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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF

The Eighth Circuit's decision below permits states to directly regulate commerce between tribal entities on tribal land in the absence of exceptional circumstances. Its decision conflicts with the precedents of this Court and the decisions of lower courts recognizing strong federal policies of tribal sovereignty, economic development, and self-determination. It further departs from this Court's precedent by fashioning an injunction that effectively rewrites Nebraska statutes. Certiorari is needed to clarify the law on these important issues.

A. The Eighth Circuit's decision conflicts with *Cabazon* and decisions of other courts.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court held that a state may assert jurisdiction over the on-reservation activities of tribal members in "exceptional circumstances." *Cabazon*, 480 U.S. at 215. In this respect, it echoed its own prior holding in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). In *Cabazon* the Court did not, as the Eighth Circuit majority held, "eschew" the exceptional circumstances test in the context of a tribe's dealings with non-Indians. While the Court noted examples showing when a tribe may be called upon to assist a State in the regulation of nonmembers, *id.*, it held there were no exceptional circumstances to justify California's attempt to directly regulate tribal entities engaged in gaming. *Id.* at 221–22.

The rule in *Cabazon* is rooted in the fundamental federal policy of respect for tribal institutions and tribal sovereignty. As this Court recognized in *Cabazon*, "a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values." 480 U.S. at 208. The exceptional circumstances requirement reflects tribes' "sovereign status" and the fact that "tribes and their reservation lands are insulated in some respects by an 'historic immunity from state and local control,' . . ." *Mescalero*, 462 U.S. at 332.

The exceptional circumstances test applies here because Nebraska's escrow and bond requirements operate directly upon tribal manufacturers within the bounds of their own reservation. As Judge Gerrard noted in the District Court, Nebraska's escrow and bond statutes "only impact the sellers of tobacco products, not the purchasers." *See* Pet. App. at 56a–57a. Respondents' own description of the escrow statue confirms this to be true. Opp. Br. at 3–4. The manufacturer here, Rock River, sells cigarettes only to another tribal entity, HCID. Because Rock River and HCID are both tribal entities engaged in commerce within the boundaries of the Tribe's reservation, Nebraska must show exceptional circumstances to regulate Rock River. The Eighth Circuit correctly found the circumstances here are not exceptional, and Respondents do not challenge its ruling.

This case might be different if Nebraska had chosen to require the consumers who buy cigarettes to pay escrow, a bond, or a tax. A state may require

that a tribal retailer "collect a tax validly imposed on non-Indians" if the collection of that tax imposes only "minimal burdens" on the Tribe. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976). Thus, Nebraska might have argued successfully that it could enlist tribal entities to collect payments from consumers at the point of sale.

That is not what Nebraska did. In its Master Settlement Agreement (MSA) with "participating manufacturers," a.k.a. Big Tobacco, Nebraska agreed to impose those requirements directly on cigarette manufacturers, which resulted in the escrow and bond statutes. The escrow requirement is far more burdensome to a manufacturer than assisting in the collection of sales tax, because it forces a manufacturer to hand over its money to the State to hold in escrow for *25 years*. Neb Rev. Stat. § 69-2703(2)(b)(iii). Whatever advantages this approach may provide states and Big Tobacco with respect to cigarettes manufactured by non-tribal entities, with respect to tribal manufacturers it requires a showing of exceptional circumstances.

Respondents try to argue that the exceptional circumstances test does not apply if cigarettes Rock River sells to HCID are ultimately purchased downstream by nonmembers. Opp. Br. at 15. They argue the escrow and bond requirements are about protecting consumers. Opp. Br. at 15. This argument ignores what Respondents admit elsewhere—that one purpose of the MSA was to protect the competitive position of Big Tobacco. Opp. Br. at 2–3. Even if one were to accept that Big Tobacco insisted

on the escrow and bond requirements because it was genuinely worried about the health of smokers, it does not change the fact that the escrow and bond requirements apply directly to manufacturers—here, tribal manufacturers. As Judge Gerrard correctly observed, "the tribal affiliation or lack thereof of purchasers is irrelevant" to imposition of the escrow and bond requirements. Pet. App. at 56a–57a.

The conflict between the Eighth Circuit's opinion and this Court's holding in *Cabazon*, standing alone, is sufficient to support issuance of a writ of certiorari under Rule 10(c). In addition, as set forth below, the fact that the Eighth Circuit majority reads *Cabazon* differently than its sister circuits and other lower federal courts, at a time when tribes are increasingly engaged in economic development as encouraged by federal policy, provides independent grounds for the court to provide clarity through a writ of certiorari under Rule 10(a).

Until this case, lower courts uniformly recognized that under *Cabazon* exceptional circumstances are required to permit a state to directly regulate a tribe within its own reservation. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003); *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1180 n.10 (10th Cir. 2012); *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 reading of *Cabazon* plainly conflicts with these decisions.

Try as they might, Opp. Br. at 9–12. Respondents cannot make this conflict disappear. In *Indian Gaming Related Cases*, the Ninth Circuit explained the ruling in *Cabazon* as an application of the exceptional circumstances test: "Because there were no exceptional circumstances that warranted the assertion of State jurisdiction over tribal bingo operations, the Court held that the State lacked authority . . . to enforce the bingo statute on Indian lands." *Indian Gaming Related Cases*, 331 F.3d at 1096. In *Pruitt*, the Tenth Circuit likewise explained that "[a]bsent an express statement by Congress, a state may not 'assert jurisdiction over the on-reservation activities of tribal members' except in 'exceptional circumstances.'" 669 F.3d at 1180 n.10.

The Eighth Circuit's ruling below creates uncertainty in the lower courts as to the application of the exceptional circumstances test in *Cabazon* which certiorari provides the means to address.

B. The Eighth Circuit's *Bracker* balancing conflicts with federal policy favoring tribal economic development.

If the Eighth Circuit's reading of *Cabazon* did not warrant certiorari, its application of the balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) would. The Eighth Circuit's application of *Bracker* violates clear federal policy by allowing a court to discount the significance of tribal economic development based on the court's own view of its value to the tribe.

As Judge Erickson summarized in his dissent, "[t]he federal government and the Tribe have parallel interests in tribal self-determination and economic development on the reservation." Pet. App. 20a (citing *Cabazon*, 480 U.S. at 219).

Contrary to Respondents' argument, the federal interest in tribal economic development is not "fairly slight." As this Court has recognized, Congress has demonstrated an "overriding goal of encouraging 'tribal self-sufficiency and economic development'." *Mescalero*, 462 U.S. at 335; *see also*, 25 U.S.C. § 1451 ("It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities."); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) ("[t]he intent and purpose of the Reorganization Act was '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.").

Respondents maintain that tribal interests are weak because, in their view, Rock River and HCID "are not significant economic engines for the Tribe." Opp. Br. at 18. This argument embodies the paternalism that Congressional policy aims to foreclose. As Respondents acknowledge, Rock River and HCID are arms of a highly sophisticated, highly

successful business operation, Ho-Chunk, Inc., Opp. Br. at 18, providing over $180 million to the Tribe in 2018. Pet. App. at 30a. If tribal sovereignty and economic self-sufficiency mean anything, the Tribe, not the State of Nebraska, must be allowed to determine the value and course of its economic development efforts. As Judge Erickson correctly observed, "there is nothing in Supreme Court precedent that diminishes federal and tribal interests in economic development if a company is operating at a loss." Pet. App. 21a. Respondents do not dispute this observation.

Respondents also do not dispute the obvious—that their own escrow and bond requirements are largely responsible for economic losses suffered by Rock River and HCID, the same losses they cite to argue that tribal interests are weak. If left in place, the Eighth Circuit's rationale would allow states to justify direct regulation of tribes by using burdensome regulations to strangle tribal economic development in its infancy, before it can mature into something more significant. This runs directly counter to federal policy.

That leaves Respondents' arguments about public health. Petitioners agree public health is an important interest for the state, the federal government, and the Tribe. For that reason, Rock River entered the Universal Tobacco Settlement Agreement with the Tribe and pays funds into escrow for each cigarette sold on the Winnebago Reservation. As Judge Erickson noted, this undercuts Respondents' argument that Nebraska's

escrow and bond requirements are needed to protect public health. Pet. App. 21a.

Whatever residual interest Nebraska has in public health runs headlong against tribal sovereignty. Respondents warn that the harms from nonmembers buying cigarettes on-reservation "could spill beyond the boundaries of the reservation." *Id.* But the same could be said for an Iowa cigarette manufacturer whose cigarettes are sold in Sioux City or Council Bluffs, Iowa. The fact that Nebraskans may cross a bridge to buy cigarettes in Iowa does not give Nebraska the authority to invade Iowa's sovereignty by imposing their escrow requirements on Iowa manufacturers. Absent a federal statute to the contrary, federal law likewise does not allow Nebraska to infringe on the Tribe's rights "to make [its] own laws and be ruled by them." *See Mescalero*, 462 U.S. at 332–33 (citations omitted).

The Court should grant certiorari to address proper application of the *Bracker* balancing test in the light of these strong federal and tribal interests in tribal self-sufficiency and economic independence.

C. The Eighth Circuit used an injunction to rewrite Nebraska statutes.

By blue-penciling a statutory distinction between members and nonmembers, the Eighth Circuit engaged in quintessentially legislative work in violation of this Court's decisions in *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320 (2006) and *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995).

Respondents do not dispute that the Eighth Circuit's proposed injunction injects a distinction between members and nonmembers that does not appear in the statutes. Opp. Br. at 19. Instead, Respondents contend that the judicially created distinction benefits Petitioners. Even if it were accurate, that argument could not save the Eighth Circuit's injunction from its fundamental flaw—that it substitutes the decision of a federal court for a law duly enacted by the Nebraska Legislature.

Respondents are also wrong about the injunction providing a purported benefit to Petitioners. The Eighth Circuit's modification of the injunction does not allow Rock River to "evade the escrow requirement" as to a portion of sales. Opp. Br. 19. The escrow requirement is unconstitutional as written, even under the Eighth Circuit's rationale, because it applies without regard to the tribal membership of consumers. In modifying the District Court's injunction, the Eighth Circuit wrote a new escrow requirement to replace the one it found unconstitutional. That does not benefit Petitioners. It harms them.

The modified injunction will also impose new requirements on Rock River foreign to the text of the statutes. Under the modified injunction, Rock River must somehow require retailers to provide information as to the membership status of each retail customer so that Rock River can pay funds into escrow for each sale to a nonmember. But Rock River does not sell to retail customers. Respondents suggest that "[t]here is nothing stopping Petitioners from working with retailers to obtain that

information." Opp. Br. 20. But there is also nothing in the statute requiring retailers to provide it. The Eighth Circuit's decision creates legal obligations without a means for Rock River to comply with them.

Respondents claim that the injunction will not require retroactive compliance with the escrow statute. But the Eighth Circuit instructed the District Court to tailor the injunction to enjoin Nebraska from enforcing the escrow statute "as to cigarettes they sell, *and have sold*, on the Winnebago Reservation to members of the Winnebago Tribe." Pet. App. at 19a (emphasis added). The injunction does nothing to stop Nebraska from seeking retroactive collection of fees, and Respondents tellingly do not commit that they will not do so. Opp. Br. at 20–21.

D. This case provides an ideal vehicle to address tribal sovereignty in the context of tribal economic development.

Respondents claim this case is a poor vehicle for the Court to address matters of tribal sovereignty because the Winnebago Tribe is not a party. To the contrary, Petitioners are in an ideal position to raise the questions presented in this case. The questions here arise at the intersection of tribal sovereignty and tribal economic development. Rock River and HCID are entities created by the Winnebago Tribe, endowed with its tribal sovereignty, for the express purpose of economic development. CA JA 259. There are no better parties to present the important questions at issue in this case.

CONCLUSION

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

Respectfully submitted,

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