No. 24-615

In the Supreme Court of the United States

HCI DISTRIBUTION, INC., ET AL.,
Petitioners,

v.

MICHAEL T. HILGERS, ATTORNEY GENERAL OF NEBRASKA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Eighth Circuit correctly apply *Bracker* balancing, rather than the exceptional-circumstances test, when concluding that Nebraska's escrow statute applies to cigarette sales made on the Winnebago Reservation to consumers who are not members of the Winnebago Tribe?

2. Did the Eighth Circuit properly weigh the state, federal, and tribal interests under *Bracker* balancing?

3. Did the Eighth Circuit appropriately mold the district court's injunction by exempting from the escrow statute only on-reservation sales of cigarettes to members of the Winnebago Tribe?

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Citation to the district court record is indicated by citation to the parties' joint appendix (App.) or joint restricted appendix (R. App.) before the Court of Appeals for the Eighth Circuit.

BRIEF IN OPPOSITION

Petitioners are corporate entities, owned by members of the Winnebago Tribe and organized under tribal law, that manufacture and sell cigarettes. While Petitioners conduct operations on the Winnebago Reservation (which is located within Nebraska), the cigarettes they manufacture and distribute end up in the pockets of both members and nonmembers of the Winnebago Tribe, from sales both on and off the Winnebago Reservation. Regulating cigarette sales, both to protect the health of its residents (both Indian and non-Indian) and to recoup costs that flow from tobacco-related illness, is an important state interest. Nebraska advances that interest by requiring cigarette manufacturers to either join a settlement agreement with the State or put money into a 25-year escrow to secure any future judgments that may arise against the manufacturer for certain health and consumer protection claims.

The district court and Eighth Circuit agreed that the Winnebago Tribe's interest in self-government prevented Nebraska from imposing escrow obligations on Petitioners with respect to cigarettes sold on the Winnebago Reservation to Winnebago members. But that was not enough for Petitioners. They now ask this Court to prevent the State from applying its escrow statute to cigarettes sold to *nonmember* consumers on the Winnebago Reservation. But the Eighth Circuit, like this Court and every other circuit to consider the issue, correctly held that on-reservation activity is not shielded from

state law if the activity involves nonmembers and if the State's interests in its law outweighs the burden on federal and tribal interests flowing from its application. The Eighth Circuit found that the State's weighty public health interests outweighed the federal interests along with the Tribe's comparatively meager interest in a business that employs few tribal members and ultimately loses the Tribe money. There is no need to disturb the Eighth Circuit's decision, which rests on a well-established rule of law and a well-reasoned, fact-intensive analysis of the interests at play.

STATEMENT OF THE CASE

I. In 1998, 52 American states and territories, including Nebraska, entered into the Master Settlement Agreement ("MSA") with the nation's largest cigarette manufacturers. *See Grand River Enters. Six Nations, Ltd. v. Beebe,* 574 F.3d 929, 933–34 (8th Cir. 2009) (discussing history and operation of MSA). Under that agreement, the settling jurisdictions released the manufacturers from certain consumer protection and health claims in exchange for restrictions on the manufacturers' activities and ongoing payments from the manufacturers. *See id.* Nebraska applies these MSA payments to a fund that covers public healthcare expenditures and administration and enforcement of the MSA. *See* Neb. Rev. Stat. §§ 71-7606, 71-7611(1)(l).

Settling states impose certain obligations on cigarette manufacturers that did not enter the MSA—known as "nonparticipating manufacturers"—to

ensure that those nonparticipants do not gain a competitive advantage over participating manufacturers by choosing not to enter the MSA. Pet. App. 3a. The requirements imposed on nonparticipating manufacturers are also designed to address the public health harms their cigarette sales have and will continue to cause consumers. Pet. App. 16a.

Nebraska enacted Nebraska Revised Statute § 69-2703 (the "Escrow Statute"), which requires a tobacco product manufacturer to either: (1) join the MSA as a participating manufacturer or (2) place money into escrow on a quarterly basis based on "units sold." *Id.* § 69-2703(1), (2). "Units sold" means the number of cigarettes sold in Nebraska in packs required to bear the stamp denoting that the required Nebraska cigarette excise tax has been prepaid on the cigarette. *Id.* § 69-2702(14). Taxes prepaid on cigarettes sold to tribal members that occur in their own Indian country[1] are refunded. *Id.* § 77-2602.05(2)(b). By law, escrow deposits shall not exceed what the manufacturer would have paid had it participated in the MSA. *Id.* § 69-2703(2)(b)(ii). The escrow account is used to secure any judgments against the nonparticipating manufacturers for

[1] Nebraska's tobacco regulation scheme defines "Indian Country" as "(a) all land in this state within the limits of any Indian reservation under the jurisdiction of the United States . . . , (b) all dependent Indian communities within the borders of this state, and (c) all Indian allotments in this state, the Indian titles to which have not been extinguished . . . ." Neb. Rev. Stat. § 77-2601(9).

certain consumer protection and health claims similar to those released by the MSA. *Id.* § 69-2703(2)(b)(i). Funds that are not withdrawn from escrow are returned to the manufacturer after 25 years. *Id.* § 69-2703(2)(b)(iii). In addition, manufacturers depositing into escrow must post a bond of at least $100,000. *Id.* § 69-2707.01(2)(a). The State may execute upon the bond to recover delinquent escrow requirements. *Id.* § 69-2707.01(5).

Nebraska additionally requires every tobacco product manufacturer whose cigarettes are sold in Nebraska to be listed on Nebraska's Directory of Certified Tobacco Product Manufacturers and Brands. *Id.* § 69-2706. A nonparticipating manufacturer must certify that it is in compliance with the Escrow Statute before it can be listed on the directory. *Id.* § 69-2706(1)(a). It is unlawful in Nebraska to sell cigarettes made by a manufacturer that is not listed on the directory. Neb. Rev. Stat. § 69-2706(4).

II. Rock River Manufacturing, Inc., is a corporate entity organized under Winnebago tribal law that manufactures cigarettes on the Winnebago Reservation. Rock River is not party to the MSA. Pet. App. 71a–73a. Nor is Rock River on the directory. R. App. 109. HCI Distribution Inc. ("HCID"), is also a corporate entity organized under tribal law that purchases and distributes cigarettes on the Winnebago Reservation. Pet. App. 71a–72a. HCID sells Rock River cigarettes. Pet. 2. Neither Rock River nor HCID has deposited any escrow nor posted the required bond for cigarettes sold in Nebraska. R. App. 109, 188. Neither have they ever stamped (with a

Nebraska stamp) and prepaid any cigarette excise tax to the State for cigarettes sold to consumers in Nebraska, even though excise taxes for on-reservation cigarette sales to nonmembers have been upheld by this Court. R. App. 110, 200; *see Washington v. Confederated Tribes of Colville Indian Rsrv.,* 447 U.S. 134 (1980) ("Colville").

III. Petitioners sued the Nebraska Attorney General and Tax Commissioner, asserting that the Escrow Statute and directory requirement as applied to Petitioners violate the Supremacy Clause and the Indian Commerce Clause of the United States Constitution. Pet. App. 69a, 77a. Petitioners sought a declaration and injunction preventing the enforcement of the Escrow Statute and directory requirement against them. Pet. App. 69a. After cross-motions for summary judgment, the district court denied in part and granted in part each party's motion for summary judgment. Pet. App. 67a. The district court determined that the Escrow Statute and directory requirement could be constitutionally applied to Petitioners for cigarettes sold outside the Winnebago Reservation but within Nebraska, but the court granted Petitioners' motion for summary judgment with respect to cigarettes sold on the Winnebago Reservation, regardless of whether the end purchaser is a member of the Winnebago Tribe. Pet. App. 24a, 52a–66a. The district court held that the Escrow Statute could apply to sales on the Winnebago Reservation only in "exceptional circumstances." Pet. App. 60a. The district court

determined the State did not show such exceptional circumstances. Pet. App. 65a–66a.

IV. Respondents appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit panel reversed the district court in part. Pet. App. 19a. The panel held that with respect to cigarettes manufactured and sold to members of the Winnebago Tribe on the Winnebago Reservation, the district court was correct to apply the exceptional-circumstances test and did not err in deciding the State did not have exceptional circumstances. Pet. App. 12a, 16a–17a.

With respect to cigarettes sold on the reservation to nonmember consumers, however, the panel held that the district court erred by applying the exceptional-circumstances test. *See* Pet. App. 11a–12a. Citing this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Eighth Circuit held that the State may regulate on-reservation activity involving nonmembers if the State's interest in the regulation outweighs the tribal and federal interests at play—i.e., *Bracker* balancing. Pet. App. 11a–12a; *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–45 (1980).

The Eighth Circuit held that the State's interest in the Escrow Statute outweighed the federal and tribal interests at play. It noted that the State had weighty interests in promoting the public health and protecting the public fisc, and the Escrow Statute "further[s] those interests by ensuring the State can

secure judgments against wrongdoers who harm its citizens and drain its fisc by causing public health expenditures." Pet. App. 16a. The federal interests, on the other hand, are relatively weak. The Eighth Circuit panel emphasized that "[n]o one ha[d] identified a federal law or policy taking a position on tribal cigarette manufacturing or state regulation of it." Pet. App. 12a. And while the panel noted that Congress had an "important" interest in encouraging the economic self-sufficiency of tribes, that interest is "not nearly as strong[] [here] as [it is] in cases where the Federal Government has blessed [a] Tribe's venture." Pet. App. 13a.

The panel then turned to the Tribe's interests. While the panel recognized a tribal interest in self-determination, it noted that those interests "bottom out when its venture adds little to no on-reservation value." Pet. App. 14a. That is the case here: Petitioners "employ only a handful of tribal members and have been operating at a loss for years," "depriv[ing] the Tribe of operating funds." Pet. App. 14a–15a. In short, because "[c]igarette manufacturing is hardly a source of employment or revenue for tribal services," the tribal interests in self-determination and economic development here were "not strong." Pet. App. 15a.[2]

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[2] The panel also observed that the Tribe has an "interest in applying its own regulatory scheme," the Universal Tobacco Settlement Agreement, which it developed to protect the health of its members. Pet. App. 15a. The opinion below did not extensively analyze this interest; however, it is ultimately protected by the injunction instructed here, which prohibits

Ultimately, the panel held that "the State's strong interest in protecting public health and redressing harm outweighs the Tribe's and Federal Government's comparatively minimal interests." Pet. App. 16a. The Eighth Circuit thus instructed the district court to modify its injunction to enjoin the State from enforcing the Escrow Statute "against Rock River and HCI Distribution [only] as to cigarettes they sell, and have sold, on the Winnebago Reservation to members of the Winnebago Tribe." Pet. App. 19a. Petitioners moved for both panel rehearing and rehearing *en banc*, which the Eighth Circuit denied. Pet. App. 92a–93a.

Respondents from enforcing the Escrow Statute for cigarette sales to tribal member consumers on the Winnebago Reservation. Pet. App. 19a.

REASONS FOR DENYING THE PETITION

This Court should not grant certiorari for three reasons. *First*, Petitioners fail to identify a split in the circuit courts. *Second*, the Eighth Circuit's decision was well-reasoned and need not be disturbed. And *third*, the absence of the Winnebago Tribe from this lawsuit makes it a poor vehicle to address matters that implicate the interests of the Tribe itself.

I. Petitioners Have Failed to Identify a Circuit Split.

This Court need not grant certiorari to resolve a circuit split because Petitioners do not identify one. Petitioners argue that the Eighth Circuit split with the Ninth and Tenth Circuits by not applying the exceptional-circumstances test to the State's enforcement of the Escrow Statute with respect to on-reservation sales to nonmembers. Petition 11. But no such split exists.

Petitioners first point to the Tenth Circuit's decision in *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012). Petitioners highlight a footnote from that case, which says that a state may not "assert jurisdiction over the on-reservation activities of tribal members" except in "exceptional circumstances." *Id.* at 1180 n.10. But that case *upheld* the application of Oklahoma's version of a cigarette escrow statute. *Id.* at 1183. And the footnote was appended in the court's response to the Tribe's argument that Oklahoma's escrow statute

impermissibly regulated the Tribe itself. *Id.* at 1180. The Tenth Circuit noted that the State had not taken any enforcement actions on the reservation, and the footnote simply expressed its doubt that the State could enforce the statute against Indians on their reservation. *Id.* at 1180 n.10 It said the State would need exceptional circumstances to enforce the act "against *tribal members* on its Indian country." *Id.* (emphasis added). Moreover, the court of appeals recognized that this Court has "repeatedly" held that states are permitted to "tax[] non-Indians in Indian country so long as the tax imposes only minimal burdens on the Indians" themselves. *Id*. at 1172; *see also id*. at 1178 (noting that this Court's precedent has "never 'gone so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State.'") (brackets omitted) (quoting *Colville*, 447 U.S. at 155).

Nothing in the *Pruitt* footnote suggests that the exceptional-circumstances test should apply to a tax or other regulation that applies to cigarettes ultimately sold to nonmembers. To the contrary. The footnote cited *Bracker*'s statement that "when on-reservation conduct *involving only Indians* is at issue, state law is generally inapplicable." *Id.* at 1180 n.10 (emphasis added) (quoting *Bracker*, 448 U.S. at 144). Of course, *Bracker* made clear that its unadorned balancing test applies to state regulation "over the conduct of non-Indians engaging in activity on the reservation." *Bracker*, 448 U.S. at 144. The footnote—which addressed the possibility of enforcement "against *tribal members* [inside] Indian

country," *Pruitt*, 669 F.3d at 180 n.10 (emphasis added)—cannot be fairly read as a holding that the exceptional-circumstances test governs the legality of an escrow requirement applied on cigarette sales to *nonmembers*.

Petitioners next cite *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003). But that case was not about an escrow statute, cigarette sales, or even the Indian Commerce Clause; questions of tribal sovereignty were in no way implicated. Instead, it was a statutory interpretation case that determined whether California had satisfied its obligation under the Indian Gaming Regulatory Act ("IGRA") to negotiate with a Tribe in good faith to form a compact. *Id.* at 1095. Petitioners cite the case because it describes the exceptional-circumstances test as articulated by this Court in *Cabazon*. *Id.* at 1096. But the Ninth Circuit was simply backgrounding *Cabazon* and how it led to Congress's passage of the IGRA; it did not apply the exceptional-circumstances test. *Id.* Here, the opinion below recognized that *Cabazon* remains good law and repeatedly cited it where appropriate. *See* Pet. App. 11a, 12a, 13a, 14a. Simply put, there is no divergence between the Eighth and Ninth Circuit's approach to or application of *Cabazon*. Nothing in *In re Indian Gaming* can be fairly read as holding that the exceptional-circumstances test must be applied when evaluating state regulation of cigarette sales to tribal nonmembers.

Petitioners also cite a pair of federal district court cases. But these cases also do not suggest that the

exceptional-circumstances test should apply here. *Oneida Tribe of Indians v. Vill. of Hobart*, 542 F. Supp. 2d 908, 909 (E.D. Wis. 2008), was about the status of land within the Oneida Reservation that had been sold to non-Indians and then reacquired by the Tribe. And, like *In re Indian Gaming*, the court mentioned but did not apply the exceptional-circumstances test. *See Oneida Tribe*, 542 F. Supp. 2d at 924, 925. *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1291 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1997), was another case involving interpretation of IGRA in which the exceptional-circumstances test was mentioned only in a summarization of *Cabazon*. Neither of these cases suggest the exceptional-circumstances test applies to regulation of on-reservation cigarette sales to nonmembers. Because Petitioners have not identified a split in authority, certiorari is not warranted.[3]

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[3] If a circuit split exists, it benefitted Petitioners. In *King Mountain Tobacco Co. v. McKenna*, the Ninth Circuit, applying *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), held that Washington's escrow statute did not violate the Constitution because the manufacturer's "activities [were] largely off-reservation." 768 F.3d 989, 994 (9th Cir. 2014). The Eighth Circuit opted to conduct *Bracker* balancing instead, but *King Mountain*'s reasoning easily applies here. *See* Brief of Appellants at 22–23, *HCI Distribution, Inc. v. Peterson*, 23-2311, 110 F.4th 1062 (8th Cir. 2023) (No. 23-2311). Like the manufacturer in *King Mountain*, Petitioners' activities largely take place outside the Winnebago reservation. The tobacco used in Rock River's manufactured cigarettes comes from outside of the reservation. Pet. App. 4a, 57a. Rock River has also historically imported cigarettes from outside Nebraska. Pet. App. 4a. The Eighth

II. The Eighth Circuit's Decision Was Correct.

Even if there is a split in authority—and there is not—this Court's intervention would not be warranted, because the Eighth Circuit faithfully applied the governing law. Three facets of its decision are worth mention. *First*, the Eighth Circuit rightly understood that *Cabazon* does not require a State to show exceptional circumstances to tax or regulate on-reservation transactions involving nonmembers. *Second*, the Eight Circuit adroitly engaged in *Bracker* balancing, correctly determining that the State's interests in public health and safety outweighed the less compelling federal and tribal interests. And *third*, the Eighth Circuit's injunction was carefully tailored to protect both state and tribal interests and is not, as Petitioners suggest, unworkable.

Circuit found the factual differences between this case and *King Mountain* were enough to distinguish its application, *see* Pet. App. 9a, but the factual similarities are readily apparent. *See* Brief of Appellants at 21–22, *HCI Distribution, Inc. v. Peterson*, 23-2311, 110 F.4th 1062 (8th Cir. 2023) (No. 23-2311). In any event, a split that benefited the party seeking this Court's intervention is not a proper predicate for certiorari review. *Cf. Deposit Guar. Nat. Bank v. Roper,* 445 U.S. 326, 333 (1980) (A prevailing party who is "not aggrieved by the judgment . . . cannot appeal from it."); *Camreta v. Greene*, 563 U.S. 692, 703–04 (2011) (This Court "generally decline[s] to consider cases at the request of a prevailing party.").

A. The exceptional-circumstances test does not apply.

Petitioners argue that the Eighth Circuit erred by not applying *Cabazon*'s exceptional-circumstances test. Pet. 9–11. Not so. *Cabazon* explained that "under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Cabazon*, 480 U.S. at 215 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331–332 (1983) (alteration omitted)). This Court explained that where a case "involves a state burden on tribal Indians in the context of their dealings with non-Indians," the case proceeds with the *Bracker* inquiry of weighing the federal and tribal interests against state interests. *Id.* at 216. The Eighth Circuit correctly held that because regulation of cigarettes ultimately sold to nonmembers "burden[s] the Tribes 'in the context of their dealings with non-Indians,'" *Bracker* balancing, not the exceptional-circumstances test, applies. Pet. App. 11a–12a.

Petitioners say the Eighth Circuit misunderstood Nebraska's statutory scheme when it reasoned that its regulation of their cigarette sales impacts tribal dealings with nonmembers. Petitioners argue that the scheme applies only to Rock River's sales to HCID, both of which are organized under tribal law and operate on the Tribe's reservation, so the regulation does not involve sales to nonmembers.

But this argument ignores the scope and purpose of the Escrow Statute. The Escrow Statute is about protecting *consumers*. It ensures that manufacturers who harm consumers with unlawful practices will not escape liability and ensures that funds are available to recompense the harms caused. Escrow deposits depend on the number of cigarettes sold because the potential harm flowing from a cigarette manufacturer's wrongdoing rises as the number of cigarettes it sells increases. The malice of a manufacturer that sells a billion cigarettes will cause harm to more consumers (and require more funds to remediate) than the malfeasance of a manufacturer that sells merely a million cigarettes. So, the Escrow Statute is directly tied to the end consumer, as it ensures that the State will be able to obtain redress for any injury caused to consumers by the manufacturer. That is the very point of the MSA and the Escrow Statute. *See* Pet. App. 16a.

Nebraska's requirement that Petitioners deposit escrow for cigarettes ultimately sold to nonmembers ensures that there are sufficient funds to secure judgments for Nebraskans harmed by those cigarettes. The Escrow Statute, therefore, is a regulation "in the context of [Petitioners'] dealings with non-Indians." *Cabazon*, 480 U.S. at 216. The Eighth Circuit correctly applied *Cabazon*.

B. The Eighth Circuit's *Bracker* balancing did not err.

Petitioners also criticize the Eighth Circuit's balancing of state, federal, and tribal interests under *Bracker*. Particularly, Petitioners say the panel minimized the Tribe's interests in avoiding the escrow requirement. Pet. 13–14. But the Eighth Circuit was correct that the State's interests outweigh these tribal interests as well as any federal interests.

1. Nebraska's interests underlying the Escrow Statute are strong.

Petitioners do not dispute that the State's interest in protecting the public health is strong. The MSA is a "landmark" agreement that restricts dozens of cigarette manufacturers from certain advertising and lobbying and requires billions of dollars in payments for harms caused by cigarette use. *See Grand River Enters.*, 574 F.3d at 933. The State has an obvious and widely recognized interest in remedying the problem posed by nonparticipating manufacturers escaping state regulation and obtaining an artificial competitive windfall. *See id.* at 934–35, 942; *Muscogee Nation*, 669 F.3d at 1164; *Omaha Tribe of Nebraska v. Miller*, 311 F. Supp. 2d 816, 818 (S.D. Iowa 2004). The requirement prevents reservations from blowing a hole through important tobacco regulation (and evading the MSA) by preventing on-reservation manufacturers from

becoming regulation shelters to traffic otherwise illegal cigarettes.

The State also has an obvious interest in "ensuring [it] can secure judgments against wrongdoers who harm its citizens and drain its fisc by causing public health expenditures." Pet. App. 16a. Were Petitioners ever to engage in tortious or otherwise unlawful conduct with respect to their manufacture and sale of cigarettes, the harm could spill far beyond the boundaries of the reservation. The State has a strong interest in preemptively securing funds to remedy these harms.

2. Federal interests are weak.

Compared to the State's interests, the federal interests here are fairly slight. There is a notable lack of federal regulation of tribal cigarette manufacturing and distribution. *See Miller*, 311 F.Supp.2d at 823. "In fact, the federal government has been generally supportive of *state* regulation of cigarette sales." *Ward v. New York*, 291 F. Supp. 2d 188, 204 (W.D.N.Y. 2003) (emphasis in original). Petitioners appeal to a general federal interest in tribal sovereignty and economic development. Pet. 12–14. That interest, however, must be weighed against "the applicable treaties and statutes which define the limits of state power," which are noticeably absent in this case. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973). And, as the Eighth Circuit noted here, "[n]o one has identified a federal law or policy taking a position on

tribal cigarette manufacturing or state regulation of it." Pet App. 12a.

3. Tribal interests are weak.

Measured against the State's compelling interests, the Tribe's interests in Petitioners avoiding the escrow requirements are weak. Petitioners assert that the Tribe's interests in self-determination and economic development are weighty and fully implicated here. Pet. 12–14. But Petitioners are not significant economic engines for the Tribe. "[T]hey employ only a handful of tribal members and have been operating at a loss for years." Pet. App. 14a–15a. And "in the companies' own words, every dollar they lose 'deprives the Tribe of operating funds.'" *Id.* To be sure, Ho-Chunk—Petitioners' parent company—is quite profitable and has returned millions of dollars to the Winnebago Tribe. *Id.* But their "parent's success . . . is not its subsidiaries' to claim." *Id.* Petitioners' cigarette manufacturing and distribution is "hardly a source of employment or revenue for tribal services, so the Tribe's self-determination and economic development interests are not strong." *Id.* In other words, the Tribe has a relatively slight interest in a purported economic-development engine that *loses* money.

Ultimately, this weighing of the relative interests was reasonable. Thus, the Eighth Circuit did not err in finding the State's interests in applying the Escrow Statute to Petitioners' sales to nonmembers outweighed any tribal and federal interests, and its

decision effectuating that balancing should not be disturbed.

C. The Eighth Circuit's injunction is appropriately tailored and workable.

Petitioners suggest the Eighth Circuit's injunction effectively rewrites Nebraska law by drawing a line between sales to members and nonmembers that does not exist in the statutory text. Pet. 15. But Petitioners cannot complain of what benefits them. If the Eighth Circuit amended Nebraska statutes, it was in Petitioners' favor. The Escrow Statute applies across Nebraska, and it does not create a blanket exception for manufacturers located in Indian country. *See* Neb. Rev. Stat. §§ 69-2703, 69-2707.01. Yet the Eighth Circuit carved out an exception *in favor of Petitioners*, allowing them to evade the escrow requirement with respect to cigarettes sold on-reservation to consumers who are members of the Winnebago Tribe. And, as the Eighth Circuit correctly reasoned, there is no reason to believe that severing the escrow requirement for cigarettes sold on-reservation to members from the rest of the scheme is contrary to legislative intent. Indeed, "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." Pet. App. 18a (quoting Neb. Rev. Stat. § 69-2703(2)(b)(iv)).

Petitioners also suggest the Eighth Circuit's injunction is unworkable. They complain that Rock River will need to track the tribal membership status of each consumer of Rock River cigarettes on the Winnebago Reservation. Pet. 15. But on-reservation retailers must record sales to members on the reservation if they seek to recuperate the benefit of the tax-free sales. *See* Form 68, Neb. Dep't of Rev., available at https://perma.cc/W3LB-HUA9; *see also Colville*, 447 U.S. at 160. There is nothing stopping Petitioners from working with retailers to obtain that information. The fact that Rock River and HCID already have extensive on-reservation operations should help facilitate the free flow of such information, both between themselves and with other on-reservation retailers.

Petitioners also complain about the purported retroactive impact of the Eighth Circuit's injunction and suggest they have no way to accurately calculate the escrow amounts due for past sales. But the Eighth Circuit's injunction does not require Petitioners to deposit escrow on past sales. Petitioners are plaintiffs in this case, and Respondents have not advanced any counterclaims. So, the Eighth Circuit's injunction applies only to Respondents. *See* Pet. App. 19a. Petitioners cannot complain that the injunction is unworkable based on an obligation it does not actually impose.

Should the State later demand that Petitioners deposit any past-owed escrow, nothing would prevent Petitioners from then raising practical concerns they may have about backward-looking compliance.

However, the State is prepared to work with Petitioners and the Tribe to negotiate common-sense escrow terms that align with both state and tribal interests, as it has done with other tribes. *See, e.g.*, Compact Relating to Cigarette and Tobacco Product Sales, Taxation, Stamping, Escrow, and Directory, Neb. Dep't of Rev. & Santee Sioux Nation (Jan. 1, 2023), available at https://perma.cc/CG3A-8JC6.

III. This Case Is a Poor Vehicle to Address Matters of Tribal Sovereignty.

Even if this Court agrees with Petitioners that the Eighth Circuit erred, this case is the wrong vehicle to address nuanced questions that relate to tribal interests. Under any framework, the Court will analyze the Tribe's interests. But notably missing from this case is the Tribe itself. The Winnebago Tribe is not a party to this case. This Court's major Indian Commerce Clause cases have very often had the benefit of hearing from the affected Tribe directly. *See, e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

Not so here. This Court should not decide questions that rest, in no small part, on a weighing of the Tribe's interests without the Tribe's direct input. As subsidiaries of the Tribe's economic development arm, Petitioners undoubtedly speak for *some* tribal members. But this Court should not accept as gospel writ the self-interested

representations of two entities that may not have *all* of the Tribe's best interest in mind. This case thus presents a poor vehicle for addressing the questions Petitioners have presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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