No. 16-1498

In the Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,
PETITIONER,

v.

COUGAR DEN, INC., A YAKAMA NATION CORPORATION,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE PETITIONER

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General
Counsel of Record

JAY D. GECK
ANNE E. EGELER
Deputy Solicitors General

FRONDA C. WOODS
Assistant Attorney General

1125 Washington Street SE
Olympia, WA 98504-0100
(360) 753-6200
noahp@atg.wa.gov

QUESTION PRESENTED

An 1855 treaty between the United States and the Yakama Indian Nation provides members of the tribe "the right, in common with citizens of the United States, to travel upon all public highways." In a series of cases, the Ninth Circuit has rejected claims that this language exempts the Yakama from taxes or state fees on off-reservation commercial activities, holding instead that the language is limited to securing for tribal members a right to travel on public highways without paying a fee for that use or obtaining state approval. In this case, however, the Washington Supreme Court interpreted the treaty far more broadly, holding that it implicitly prohibits states from taxing "any trade, traveling, and importation" by the Yakama, even off-reservation, "that requires the use of public roads." The court therefore held that the treaty preempts Washington from imposing wholesale fuel taxes on Respondent Cougar Den, a Yakama-owned fuel distributor that imports millions of gallons of fuel into Washington annually for sale to the general public.

The question presented is:

Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways.

PARTIES

The Washington State Department of Licensing is the Petitioner and was the appellant in the Washington Supreme Court.

The Respondent is Cougar Den, Inc., a company incorporated under the laws of the Yakama Nation. Cougar Den, Inc., was the respondent in the Washington Supreme Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

To preserve the respective sovereignty of states and Indian tribes and to minimize disputes between them, this Court has adopted a bright-line approach to determine when states can tax tribes and their members. In Indian country, Indians are generally immune from state taxes. But outside Indian country, Indians are subject to generally applicable state taxes "[a]bsent express federal law to the contrary[.]" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). Because of the importance of state taxing power, "tax exemptions are not granted by implication"; there must be "a definitely expressed exemption[.]" *Id.* at 156 (internal quotation marks omitted).

This case involves application of Washington State's fuel tax to Respondent Cougar Den, a fuel company owned by a member of the Yakama Nation. It is undisputed that the tax is generally applicable and applies to Cougar Den's possession of fuel outside the Yakama reservation. Cougar Den refuses to pay the tax and has avoided tens of millions of dollars in Washington fuel taxes.

Cougar Den claims to be exempt from the tax under an 1855 treaty that never mentions taxes, fuel, or off-reservation trading rights. It relies upon a clause providing the Tribe "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, art. III, 12 Stat. 951, 953 (June 9, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859). Cougar Den maintains that the State cannot tax its fuel because it ships the fuel by highway.

The Washington Supreme Court agreed with Cougar Den. Although the court acknowledged that the tax "is assessed regardless of whether Cougar Den uses the highway," it nonetheless found that the tax conflicted with the Yakama right to travel by highway. Pet. App. 13a, 13a-14a. The court held that "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." Pet. App. 16a.

This Court should reverse. The Washington court ignored the clear rule that, for off-reservation activities, "tax exemptions are not granted by implication" and must be "definitely expressed[.]" *Mescalero Apache Tribe*, 411 U.S. at 156. "[T]he right, in common with citizens of the United States, to travel upon all public highways[,]" simply does not address (much less expressly preempt) taxes on goods, like Washington's fuel tax.

A contrary ruling would create a massive loophole in state tax regimes, allowing Yakama businesses to avoid taxes nationwide simply by transporting goods over highways. It also would give the Yakama Nation an unwarranted economic advantage over other tribes and non-tribal businesses. Cougar Den is already expanding its fuel business to other states, claiming exemption from their fuel taxes. Other Yakama businesses are claiming exemption from state and federal cigarette taxes on the same theory: cigarettes shipped by highway cannot be taxed. Nothing in the Yakama Treaty justifies creation of this expansive new right to avoid taxes on goods simply by transporting them by highway.

OPINIONS BELOW

The Washington Supreme Court opinion is reported at 188 Wash. 2d 55, 392 P.3d 1014 (2017). Pet. App. 1a-29a. The superior court order is unreported. Pet. App. 30a-43a. The final order of the Director of the Washington Department of Licensing is unreported. Pet. App. 44a-61a.

JURISDICTION

The Washington Supreme Court issued its opinion on March 16, 2017. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES

The full text of the relevant Washington fuel tax statutes is in the Joint Appendix at pages 116a to 131a. The most relevant excerpts are provided here.

Wash. Rev. Code § 82.36.020 (2012) (JA 119a)

(1) There is hereby levied and imposed upon motor vehicle fuel licensees . . . a tax at the rate computed in the manner provided in RCW 82.36.025 on each gallon of motor vehicle fuel.

(2) The tax imposed by subsection (1) of this section is imposed when any of the following occurs:

> (a) Motor vehicle fuel is removed in this state from a terminal if the motor vehicle fuel is removed at the rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state;
>
> (b) Motor vehicle fuel is removed in this state from a refinery if either of the following applies:

> (i) The removal is by bulk transfer and the refiner or the owner of the motor vehicle fuel immediately before the removal is not a licensee; or
>
> (ii) The removal is at the refinery rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state;
>
> (c) Motor vehicle fuel enters into this state if either of the following applies:
>
> (i) The entry is by bulk transfer and the importer is not a licensee; or
>
> (ii) The entry is not by bulk transfer;
>
> . . . .

Wash. Rev. Code § 82.36.022 (2012) (JA 120a)

> It is the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state. . . .

Wash. Rev. Code § 82.36.100 (2012) (JA 122-23a)

> Every person other than a licensee who acquires any motor vehicle fuel within this state upon which payment of tax is required under the provisions of this chapter, or imports such motor vehicle fuel into this state and sells, distributes, or in any manner uses it in this state shall, if the tax has not been paid, apply for a license to carry on such activities, comply with all the provisions of this chapter, and pay an excise tax at the rate computed in the manner provided in RCW 82.36.025 for each gallon thereof so sold,

distributed, or used during the fiscal year for which such rate is applicable. . . .

Article I of the Treaty with the Yakamas provides (JA 76a-77a):

> The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows [description omitted].

Article III of the Treaty with the Yakamas provides (JA 80-81a):

> That, if necessary for the public convenience, roads may be run through the said reservation ; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them ; as also the right, in common with citizens of the United States, to travel upon all public highways.
>
> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them ; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

STATEMENT

A. Washington's Fuel Tax

Washington's fuel tax is one of the State's most important and longstanding revenue sources. The State has taxed fuel since 1921, and the tax generates over $1.5 billion annually.[1]

Over the years, Washington has changed the tax several times to minimize tax evasion and respond to changing circumstances. Most recently, the State significantly changed its approach to collecting fuel taxes in response to *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005). There, the court held that the incidence of the tax at the time fell on retailers (gas stations), including those operating within Indian reservations. *Id.* at 1262. Because states generally cannot impose taxes on tribes or their members within their reservations, the district court held that the State was barred from collecting its fuel tax from tribally-owned gas stations within Indian country. *Id.* The district court based its ruling on this Court's decision in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), which reached the same conclusion as to a similar fuel tax.

In *Chickasaw Nation*, however, this Court made clear that "if a State is unable to enforce a tax because the legal incidence . . . is on Indians or Indian tribes, the State generally is free to amend its law to

---

[1] 1921 Wash. Sess. Laws p. 669 (ch. 173); Wash. State Dep't of Transp., *History of State Transportation Revenue + Forecasts by Fiscal Year* (Excel spreadsheet), https://www.wsdot.wa.gov/sites/default/files/2018/03/15/Economic-Data-TransportationRevenueHistory.xlsx (reporting for 2016).

shift the tax's legal incidence." *Chickasaw Nation*, 515 U.S. at 460. After the district court ruled in *Squaxin Island Tribe*, the Washington Legislature did exactly that. Rather than requiring payment of the tax after a retail sale on the reservation, Washington changed the incidence of the tax to a licensee's first possession of motor vehicle fuel in the State. Wash. Rev. Code §§ 82.36.020, .026; Wash. Rev. Code §§ 82.38.030, .035.[2] The licensees liable for the tax include fuel suppliers and importers. JA 121a, Wash. Rev. Code § 82.36.026; JA 129a, Wash. Rev. Code § 82.38.035. In keeping with this new structure, the State's express statutory intent was changed from a tax on end consumers to a tax "on the first taxable event and upon the first taxable person" within the State. Compare former Wash. Rev. Code § 82.36.407(1) (1999) to JA 120a, Wash. Rev. Code § 82.36.022 (2012) and JA 129a, Wash. Rev. Code § 82.38.031 (2012).

Washington's tax is now assessed on the first possession of each gallon of fuel withdrawn from a refinery or terminal in the State or brought into the State (unless the fuel is in the tank of a car). JA 119a-20a, Wash. Rev. Code §§ 82.36.020, .022; JA 126-28, Wash. Rev. Code § 82.38.030. For example,

---

[2] Unless otherwise indicated, citations to Washington fuel tax statutes refer to the 2012 versions in effect when the events of this case occurred. Chapters 82.36 and 82.38 of the Washington Revised Code were consolidated without substantive change into a single Chapter 82.38 as of July 2016. 2013 Wash. Sess. Laws p. 1322 (ch. 225); 2015 Wash. Sess. Laws p. 1178 (ch. 228, § 40).

when a tanker truck or rail car is loaded at a refinery in Washington, the tax attaches when the fuel is loaded.[3] JA 119a, Wash. Rev. Code § 82.36.020(2)(a)-(b); JA 127a, Wash. Rev. Code § 82.38.030(7)(a)-(b). Similarly, if fuel is withdrawn at an out-of-state refinery and brought into Washington, the tax is imposed on the first possession in the State. JA 119a, Wash. Rev. Code § 82.36.020(2)(c); JA 120a, Wash. Rev. Code § 82.36.022; JA 121a, Wash. Rev. Code § 82.36.026(3); JA 127a, Wash. Rev. Code § 82.38.030(7)(c); JA 129a, Wash. Rev. Code § 82.38.035(3).

A taxable first possession of motor vehicle fuel never occurs within the Yakama Reservation. There are no refineries or terminals located within the Reservation. JA 40a. The Reservation is situated entirely within Washington State and does not touch the state border. JA 101a.

Virtually every tribe in Washington that has gas stations within its reservation has entered a fuel-tax agreement with the State.[4] Under the agreements, tribally-owned gas stations purchase fuel exclusively from taxpaying, state-licensed fuel companies. Wash. Rev. Code § 82.38.310(3)(a) (2018). The State then

---

[3] First possession is not taxed if the fuel is obtained by a licensed exporter for delivery outside Washington. Wash. Rev. Code § 82.36.020(2)(b)(ii); Wash. Rev. Code § 82.38.030(7)(b)(ii).

[4] Wash. State Dep't of Licensing, *Tribal Fuel Tax Agreement Report* 2 (Jan. 2018), https://www.dol.wa.gov/about/docs/leg-reports/2017-tribal-fuel-tax-agreement.pdf (reporting for 2016).

refunds to the tribes an amount—typically equal to 75% of the state fuel tax revenue—from the fuel purchased and resold by tribal retailers.[5] Tribes are then able to use this revenue for their transportation and public safety needs. Wash. Rev. Code § 82.38.310(3)(b) (2018). The Yakama Nation is the only tribe in Washington that has gas stations within its reservation but has chosen to terminate its fuel agreement with the State. JA 28a, 102a-03a, 105a-10a.

B. Cougar Den Is Owned by a Yakama Indian and Brought Millions of Gallons of Fuel into Washington Without Paying the State Fuel Tax

Cougar Den is owned by Kip Ramsey, a member of the federally-recognized Yakama Nation. Pet. App. 2a, 62a-63a (Stip. Facts 2, 5-7). The Tribe signed a treaty with the United States in 1855 that created the Yakama Reservation in Washington while ceding the Tribe's claim to any "right, title, and interest" in other lands. Treaty with the Yakamas, arts. I & II, 12 Stat. at 951-52. The reservation includes hundreds of thousands of acres owned in fee by individual Indian and non-Indian landowners, with the remainder held in trust by the United States. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 415 (1989). Much of the fee land is in three cities within the reservation. *Id.* "The remaining fee land is scattered throughout the reservation in a 'checkerboard' pattern." *Id.* State highways and county roads funded by state fuel taxes

[5] *Id.* at 1-2.

serve these cities and the reservation. *See Brendale*, 492 U.S. at 445 (Stevens, J., concurring); Wash. Rev. Code § 46.68.090.[6]

At the time of the events in this case, Cougar Den had never applied for or held a Washington license to supply fuel. Pet. App. 49a, 63a. In 2012, it obtained an Oregon fuel dealer license and began using it to purchase vast quantities of fuel in Portland, Oregon. Pet. App. 63a, 64a. Cougar Den avoided paying Oregon fuel taxes by representing that its fuel would be exported into Washington under a tribal license. *See* Or. Rev. Stat. § 319.240. Cougar Den stipulated that it imported millions of gallons of fuel in a matter of months without paying Washington taxes. Pet. App. 64a (Stip. Facts 12-14). Cougar Den sold nearly all of this fuel to Yakama-owned gas stations within the Yakama Reservation. Pet. App. 50a. Those stations then sold the fuel to the general public. Pet. App. 50a.

C. When Washington's Department of Licensing Sought to Collect Cougar Den's Unpaid Taxes, Cougar Den Claimed to be Exempt Under the Yakama Treaty

Washington law directs the Department of Licensing to administer motor vehicle fuel taxes. Wash. Rev. Code § 46.01.040(1). After learning that Cougar Den had brought over 5 million gallons of fuel into Washington without being licensed or paying taxes, the Department assessed Cougar Den $3.6

---

[6] *See also* Wash. State Dep't of Transp., *Washington State Highway Map*, http://www.wsdot.wa.gov/Publications/HighwayMap/view.htm (last visited Aug. 6, 2018).

million in taxes, penalties, and interest for Cougar Den's activities between March and October 2013. Pet. App. 49a; JA 10a-14a. Cougar Den continued to bring fuel into Washington without paying taxes and without a license. The Department continued to assess taxes, and tens of millions of dollars in later assessments are stayed pending the outcome of this case. *See* JA 19a-26a (Assessments 760M, 761M). Cougar Den also began shipping untaxed fuel from Oregon to several Indian reservations in California. *See* Pet. App. 27a.

In response to the Department's assessment, Cougar Den asked for a formal administrative hearing. JA 15a-18a. At the hearing, Cougar Den's arguments were limited to questions of law. JA 7a-8a, 15a-18a. Cougar Den's primary argument was that it was owned by a member of the Yakama Nation and that the Yakama Treaty prohibited state motor vehicle fuel taxes from being levied on its fuel. BIO App. 6; Pet. App. 54a (Conclusion 10). Article III of that Treaty specifies that the United States can build roads through the reservation and that the Yakama people have "the right, in common with citizens of the United States, to travel upon all public highways."[7]

[7] Nearly identical language concerning travel upon public highways appears in two other treaties negotiated around the same time with tribes in Idaho and Montana. *See* Treaty with the Nez Percés, art. III, ¶ 1, 12 Stat. 957, 958 (June 11, 1855, ratified Mar. 8, 1859, proclaimed Apr. 29, 1859); Treaty with the Flatheads, art. III, ¶ 1, 12 Stat. 975, 976 (July 16, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859).

In response to cross motions for summary judgment, an administrative law judge initially ruled in favor of Cougar Den. BIO App. 1-15. Under state law, an agency director reviews initial orders by administrative law judges, so the matter then went to the Director of Licensing. BIO App. 15. The Director reviewed the record and entered a final order rejecting Cougar Den's treaty defense. Pet. App. 44a, 56a-58a.

The Director relied on three legal conclusions. First, the "Structure of Washington Fuel Tax Laws" showed that the tax was imposed outside the reservation. Pet. App. 51a-53a. Cougar Den did not dispute this conclusion. Second, "[o]utside of Indian reservations, Indians are subject to state taxes and regulations absent express federal law to the contrary." Pet. App. 54a (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). Third, the order held that no treaty language expresses a right to sell fuel free from state taxes or without the required license. Pet. App. 56a-58a. The taxes do not violate a treaty right because they "are not a charge for Cougar Den's use of public highways," but relate to the fuel itself. Pet. App. 58a.

Cougar Den sought judicial review under the State Administrative Procedure Act, Wash. Rev. Code § 34.05.570(3). A state superior court reversed the Final Order, concluding that the Director erred in interpreting the treaty. Pet. App. 34a-35a.[8] The trial judge concluded that the treaty right to travel "shields

[8] Under state law, Washington courts review only the final agency order, not initial orders. *Tapper v. Emp't Sec. Dep't*, 122 Wash. 2d 397, 404, 858 P.2d 494 (1993) (citing Wash. Rev. Code § 34.05.464(4)).

the transport of fuel" moved on public highways from taxation. Pet. App. 39a. The State appealed directly to the Washington Supreme Court. Pet. App. 3a.

D. The Washington Supreme Court Held That the Yakama Treaty Preempts Taxing Goods Transported over Public Highways

The Washington Supreme Court affirmed in a divided decision. Because the only issue in the case was a legal question of treaty interpretation, the court applied de novo review. Pet. App. 3a-4a.

The court began by noting that the incidence of this tax is outside the Yakama Reservation, and that "[o]utside an Indian reservation, Indian citizens are subject to state tax laws, '[a]bsent express federal law to the contrary.'" Pet. App. 4a (quoting *Mescalero Apache Tribe*, 411 U.S. at 148 (second alteration in original)). The majority then noted that "[a] treaty constitutes an express federal law[,]" Pet. App. 4a, but never cited or discussed the *Mescalero* test again. Instead, the majority moved quickly past the treaty language and focused on how it thought the Yakama understood the treaty when it was signed. Pet. App. 6a-9a, 16a.

In analyzing the Treaty's history, the majority relied primarily on *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). Pet. App. 6a. *Cree* involved "Washington truck license and overweight permit fees," i.e., fees paid for using highways. *Cree*, 157 F.3d at 764. The Ninth Circuit deemed such fees preempted based on the Yakamas' understanding that they would have "the right to transport goods to market over public highways without payment of fees *for that use*." *Id.* at 769 (emphasis added). The Washington court majority

recognized that Cougar Den's case is different because here "the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway." Pet. App. 13a-14a. But it held that this was "immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway." Pet. App. 14a. The majority concluded that "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." Pet. App. 16a.

To support this expansion of *Cree*'s holding beyond fees for using the highway, the majority cited *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). Pet. App. 13a. *Smiskin* held that Yakama members could not be prosecuted for failing to give the State notice before transporting cigarettes. The majority deemed *Smiskin* controlling, saying: "In both cases, the State placed a condition on travel that affected the Yakamas' treaty right to transport goods to market without restriction." Pet. App. 13a.

The majority sought to distinguish *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 1542 (2015), which involved a Yakama-owned cigarette company that shipped its cigarettes nationwide. The company argued that the Treaty exempted it from fees the State imposes on cigarette manufacturers. The Ninth Circuit disagreed, saying: "[T]he Treaty is not an express federal law that exempts King Mountain from state economic regulations." *Id.* at 994. The Washington court dismissed *King Mountain*, asserting that "travel was not at issue" there. Pet. App. 13a.

Chief Justice Fairhurst and Justice Wiggins dissented, finding that the majority's reasoning contradicted precedent and would create a giant hole "in Washington's ability to tax goods consumed within the state, without legal basis." Pet. App. 17a.

The dissent pointed out that the majority decision conflicted with Ninth Circuit precedent. "*Smiskin* does not stand for the proposition the majority asserts—the Yakama Nation's treaty right to travel is a de facto right to trade simply because travel is necessary for trade. Indeed, a reading of *King Mountain* confirms the opposite to be true." Pet. App. 24a. "Travel was necessary for the trade at issue in *King Mountain*, yet the Ninth Circuit found the state obligation burdened only trade, rather than travel and, therefore, was not preempted . . . ." Pet. App. 24a (citing *King Mountain*, 768 F.3d at 997-98).

The dissent also noted that King Mountain had made the same argument as Cougar Den, claiming that the right to travel "'unequivocally prohibit[s] imposition of economic restrictions . . . on the Yakama people's Treaty right to . . . trade.'" Pet. App. 25a (alterations in original) (quoting *King Mountain*, 768 F.3d at 997). But the Ninth Circuit held that the right to travel did *not* carry with it a right to avoid regulation or taxation of trade; it only "'guarantee[d] the Yakamas the right to transport goods to market over public highways without payment of fees for that use.'" Pet. App. 25a (quoting *Cree*, 157 F.3d at 769).

The dissent concluded that the majority "puts at risk . . . Washington's, and potentially other states', ability to tax goods[.]" Pet. App. 27a. "Nothing indicates any of the parties understood the Treaty of 1855 to provide for such a right." Pet. App. 28a.

SUMMARY OF ARGUMENT

This Court has adopted a bright-line approach to determine when states can tax Indians. Absent congressional authorization, states cannot tax Indians within Indian country. But outside of Indian country, generally applicable state and federal taxes apply to Indians "[a]bsent express federal law to the contrary[.]" *Mescalero Apache Tribe*, 411 U.S. at 148. Exemptions from such taxes must be "clearly expressed" and "'unambiguously proved.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (quoting *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988)). This Court has rigorously enforced these principles because they serve important goals, including reducing state-tribal disputes and ensuring efficient tax administration.

It is undisputed in this case that Washington's fuel tax is nondiscriminatory and applies to Cougar Den outside the Yakama Reservation. Cougar Den therefore must show that federal law "clearly expresse[s]" and "'unambiguously prove[s]'" an intent to exempt it from this tax. *Chickasaw Nation*, 534 U.S. at 95. Cougar Den can make no such showing.

Cougar Den claims exemption based on the Yakama Treaty clause providing the tribe "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, art. III, 12 Stat. at 953. But nothing in this language

expresses an intent to preempt application of taxes like Washington's fuel tax. This is a tax on the possession of goods—fuel—and "is assessed regardless of whether Cougar Den uses the highway[.]" Pet. App. 13a-14a. Nothing in the right-to-travel clause preempts application of a tax such as this.

In reaching a contrary conclusion, the Washington Supreme Court relied primarily on a lopsided and incomplete description of how the parties allegedly understood the treaty when it was signed. But alleged understandings cannot create unwritten tax exemptions, and even if they could in some generic sense, they cannot do so here. Nothing in the treaty's text or negotiating history suggests that the parties understood they were creating a permanent right for the Yakama to be free of taxes on goods simply because they transport those goods by highway.

The consequences of accepting Cougar Den's expansive view of the treaty would be significant and unfortunate. Cougar Den could continue expanding its fuel business to sell tax-free fuel throughout Washington and in Indian Country in other states. Other Yakama businesses could continue and expand their efforts to evade taxes on other goods, particularly cigarettes, on the same theory that the Washington court applied here. States and the federal government would thus be deprived of crucial tax revenue and power to regulate certain goods. And other tribes and non-tribal businesses would be placed at a severe, unwarranted disadvantage by the

Yakama's expansive exemption from taxation of goods transported by highway. This Court should reverse and hold that Washington's fuel tax applies to Cougar Den.

ARGUMENT

A. This Court's Precedent Requires Express Federal Law to Preempt Application of Nondiscriminatory, Off-Reservation Taxes Like the Tax Here

It is undisputed that the fuel tax at issue here is neutral as between Indians and non-Indians and that its incidence is off-reservation. Pet. App. 4a-5a, 54a-55a. Under this Court's precedent, such taxes are preempted only if they conflict with express federal law.

This Court has adopted a bright-line approach to determine when states can tax tribes or their members, with the test turning on where the incidence of the tax falls. When a state imposes a non-discriminatory tax *outside* Indian country, as here, the tax applies to a tribe and its members "[a]bsent express federal law to the contrary[.]" *Mescalero Apache Tribe*, 411 U.S. at 148. But if a State seeks to tax a tribe or its members *within* Indian Country, the opposite is true: the tax is invalid "[a]bsent explicit congressional direction to the contrary[.]" *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 128 (1993); *Chickasaw Nation*, 515 U.S. at 459 ("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.").

This bright-line standard about where the tax applies serves several crucial purposes emphasized by this Court. It avoids needless disputes and litigation between states and tribes. *See, e.g.*, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005) ("'The need to avoid litigation . . . counsels in favor of a bright-line standard . . . .'" (quoting *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999))). It ensures efficiency and predictability in tax administration. *See, e.g.*, *Wagnon*, 546 U.S. at 113; *Chickasaw Nation*, 515 U.S. at 459-60 ("[T]ax administration requires predictability."). It "accords due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members." *Chickasaw Nation*, 515 U.S. at 459. And it appropriately acknowledges the respective sovereignty of states and tribes. *See, e.g.*, *Wagnon*, 546 U.S. at 112-13 (explaining that this rule "relies 'heavily on the doctrine of tribal sovereignty . . . which historically gave state law "no role to play" within a tribe's territorial boundaries'" (quoting *Sac & Fox Nation*, 508 U.S. at 123-24), and describing "the special geographic sovereignty concerns" that justify a bright-line rule).

To protect these important principles, this Court has repeatedly refused to modify the test at the request of either states or tribes. For example, when Oklahoma argued that the Court should look beyond the legal incidence of an on-reservation tax to its economic impact, this Court refused, emphasizing that "our focus on a tax's legal incidence

accommodates the reality that tax administration requires predictability." *Chickasaw Nation*, 515 U.S. at 459-60. Similarly, when a tribe argued that an off-reservation fuel tax like the one at issue here was preempted because it interfered with tribal taxing authority, this Court refused to modify its normal bright-line test. *See, e.g.*, *Wagnon*, 546 U.S. at 114-15 (refusing to apply a different test despite Tribe's "claim that the Kansas motor fuel tax interferes with its own motor fuel tax").

Because the Court has adopted such a bright-line rule based on the incidence of the tax, where the incidence falls is "[t]he initial and frequently dispositive question in Indian tax cases[.]" *Chickasaw Nation*, 515 U.S. at 458. Here, the answer to this "frequently dispositive question" is undisputed: the incidence is off-reservation.

As to such a tax, this Court has forcefully described the principles to be applied. Tribes and their members are subject to nondiscriminatory off-reservation taxes "[a]bsent a 'definitely expressed' exemption[.]" *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Choteau v. Burnet*, 283 U.S. 691, 697 (1931)). "[T]ax exemptions are not granted by implication." *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943)). Instead, they must be "clearly expressed" and "'unambiguously proved.'" *Chickasaw Nation*, 534 U.S. at 95 (quoting *Wells Fargo Bank*, 485 U.S. at 354). If Congress wants to preempt state

taxes, it must "say so in plain words"; "[s]uch a conclusion cannot rest on dubious inferences." *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Oklahoma Tax Comm'n*, 319 U.S. at 607); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870) (holding that if an exemption had been intended, it "would doubtless have been expressed"). These are the principles that apply here.

B. Nothing in the Yakama Treaty Expressly Preempts Application of the Tax Here

Respondent Cougar Den claims exemption from Washington's fuel tax based on the Yakama Treaty clause guaranteeing members "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, 12 Stat. at 953 . Nothing in this language, however, expressly exempts the Yakama from Washington's fuel tax.

In analyzing Cougar Den's claim, this Court starts with the treaty's plain language, liberally construing ambiguous terms in favor of the Tribe. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999) ("[T]he starting point for any analysis . . . is the treaty language itself."); *Chickasaw Nation*, 515 U.S. at 465. The Court does not rewrite or expand the treaty language or ignore clear limits on its scope. *See, e.g.*, *id.* at 466 ("[L]iberal construction cannot [overcome] a clear geographic limit in the Treaty."); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) (holding that treaties "cannot be re-written or expanded beyond their clear terms").

Applying these principles, nothing in the Yakama Treaty, even liberally construed, provides a

"'definitely expressed' exemption" from Washington's fuel tax. *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Choteau*, 283 U.S. at 696). Washington's fuel tax does not restrict the Yakama's (or anyone's) right to travel on public highways. The tax is assessed per gallon of fuel and does not depend in any way on use of a highway. As the Washington Supreme Court acknowledged, the tax "is assessed regardless of whether Cougar Den uses the highway." Pet. App. 13a-14a. It is thus untenable to say that the Yakama right to travel on public highways "clearly expresse[s]" and "'unambiguously prove[s]'" preemption of Washington's fuel tax. *Chickasaw Nation*, 534 U.S. at 95 (quoting *Wells Fargo Bank*, 485 U.S. at 354). The right-to-travel clause simply does not address (much less expressly preempt) taxes on goods that happen to be transported over public highways.

This Court's decisions in *Mescalero Apache Tribe* and *Chickasaw Nation* are instructive. Both confirm that the right-to-travel provision comes nowhere close to constituting a definitely expressed exemption from Washington's fuel tax.

Mescalero Apache Tribe addressed the Indian Reorganization Act of 1934, which provided that "'any lands or rights acquired' pursuant to" the Act "'shall be exempt from State and local taxation.'" *Mescalero Apache Tribe*, 411 U.S. at 155 (quoting 25 U.S.C. § 465, subsequently renumbered as 25 U.S.C. § 5108). On that basis, this Court held preempted a state use tax on "permanent improvements" affixed to off-reservation land the tribe leased from the United States. *Id.* at 158. But the Court rejected the

argument that the tax exemption extended to income the Tribe earned from the tax-exempt land. The Court emphasized that, "[o]n its face, the statute exempts land and rights in land, not income derived from its use." *Mescalero Apache Tribe*, 411 U.S. at 155. It then held that in the absence of clear statutory language, courts "will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax." *Id.* at 156.

Here, "[o]n its face," *id.* at 155, the Treaty secures "the right, in common with citizens of the United States, to travel upon all public highways," Treaty with the Yakamas, art. III, 12 Stat. at 953. This language says nothing about a tax exemption at all, much less an exemption from a tax on fuel or other goods, even if they happen to be transported by highway. If a specific tax exemption for land does not exempt income earned from that land, then surely a provision that says nothing about taxes and never mentions fuel or any other good does not preempt a tax on fuel.

In *Chickasaw Nation*, the Tribe argued that its members who worked for the tribal government on the reservation but lived outside the reservation were exempt from Oklahoma's income tax, a non-discriminatory off-reservation tax like the one here. The Tribe cited a treaty provision stating that "no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation[.]" *Chickasaw Nation*, 515 U.S. at 465 (first alteration in original) (quoting Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333-34). The Tribe contended that "the State's income tax, when imposed

on tribal members employed by the Tribe, is a law 'for the government of the [Chickasaw] Nation[.]'" *Chickasaw Nation*, 515 U.S. at 465 (first alteration in original).

This Court rejected the Tribe's argument, saying that the Treaty's terms limited its reach to "'within [the Nation's] limits.'" *Id.* at 466 (alteration in original). The Court therefore declined to "read the Treaty as conferring supersovereign authority to interfere with another jurisdiction's sovereign right to tax income[.]" *Id.*

Similarly, the Yakama Treaty language is limited to guaranteeing "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, art. III, 12 Stat. at 953. This language says nothing whatsoever about preempting taxes, much less preempting an off-reservation tax imposed on possession of goods where the tax does not restrict or condition the taxpayer's use of the highway.

In nonetheless concluding that the right-to-travel clause preempted application of Washington's fuel tax, the Washington Supreme Court cited four rationales. None is persuasive.

1. Cougar Den's decision to transport fuel by highway does not convert Washington's fuel tax into a restriction on highway travel

Although the Washington court acknowledged that Washington's fuel tax "is assessed regardless of whether Cougar Den uses the highway," Pet. App. 13a-14a, it nonetheless held that the Yakama right to

travel on public highways preempted the tax. The court's primary rationale was that "in this case, it was impossible for Cougar Den to import fuel without using the highway." Pet. App. 14a. That conclusion was both factually unsupported and legally irrelevant.

Neither the administrative agency that initially adjudicated this dispute nor the superior court judge who reviewed the agency's decision made any finding that "it was impossible for Cougar Den to import fuel without using the highway." Pet. App. 14a. There are many ways to import fuel into Washington, from railroad to barge to pipeline, and an importer can use any of them.

More importantly, even if the highway were the only way for Cougar Den to import fuel, that would not warrant rewriting the Treaty to expressly exempt the company from this uniform, off-reservation tax. The Treaty guarantees "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, art. III, 12 Stat. at 953. Nothing in this language says anything about preempting off-reservation taxes on possession of goods simply because the only practical way to transport them is by highway.

This "practicability" argument is not only untethered from the treaty text, it also leads to wildly implausible results that the parties could not possibly have intended. For example, it would mean that whether goods are exempt from taxes would depend on factors like whether the goods are too heavy to transport by airplane. Absolutely nothing in the treaty language or the parties' intentions would support that result. More broadly, this rationale

would mean that the right to travel by highway created an exemption from future taxes based on the happenstance of what means of transportation for a good were then practicable. Under this reasoning, construction of an airstrip or rail line within the Yakama Reservation (both of which already exist) would suddenly render certain goods subject to taxation because it would become practical to transport them by means other than highway. That makes no sense.

This reasoning also (as detailed further below) would lead to the absurd conclusion that the parties intended to grant the Yakama carte blanche to transport and sell goods nationwide free of taxes on those goods so long as the only practical way to transport them was by highway. The treaty language contains no inkling that it created such an expansive right, the shape of which would change constantly as the means of transportation evolve.

2. That the taxable event here occurred when Cougar Den brought fuel into Washington does not convert Washington's fuel tax into a restriction on highway travel

The Washington Supreme Court also opined that Washington's fuel tax is a tax on highway travel because the State "taxes the importation of fuel." Pet. App. 16a. This rationale for claiming the tax is for traveling on public highways cannot withstand scrutiny.

Washington's fuel tax applies to fuel purchased both inside and outside of Washington, not just to imported fuel. The tax applies to a licensee's

first possession in the State, regardless of where the fuel is obtained. When a licensee acquires fuel from a terminal in Washington, the tax immediately applies to the possession of the fuel. JA 119a, Wash. Rev. Code § 82.36.020(2); JA 121a, Wash. Rev. Code § 82.36.026(1); JA 127a-28a, Wash. Rev. Code § 82.38.030(7); JA 129a, Wash. Rev. Code § 82.38.035(1). And when a licensee purchases fuel at a facility outside Washington, the tax applies the moment the fuel crosses into Washington, because that is the first possession in the State. Pet. App. 53a; JA 119a, Wash. Rev. Code § 82.36.020(2)(c); JA 120a, Wash. Rev. Code § 82.36.022; JA 121a, Wash. Rev. Code § 82.36.026(3); JA 127a-29a, Wash. Rev. Code § 82.38.030(7)(c); JA 129a, Wash. Rev. Code § 82.38.035(3).

The fact that bringing fuel into Washington is one possible trigger for the tax does not convert the tax into a fee or tax on highway travel. For one thing, the tax applies even if the licensee imports the fuel without using the highway, such as by railcar. *See* JA 119a-20a, Wash. Rev. Code § 82.36.020; JA 126a-28a, Wash. Rev. Code § 82.38.030. More importantly, just because importing fuel by highway is one possible trigger for the tax does not turn this into a tax on highway travel; the nature of a tax is not determined by one possible application. *Cf. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) ("reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole'" (alteration in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))). The tax applies to the fuel itself, is imposed per gallon of fuel

possessed, and "is assessed regardless of whether Cougar Den uses the highway[.]" Pet. App. 13a-14a. Calling this tax an import tax does not make it a tax on highway travel.

Here again, the absurd consequences of the Washington court's reading demonstrate that it cannot be correct. If any tax or fee on goods the Yakama transport by highway is preempted if it can be characterized as an "import tax," then the Yakama could create a thriving business by avoiding tariffs on goods from other countries simply by trucking the goods in from Canada or Mexico. Nothing in the treaty language justifies that result.

3. Nothing in the Ninth Circuit's decisions interpreting the Treaty converts Washington's fuel tax into a restriction on highway travel

The Washington Supreme Court also justified its holding based in part on Ninth Circuit decisions interpreting the Yakama Treaty right to travel. This Court is of course not bound by those decisions. But even accepting those decisions as persuasive, they support application of Washington's fuel tax here.

The Ninth Circuit has interpreted the right-to-travel clause several times. It has rejected arguments that it preempts taxes or regulations directed at goods themselves, like the fuel tax here. Instead, it has held that the clause preempts only state taxes and fees imposed *for using highways* and requirements that the Yakama obtain state approval prior to traveling.[9]

---

[9] The Ninth Circuit's view that the treaty preempts non-discriminatory state charges directly for using highways is

The Ninth Circuit first interpreted this treaty language in *Cree v. Waterbury*, 78 F.3d 1400 (9th Cir. 1996). It rejected the district court's ruling that the meaning of the right-to-travel clause had already been determined in cases interpreting other sections of the treaty, *id.* at 1403-05, and remanded for the district court "to examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right." *Id.* at 1405.

The district court conducted that inquiry and the case returned to the Ninth Circuit in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). There the court held that the treaty right to travel on highways preempted "various Washington truck license and overweight permit fees," i.e., "fees imposed for use of the public highways," when Yakamas used highways to transport logs from reservation forest lands to off-

---

extremely questionable. The Yakama Treaty right "to travel upon all public highways" is "in common with citizens of the United States." And as the United States has previously argued, "a right in common with other citizens to travel on highways does not expressly exempt the Yakama from 'generally applicable' taxes." Brief For The United States In Opposition at 8, *Ramsey v. United States*, No. 02-1547 (U.S. June 26, 2003), https://www.justice.gov/osg/brief/ramsey-v-united-states-opposition. The Ninth Circuit agreed with the United States as to federal taxes and fees in *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), holding that the right-to-travel clause "contains no exemptive language. 'In common with' does not express an intent to exempt the Yakama from taxes." *Id.* at 1080. But the Court need not resolve here whether the treaty preempts charges directly for using the highway, because Washington's fuel tax is *not* a charge or condition for using the highway.

reservation mills. *Cree*, 157 F.3d at 764, 768. The court held that the treaty "guarantee[d] the Yakamas the right to transport goods to market over public highways without payment of fees *for that use*." *Id.* at 769 (emphasis added).

The Ninth Circuit quickly made clear that this treaty right was limited and did not extend even to federal highway taxes. In *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812 (2003), the court held that a different approach to treaty interpretation applies depending on whether a state or federal tax is at issue. *Id.* at 1078. As to both state and federal taxes, "tax laws applied to Indians outside of Indian country . . . are presumed valid absent express federal law to the contrary." *Id.* at 1077 (internal quotation marks omitted). But with a federal tax, the court said, there must be "express exemptive language" in the treaty before the court even considers canons of construction to determine whether "the exemption applies to the tax at issue." *Id.* at 1079. By contrast, the court said, when a court evaluates a state tax, "there is no requirement to find express exemptive language *before* employing the canon of construction favoring Indians." *Id.* at 1079. Applying the first of these two standards, the court held that the treaty "contains no 'express exemptive language'" and thus creates no treaty right to avoid federal taxes on fuel used by trucks on the highway. *Id.* at 1080.[10]

---

[10] The State is unaware of any other Circuit applying this rule that courts should take a different approach to interpreting treaties depending on whether a state or federal tax is at issue. But the Court need not address this issue here because, as

The Ninth Circuit also limited its reasoning in the only other case in which it has found preemption of state law under the right-to-travel clause. In *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), the court held that the Treaty guaranteed the Yakamas the right to travel on public highways without obtaining prior approval from the State. *Id.* at 1267. The court therefore held that the Treaty barred prosecution of two Yakama members for transporting untaxed cigarettes without first notifying the State. *Id.* But the court never suggested that the State cigarette tax itself was preempted as to the Yakama, only that the requirement to provide notice before using the highways was. *Id.* at 1271; *see also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (upholding application of this tax to the Yakama); *United States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008) (holding that the treaty did not preempt prosecution of a Yakama tribal member for conspiring to violate federal law by agreeing to transport untaxed cigarettes in violation of state law, because the untaxed cigarettes were contraband); *Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258 (E.D. Wash. 2010) (holding that *res judicata* barred Tribe from claiming that the right to travel preempts state cigarette taxes because "*Colville* squarely holds that the Yakama Treaty of 1855 does not preempt"

---

explained above and below, Washington's fuel tax is not a tax for using the highway, but rather a tax on goods. Thus, even under the Ninth Circuit's approach, Washington's off-reservation tax is lawful regardless of whether it is imposed by the State or the federal government.

those laws), *aff'd on other grounds*, 658 F.3d 1078 (9th Cir. 2011).

Finally, in *King Mountain*, the court considered whether the treaty preempted a state escrow fee that tobacco manufacturers had to pay on each unit of cigarettes they sold. *King Mountain*, 768 F.3d at 991. King Mountain was a Yakama-owned tobacco manufacturer that engaged in extensive interstate trade as part of its manufacturing process, *id.* at 991, and it argued that Article III of the Treaty exempted it from the escrow fee. The court disagreed. The court first emphasized that regardless of whether a state or federal tax is at issue, an off-reservation tax is preempted only if "an express federal law" exempts the tribal business. *Id.* at 994. Because a state tax was at issue, the court considered canons of construction in assessing whether the right-to-travel clause expressly exempted King Mountain. *Id.* at 995. But it found that "the relevant text of the Yakama Treaty is not ambiguous and the plain language of the Treaty does not provide a federal exemption from the Washington escrow statute." *Id.* at 995. While "the plain text of Article III . . . reserved to the Yakama the right 'to travel upon all public highways[,]'" nothing in the treaty's text created a "right to trade" free of state taxes or regulations. *Id.* at 997.

The Washington Supreme Court attempted to distinguish *King Mountain* while treating *Smiskin* as nearly dispositive. Pet. App. 13a ("Smiskin is nearly identical to this case."). Neither conclusion is tenable.

Smiskin did not invalidate a tax on goods; it invalidated what it called a direct condition on travel on public highways—a requirement that Yakama

members notify the State before traveling with untaxed cigarettes. Indeed, *Smiskin* never hinted that the underlying cigarette tax was invalid as to the Yakama. Thus, even if *Smiskin* is rightly decided (a point the State does not concede and that this Court need not address), it provides no support for reading the right to travel provision as creating an exemption from taxes on goods. [11]

Meanwhile, the Washington court brushed aside the Ninth Circuit's decision in *King Mountain* on the ground that, "in *King Mountain,* travel was not at issue." Pet. App. 13a. The Ninth Circuit opinion in *King Mountain* refutes that statement. "King Mountain ships its tobacco crop to Tennessee where it is threshed. Then the tobacco is sent to a factory in

---

[11] The State agrees with the United States that *Smiskin* was wrongly decided. *See* Brief for the United States as Amicus Curiae at 17. The purpose of Washington's pre-notification requirement was to enforce the collection of the State's tax on cigarettes. It is clear that such taxes may be applied to on-reservation sales of cigarettes to non-Indians, even by a tribe or its members, where the incidence of the tax is on the non-Indian purchaser. *See, e.g.*, *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 154-157; *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481-83 (1976). The pre-notification requirement under Washington law creates no conflict with the Yakamas' ability to use public highways; it is at most a modest regulatory requirement that serves the comprehensive cigarette tax regime. Under *Colville* and *Moe*, both of which involved tribes whose treaties contain the "right to travel" language, such modest requirements are valid because the Tribe and its members were not exempt from enforcement of the State's overall cigarette tax regime. Thus, there was no sound reason for the Ninth Circuit in *Smiskin* to conclude that the pre-notification requirement violated the Treaty.

North Carolina where more tobacco is purchased and blended with reservation tobacco." *King Mountain*, 768 F.3d at 994. King Mountain then has its tobacco "sent back to the reservation, where much of it is made into cigarettes. King Mountain sells its tobacco products throughout Washington and in about sixteen other states." *Id. King Mountain* thus involved vastly more travel than is at issue here, where Cougar Den is simply bringing fuel from Oregon into Washington. The Washington court's distinction of the case is unpersuasive.

In short, the Ninth Circuit's approach to the right-to-travel clause would have compelled upholding application of Washington's fuel tax here. It provides no basis for the opposite conclusion.

4. The historical understanding of the right to travel creates no right to buy or sell goods tax free

Underpinning much of the Washington Supreme Court's reasoning was the idea that Washington cannot apply its fuel tax to Cougar Den because doing so is inconsistent with the Yakama Nation's historic understanding of the right-to-travel clause. This rationale is flawed both as a general matter and in the context of this case.

This rationale is flawed across the board because off-reservation tax exemptions cannot be based on unwritten understandings. Looking to historical understanding is certainly an important guide to the meaning of terms the parties used, but it cannot justify adding terms that are not there. *See, e.g.*, *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction

regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist . . . ."); *Choctaw Nation of Indians*, 318 U.S. at 432 ("Indian treaties cannot be re-written or expanded beyond their clear terms . . . to achieve the asserted understanding of the parties."). This rule has extra force in the tax context, where this Court has been emphatic that tribes and their members are subject to nondiscriminatory off-reservation taxes "[a]bsent a 'definitely expressed' exemption[.]" *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Choteau*, 283 U.S. at 696). "[T]ax exemptions are not granted by implication." *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Oklahoma Tax Comm'n*, 319 U.S. at 606). They must be "clearly expressed" and 'unambiguously proved.'" *Chickasaw Nation*, 534 U.S. at 95 (quoting *Wells Fargo Bank*, 485 U.S. at 354). Historical understanding thus cannot provide a basis for writing a tax exemption into a treaty; there must be "a 'definitely expressed' exemption[.]" *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Choteau*, 283 U.S. at 696).

This rationale is also flawed as applied to this case. Even if historical understanding could sometimes justify rewriting treaty terms to create a tax exemption, it would not do so here, because there is no evidence that the parties understood that they were agreeing to allow the Yakama forever to buy, sell, or possess goods free of taxes.

In reaching a contrary conclusion, the Washington Supreme Court cited several factors. None can justify its conclusion.

First, the Washington court noted that "[a]gents of the United States . . . repeatedly emphasized in negotiations that tribal members would retain the '"same liberties . . . *to go on the roads to market*."'" Pet. App. 8a (second alteration ours) (quoting *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1244 (E.D. Wash. 1997)). But a right "*to go on the roads to market*" says nothing about whether goods brought to market are exempt from taxes. The Washington court cited nothing to suggest that the negotiators discussed or that the Yakama understood that goods the Yakama brought to market by highway would be exempt from tax.

Second, the Washington court said that "[t]ravel was woven into the fabric of Yakama life," and "[t]he treaty was presented as a means to preserve Yakama customs[.]" Pet. App. at 7a, 8a. Therefore, "the treaty protects the Tribe's historical practice of using the roads to engage in trade and commerce." Pet. App. 14a. There is a big difference, however, between an understanding that the Yakama could continue their existing trading practices and an understanding that the Yakama would be exempt from future taxes on goods if they transported those goods on interstate highways.

While the parties did discuss preserving historical practices, they also specifically discussed highways that the government would build in the future. As to those highways, the parties made reciprocal commitments, reflected in the treaty text and negotiations. The Tribe agreed that the United States could build future roads through the reservation, and the United States made a corresponding commitment that the Tribe could use

those roads beyond the reservation "in common with citizens of the United States[.]" Treaty with the Yakamas, art. III, 12 Stat. at 953. As to those future highways, the federal negotiators promised equal access, not a permanent tax-free zone, saying: "[Y]ou will be permitted to travel the roads outside the Reservation. We have some kind of roads which perhaps you have never seen; we may wish to make one of the roads from the settlements east of the mountains to our settlements here . . . . You would have the benefit of it as well as the other people."[12]

Third, the Washington court said that the parties "'intended that the Yakamas would retain their right to travel outside reservation boundaries, with no conditions attached.'" Pet. App. 8a (quoting *Yakama Indian Nation*, 955 F. Supp. at 1251). But the quoted district court opinion makes clear that it does not mean "no conditions attached" literally. The court said, for example, that the Yakama are obviously subject to "[l]aws with a purely regulatory purpose," Pet. App. 15a, which would presumably include things like speed limits, seatbelt laws, prohibitions on transporting illegal items, and other "conditions" on highway travel. It is thus clear that the dicta about "no conditions attached" the court used means

---

[12] Record of the official proceedings at the Council in the Walla Walla Valley, in U.S. Dep't of the Interior, *Report on Source, Nature, and Extent of the Fishing, Hunting, and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon* 423-24 (1942), https://www.sos.wa.gov/library/publications_detail.aspx?p=116; *see also id.*at 425 ("Now as we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country[.]").

something far narrower than it sounds. *See Yakama Indian Nation*, 955 F. Supp. at 1260 (declaring that Yakamas "must comply with state regulations designed to preserve and maintain the public roads" and "must comply with state registration requirements").

While the phrase "no conditions attached" appears nowhere in the treaty or its negotiating history, the parties were obviously concerned with protecting the freedom to travel against certain types of potential restrictions. But that goal must be viewed in context. At the time of the Treaty, treaties, state laws, and federal policies sometimes barred Indians from leaving their reservations at all, or without specific permission.[13] The Yakama Treaty language offered in good faith by federal negotiators foreclosed those types of restrictions. But that does not mean that it implicitly created a vastly broader right that would preempt future taxation of goods transported off reservation.

Even the Ninth Circuit, which has adopted an extremely broad reading of the Yakama's historical understanding, has not gone as far as Cougar Den demands here. That court has said, based on historical

---

[13] *See, e.g.*, Treaty with the Utahs, art. VII, 9 Stat. 984, 985 (Dec. 30, 1849, ratified Sept. 9, 1850, proclaimed Sept. 9, 1850); 1849-1858 Minn. Laws p. 842; 1845 Mo. Laws p. 578; U.S. Dep't of the Interior, *Sixty-First Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 24 (1892), http://digital.library.wisc.edu/1711.dl/History.AnnRep92; U.S. Dep't of the Interior, *Fifty-Seventh Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 86 (1888), http://digital.library.wisc.edu/1711.dl/History.AnnRep88.

understanding, that "the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees *for that use*." *Cree*, 157 F.3d at 769 (emphasis added). But even if that conclusion is correct, Washington's fuel tax is not a tax *for use of the highway*, it is a tax for possessing fuel.

In short, the right to travel is clearly protected by the Treaty and was certainly important to the Yakama. But nothing in the Treaty or its negotiating history shows that the Yakama understood that they would forever be able to transport goods to and from their reservation without paying taxes that might apply to those goods.

C. A Ruling for Cougar Den Would Undermine Critical State and Federal Taxing Authority and Is Unnecessary to Protect Tribal Authority

Cougar Den's position, adopted by the Washington Supreme Court, is that any trade it conducts over public roads cannot be taxed. *See* Pet. App. 16a ("[A]ny trade, traveling, and importation that requires the use of public roads fall within the scope of the right to travel provision of the treaty."). If this Court accepts that principle, the consequences for state and federal taxing powers will be immense. And while such a ruling would certainly benefit the Yakama, it would disadvantage other tribes and is entirely unnecessary to protect tribal authority.

This case amply illustrates what is at stake in this Court's interpretation of the Yakama Treaty. In just seven months in 2013, Cougar Den avoided several million dollars in Washington fuel taxes. In

the years since, Cougar Den has avoided over $40 million more. If the Court holds that Cougar Den's tax avoidance is protected under the Yakama Treaty, Washington will eventually lose hundreds of millions of dollars in fuel tax revenue just from Cougar Den's continuation of its current conduct.

Even more troubling if the Court accepts Cougar Den's position is that the company will be free to expand its business throughout Washington and nationwide. Cougar Den could import fuel from Oregon and sell it to gas stations throughout Washington, decimating Washington's fuel tax regime and the primary source of funding for transportation infrastructure in Washington. And there is no practical way for the State to amend its fuel tax system to address this problem. Beyond Washington, Cougar Den is already licensed to export fuel from Idaho and Nevada. If use of a public road shelters the Yakama from state taxes, they may obtain fuel tax-free in these states, transport the fuel into other states, and evade the recipient state's taxes. Another Yakama-owned company is already attempting to ship fuel from Nevada into California. *See Salton Sea Venture, Inc. v. Ramsey*, 2011 WL 4945072 (S.D. Cal. Oct. 18, 2011).

The ramifications of accepting Cougar Den's position are not limited to fuel taxes. Stretching the treaty language to preempt taxation of "any trade, traveling, and importation that requires the use of public roads," suggests that the Yakama may skirt a host of non-discriminatory taxes on off-reservation activity. The most obviously imperiled would be other taxes that apply to the first possession of goods in a state. In Washington, for example, the State's

hazardous substance tax and petroleum products tax apply upon first possession in Washington. Wash. Rev. Code § 82.21.030(1); Wash. Rev. Code § 82.23A.020(1). Both taxes are dedicated to environmental clean-up. Wash. Rev. Code § 82.21.030(2); Wash. Rev. Code § 82.23A.020(2). But the Yakama would surely argue that other taxes related to trade done by highway, such as sales taxes on goods transported by highway or taxes on businesses engaged in highway trade, are also exempt. *See*, *e.g.*, Wash. Rev. Code § 82.08.020; Wash. Rev. Code § 82.04.220.[14]

The impact on taxation of tobacco products is particularly staggering. Like most states, Washington imposes a steep tax on the first possession of cigarettes in the state. Wash. Rev. Code § 82.24.020; Wash. Rev. Code § 82.26.020.[15] The federal government also imposes a variety of taxes and fees on cigarettes, including a hefty tax on tobacco products when they are removed from a manufacturer's warehouse. 26 U.S.C. §§ 5701-5703.[16] In

---

[14] Tax Foundation, *Unpacking the State and Local Tax Toolkit: Sources of State and Local Tax Collections* (June 2017), https://taxfoundation.org/toolkit-sources-state-local-tax-collections/.

[15] Tax Foundation, *How High Are Cigarette Tax Rates in Your State?* (Jan. 25, 2018), https://taxfoundation.org/state-cigarette-tax-rates-2018/.

[16] Washington's tax rate on a carton of 200 cigarettes is $30.25 ($3.025 per 20-cigarette pack). Wash. Rev. Code §§ 82.24.020(1), .026. The federal tax rate on a carton of 200 cigarettes is approximately $10.00 to $20.00 ($1.00-$2.00 per pack), depending on the size and weight of the cigarettes. *See* 26 U.S.C. § 5701(b).

addition to bringing in considerable state and federal tax revenue, cigarette taxes further the government's interest in protecting public health by reducing tobacco use. *See* Centers for Disease Control & Prevention, *Use of Tobacco Stamps to Prevent and Reduce Illicit Tobacco Trade* (May 29, 2015), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6420a2.htm (reporting that tobacco use is the leading cause of preventable death in the United States).

If the Yakama can escape state and federal taxation of cigarettes transported by highway, they will be empowered to distribute untaxed cigarettes nationwide. This is not a hypothetical scenario. King Mountain Tobacco, a company incorporated under the laws of the Yakama Nation, has been in litigation with the federal government, the State of Washington, and the City and State of New York regarding its refusal to pay federal, local, and state taxes on cigarettes that it transports by highway, off-reservation.[17]

Accepting Cougar Den's argument would not only seriously impair state tax collection, it would also give Yakama businesses an unfair advantage over

---

[17] *See, e.g.*, *King Mountain Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061 (E.D. Wash. 2014), *vacated*, 843 F.3d 810 (9th Cir. 2016); *United States v. King Mountain Tobacco Co.*, 2015 WL 4523642 (E.D. Wash. July 27, 2015), *appeal docketed*, No. 16-35956 (9th Cir. Nov. 17, 2016); *United States v. King Mountain Tobacco Co.*, 2014 WL 279574 (E.D. Wash. Jan. 24, 2014), *appeal docketed*, No 16-35607 (9th Cir. July 29, 2016); *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1542 (2015); *City of New York v. King Mountain Tobacco Co.*, No. 2:10-cv-5783 (E.D.N.Y. 2010); *New York v. Mountain Tobacco Co.*, 953 F. Supp. 2d 385 (E.D.N.Y. 2013).

both non-Indian businesses and businesses owned by members of the twenty-eight other tribes in Washington and other tribes nationwide. The Yakama should not be allowed to use an untenable treaty interpretation to market a tax exemption throughout the country. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (rejecting attempt to use "[p]rinciples of federal Indian law . . . to market an exemption from state taxation").

Cougar Den's attack on Washington's fuel tax system is particularly unfortunate given the collaborative relationship Washington has developed in recent years with other tribes as to fuel taxes. Other than the Yakama Nation, every tribe in Washington that has a gas station within its reservation has a fuel tax agreement with the State. Under those agreements, the tribes purchase fuel from taxpaying, state-licensed fuel sellers. Wash. Rev. Code § 82.38.310(3)(a) (2018). The tribes report their purchases and generally receive 75% of the state fuel tax revenue on the fuel they purchase to use for transportation and public safety needs.[18] Collecting fuel taxes has become a source of cooperation for Washington State and tribes, rather than a source of conflict. *See, e.g.*, *Auto. United Trades Org. v. State*, 183 Wash. 2d 842, 851, 357 P.3d 615 (2015) (explaining that because of the fuel tax agreements, "the State and the tribes seem to have largely settled

[18] Wash. State Dep't of Licensing, *Tribal Fuel Tax Agreement Report* 2 (Jan. 2018), https://www.dol.wa.gov/about/docs/leg-reports/2017-tribal-fuel-tax-agreement.pdf (reporting for 2016).

. . . their conflicts over fuel taxes"). Cougar Den would upend that.

Finally, if the Yakama Treaty precludes state taxation of goods carried over highways, it places a cloud over the state's ability to regulate Yakama use of highways in other ways as well. Rules like licensing requirements, truck weight limits or other safety rules, and even speed limits arguably would be preempted. Rules regulating the transportation of goods are even more obviously imperiled. For example, Washington protects its vitally important apple crop from some pests by prohibiting certain fruit from being hauled from a quarantined area through a pest-free area. Wash. Admin. Code § 16-470-105 (2018). If carrying goods over the highways immunizes the Yakama from any state oversight, they would be free to ignore such regulations.

The Washington Supreme Court brushed aside this concern, saying "[l]aws with a purely regulatory purpose can be validly applied" regardless of the treaty. Pet. App. 15a. But this facile assurance has no basis in precedent. To the contrary, when this Court announced the guiding principle that "Indians going beyond reservation boundaries" are subject to State laws "[a]bsent express federal law to the contrary," the very next sentence said: "That principle is as relevant to a State's tax laws as it is to state criminal laws . . . ." *Mescalero Apache Tribe*, 411 U.S. at 148-49. In other words, the interpretive rule is the same whether the state law at issue is a tax law or a "purely regulatory" criminal law. The distinction invented by the Washington court is baseless, and the truth is that the enormously broad treaty right it

announced, untethered from treaty text, threatens a wide range of state taxes and regulations.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

RESPECTFULLY SUBMITTED.

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General
Counsel of Record

JAY D. GECK
ANNE E. EGELER
Deputy Solicitor General

FRONDA C. WOODS
Assistant Attorney General

1125 Washington Street SE
Olympia, WA 98504-0100
(360) 753-6200
noahp@atg.wa.gov

August 9, 2018