacco regulations. Filing 124 at 16; filing 130 at 13, 50. Rock River currently manufactures all its own cigarettes in its facility on the Reservation. Filing

130 at 3; filing 131-3 at 10; filing 124 at 16; filing 127. Rock River purchases a tobacco blend from a company called AllianceOne, which is not located in Nebraska and not affiliated with the Winnebago Tribe. Filing 130 at 9. Rock River also is a federally licensed importer of cigarettes manufactured by other companies. Filing 130 at 2. Rock River has operated at a loss since 2016, and lost $804,401 in 2021. Filing 124 at 17. For sales of cigarettes in states other than Nebraska, Rock River complies with escrow and directory statutes. Filing 130 at 16; filing 149 at 16. Since 2014, Rock River has employed fifteen people, nine of whom were members of the Winnebago Tribe. Filing 130 at 4.

HCID is a tobacco distributor which purchases tobacco products from Rock River and sells them to customers for retail sales. Filing 124 at 14; filing 130 at 6. In Nebraska, HCID sells cigarettes to casinos run by the Tribe and to convenience stores owned by another Ho-Chunk subsidiary, Ho-Chunk Winnebago, Inc. Ho-Chunk Winnebago owns Pony Express and other convenience stores on the Winnebago Reservation and on the neighboring Omaha Reservation. Filing 124 at 14, 18. HCID also sells cigarettes to customers outside of Nebraska, and to retailers which are unaffiliated with the Tribe. Filing 124 at 14. In 2021, HCID reported that it sold 1,852,800 cigarettes to retail locations on the Omaha Reservation, and from January through August 2022, it reported 4,709,800 cigarettes sold on the Winnebago Reservation. Filing 130 at 18.

A pack of cigarettes contains 20 cigarettes, and a carton contains 200 cigarettes. Filing 130 at 9.

Rock River spends approximately $3.7654 per carton of cigarettes for materials to manufacture cigarettes, including the tobacco, packaging materials, glue, papers, and all other raw materials. Filing 124 at 17. Rock River spends approximately $1.6161 per carton for labor, overhead, and utilities. Filing 124 at 18. Federal and freight taxes cost Rock River approximately $10.86235 per carton. *Id*. Rock River sells Silver Cloud cigarettes to HCID for $17.35 per carton, and a typical sale of Silver Cloud cigarettes from HCID to Pony Express stores is $20.64 per carton. Filing 149 at 9. The cost of a carton does not include the value of the cigarette escrow or state excise tax. Filing 130 at 13. If required to pay escrow deposits, the price of cigarettes from Rock River to HCID, and from HCID to its retailers, would increase.

The Tribe taxes and regulates tobacco products sold and manufactured on the Winnebago Reservation. And the Tribe has its own settlement agreement, the Universal Tobacco Settlement Agreement, entered into by the plaintiffs in April 2016. Filing 125-3 at 167-79. Under the agreement, the plaintiffs are prohibited from certain marketing practices, such as using advertising tailored to minors, and they must pay a certain amount to the Tribe for each cigarette sold. The Tribe released the plaintiffs for past and future claims arising out of the use, sale, distribution, manufacture, development, advertising, marketing, health effects or the exposure to cigarettes, which parallels the released claims in the MSA. Filing 125-3 at 171.

III. DISCUSSION

As described in this Court's earlier Order, under the Indian Commerce Clause of the Constitution, U.S. Const. art 1, § 8, cl. 3, the State cannot require the Tribe to comply with the tobacco regulations if such regulations are preempted by federal law or if they constitute an unlawful infringement on the right of the Tribe to make and be ruled by its own laws. Filing 35 at 11-12; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *see also* Conference of Western Attorneys General, American Indian Law Deskbook §§ 5:17, 5:20 (2016).

While the field of Indian law is fraught with exemptions, exceptions, and unique legal frameworks which evade sweeping generalizations, the Supreme Court has laid out foundational principles to follow in determining the limits of a state's power in Indian country. *See, e.g., Bracker*, 448 U.S. at 141, 100 S.Ct. 2578. To begin, a state is categorically barred from taxing "reservation lands and reservation Indians." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995); filing 35 at 12. Evaluating the scope of state regulation over both member and non-member conduct in Indian country is subject to the analysis described in *Bracker*, 448 U.S. at 141, 100 S.Ct. 2578.

Only in "exceptional circumstances" may a state "assert jurisdiction over the on-reservation activities of tribal members." *California v. Cabazon*

Band of Mission Indians, 480 U.S. 202, 215, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), superseded by statute, Indian Gaming Regulatory Act, Pub. L. 100-497, 102 Stat. 2467 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983)); *see also Bracker*, 448 U.S. at 141, 100 S.Ct. 2578 ("When on-on reservation conduct involving only Indians is at issue, state law is generally inapplicable"); Restatement of the Law of American Indians §§ 31, 49; Cohen's Handbook of Federal Indian Law §§ 6.01, 6.03 (2012 ed.); American Indian Law Deskbook § 5:20. But, a state may, in some circumstances, impose "minimal burdens" on a tribally-run business on a reservation in order to enforce valid state laws. For example, a state can require a tribe to collect and record valid cigarette excise taxes imposed on non-members. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 480, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 159-60, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

This is the complicated (and somewhat contradictory) legal morass in which the State's attempted regulation of the plaintiffs' tobacco sales is situated. So, the escrow laws are categorically preempted if they are a direct tax on the Tribe. And if the laws are not a tax, the Court must conduct the two-part analysis outlined in *Bracker*: The State regulations are not allowed if they are preempted by federal law (using *Bracker*'s unique preemption standards), or if they infringe on the Tribe's ability to make its own rules and be governed by them. In the latter analysis, the Court must conduct "a

particularized inquiry into the nature of the state, federal, and tribal interests at stake" to determine the limit and scope of the State's regulatory authority in Indian country. *Bracker*, 448 U.S. at 145, 100 S.Ct. 2578; *see also White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1137-38 (8th Cir. 1982).

1. Is it a Tax?

This Court previously held that the escrow and bond requirements could be characterized as a tax on reservation land and reservation Indians, and thus categorically barred. Filing 35 at 14 (citing *Chickasaw Nation*, 515 U.S. at 458, 115 S.Ct. 2214). The State argues that the contested regulations are not a tax, and, if the Court finds that they are a tax, the State asserts that this Court lacks jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341. Filing 130 at 23, 30. The plaintiffs argue that the escrow requirement is an impermissible direct tax on a tribal business, and the State has no control over the plaintiffs' tobacco business on the Winnebago Reservation or the Omaha Reservation. Filing 124 at 27.

Because contained in the power to tax is the power to destroy, the Supreme Court has categorically barred state taxes levied directly on reservation lands and reservation Indians, and courts need not engage in the Bracker balancing act. *See Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992). The Supreme Court has recognized the tension between states and

tribes, and a state's motivation to weaken the power of a tribe. *See McGirt v. Oklahoma*, —— U.S. ——, 140 S.Ct. 2452, 2462, 207 L.Ed.2d 985 (2020) (states are "neighbors who might be least inclined to respect" tribes). So the Constitution protects tribes from state action which has the power to destroy reservation communities.

A tax can be generally defined as an involuntary exaction which provides for the support of the government. *See* filing 35 at 14 (citing *United States v. La Franca*, 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (1931), *Michigan Emp't Sec. Comm'n v. Patt*, 4 Mich.App. 228, 144 N.W.2d 663, 665 (1966)). An involuntary exaction which is not a tax is likely a penalty. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 565, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012). Fundamentally, taxes are intended to raise revenue while penalties intend to control behavior. *See id*. at 567, 132 S.Ct. 2566. Yet all taxes, in some way, influence behavior. Id. And a penalty will still raise revenue, but is imposed on parties as punishment for an unlawful act or omission. *Id*. So to tell the difference between the two, courts have taken a functional approach and consider characteristics like the burden on the payor, any scienter requirement, and how the exaction is enforced. *Id*.

The alleged taxes in this case are certain payments tobacco product manufacturers must make while doing business in Nebraska. First, manufacturers must make quarterly deposits into a qualified escrow fund. Neb. Rev. Stat. § 69-2703(2)(a). Second, they must post a bond of at least

$100,000 for the benefit of the State, which secures the escrow if the tobacco product manufacturer neglects the obligation to pay the deposit. § 69-2707.01. There is no exaction, and no revenue for the State, unless the State proves the manufacturer committed some wrong related to "(A) the use, sale, distribution, manufacture, development, advertising, marketing, or health effects of, (B) the exposure to, or (C) research, statements, or warnings regarding" tobacco products "manufactured in the ordinary course of business." Master Settlement Agreement part II, cl. nn; Neb. Rev. Stat. §§ 69-2703(2)(b)(i), 69-2702(11). It is not the escrow requirement which raises revenue; rather, the manufacturer's wrongdoing generates funds for the State. The escrow deposits and the bond merely secure the collection of those funds. There is a strong scienter element to the escrow and bond statutes, and a judgment or settlement must be reached before any exaction is made. The escrow requirements more closely resemble a penalty than a tax because so long as the non-participating manufacturer does nothing wrong, the manufacturer may collect interest on the escrow and is entitled to the money after 25 years. From the *Sebelius* factors, it is clear that the escrow and bond requirements are penalties, not taxes.

The plaintiffs' arguments that the regulations are a tax are unconvincing. The plaintiffs even refer to the escrow statutes as a "punitive tax agreement," recognizing the strong scienter element of the escrow and bond requirements. Filing 124 at 33. This "punitive" nature is a key indicator that the regulations are penalties, not taxes. The plaintiffs argue that the escrow is a tax because the non-

participating manufacturers must send forms to the Nebraska Tax Commissioner, and because other states codified the escrow requirements in their tax codes (though Nebraska did not). Filing 124 at 32-33. The enforcement mechanism and the location of a law in a state's code were factors considered by the Sebelius court, but, as the plaintiffs themselves explain, courts must take a " 'functional approach' rooted in practicality" in determining whether a tax is actually a penalty. Filing 149 at 27-28 (quoting *Sebelius*, 567 U.S. at 566, 132 S.Ct. 2566).

The plaintiffs argue that this Court should find the regulations to be taxes if such an interpretation is "fairly possible." Filing 124 at 29 (quoting *Sebelius*, 567 U.S. at 563, 132 S.Ct. 2566) (quoting *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932)). But that is because federal courts interpret statutes in a way which would preserve constitutionality, for both federal and state laws. *Sebelius*, 567 U.S. at 563, 132 S.Ct. 2566 (quoting *Hooper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895) (applying the canon in the context of a state statute)).

For these reasons, the escrow and bond requirements are a penalty, not a tax. This holding is in line with other courts to consider the issue. *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 996 (9th Cir. 2014); *United States v. Oregon*, 671 F.3d 484, 486, 490-91 (4th Cir. 2012). Therefore, the Court need not address the State's Tax Injunction Act arguments (filing 130 at 29), and the Winnebago Tribe's motion to intervene on condition (filing 164) is denied as moot because the condition is not met.

The State's escrow regulations are not categorically barred. Thus, this Court moves on to the two *Bracker* "independent but related" analyses. 448 U.S. at 142, 100 S.Ct. 2578.

2. Two-Prong *Bracker* Analyses

The lodestar of both *Bracker* analyses is what remains of the Winnebago Tribe's sovereignty. 448 U.S. at 142-43, 100 S.Ct. 2578. Native American tribes are imbued with inherent sovereignty, and, through time immemorial, they have reserved elements of nationhood and sovereignty not ceded by treaty or abrogated by federal action. *See, e.g., Mescalero Apache Tribe*, 462 U.S. at 332, 103 S.Ct. 2378 (quoting *Colville*, 447 U.S. at 153, 100 S.Ct. 2069); *Williams*, 358 U.S. at 219-20, 79 S.Ct. 269; *U.S. v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 49 L.Ed. 1089 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted."); *Winters v. U.S.*, 207 U.S. 564, 576-77, 28 S.Ct. 207, 52 L.Ed. 340 (1908); *Worcester v. Georgia*, 31 U.S. 515, 559-60, 6 Pet. 515, 8 L.Ed. 483 (1832); Restatement of the Law of American Indians §§ 5 cmt. c, 13; Cohen's Handbook § 4.01; American Indian Law Deskbook § 5:6. Generally speaking, without express federal authorization, a state has no authority over Indians in their own Indian country. *See, e.g., Bracker*, 448 U.S. at 142, 100 S.Ct. 2578; Restatement of the Law of American Indians §§ 31, 49; Cohen's Handbook §§ 6.01, 6.03 (2012 ed.). The Tribe's sovereignty is most protective over its own members who are on the Winnebago Reservation. "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, 100 S.Ct. 2578.

The State asserts that the plaintiffs have failed to make a prima facie showing that state regulation is unreasonable and unrelated to its regulatory authority, and so *Bracker* balancing is unnecessary. Filing 130 at 46, citing *Alexander*, 683 F.2d at 1138. A tribe has a burden to show a regulation is invalid when seeking to evade state authority over "non-member activities within [a] Reservation." *Alexander*, 683 F.2d at 1137. The legal standard is different for state laws applied to enrolled members on their own reservation. And, a regulation is not a valid exercise of a state's regulatory authority if it infringes on the Tribe's right to make its own laws and be governed by them. To determine whether the regulation makes such an infringement, courts balance the considerations discussed in *Bracker*. *See*, *e.g., Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 935 (8th Cir. 2019); *Alexander*, 683 F.2d at 1137.

Answers to questions about a state's authority in Indian country do not depend on "mechanical or absolute conceptions of state or tribal sovereignty." *Bracker*, 448 U.S. at 145, 100 S.Ct. 2578. Rather, the 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" or the Constitution. *Alexander*, 683 F.2d at 1137.

(a) *Bracker* Prong One: Preemption

"The unique historical origins of tribal sovereignty make it generally unhelpful to apply" the same standards of preemption found elsewhere in the law. *Bracker*, 448 U.S. at 143, 100 S.Ct. 2578. Instead, tribal sovereignty provides "an important 'backdrop' against which ambiguous federal enactments must always be measured." *Id*. (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)). Usually whether a federal law preempts state action depends on the answers to four questions:

> Is the state law explicitly preempted by the federal law? Is the state law implicitly preempted by the federal law because Congress has regulated the entire field? Is the state law implicitly preempted because compliance by a private party with federal and state law is impossible? Is the state law implicitly preempted because it creates an obstacle to accomplishment and execution of the full purpose of federal law?

Miller, 311 F. Supp. 2d at 824 (quoting *Sears, Roebuck and Co. v. O'Brien*, 178 F.3d 962, 966 (8th Cir. 1999)).

The sovereignty "backdrop" is significant. *Alexander*, 683 F.2d at 1138. But Congress has not so regulated the field of tobacco as to expressly preempt state action. Other courts to consider the escrow and bond requirements in the context of Indian sellers of tobacco did not see any conflict, express or implied, with state and federal tobacco regulation in Indian country, and this Court agrees. *See Miller*, 311 F. Supp. 2d at 823; *Colville*, 447 U.S. at 155-56, 100 S.Ct. 2069; filing 35 at 11-12.

The plaintiffs argue that the Indian Trader Statutes, 25 U.S.C. §§ 261-264, preempt state regulation of sales made in Indian country.[3] The Indian Trader Statutes require the Commissioner of Indian Affairs to regulate and license who may sell goods to tribal members in Indian country, and they criminalize unlicensed trading. *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 163-66, 100 S.Ct. 2599, 65 L.Ed.2d 684 (1980). The Supreme Court has held that, in some instances, these statutes preempt certain regulations of non-members doing business on a reservation. *Id.*; *Warren Trading*

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[3] The defendants argue that the plaintiffs cannot assert this preemption as a new claim for relief. Filing 144 at 84. But the cases relied on by the State involve a party revising facts to either support an additional claim for relief or create an illusory factual dispute. *See Wilson v. Westinghouse Electric Corp.*, 838 F.2d 286, 288-89 (8th Cir. 1988); *Sorenson v. First Wisconsin Nat'l Bank of Milwaukee, N.A.*, 931 F.2d 19, 21 (8th Cir. 1991). In this case, the plaintiffs are not asserting new or contradictory facts in order to avoid summary judgment. Rather, the plaintiffs are making a legal argument clearly allowed by the *Bracker* analysis. Ultimately, the issue is moot, since the Indian Trader Statutes do not preempt the State's regulation.

Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685, 691-92, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965).

However, the Eighth Circuit has recently recognized that lately, the Supreme Court has more narrowly construed the Indian Trader Statutes, limiting their preemption effect. *Flandreau Santee Sioux Tribe v. Houdyshell*, 50 F.4th 662, 677 (8th Cir. 2022) (citing *Dep't of Tax'n and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 71, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994)). In that case, the issue was whether a state could impose a tax on a non-member contractor working at a casino on a reservation. The Court of Appeals held that the tax was not preempted by the Indian Trader Statutes because there is "no comprehensive and pervasive regulatory scheme governing casino construction projects" in the statutes; the tax was non-discriminatory and applied on all gross receipts of all contractors; there was no evidence that the contractor at issue only performed work for the Tribe; and, importantly, because "the Supreme Court has seemingly moved away from a more rigid application of the Indian Trader Statutes." *Id.* at 677-78; *see also Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710, 727 (9th Cir. 2021).

When the plaintiffs are selling cigarettes on the Omaha Reservation, this is non-member conduct. Bonta, 1 F.4th at 729; *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012). But the Indian Trader Statutes cannot be said to preempt state regulation of those sales for the same reasons as in Houdyshell: There is no comprehensive and pervasive tobacco sales regulatory scheme, the

regulations are non-discriminatory and apply to all sales of tobacco products, and the plaintiffs do business other places than the Omaha Reservation. *See* filing 130 at 14; filing 149 at 16.

A distinction between *Houdyshell* and this case is that, in some circumstances, the Winnebago Tribe is selling cigarettes on its own Reservation. But this type of conduct does not fall under the purview of the Indian Trader Statutes, which generally concern sales by non-members to tribal members on a reservation. 25 U.S.C. § 264; *see also Colville*, 447 U.S. at 155-56, 100 S.Ct. 2069. The Indian Trader Statutes cannot be interpreted as prohibiting state regulatory authority over sales by tribal businesses to other tribal members in Indian country because such conduct is not contemplated by the statutes. See *Colville*, 447 U.S. at 155-56, 100 S.Ct. 2069. There is no ambiguity here to resolve through the lens of tribal sovereignty under the *Bracker* preemption standard, and the State regulations are not preempted.

(b) *Bracker* Prong Two: Tribal Sovereignty

Moving to part two of the *Bracker* framework, the plaintiffs' lawsuit will only be successful if it can show that the State's escrow and bond requirements unconstitutionally infringe on the Tribe's right to make its own laws and be governed by them. *Bracker*, 448 U.S. at 142, 100 S.Ct. 2578; *Alexander*, 683 F.2d at 1137; *see also Williams*, 358 U.S. at 220, 79 S.Ct. 269. This analysis involves a balancing of various state, federal, and tribal economic and governmental policy interests. *Alexander*, 683 F.2d at

1138. A state has some regulatory authority over non-members in Indian country. *See Noem*, 938 F.3d at 932-33. The limit and extent to this authority is determined by the *Bracker* analysis. *See id.* at 935. "Indians going beyond reservation boundaries have generally been held to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). But to justify regulations of on-reservation conduct involving only tribal members, the State must demonstrate "exceptional circumstances." *Cabazon*, 480 U.S. at 215, 107 S.Ct. 1083 (quoting *Mescalero Apache Tribe*, 462 U.S. at 331-32, 103 S.Ct. 2378); American Indian Law Deskbook § 5:20; *see also* Cohen's Handbook § 6.03(b).

(i) State's Interests

The State has a strong interest in protecting the public health by regulating tobacco sales. The laws at issue require escrow deposits in the event a tobacco product manufacturer causes harm to the public, such as exposing Nebraskans to health risks. The bond requirement secures the escrow, and the escrow secures any potential future monetary judgment. These laws ensure that the State can enforce a judgment against manufacturers which may otherwise be judgment-proof. *See Miller*, 311 F. Supp. 2d at 826. And, contractually, the State must diligently enforce these laws, or else it risks losing substantial payments as part of the MSA. The MSA settlement payments fund various health, education, and other state programs. Filing 145 at 68-69. So the State has two important interests in enforcing the

escrow and bond requirements against the plaintiffs – securing any potential judgment against tobacco product manufacturers which cause harm to public health, and fulfilling the State's contractual obligations to secure settlement payments to fund essential state programs. The State has an interest in protecting both Indian and non-Indian potential victims of misbehaving tobacco product manufacturers. *See Oklahoma v. Castro-Huerta*, 597 U.S. 629, 142 S. Ct. 2486, 2502, 213 L.Ed.2d 847 (2022).

The plaintiffs characterize the State's interest as a "generalized interest in raising revenue." Filing 124 at 43 (quoting *Noem*, 938 F.3d at 935, 937). However, as explained above, the escrow laws are not concerned with raising revenue. Instead, the State's interest is in protecting the public health and securing a judgment in the event that a manufacturer causes harm to the public. Protecting public health and safety has been regularly validated as a strong governmental interest. *See, e.g., Flandreau Santee Sioux Tribe v. Terwilliger*, 496 F. Supp. 3d 1307, 1331 (D.S.D. 2020); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 217 (2d Cir. 2003); *Ward v. New York*, 291 F. Supp. 2d 188, 204 (W.D.N.Y. 2003).

The State's interest in protecting the public health provides justification for its enforcement of the laws against nonmembers, and this interest might create "exceptional circumstances" allowing State regulatory authority over the on-reservation activities of a tribal business. *Mescalero Apache Tribe*, 462 U.S. at 331-32, 103 S.Ct. 2378; *see*

Cabazon, 480 U.S. at 215, 107 S.Ct. 1083. The State's contractual obligation to enforce its escrow laws, however, is a less substantial interest, and is decidedly unexceptional. The State's obligation does not tip the scale one way or another with respect to whether the State has the authority to enforce its laws in Indian country.

(ii) Federal Interests

The 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. *See* Uniform Standards for Tribal Consultation, 87 Fed. Reg. 74479 (Nov. 30, 2022) ("The United States recognizes the right of Tribal governments to self-govern and supports Tribal sovereignty and self-determination."); National Native American Heritage Month, 2020, 85 Fed. Reg. 70425 (Oct. 30, 2020) ("This comprehensive plan protects Tribal sovereignty and economic self-determination"); *Colville*, 447 U.S. at 155, 100 S.Ct. 2069; *Mescalero Apache Tribe*, 462 U.S. at 334-35, 103 S.Ct. 2378; *Cabazon*, 480 U.S. at 217, 107 S.Ct. 1083; Restatement of the Law of American Indians § 4 cmt. d. This commitment arises out of the trust relationship between the federal government and Native tribes. *See* Cohen's Handbook § 5.04(3). But this federal interest does not go "so far as to grant tribal enterprises . . . an artificial competitive advantage over all other businesses in a State." *Miller*, 311 F.Supp.2d at 823 (citing *Colville*, 447 U.S. at 155, 100 S.Ct. 2069).

The federal interests here are less commanding than in *Cabazon*, 480 U.S. 202, 107 S.Ct. 1083, or *Mescalero Apache Tribe*, 462 U.S. 324, 103 S.Ct. 2378. In those cases, the federal government had implemented policies specific to the areas sought to be regulated by the states, casinos and wildlife management. Here, the federal government has not indicated, through acts of Congress, rules of the Bureau of Indian Affairs, or any other administrative effort, any intention to either encourage or discourage tribal tobacco product manufacturing. But the federal government is aware that some tribal businesses are engaging in tobacco product manufacturing, and no action has been taken to disallow this activity or allow state regulation. See, e.g., 21 U.S.C. 387t(c); U.S. Food and Drug Administration Center for Tobacco Products, Manufacturers on Tribal Lands, https://bit.ly/41SWKtK (Nov. 5, 2020). The plaintiffs comply with various federal laws governing tobacco labeling, licensing, and reporting. Filing 130 at 50-51.

On-reservation businesses run by tribal entities are entitled to some level of federal protection from state interference. *McGirt*, 140 S. Ct. at 2476 ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history.") (quoting *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 89 L.Ed. 1367 (1945)); *Bracker*, 448 U.S. at 143-45, 100 S.Ct. 2578; Restatement of the Law of American Indians § 4 cmt. d; Cohen's Handbook § 5.04(2)(b); *cf. Miller*, 311 F.Supp.2d at 824 ("the federal interest in encouraging Indian tribal economic self-sufficiency

and tribal self-determination alone is insufficient to preempt state jurisdiction to regulate off-reservation tribal commerce" (emphasis added)). In the face of federal silence, the federal interests weigh in favor of preventing state interference with tribal businesses.

(iii) Tribal Interests

The Tribe's interests can be framed a few different ways. Narrowly construed, the Tribe's interest is in selling cigarettes, a product known to cause health problems, to raise revenue for the Tribe. But the tribal interests run deeper and implicate inherent attributes of sovereignty not yet ceded by treaty or abrogated by federal action. *See Mescalero Apache Tribe*, 462 U.S. at 332, 103 S.Ct. 2378; *Winans*, 198 U.S. at 381, 25 S.Ct. 662. The State acknowledges that "[t]ribal interests include the right of a tribal member to purchase cigarettes excise tax free while within the boundaries of the Indian country governed by the tribe of which they are a member." Filing 145 at 67. The right of a tribal company to sell cigarettes free of state regulation within the boundaries of its own Indian country is analogous, at least in terms of assessing the interests of the Tribe.

The Tribe taxes and regulates tobacco product sales on the Winnebago Reservation, and has entered into the Universal Tobacco Settlement Agreement, which mirrors the MSA. *See* filing 124 at 6. The Tribe, as much as the State, has an interest in protecting the public health of its members on the Winnebago Reservation, and has an interest in securing a monetary judgment against the plaintiffs

if they cause a harm to the Tribe. The Tribe, not the State, carries the burden of protecting its members who may be harmed by products manufactured by a tribal business. So, the Tribe has a legitimate interest in regulating tobacco sales on the Winnebago Reservation in a way which will protect its members' public health and safety, much like the State.

Additionally, the Tribe has an economic interest in the plaintiffs' businesses. While the Tribe does not have a valid interest in maintaining an artificial competitive advantage, *Moe*, 425 U.S. at 482, 96 S.Ct. 1634, the Tribe and the federal government both have a strong policy incentive to promote tribal businesses and tribal economic development. *See Cabazon*, 480 U.S. at 218-19, 107 S.Ct. 1083. In determining the tribal interests at stake, the Cabazon court considered that tribal games were "the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservation." *Id*. Here, the plaintiffs are not the sole source of income for the Tribe, because they are subsidiaries of a much larger parent company which engages in a wide variety of markets to create revenue for the Tribe. And, the plaintiffs are not a "major source" of employment, as only nine tribal members have been employed by Rock River since 2014.[4] Filing 130 at 4; filing 149 at

[4] The plaintiffs assert that they have been forced to "downsize their personnel dramatically" since 2018 following an ATF raid and the State's attempted enforcement of the escrow requirements. Filing 149 at 3. However, even prior to these

3. The Tribe's interests here are not as strong as in *Cabazon*, but there is still an economic interest which weighs in the plaintiffs' favor.

The State argues that the only interest the Tribe has in evading the escrow laws is in the competitive advantage the Tribe would have by selling tobacco products without having to account for escrow deposits. Filing 130 at 57. But the tribal interests here, while weaker than *Cabazon*, are stronger than those in *Colville*. A tribe does not have in interest in marketing an "exemption from state taxation." *Colville*, 447 U.S. at 155, 100 S.Ct. 2069; *see also Noem*, 938 F.3d at 933. But the plaintiffs are selling tobacco products which have been manufactured on the Winnebago Reservation, and they are "not merely importing a product onto the reservation[ ] for immediate resale to non-Indians." *Cabazon*, 480 U.S. at 219, 107 S.Ct. 1083. Both the cigarettes which Rock River imports from other manufacturers and ones manufactured on the Winnebago Reservation are distinguishable from the products in Colville. Again, the plaintiffs are not "merely importing ... for immediate resale," *Cabazon*, 480 U.S. at 219, 107 S.Ct. 1083, because when Rock River imports cigarettes, it still stamps them pursuant to state and federal law, and it sells them to HCID to be distributed to Pony Express stores for resale. This economic system creates value for the Tribe and for the consumers.

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concerns, the plaintiffs appear to have been minimally staffed by Winnebago members since 2014. *See* filing 131-18.

The Tribe has created a sophisticated vertically integrated business which capitalizes on all stages of the tobacco product market, from manufacturing to distribution to retail sale. The tribal business has sold imported cigarettes in the past, but these are purchased by Rock River and sold to HCID to be distributed to retailers, so it is less analogous to a retailer which imports a product onto a reservation "for immediate resale." *Cabazon*, 480 U.S. at 219, 107 S.Ct. 1083. The value of the plaintiffs' sales to customers on the Reservation comes from the tobacco products manufactured by the plaintiffs, and from their well-structured businesses which allow the Tribe to profit from all aspects of the tobacco product market, and not from any marketed exemption from state regulations.

(iv) Balancing

Both sales on the Omaha Reservation and the Winnebago Reservation are subject to *Bracker* balance: For sales on the Omaha Reservation, the conduct is on-reservation by a non-member, and sales on the Winnebago Reservation are on-reservation activities of a tribal business. These distinctions significantly change the balancing analysis.

a. Omaha Reservation

The plaintiffs' activities on the Omaha Reservation constitute non-member conduct on a reservation. *See Pruitt*, 669 F.3d at 1172 (tribal members acting outside their own Indian country, "including within the Indian country of another

tribe," are subject to state regulation); *Bonta*, 1 F.4th at 729. On balance, the *Bracker* factors allow State regulation of such conduct. The plaintiffs' tribal affiliation provides the plaintiffs little protection once they are doing business outside the boundaries of the Winnebago Reservation. *See Pruitt*, 669 F.3d at 1172; *Colville*, 447 U.S. at 161, 100 S.Ct. 2069. The State's interests outweigh the federal and tribal interests for the sales on the Omaha Reservation.

The Omaha Reservation is within the territory of the State.[5] *Nevada v. Hicks*, 533 U.S. 353, 361-62, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001). And non-Indians and non-member Indians are expected to comply with nondiscriminatory state laws in Indian country. *See Alexander*, 683 F.2d at 1138; *Moe*, 425 U.S. at 482, 96 S.Ct. 1634; *Colville*, 447 U.S. at 160, 100 S.Ct. 2069; *Pruitt*, 669 F.3d at 1172. The Omaha Tribe's sovereignty is the one implicated by the State's regulation for sales on the Omaha Reservation. *See Colville*, 447 U.S. at 161, 100 S.Ct. 2069. The Winnebago Tribe does not have the same interests for activities which take place off the Winnebago Reservation. The escrow and bond requirements have been upheld by other courts for

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[5] The plaintiffs argue that their treaty rights and the Kansas-Nebraska Act of 1854 prevent State action in all Indian territory. *See* filing 124 at 70-71. While the Kansas-Nebraska Act did not confer State jurisdiction in Indian country, subsequent laws, such as Pub. L. 280, 67 Stat. 588, as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360, did so. Congress has broad authority to modify the powers of tribes and the boundaries of reservations, and has done so here. Restatement of the Law of American Indians § 14; *see Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014).

sales in Indian country made by a non-member tobacco product manufacturer. *Miller*, 311 F.Supp.2d at 826; *Pruitt*, 669 F.3d at 1182-83; *see also Pryor*, 425 F.3d at 174.

For these reasons, as they pertain to sales on the Omaha Reservation, the plaintiffs' motion for summary judgment is denied and the defendants' motion is granted. The plaintiffs must comply with the State's escrow and bond requirements while selling tobacco products on the Omaha Reservation.

b. Winnebago Reservation

(1) On-Reservation Conduct by a Tribal Business

As a preliminary matter, the Court must determine whether the State is regulating non-member conduct or member conduct, and whether the conduct sought to be regulated takes place on the Winnebago Reservation. *See Bracker*, 448 U.S. at 144, 100 S.Ct. 2578; *Pruitt*, 669 F.3d at 1171 (citing *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101, 126 S.Ct. 676, 163 L.Ed.2d 429 (2005)). Only in "exceptional circumstances" may a state "assert jurisdiction over the on-reservation activities of tribal members." *Cabazon*, 480 U.S. at 215, 107 S.Ct. 1083 (quoting *Mescalero Apache Tribe*, 462 U.S. at 331–32, 103 S.Ct. 2378). This is because a tribe's sovereignty is most protective over its own members on its own reservation, "the federal interest in encouraging tribal self-government is at its strongest," and a state's interest in regulating such

activities is "minimal." *Bracker*, 448 U.S. at 144, 100 S.Ct. 2578.

The contested laws concern the sale of cigarettes from a tobacco product manufacturer to a consumer or to an intermediary, like a distributor or retailer. Neb. Rev. Stat. § 69-2703. Before lawfully selling cigarettes in Nebraska, tobacco product manufacturers must be listed in the State's directory. See § 69-2706(4). A tobacco product manufacturer includes any entity that manufactures cigarettes intended to be sold in the United States. § 69-2702(13). Tobacco product manufacturers who do not participate in the MSA must certify compliance with the escrow statute, § 69-2703, and must post a bond, § 69-2707.01, in order to be placed on the directory. § 69-2706.

In Nebraska, cigarette taxes are levied on the consumer, but are pre-paid by tobacco companies. See § 77-2602; Nebraska Dep't of Revenue, Information for Cigarette and Tobacco Products Retailers, https://bit.ly/3L5Pe7U (accessed Apr. 27, 2023). A stamping agent for the tobacco company, certified by the Nebraska Tax Commissioner, pays the per-cigarette tax and receives a stamp to affix to a pack of cigarettes. The stamps can only be placed on brands listed in the directory, which means the stamp certifies compliance with both the cigarette tax, § 77-2602, and with the escrow deposit and bond requirements, § 69-2703. *See* § 69-2706(1)(d).

The escrow and bond requirements operate separately from the cigarette tax. Compare § 77-2602 with § 69-2703; *see also* filing 145 at 53 ("Despite the

complimentary [sic] nature of the tax and escrow regulatory mechanisms, they remain legally distinct."). And unlike the cigarette tax, the escrow deposits and bond are imposed on the manufacturer. § 69-7203. This is also true for settlement payments from participating manufacturers—these are not related to the cigarette tax, and instead these payments are made in exchange for a release of claims relating to health and advertising liability which would arise from selling cigarettes, rather than buying them. Both the escrow requirements and the participating manufacturer settlement payments are related to potential wrongdoing of manufacturers, while the cigarette tax is imposed on those buying what the manufacturers are selling. See *Moe*, 425 U.S. at 482, 96 S.Ct. 1634. The State's argument that the regulations are "minimal burdens" incident to the valid collection of the cigarette tax is without merit because the escrow laws are not intended to prevent fraud or tax evasion like the regulations in *Moe* or *Colville*. Filing 130 at 49; *Moe*, 425 U.S. at 483, 96 S.Ct. 1634; *Colville*, 447 U.S. at 159, 100 S.Ct. 2069.

The escrow and bond requirements only impact the sellers of tobacco products, not the purchasers. These requirements directly regulate a tribal business. *Cf. Pruitt*, 669 F.3d at 1180. The purchaser is indirectly impacted by the subsequent increase in price. The identity and tribal affiliation of purchasers matters in the context of the cigarette tax because it is the "vendee, user, consumer, or possessor of cigarettes" who is obliged to pay. Neb. Rev. Stat. § 77-2602.01. Of course, the cigarette tax is prepaid by tobacco companies, see id., but the

reason that states may impose "minimal burdens" on tribal business is because tribes are not subject to the regulation itself, and may only be required to assist in enforcement. In this context, the tribal affiliation, or lack thereof, of the purchasers is irrelevant. *Compare Pruitt*, 669 F.3d at 1180 (escrow laws "do not directly regulate" the tribe) and *Houdyshell*, 50 F.4th at 671 (a non-preempted tax was "not aimed at regulating tribal gaming"), with *Cabazon*, 480 U.S. at 214, 107 S.Ct. 1083 ("the state and county laws at issue here are imposed directly on the Tribes that operate the games").

From this, it is clear that the subject of the State's regulations is Rock River, a tribally chartered tobacco product manufacturing company. The tobacco product manufacturer, and no one else, is responsible for making the escrow deposits and for posting a bond. Because the escrow and bond requirements only apply to sellers of cigarettes, the tribal affiliation or lack thereof of purchasers is irrelevant.

Having established that the State's regulations constitute a direct regulation on a tribal entity, the next question is whether the conduct takes place on-reservation or off. The State argues that the plaintiffs' conduct is off-reservation, relying on *King Mountain Tobacco Co. v. McKenna*, 768 F.3d at 998. Filing 130 at 54-55. According to the State, because Rock River purchases tobacco from places outside the Winnebago Reservation, sells cigarettes to retailers outside the Winnebago Reservation, and most of Rock River's products are ultimately purchased by non-members outside of the Winnebago

Reservation, the plaintiffs' activities are off-reservation and thus these activities are subject to otherwise applicable state laws.

Relying on *Jones*, 411 U.S. 145, 93 S.Ct. 1267, the *King Mountain* court reasoned that because the tribal tobacco product manufacturer sent tobacco to other places off the reservation to be processed and mixed with non-reservation tobacco, the company's "tobacco related activities" were "largely off reservation" and thus subject to generally applicable state regulation. The district court determined that because the tobacco products produced by the tribal company were "not principally generated from the use of reservation land and resources" and "not directly derived from trust land" that the business's activities were "off-reservation." *King Mountain Tobacco Co. v. McKenna*, No. 11-cv-3018, 2013 WL 1403342, at *8. The State urges the same result here.

But this Court is neither bound by, nor persuaded by, the Ninth Circuit's interpretation of *Jones*. In *Jones*, the tribe was operating a ski resort located wholly off reservation land. 411 U.S. at 146, 93 S.Ct. 1267. The entire business was off the reservation, not parts of the business. *Id*. There is no 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. Jones does not provide a "test" to apply in order to determine whether a tribal member's business is on reservation or off; it simply stands for the unremarkable principle that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law

otherwise applicable to all citizens of the State." *McKenna*, 2013 WL 1403342 at *7 (quoting *Jones*, 411 U.S. at 148-49, 93 S.Ct. 1267). However, this general principle must be read alongside the principle that state law is generally inapplicable to on-reservation conduct involving tribal members. *Bracker*, 448 U.S. at 144, 100 S.Ct. 2578.

Additionally, the *King Mountain* holding is inconsistent with *Cabazon*. *Compare King Mountain*, 768 F.3d at 994, *with Cabazon*, 480 U.S. at 205-06, 214-16, 107 S.Ct. 1083. In *Cabazon*, a state could not impose restrictions or regulations on a tribal-run bingo operation. While that Court did not make any findings to this effect, certainly there were aspects of the bingo operation which required "off-reservation" resources. And the revenue generated by the bingo operation primarily came from non-members coming onto the reservation to participate in the bingo, not from reservation resources. *See Cabazon*, 480 U.S. at 205-06, 214-16, 107 S.Ct. 1083. While the federal preemption arguments were stronger in that case than here or in *McKenna* because the federal government actively promoted tribal bingo enterprises, *id*. at 217-18, 107 S.Ct. 1083, the Court assumed that because the bingo operation was on the reservation, operating the bingo establishment was on-reservation conduct, and no "test" about such conduct was necessary. *Compare id., with McKenna*, 2013 WL 1403342 at *7-8, *and King Mountain*, 768 F.3d at 994; *see also Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 435 (9th Cir. 1994) ("It is not necessary ... that the entire value of the on-reservation activity come from within the reservation's borders.").

The conduct at issue in this case is the sale of tobacco products by a tobacco product manufacturer or importer (*see* Neb. Rev. Stat. § 69-2702(13)(a)) to Nebraska consumers – not the purchase or acquisition of raw materials, and not even the actual manufacturing process or the importation of tobacco products. A tribal business selling cigarettes on a reservation is on-reservation conduct, even if non-members are coming onto the reservation to purchase cigarettes or if off-reservation resources are needed to create the product being sold. *Cf. Cabazon*, 480 U.S. at 220-21, 107 S.Ct. 1083.

(2) Exceptional Circumstances

The sale of cigarettes by the plaintiffs on the Winnebago Reservation constitute "on-reservation conduct involving only Indians." *Bracker*, 448 U.S. at 144, 100 S.Ct. 2578. The State must demonstrate "exceptional circumstances" in order to impose its regulations on the plaintiffs. *Mescalero Apache Tribe*, 462 U.S. at 331-32, 103 S.Ct. 2378; *Cabazon*, 480 U.S. at 215, 107 S.Ct. 1083; *see also Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 175, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977); *Hicks*, 533 U.S. at 353, 361-62, 121 S.Ct. 2304; Restatement of the Law of American Indians §§ 31(a)(2), 31 cmt. c, 49; American Indian Law Deskbook § 5:20. Exceptional 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." American Indian Law Deskbook § 5:20; *Mescalero*

Apache Tribe, 462 U.S. at 331-32 n.15, 103 S.Ct. 2378 (citing *Puyallup Tribe*, 433 U.S. at 175, 97 S.Ct. 2616); *see also Hicks*, 533 U.S. at 362, 121 S.Ct. 2304.

"A tribe's power to prescribe the conduct of tribal members has never been doubted," and state actions which infringe on that power necessarily infringe on tribal sovereignty. *Mescalero Apache Tribe*, 462 U.S. at 332, 103 S.Ct. 2378; *see also* Restatement of the Law of American Indians § 49. Certainly Nebraska residents will come to the Winnebago Reservation to purchase tobacco products, and may experience the known adverse health effects, but Nebraska allows products with the same health effects to be purchased elsewhere in the state, and residents may also travel to other states to purchase them. These are not the types of "off-reservation" effects contemplated in *Mescalero Apache Tribe*, 462 U.S. at 336, 103 S.Ct. 2378. The off-reservation effects of the plaintiffs' sales of cigarettes to non-members help demonstrate the State's interest, but an asserted authority over sales of a legal product, in compliance with federal standards for health and safety, is hardly an "exceptional circumstance."

While the federal and tribal interests are less weighty than those in *Cabazon* or *Mescalero Apache Tribe* for reasons discussed above, and while the State interests are compelling, the burden the State seeks to impose tips the weight of the balancing test toward the plaintiffs. The regulations are not taxes; they are punitive exactions, meant to compensate the State for potential future violations of State laws. But no harm has yet occurred. Indeed, 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 product manufacturers and the tobacco product manufacturers who are signatories to the MSA. *See Miller*, 311 F.Supp.2d at 818 (the escrow laws were passed in response to the settling manufacturers' concerns about non-settling manufacturers' "lower costs and commercial freedom"); *Pryor*, 425 F.3d at 163. The State's interest in the continued MSA payments from participating manufacturers cannot justify the regulation. The State is obliged to "diligently enforce" the escrow laws. But this does not grant the State the power to regulate areas outside its jurisdiction.

The State characterizes the escrow and bond requirements as having an "indirect effect on tribal members in Indian country." Filing 130 at 57 (quoting *Pruitt*, 669 F.3d at 1182). But the plaintiffs would incur a substantial burden in complying with the escrow laws. 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 in the MSA. *See Pryor*, 425 F.3d. at 163; *Miller*, 311 F.Supp.2d at 818. And, it is unclear, in negotiating an "agreement" with the Tribe under Neb. Rev. Stat. §§ 69-2703(2)(b)(iv) and 77-2602.06, what other burdens the State might seek to impose on tribal businesses. 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. Further, the *Moe* "minimal

burden" analysis is an exception to the general rule that a state has no power over on-reservation tribal businesses, even those which provide goods or services to non-members. Cohen's Handbook § 6.03(1)(b); American Indian Law Deskbook § 5:20; *see also, e.g., Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 981-83 (10th Cir. 2005).

This case, similar to *Cabazon*, "involves a state burden on tribal Indians in the context of their dealings with non-Indians" because the question is whether the State may impose its escrow and bond requirements on tribal businesses selling tobacco products to both members and non-members. 480 U.S. at 216, 107 S.Ct. 1083. The State asserts that *Cabazon*, because it was superseded by statute, does not reflect the standard to be applied to this case. Filing 145 at 78. The State argues that the Supreme Court has not applied the *Cabazon* analysis in the context of cigarette taxation, so this Court should not rely on the analysis. But this case is unique in that it is a tribal business operating on a reservation which is burdened by State's attempted regulation. *Cabazon* lays out the appropriate standard for when state authority is allowed in Indian country over tribal entities. 480 U.S. at 219-20, 107 S.Ct. 1083. Congress has not acted to enable state regulation of tobacco product manufacturing in Indian country, and until it does so, *Cabazon* demonstrates the importance of protecting tribes from state action which would infringe on the tribe's right to make its own laws and be governed by them.

In other cases, states were able to impose certain burdens on tribal businesses for on-

reservation conduct of non-members. *Moe*, 425 U.S. at 482-83, 96 S.Ct. 1634; *Colville*, 447 U.S. at 151, 100 S.Ct. 2069; *see also Alexander*, 683 F.2d at 1138; Neb. Rev. Stat. § 77-2602.01. But that justification does not exist here because it is only the tobacco product manufacturer's obligation to pay the escrow. Compare Neb. Rev. Stat. § 77-2602.01 ("The impact of [the cigarette excise tax] is hereby declared to be on the vendee, user, consumer, or possessor of cigarettes in this state") with § 69-2703 ("Any tobacco product manufacturer selling cigarettes to consumers within the state, whether directly or through a distributor, retailer, or similar intermediary or intermediaries ... shall ... [p]lace into a qualified escrow account ... $.0188482 per unit sold.").

The State further argues, based on *Pruitt and Rice v. Rehner*, 463 U.S. 713, 720, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983), that "invalidation of a state law because it interferes with tribal sovereignty is not favored." Filing 130 at 56 (quoting *Pruitt*, 669 F.3d at 1171). This is generally true for state regulation of non-members in Indian country, but not the case for on-reservation conduct by a tribal business. *Rice* represents one of very few situations where a tribal business was required to adhere to state civil regulations. *See* American Indian Law Deskbook § 5:20 n.6. But this decision rested on such historically pervasive federal regulation involving alcohol in Indian country that Congress had "divested the Indians of any inherent power to regulate in this area," giving the states such authority. *Rice*, 463 U.S. at 724, 733, 103 S.Ct. 3291; American Indian Law Deskbook § 5:20 n.6. No comparable federal regulation exists for tobacco product manufacturing,

or tobacco use generally, in Indian country. Congress cannot be said to have divested tribes of the power to regulate tobacco product manufacturing as is the case with liquor sales. *See* Restatement of the Law of American Indians § 14 cmt. b.

To summarize, the distinguishing facts of this case, which show a lack of "exceptional circumstances" justifying state authority, are:

- The regulations at issue constitute a direct burden on a tribal business operating on a reservation, *cf.*, *e.g.*, *Pruitt*, 669 F.3d at 1180,
- The regulations are not incident to the collection of a valid tax imposed on non-members, *cf. Moe*, 425 U.S. at 483, 96 S.Ct. 1634,
- The plaintiffs are providing more than an exemption to state taxation to customers, *Cabazon*, 480 U.S. at 219, 107 S.Ct. 1083; cf. *Colville*, 447 U.S. at 155, 100 S.Ct. 2069,
- The federal government has neither implicitly nor explicitly authorized state regulation of tribal tobacco businesses, *cf. Rice*, 463 U.S. at 733, 103 S.Ct. 3291,
- The federal government has neither prohibited nor limited tribal tobacco businesses to such a degree as to divest the Tribe's inherent power to regulate in this area, *cf. id.* at 724, 103 S.Ct. 3291,
- The regulation involves an exaction which, while not a tax, constitutes a non-minimal burden on tribal commerce because the State is attempting to pre-enforce any potential judgment against a tribal business operating

on its own reservation, *cf. Moe*, 425 U.S. at 483, 96 S.Ct. 1634

- The tribal conduct is not criminal and is in compliance with relevant federal health and safety laws, cf. Hicks, 533 U.S. at 364, 121 S.Ct. 2304,
- The Tribe's treaty does not abrogate its ability to regulate tribal businesses, *cf. Puyallup Tribe*, 433 U.S. at 175, 97 S.Ct. 2616, *and Mescalero Apache Tribe*, 462 U.S. at 342, 103 S.Ct. 2378, and
- The purported "off-reservation effects" are insufficient to justify State intrusion into the affairs of on-reservation tribal businesses, *Mescalero Apache Tribe*, 462 U.S. at 342, 103 S.Ct. 2378.

In the face of Congress's silence and without exceptional circumstances, this Court will not allow the State to infringe on the Winnebago Tribe's sovereignty by allowing state authority over a lawful tribal business selling goods on its own reservation. *See McGirt*, 140 S.Ct. at 2459, 2462-63; *Bay Mills*, 572 U.S. at 790, 134 S.Ct. 2024; Restatement of the Law of American Indians §§ 31(c), 46(e), 49.

(c) Other Matters

For the purposes of this Order, some of the parties' contentions are moot or irrelevant. To the extent the parties dispute the factual boundaries of the Omaha and Winnebago Reservation, that matter would be better taken up in an enforcement action by the State. *See* filing 170 at 2. The State insists that the plaintiffs provided insufficient documentation

"for establishing the factual boundaries of the Omaha or Winnebago Reservations." Filing 170 at 2. The factual borders of the reservations do not impact the legal analysis in this Order.

Because the Court did not rely on filing 125-3, the declaration of Victoria Kitcheyan, Chairwoman of the Tribal Council of the Winnebago Tribe, the State's motion to strike (filing 154) is denied as moot.[6]

IT IS ORDERED:

1. The plaintiffs' motion for summary judgment (filing 123) is granted in part and denied in part.

2. The defendants' motion for summary judgment (filing 129) is granted in part and denied in part.

3. The defendants and their successors are permanently enjoined from enforcing the escrow and bond payment requirements for sales by the plaintiffs on the Winnebago Reservation.

4. The Winnebago Tribe of Nebraska's motion to intervene on condition (filing 164) and the

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[6] The State's motion was only directed at the affidavit of Victoria Kitcheyan, and not the underlying documents attached. So, the Court properly assessed the information attached in the underlying documents, which included relevant sections of the Winnebago Tribal Code, the Universal Tobacco Settlement Agreement, a 2018 Economic Impact Study done by Ho-Chunk which provided general information about Ho-Chunk and its subsidiaries, and Ho-Chunk's Annual Report for shareholders. *See generally* filing 125-3.

defendants' motion for a hearing (filing 169) are denied as moot.

5. The defendants' motion to strike (filing 154) is denied as moot.

6. The Clerk of the Court is directed to substitute Mike Hilgers, Nebraska Attorney General, and Glen A. White, Interim Nebraska Tax Commissioner, as the defendants pursuant to Fed. R. Civ. P. 25(d)(1).

7. This case is closed.

8. A separate judgment will be entered.

Dated this 27th day of April, 2023.

BY THE COURT:
s/ John M. Gerard
John M. Gerrard
Senior United States
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

HCI DISTRIBUTION, INC. and ROCK RIVER MANUFACTURING, INC., Plaintiffs, vs. MIKE HILGERS, Nebraska Attorney General, and TONY FULTON, Interim Nebraska Tax Commissioner, Defendant.	8:18-CV-173 MEMORANDUM AND ORDER Filed December 19, 2018.

The plaintiffs seek a declaration of rights pursuant to 28 U.S.C. § 2201, and injunctive relief pursuant to 28 U.S.C. § 2202, regarding the enforcement of Nebraska's statutes regulating tobacco product manufacturing and distribution. The defendants are the duly elected state officers whose offices are charged with enforcement of the statutes from which the plaintiffs seek relief. The defendants jointly filed a motion to dismiss (filing 27) the plaintiffs' complaint for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and

failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). The defendants' motion will be sustained in part and denied in part.

I. STANDARD OF REVIEW

A motion pursuant to Rule 12(b)(1) challenges whether the court has subject matter jurisdiction. The party asserting subject matter jurisdiction bears the burden of proof. *Great Rivers Habitat Alliance v. FEMA*, 615 F.3d 985, 988 (8th Cir. 2010).

A court deciding a motion under Rule 12(b)(1) must distinguish between a "facial attack" and a "factual attack." *Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 910, 914 (8th Cir. 2015). A facial attack concerns a failure to allege sufficient facts to support subject matter jurisdiction, whereas a factual attack concerns the veracity of the pled facts supporting subject matter jurisdiction. *See Davis v. Anthony*, Inc., 886 F.3d 674, 679 (8th Cir. 2018). In a facial attack, the Court merely needs to look and see if the plaintiffs have sufficiently alleged a basis of subject matter jurisdiction and accepts all factual allegations in the pleadings as true and views them in the light most favorable to the nonmoving party. *Branson Label*, 793 F.3d at 914. Here, the defendants are advancing a "facial attack" to subject matter jurisdiction, based on the pleadings. See id. Accordingly, the Court restricts itself to the pleadings and the plaintiffs receive the same protections as they do under Rule 12(b)(6). *Hastings v. Wilson*, 516 F.3d 1055, 1058 (8th Cir. 2008).

To survive a Rule 12(b)(6) motion to dismiss, a complaint must set forth a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). This standard does not require detailed factual allegations, but it demands more than an unadorned accusation. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). For the purposes of a motion to dismiss a court must take all the factual allegations in the complaint as true, but is not bound to accept as true a legal conclusion couched as a factual allegation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

II. BACKGROUND

The plaintiffs, HCI Distribution, Inc., and Rock River Manufacturing, Inc., are wholly owned subsidiaries of Ho-Chunk, Inc. Filing 1 at 6. Ho-Chunk is the economic development arm of the Winnebago Tribe. Both HCI and Rock River are incorporated under Tribal law. The Tribe is a federally recognized Indian tribe eligible to receive services from the United States Bureau of Indian Affairs with its reservation land sited within the boundaries of Nebraska. Filing 1 at 6; *see* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 83 Fed. Reg. 4,235 (Jan 30, 2018).

HCI's business consists of purchasing and reselling tobacco goods exclusively in Indian country throughout the United States. Filing 1 at 7. HCI sells to reservation-based wholesalers and retailers

exclusively in Indian country. All tobacco products HCI ships are affixed with tax stamps in accordance with Tribal law. HCI employs tribal members and allocates 20 percent of its net profits to support tribal welfare programs, which in 2017 allowed HCI to contribute $ 157,381 to the tribe.

Rock River is a federally licensed cigarette manufacturer with its facilities on the Tribe's reservation. Filing 1 at 8. All Rock River's products are manufactured on the reservation. Rock River's products are distributed by HCI and other distributors, and are sold by such distributors to retailers nationwide. All Rock River's tobacco products bear the tribal stamp for each jurisdiction where its products are sold.

In 1998, Nebraska and 45 other states settled lawsuits with several tobacco manufacturers and trade organizations. The parties' Master Settlement Agreement (MSA) required the tobacco manufacturers to place restrictions on tobacco product advertising and marketing, as well as make cash payments in perpetuity to the settling states. Filing 1 at 2; *see also Omaha Tribe of Nebraska v. Miller*, 311 F.Supp.2d 816, 818 (S.D. Iowa 2004). Later, additional tobacco manufacturers signed onto the MSA. These subsequent participating manufacturers, together with the original participating manufacturers are referred to collectively as the participating manufacturers. Filing 1 at 2.

Not all tobacco manufacturers signed onto the MSA. Those that did not are called non-participating

manufacturers. Rock River is one such non-participating manufacturer. Filing 1 at 8. The settling states became concerned that the non-participating manufacturers could avoid liability for the harm that their tobacco products could cause, and the participating manufacturers were concerned that the non-participating manufacturers would be able to unfairly compete in the market without incurring costs similar to the costs associated with participation in the MSA. *Miller*, 311 F.Supp.2d at 818; filing 1 at 3. In response, the participating manufacturers and the settling states agreed to enact variations of a model statutory scheme that imposed fees and other regulations on non-participating manufacturers. Filing 1 at 3. Those statutes are often referred to as qualifying or escrow statutes. Filing 1 at 9.

Nebraska enacted its version of an escrow statute in 1999. Neb. Rev. Stat. §§ 69-2701 to 69-2703.01. Section 69-2703 essentially provided that tobacco manufacturers selling cigarettes within the state could either join the MSA as a participating manufacturer or be required to fund an escrow account by placing funds into an account on a quarterly basis regarding the manufacturer's unit sales of tobacco products. Violation of the escrow requirements could result in civil penalties and possible exclusion from selling tobacco products in the state.

The terms of the MSA required the settling states to diligently enforce their escrow statute. Filing 1 at 9-10. When enforcement proved difficult, the states enacted further model legislation referred

to as the directory statute. The purpose of this legislation was to publish a list of tobacco product manufacturers and tobacco products that were in full compliance with the escrow statute and other tobacco manufacturing and licensing laws. Filing 1 at 10. Tobacco products not on the directory list could not be sold in the state. Nebraska's directory statute, enacted in 2003, is found at §§ 69-2704 to 69-2707.01. Together, the escrow and directory statutes are often referred to as the MSA laws.

Still claiming that the settling states were not diligently enforcing the escrow requirements, the participating manufacturers initiated an arbitration proceeding to reduce the payments owed to the settling states. Filing 1 at 12. Of particular concern were tobacco producer sales in Indian country. Filing 1 at 13. Some of the settling states, including Nebraska, were pressured into including new statutory provisions aimed at the tribal tobacco business. Filing 1 at 12; *see also* filing 1-5.

The plaintiffs and the Tribe have always maintained that their sovereign authority precluded the state's authority to regulate their on-reservation tobacco manufacturing and tobacco distribution business. Filing 1 at 11. In 2011, the Nebraska Attorney General's office worked with representatives of the tobacco manufacturers to devise model legislation aimed at regulating tribal tobacco manufacturing and distribution, and require tribes to comply with Nebraska's MSA laws. Filing 1-1. That same year, legislation was enacted that purportedly brought tribal tobacco product manufacturing and distribution within the

regulations imposed by the escrow statute, but also purported to provide a release of funds for "cigarettes sold on an Indian tribe's Indian country to its tribal members"—but only if there was an agreement with the Governor, in which a tribe was required to accept state regulation of the tribe's cigarette manufacturing and distribution business. See §§ 69-2703(2)(b)(iv) and 77-2602.06.

In December 2015, the Tribe, and the plaintiffs in April 2016, entered into an agreement of their own separate from their negotiations with the State. This agreement is called the "Universal Tobacco Settlement Agreement." The agreement purported to regulate cigarette sales in Indian country, as well as create a fund that would allow the tobacco product manufacturers participating in this new agreement to obtain a release of all claims that may arise out of the sale of their products. Filing 1 at 11-12; filing 1-2. In addition to regulating cigarette marketing, the agreement required the participating tobacco product manufacturers to make quarterly payments to a settling tribe regarding the number of cigarettes sold in that tribe's jurisdiction. Filing 1-2 at 6-7. In 2017, the Tribe received fees pursuant to the agreement totaling $ 31,681.00. Filing 1 at 11-12. In addition, the Tribe imposes a tax on the sale of cigarettes within its jurisdiction. In 2017 the Tribe collected $ 122,658 in cigarette tax revenue. *Id*.

In 2014, at approximately the same time the Tribe was considering participation in the Universal Tobacco Settlement Agreement, the Nebraska Department of Revenue issued tax statements to several reservation-based cigarette retailers. Filing 1

at 14. According to the plaintiffs, the issuance of tax statements prompted them to engage in negotiations with the defendants to settle their disagreement regarding whether their tobacco manufacturing and distribution business was subject to Nebraska's MSA laws. The plaintiffs contend that the negotiations were unsuccessful due to the defendants' insistence that the plaintiffs were not excused from strict compliance with Nebraska's MSA laws. The plaintiffs represent that since March 2014, they have operated under a cloud of uncertainty regarding the threat of penalties and retaliation by the defendants, which has created an impediment to their business operations and ability to expand economically. Filing 1 at 15.

III. DISCUSSION

1. SUBJECT-MATTER JURISDICTION

The plaintiffs rely on 28 U.S.C. § 1362 and § 1331 for subject matter jurisdiction. Section 1362 specifically pertains to Indian tribes and gives the district courts "original jurisdiction of all civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Similarly, § 1331 pertains to all civil actions and gives district courts original jurisdiction for "actions arising under the Constitution, laws, or treaties of the United States."

There is no dispute that the plaintiffs' claims constitute a civil action arising under the

Constitution. The plaintiffs alleged that the defendants' regulatory scheme violates both the Supremacy Clause (art. VI, cl. 2) and the Indian Commerce Clause (art. 1 § 8, cl. 3) of the Constitution. As such, subject matter jurisdiction pursuant to § 1331 was sufficiently pled.[1]

The Court finds that at a minimum, there is subject matter jurisdiction pursuant to § 1331. Accordingly, the Court will deny the defendants' motion to dismiss pursuant to Rule 12(b)(1) regarding a lack of subject matter jurisdiction.

2. STANDING AND RIPENESS.

Standing is essential regarding the Article III requirement of case or controversy. *McDaniel v. Precythe*, 897 F.3d 946, 950 (8th Cir. 2018). "To demonstrate Article III standing, a plaintiff 'must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable

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[1] Regarding § 1362 subject matter jurisdiction, the defendants argue that the plaintiffs are not "an Indian tribe or band" within the meaning of § 1362. Filing 28 at 44. However, the defendants do not dispute that the plaintiffs are tribal businesses and that the Tribe is federally recognized. So, the defendants' assertion that the plaintiffs are not an Indian band or tribe is contrary to the pled facts. The plaintiffs alleged that they are incorporated under Tribal law, are wholly owned by Ho-Chunk, and that Ho-Chunk is the economic development arm of the Tribe. To argue that the economic arm of the Tribe is not part of the Tribe is like arguing that the defendants, as the law enforcement arms of the State, are not the State. *See United Keetoowah Band of Cherokee Indians v. State of Okla. ex rel. Moss*, 927 F.2d 1170, 1173 (10th Cir. 1991).

judicial decision.'" *Id.* (quoting *Spokeo, Inc. v. Robins*, S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016)).

The plaintiffs allege that the defendants threaten to enforce the escrow and directory statutes against the plaintiffs, which the plaintiffs argue represent an unconstitutional—and therefore unlawful—interference with their tribal sovereignty. And, violation of the escrow and directory statutes would subject the plaintiffs to civil penalties. Pre-enforcement challenges to governmental action may constitute an injury in fact sufficient for Article III standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 134 S.Ct. 2334, 2342, 189 L.Ed.2d 246 (2014) ("[A] plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.' ") (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)).

The plaintiffs sufficiently alleged facts showing a credible threat that the defendants will seek to enforce the escrow and directory statutes if not enjoined from so doing. The plaintiffs alleged that issuance of tax assessments to reservation-based cigarette retailers prompted the plaintiffs to engage in settlement discussions with the defendants, but that the discussions were unsuccessful due to the defendants' insistence that the plaintiffs were not excused from strict compliance with Nebraska's MSA laws. Filing 1 at 14.

Finally, "when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained of provision." *Dig. Recognition Network v. Hutchinson*, 803 F.3d 952, 957-58 (8th Cir. 2015); *see also Calzone v. Hawley*, 866 F.3d 866, 869 (2017). The defendants are the elected officials whose offices are charged with enforcing the escrow and directory statutes. Moreover, a decision by this Court that the statutes violate the plaintiffs' constitutional rights would certainly favorably redress the plaintiffs' claims. The Court finds that the plaintiffs have Article III standing in this matter.

As a matter of completeness, the defendants' ripeness argument concerns what is referred to as the "term sheet." The Court understands the allegations in the plaintiffs' complaint regarding the term sheet to be that it is evidence that Indian tribes were targets of the revisions to the MSA laws. The term sheet does not present a claim or cause of action in and of itself. *See* filing 1 at 13-14, 17; *see also* filing 29 at 20 n.12.

3. ELEVENTH AMENDMENT SOVEREIGN IMMUNITY.

The defendants, two state officials, assert that they are immune from suit under the Eleventh Amendment. Filing 28 at 11-12. The Eleventh Amendment bars suits brought by private individuals against a State. *McDaniel*, 897 F.3d at 951 (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521

U.S. 261, 267-68, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997)). "Under the exception established in *Ex parte Young,* however, a private party may sue state officials in their official capacities for prospective injunctive relief." *McDaniel*, 897 F.3d at 951-52 (citing *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002)). In assessing application of the doctrine in *Ex parte Young*, a court should conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.*

The plaintiffs' complaint does not specifically identify whether the defendants are sued in their official or individual capacity. However, the general rule is a complaint that is silent regarding the capacity in which the defendant is sued is interpreted as including only official-capacity claims. *Baker v. Chisom*, 501 F.3d 920, 923 (8th Cir. 2007). "If the complaint does not specifically name the defendant in his individual capacity, it is presumed he is sued only in his official capacity." *Id.*

Even without application of the general rule, it is clear the plaintiffs intended to sue the defendants in their official capacity. In the section of the plaintiffs' complaint where the parties are identified, defendant Peterson was not identified as an individual but identified as the Nebraska Attorney General. Filing 1 at 6. Defendant Fulton was also not identified as an individual but identified as the Nebraska Tax Commissioner. *Id.* Both defendants are alleged to be "charged with enforcing Nebraska's

MSA laws." Filing 1 at 6. Importantly, the plaintiffs only seek prospective injunctive relief from the defendants' enforcement of Nebraska's MSA laws.

The plaintiffs' claims fit the analysis required for application of the *Ex parte Young* doctrine. The plaintiffs pray to enjoin the defendants from enforcing state laws that interfere with the Tribe's constitutionally protected sovereignty. "The prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our 'straightforward inquiry.'" *Verizon Md. Inc.*, 535 U.S. at 645, 122 S.Ct. 1753. The Court finds that the defendants are not shielded by Eleventh Amendment immunity.

4. SUPREMACY CLAUSE AND INDIAN COMMERCE CLAUSE.

Although the plaintiffs' complaint references separate Supremacy Clause and Indian Commerce Clause causes of action, the claims as pled bootstrap each other. Essentially, the plaintiffs allege that the defendants' regulatory scheme violates the Supremacy Clause because the scheme violates the Indian Commerce Clause. Filing 1 at 15-16. Thus, analysis of the defendant's motion to dismiss the plaintiffs' Indian Commerce Clause claims will resolve both constitutional claims.

Pursuant to the Indian Commerce Clause,[2] Congress has broad powers to regulate tribal affairs.

> This congressional authority and the semi-independent position of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (quotations omitted). The parties appear to agree, as does the Court, that Congress has not enacted comprehensive cigarette manufacturing and distribution legislation that would preempt state regulations. Thus, the issue is whether the state regulatory scheme in this matter constitutes an unlawful infringement on the right of the tribe to make and be ruled by its own laws.

In considering whether a state enactment represents an unlawful infringement of a tribe's sovereignty, a distinction is drawn between state regulation of tribal activities and taxation of a tribe

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[2] "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." U.S. Const. art 1, § 8, cl. 3.

or tribe member. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995). Additionally, when the challenge involves a tax, "the 'who' and the 'where' of the challenged tax have significant consequences." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101, 126 S.Ct. 676, 163 L.Ed.2d 429 (2005).

When the issue is state regulation of tribal affairs, a balance of federal, state and tribal interests is engaged. "Under certain circumstances a State may validly assert authority over the activities of non-members on a reservation, and in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983)). States generally have the authority to require tribes to collect lawful taxes, such as sales taxes, from non-tribal members' activities on tribal lands. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 150-51, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros.*, Inc., 512 U.S. 61, 68, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994). In these situations, the legal incidence of the tax is on the consumer to pay the sales tax, and the tribal business is merely collecting the tax for the state. States may also impose a regulatory burden on a tribe to keep extensive records of cigarette sales, as a state has a valid interest in ensuring compliance

with lawful taxes that might otherwise be evaded. *Milhelm Attea*, 512 U.S. at 62, 114 S.Ct. 2028.

Regarding regulations pertaining to tribal members on the reservation, "[w]hen 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, 100 S.Ct. 2578. However, "when Indians ('who') act outside of their own Indian country ('where'), including within the Indian country of another tribe, they are subject to non-discriminatory state laws otherwise applicable to all citizens of the state." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012).

State taxation levied on a tribe or tribe member on the tribe's reservation is more categorical. "[A] State is without power to tax reservation lands and reservation Indians. Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country." *Chickasaw Nation*, 515 U.S. at 458, 115 S.Ct. 2214 (citation omitted).

> If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization. But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of

> federal, state and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy[.]

Id. at 459 (citation omitted).

On a motion to dismiss pursuant to Rule 12(b)(6), the non-moving party is entitled to all inferences in fact and law. *Gallagher v. City of Clayton*, 699 F.3d 1013, 1016 (8th Cir. 2012). With the requisite standard of review in mind, the Court finds that the escrow requirement found in § 69-2703 could be viewed as imposing a tax. The Court acknowledges that both parties argue the MSA laws, and specifically the escrow requirement, is not a tax. But, the Court concludes, that determination can only be made upon a full and complete evidentiary record. As this matter currently stands, on the plaintiffs' complaint alone, the Court finds that the escrow requirement could be viewed as a tax, the legal incidence of which rests, at least in part, on the plaintiffs in tribal territory and therefore cannot be enforced absent clear congressional authorization. *See Chickasaw Nation*, 515 U.S. at 458, 115 S.Ct. 2214. Moreover, to the extent that the legal incidence of the tax is on a non-Indian or non-tribal member, "the tax may nonetheless be pre-empted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails the [*Bracker* interest-balancing test]." *Prairie Band Potawatomi Nation*, 546 U.S. at 102, 126 S.Ct. 676.

"A 'tax' is an enforced contribution to provide for the support of government." *United States v. La*

Franca, 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (1931). "[A]n involuntary exaction, levied for a governmental or public purpose, can be held to be nothing other than a tax within the purview of the Federal bankruptcy act." *Michigan Emp't Sec. Comm'n v. Patt*, 4 Mich.App. 228, 144 N.W.2d 663, 665 (1966) (contributions to a fund required by Employment Security Act deemed a tax). "[A] shared responsibility payment may for constitutional purposes be considered a tax, not a penalty." *Nat. Fed'n. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 566, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) (concluding that the Affordable Care Act's individual mandate was a tax).

Arguably, the escrow statute requires non-participating manufacturers to make a "shared responsibility payment" into a qualified escrow fund. "Any tobacco product manufacturer selling cigarettes to consumers within the state" are required to become a participating member of the MSA or "[p]lace into a qualified escrow fund on a quarterly basis" a statutorily mandated monetary contribution based on the number of cigarette "units sold." §§ 69-2703(1) & (2)(a). The purpose for the qualified escrow fund is "[t]o pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the state or any releasing party located or residing in the state." § 69-2703(2)(b)(i).

Not only may the escrowed funds inure to the benefit of the state or residents of the state, but the non-participating manufacturer is denied access to

the escrowed funds' principal,[3] with certain limited exceptions.

> Qualified escrow fund means an escrow arrangement with a federally or state-chartered financial institution ... where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer that places such funds into escrow from using, accessing, or directing the use of the funds' principal.

§ 69-2702(10).

One of the limited exceptions allowing access to an escrow funds' principal concerns Indian tribes. A tribe "may seek release of escrow deposited pursuant to this section on cigarettes sold on an Indian tribe's Indian country to its tribal members." § 69-2703(2)(b)(iv). However, the release is conditioned on the existence of an agreement with the state in which the tribe agrees to significant state regulatory control and a limited waiver of the tribe's sovereign immunity. *See* § 77-2602.06.

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[3] Funds are released to satisfy judgments or settlements "in the order in which they were placed into escrow." § 69-2703(2)(b)(i). After a quarterly contribution has been in escrow for 25 years, if not released due to satisfaction of a judgment or settlement, that quarterly contribution will revert-back to the tobacco product manufacturer. § 69-2703(2)(b)(iii).

Moreover, the directory statute incorporates the taxation features of the escrow statute by requiring "[e]very tobacco product manufacturer whose cigarettes are sold in this state" and who is a non-participating manufacturer to certify that it has "established and continues to maintain a qualified escrow fund that has been reviewed and approved by the Attorney General." And, each such non-participating manufacturer must certify it "is in full compliance" with the requisite quarterly contributions to its qualified escrow fund. § 69-2706(1)(d)(iii).

It is true that the MSA laws on the whole are regulatory. Indeed, the directory statute incorporates participation in the escrow statutory scheme by reference, but otherwise, on its own, does not impose payment into a fund available for the state to use as it sees fit. But that does not exclude the possibility that the escrow provision effects a tax on the tribal tobacco products manufacturers. "'Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.'" *Nat. Fed'n. of Indep. Business*, 567 U.S. at 567, 132 S.Ct. 2566.

Again, both parties argue that the MSA laws do not impose a tax. But even if the MSA laws better fit the paradigm of a regulatory scheme, the laws would be subject to review pursuant to the Bracker interest-balancing test. *See Cabazon Band of Mission Indians*, 480 U.S. at 215, 107 S.Ct. 1083. Thus, whether framed as taxation or as regulatory, the facts alleged in the complaint would allow the Court

to conclude that Nebraska's MSA laws infringe on "the right of reservation Indians to make their own laws and be ruled by them." *Bracker*, 448 U.S. at 142, 100 S.Ct. 2578. What is clear is that the plaintiffs' Indian Commerce Clause claims may not be resolved on a summary basis. Resolution of the issues concerning Indian country and tribal member taxation and regulation are exceedingly complex and context-dependent. The Court cannot determine whether the MSA laws impose a tax or regulation, or both, or the extent to which the tax or regulations interfere with a tribe's right to make and be ruled by its own laws, on the plaintiffs' complaint standing alone. The Court anticipates that a full evidentiary record will be required before it may undertake a complete resolution of the parties' claims and contentions pursuant to the Indian Commerce Clause. Accordingly, the Court finds that the plaintiffs have alleged a plausible factual basis to give rise to a claim pursuant to the Indian Commerce Clause.

5. EQUAL PROTECTION

Plaintiffs allege that the "State of Nebraska" has "targeted Indian tribes and reservation Indians for increased scrutiny and increased legal burdens under its MSA laws." Filing 1 at 17. The Equal Protection Clause generally requires the government to treat similarly situated people alike. *City of Cleburne v. Cleburne Living Ctr., Inc.* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Accordingly, the first step in an equal protection analysis in this matter is determining whether the plaintiffs have alleged facts showing they are treated differently than other tobacco product

manufacturers. *See Klinger v. Dept. of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994).

The plaintiffs allege that Indian tribal sovereignty requires that they must be treated differently from all other tobacco product manufacturers. As such, the plaintiffs' claim is the exact opposite of an equal protection claim. The plaintiffs claim that the Indian Commerce Clause and Indian tribal sovereign immunity require their disparate treatment from all other tobacco product manufacturers, and that they are entitled to have this disparate treatment continue.

Although dissimilar to the model MSA statutes enacted by other states, Nebraska's MSA laws—in the same manner as other State's MSA laws—seeks to treat all tobacco product manufacturers alike, yet give some degree of deference to an Indian tribe's tobacco product manufacturing business. The deference is due to an Indian tribe's sovereignty. Because the plaintiffs' complaint seeks to achieve greater disparate treatment from other tobacco product manufacturers by enjoining the application of Nebraska's MSA laws with respect to its tobacco product manufacturing, the Court finds that plaintiffs failed to allege an equal protection violation. That claim will be dismissed.

IT IS ORDERED:

1. The defendants' motion to dismiss (filing 27) is granted in part and in part denied.

2. The plaintiffs' equal protection claim is dismissed.

3. This matter is referred to the Magistrate Judge for case progression.

Dated this 19th day of December, 2018.

BY THE COURT:
s/ John M. Gerard
John M. Gerrard
Senior United States
District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

No: 23-2311

HCI Distribution, Inc.; Rock River Manufacturing, Inc.

Appellees

v.

Douglas Joseph Peterson, Nebraska Attorney General; Tony Fulton, Nebraska Tax Commissioner,

Michael Hilgers, Nebraska Attorney General; Glen A. White, Interim Nebraska Tax Commissioner,

Appellants

Appeal from United States District Court for the District of Nebraska – Omaha
(8:18-cv-00173-JMG)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 06, 2024.

Order Entered at the Direction of the Court: Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Maureen W. Gornik

APPENDIX E

Neb. Rev. Stat. § 69-2703

Any tobacco product manufacturer selling cigarettes to consumers within the state, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, after April 29, 1999, shall do one of the following:

(1) Become a participating manufacturer, as that term is defined in section II(jj) of the Master Settlement Agreement, and generally perform its financial obligations under the Master Settlement Agreement; or

(2)(a) Place into a qualified escrow fund on a quarterly basis, no later than thirty days after the end of each calendar quarter in which sales are made, the following amounts, as such amounts are adjusted for inflation:

(i) 1999: $.0094241 per unit sold after April 29, 1999;

(ii) 2000: $.0104712 per unit sold;

(iii) For each of the years 2001 and 2002: $.0136125 per unit sold;

(iv) For each of the years 2003, 2004, 2005, and 2006: $.0167539 per unit sold; and

(v) For the year 2007 and each year thereafter: $.0188482 per unit sold.

(b) A tobacco product manufacturer that places funds into escrow pursuant to subdivision (2)(a) of this section shall receive the interest or other appreciation on such funds as earned. Such funds shall be released from escrow only under the following circumstances:

(i) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the state or any releasing party located or residing in the state. Funds shall be released from escrow under this subdivision (2)(b)(i) in the order in which they were placed into escrow and only to the extent and at the time necessary to make payments required under such judgment or settlement;

(ii) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the Master Settlement Agreement payments, as determined pursuant to section IX(i) of that Agreement including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold had it been a

participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer;

(iii) To the extent not released from escrow under subdivision (2)(b)(i) or (2)(b)(ii) of this section, funds shall be released from escrow and revert back to such tobacco product manufacturer twenty-five years after the date on which they were placed into escrow; or

(iv) An Indian tribe may seek release of escrow deposited pursuant to this section on cigarettes sold on an Indian tribe's Indian country to its tribal members pursuant to an agreement entered into between the state and the Indian tribe pursuant to section 77-2602.06. Amounts the state collects on a bond under section 69-2707.01 shall not be subject to release under this section.

(c) Each tobacco product manufacturer that elects to place funds into escrow pursuant to subdivision (2) of this section shall annually certify to the Attorney General that it is in compliance with subdivision (2) of this section. The Attorney General may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under this section. Any tobacco product manufacturer that fails in

any calendar quarter to place into escrow the funds required under this section shall:

(i) Be required within fifteen days to place such funds into escrow as shall bring the manufacturer into compliance with this section. The court, upon a finding of a violation of subdivision (2) of this section, may impose a civil penalty in an amount not to exceed five percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent of the original amount improperly withheld from escrow;

(ii) In the case of a knowing violation, be required within fifteen days to place such funds into escrow as shall bring the manufacturer into compliance with this section. The court, upon a finding of a knowing violation of subdivision (2) of this section, may impose a civil penalty in an amount not to exceed fifteen percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent of the original amount improperly withheld from escrow. Such civil penalty shall be remitted to the State Treasurer for distribution in accordance with Article VII, section 5, of the Constitution of Nebraska; and

(iii) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the state, whether directly or through a distributor, retailer, or similar intermediary, for a period not to exceed two years.

(d) An importer shall be jointly and severally liable for escrow deposits due from a nonparticipating manufacturer with respect to nonparticipating manufacturer cigarettes that it imported and which were then sold in this state, except as provided for by an agreement entered into pursuant to section 77-2602.06.

(e) Each failure to make a quarterly deposit required under this section constitutes a separate violation.