No. 16-1498

# In the Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING, PETITIONER

*v.*

COUGAR DEN, INC.

*ON WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER**

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## QUESTION PRESENTED

Article III of the Treaty of June 9, 1855, between the United States and the Yakama Nation of Indians, 12 Stat. 952-953, secures to the Yakamas the "right, in common with citizens of the United States, to travel upon all public highways." The question presented is:

Whether Article III precludes application to Yakama tribal members of a tax imposed by the State of Washington on fuel purchased out-of-state and imported into Washington, as part of a comprehensive state scheme that also imposes the tax on fuel removed from an in-state terminal or refinery.

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## INTEREST OF THE UNITED STATES

At issue in this case is the scope of a right guaranteed to the Yakama Indian Nation by a treaty entered into between the Yakamas and the United States. The United States has an interest in the proper interpretation of treaties between the federal government and Indian tribes, in light of both the United States' own interests as a party to such treaties and its special relationship with the Indian signatories whose rights are secured under such treaties. At the Court's invitation, the United States filed an amicus brief at the petition stage of this case.

## STATEMENT

1. In the mid-nineteenth century, the United States entered into a series of treaties with Indian tribes in

what is now the State of Washington. *Tulee* v. *Washington*, 315 U.S. 681, 682-683 (1942). A group of Indians now known as the Yakama Indian Nation (the Tribe) agreed in one of those treaties to cede vast tracts of land within that territory to the United States, reserving for itself a much smaller reservation. *Ibid.* One of the United States' major aims in entering into the treaty was to enable the construction of public highways and railroads in the region, including through the Tribe's reservation. *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1240-1241 (E.D. Wash. 1997), aff'd *sub nom. Cree* v. *Flores*, 157 F.3d 762 (9th Cir. 1998). To secure from the Tribe the concession that roads could be built through the reservation, the United States made certain representations regarding the Tribe's access to and use of public roads. Specifically, Article III of the Treaty provides:

> [I]f 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.

Treaty of June 9, 1855, between the United States and the Yakama Nation of Indians (1855 Treaty), art. III, 12 Stat. 952-953.[1]

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[1] The United States has entered into treaties with tribes in Idaho and Montana that contain identically worded right-to-travel provisions. See Treaty of June 11, 1855, between the United States and the Nez Percé Indians, art. III, 12 Stat. 958; Treaty of July 16, 1855, between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, art. III, 12 Stat. 976.

2. a. The Washington state law at issue in this case requires suppliers, exporters, blenders, distributors, and (as relevant here) importers of motor-vehicle fuel to obtain a license and imposes a per-gallon motor-fuel tax on "licensees." Wash. Rev. Code Ann. §§ 82.36.010(12), 82.36.020, 82.36.080(1)(d) (West 2012), 82.38.020(12), 82.38.030, 82.38.090(1)(d) (West 2008).[2] The tax applies both to fuel originating in the State (for example, when a tanker truck is filled with fuel from a refinery or bulk storage facility) and to fuel brought into the State after being removed from a refinery or bulk storage facility outside of Washington. For fuel removed from an in-state refinery or terminal, the State imposes the tax at the time of removal (with certain exceptions not relevant here). *Id.* §§ 82.36.020(2)(a)-(b) (West 2012), 82.38.030(7)(a)-(b) (West 2008). For fuel that "enters into" Washington from another State, the tax is imposed upon entry. *Id.* §§ 82.36.020(2)(c) (West 2012), 82.38.030(7)(c) (West 2008).[3] Those who bring fuel into the State via a public highway must pay the same per-gallon tax as those who bring fuel into the State's stream

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[2] Citations are to the 2008 and 2012 Revised Code of Washington Annotated, which was in effect when the relevant conduct took place. The State has recodified the cited provisions without substantive change. See Pet. Br. 7 n.2.

[3] The tax does not apply immediately to fuel imported into the State by pipeline or vessel operated by a "licensee" and bound for a "terminal" or "refinery." Pet. App. 18a (Fairhurst, C.J., dissenting) (citing Wash. Rev. Code Ann. §§ 82.36.010(3), (4), (10), and 82.36.020(2)(c) (West 2012); *id.* §§ 82.38.020(4), (5), (12), and 82.38.030(7)(c) (West 2008)). The tax is triggered when fuel first brought in by one of those methods is later removed from the in-state terminal or refinery. Wash. Rev. Code Ann. §§ 82.36.020(2)(a)-(c) (West 2012), 82.38.030(7)(a)-(c) (West 2008).

of commerce through other means. *Id.* §§ 82.36.020 (West 2012), 82.38.030 (West 2008).

b. The state motor-fuel tax currently in effect is not the first version of such a tax that the Washington Legislature has adopted. Before the current tax was enacted, a federal district court had determined that a previous version of the tax placed the incidence of the tax on fuel retailers (*i.e.*, gas stations). See *Squaxin Island Tribe* v. *Stephens*, 400 F. Supp. 2d 1250, 1262 (W.D. Wash. 2005). That court had therefore held that the previous fuel-tax regime, as it pertained to Indian retailers operating on Indian lands, ran afoul of the rule that States generally may not tax Indian activities in Indian country absent congressional authorization. *Id.* at 1261-1262; see *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 458-459 (1995); *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 475-480 (1976).

Following that adverse judgment, the Washington Legislature crafted the current fuel tax, following guidance from this Court. In *Chickasaw Nation*, the Court held that a State could not apply its motor-fuel tax to fuel sold by a tribe to non-Indians in Indian country where the incidence of the tax was on the tribe (as a fuel retailer), but it noted that "if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence." 515 U.S. at 460. The Washington Legislature accordingly moved the incidence of its motor-fuel tax up the supply chain. With respect to fuel ultimately sold on an Indian reservation, the effect of that change is to impose the tax before the fuel arrives on the reservation. See Pet. Br. 6-7. The Washington Legislature's intent

and purpose, as set forth in the statute, is to impose a per-gallon tax on motor fuel "at the time and place of the first taxable event and upon the first taxable person within th[e] state." Wash. Rev. Code Ann. §§ 82.36.022 (West 2012), 82.38.031 (West 2008).

Putting to one side any effect the Yakama Treaty might have here, such a tax is lawful as applied to fuel to be delivered to Indian country. See *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 99, 115 (2005) (holding that *Chickasaw Nation*'s bar on imposing a state excise tax on a tribe or tribal members for sales in Indian country did not apply to a state tax imposed on the off-reservation receipt of fuel by a non-Indian distributor who subsequently delivered the fuel to a tribally owned gas station on the reservation).

3. Respondent Cougar Den, Inc., is a business incorporated under Yakama Nation law. Its owner and president is an enrolled member of the Tribe. Pet. App. 2a. Beginning in 2013, respondent used public highways to transport fuel from Oregon to the Tribe's Reservation in Washington. *Ibid.* Respondent contracted with a trucking company, KAG West, to have the fuel transported over the Oregon-Washington border. *Ibid.*[4] Respondent sold more than 90% of its fuel to Yakama-owned retail gas stations on the Tribe's Reservation, which in turn sold the fuel to customers. *Id.* at 50a-51a. Respondent did not obtain a fuel-importer license or pay the Washington motor-fuel tax when either it or KAG West brought fuel into Washington. *Id.* at 2a. In

[4] Under the Washington statute, where an entity importing fuel into the State is acting as an agent, "the person for whom the agent is acting is the importer." Wash. Rev. Code Ann. § 82.36.010(16) (West 2012).

December 2013, petitioner, the Washington State Department of Licensing (the Department), issued an assessment against respondent, demanding payment of $3.6 million in unpaid taxes, penalties, and licensing fees. *Ibid.*

Respondent appealed the assessment to an administrative law judge in the Department, who held that the assessment violated the provision in Article III of the 1855 Treaty that secures to the Yakamas the "right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. 952-953; see Pet. App. 2a-3a. The Department's Director overturned the administrative law judge's order. Pet. App. 44a-61a. The Director reasoned that Article III of the 1855 Treaty did not exempt respondent from paying the state motor-fuel tax because respondent "is not being taxed for using public highways"; rather, respondent "is being taxed for importing fuel." *Id.* at 58a. The Director concluded that respondent "needs a Washington fuel importer license to bring fuel into this state." *Ibid.*

4. Respondent petitioned for review in Yakima County Superior Court, and the court set aside the Director's order. Pet. App. 30a-43a. The court concluded that respondent's transport of fuel into Washington "falls within its [r]ight to [t]ravel" under Article III of the 1855 Treaty, and that because the Washington tax "places a restriction on the [r]ight to [t]ravel," the "taxes, penalties, interest, and licensing requirements" imposed by the state law "are preempted and barred by the Treaty." *Id.* at 34a.

5. The Washington Supreme Court granted direct review and affirmed. Pet. App. 1a-29a.

a. The Washington Supreme Court rejected petitioner's contention that Article III of the 1855 Treaty

permits the State to restrict or regulate a good that is incidentally brought over a highway. Pet. App. 6a. The court concluded that petitioner's interpretation of Article III "ignores the historical significance of travel to the Yakama Indians" and the established rule of treaty interpretation that "Indian treaties must be interpreted as the Indians would have understood them." *Id.* at 5a-6a (citing *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 630-631 (1970)). The court observed that when the Treaty was signed, the Tribe "exercised free and open access to transport goods as a central part of a trading network running from the western coastal tribes to the eastern plains tribes," and it concluded that the Treaty was intended to preserve the Tribe's ability to travel on the public highways to engage in trade. *Id.* at 7a-8a. In the court's view, the Treaty accordingly secures to the Tribe and its members a right to travel on highways without state regulation. *Ibid.* The state motor-fuel tax interfered with that right, the court reasoned, because it taxed the "importation of fuel, which is the transportation of fuel." *Id.* at 16a. The court further reasoned that the Treaty also secures a right to conduct "any trade, traveling, and importation," without complying with state regulation, so long as the Tribe "requires the use of public roads" in carrying out that activity. *Ibid.* For that reason, and because, according to the court, it would be "impossible" for respondent to import motor-fuel to the Yakama Reservation without using the public highways, the court held that the State could not impose its motor-fuel excise tax on respondent. *Id.* at 13a-14a, 16a.

The Washington Supreme Court found support for its conclusion in cases in which the Ninth Circuit had ruled that two Washington laws could not be enforced

against members of the Tribe: a law that imposed license and overweight-truck permit fees on persons who hauled logs from the Tribe's Reservation to off-reservation mills (see *Cree*, 157 F.3d at 765); and a law that required individuals other than licensed wholesalers to give notice to the state liquor control board before transporting "unstamped" cigarettes within the State (see *United States* v. *Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007)). Pet. App. 9a-11a.

The Washington Supreme Court distinguished the Ninth Circuit's decision in *King Mountain Tobacco Co.* v. *McKenna*, 768 F.3d 989 (2014), cert. denied, 135 S. Ct. 1542 (2015), in which a business owned by an enrolled member of the Tribe claimed an exemption based on Article III of the 1855 Treaty from a Washington statute that required the business to place money into escrow to reimburse the State for health-care costs related to the use of tobacco products. Pet. App. 12a-13a. The tribal business manufactured its products by shipping its tobacco crop to Tennessee and North Carolina for mixing and processing and then, after returning the processed tobacco to the Reservation, sold its products throughout Washington and other States. 768 F.3d at 991. In *King Mountain*, the Ninth Circuit concluded that the business was not exempt from making the escrow payments because the Treaty secured to the Tribe the right "to travel upon all public highways," not the "right to trade." *Id.* at 997-998. According to the Washington Supreme Court, *King Mountain* stands for the proposition that "[w]here trade does not involve travel on public highways, the right to travel provision in the treaty is not implicated." Pet. App. 13a. But here, the court concluded, "travel on public highways is directly at issue because the tax was an importation tax," and it

"was impossible for [respondent] to import fuel without using the highway." *Id.* at 13a-14a; see *id.* at 16a.

b. Chief Justice Fairhurst, joined by Justice Wiggins, dissented. Pet. App. 17a-29a. She explained that the Tribe's "right to travel" protected by the treaty "is not a right to trade," and the motor-fuel tax could therefore be applied to members of the Tribe because the tax "burdens trade[,] * * * not fuel transport." *Id.* at 17a. In her view, the Washington Legislature's clear intent was "to levy an excise tax on the first instance of wholesale possession of fuel not distributed through a refinery or importation terminal within the state," and that "[w]hether that fuel is then brought to market within Washington is not necessary or relevant for purposes of assessing tax due." *Id.* at 18a-19a (emphasis omitted); see p. 3 n.3, *supra*.

Chief Justice Fairhurst further concluded that the treaty right "applies to trade only if inextricably linked to travel," which is not true of the motor-fuel tax. Pet. App. 25a; see *id.* at 23a. She explained that in *King Mountain*, the escrow payments required by state law "had nothing to do with travel, other than to impose a financial burden on the products King Mountain sought to bring to market in Washington." *Id.* at 26a. "Similarly," she continued, "Washington's fuel excise tax on importers, imposed on the first incidence of wholesale possession of fuel within Washington, has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington." *Ibid.* Chief Justice Fairhurst acknowledged that in *King Mountain* and in this case, "travel is necessary for trade" and that "[w]ithout travel, most goods have no market." *Ibid.* But she concluded that

"necessity of transport, without an inextricable link between travel and trade, is not sufficient for preemption." *Ibid.*

## SUMMARY OF ARGUMENT

The Washington Supreme Court erred in concluding that Article III of the 1855 Treaty exempts respondent from paying Washington's motor-fuel tax.

A. Indian tribal members going beyond reservation boundaries, like respondent in this case, are generally subject to non-discriminatory state laws. State laws may not, however, infringe on any right secured in an Indian treaty for the tribe and its members to engage in specific activities outside the reservation.

Article III secures to the Yakama Indians the "right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. 952-953. Whatever the precise scope of that right with regard to restrictions on or taxation of highway use, the right, by its plain terms, does not protect activities other than travel, such as the possession of goods to be used in trade. And the available historical evidence does not demonstrate that Article III was intended to extend to activities other than what is expressly stated in the text.

B. Washington's motor-fuel tax falls outside of Article III's ambit because it is not directed at travel on public highways, but instead the first possession of fuel by a licensee in the State. To be sure, sometimes the first possession occurs on public highways, if licensees bring fuel into Washington by truck. But the State taxes the first possession of fuel regardless of whether that possession occurs on a highway when the fuel is brought over the border; via some other method of transporting fuel into the State; or at an in-state refinery or terminal. Nothing about a licensee's liability for

the tax turns on the licensee's decision to use highways in the course of its business.

The history of the motor-fuel tax further demonstrates that the Washington Legislature was targeting first possession, rather than the use of the highways. The Legislature adopted the current version of the tax after a federal court struck down an earlier version, which the court determined had placed the incidence of the tax on on-reservation Indian fuel retailers. Consistent with guidance from this Court, the Legislature revised the tax by shifting the incidence of the tax up the chain to the first moment that a licensee possesses motor fuel in the State, before delivering it to an on-reservation entity.

C. The Washington Supreme Court erred in holding that Article III of the 1855 Treaty nevertheless barred the State from collecting its motor-fuel tax from respondent. Notwithstanding the text of Article III and the context and history of Washington's motor-fuel tax, the court determined that the tax imposed an impermissible burden on public-highway travel. In so concluding, the court focused on the fact that the events giving rise to tax liability will, for some licensees, take place on a public highway. But the operative question in evaluating a state tax is what activity the tax targets, not where a taxed entity chooses to undertake that activity.

Washington's motor-fuel tax does not depend upon the use of the highways, even if respondent happened to be using a highway when the tax was triggered. The Washington Supreme Court did not appear to dispute that the Treaty would not bar application of the tax to respondent if it obtained motor fuel from a refinery or terminal rack within the State, even if the fuel was withdrawn into a tanker truck and then transported to the

Reservation on public highways. There is no reason for a different result if respondent obtains the fuel from a refinery or terminal rack in Oregon and brings it into Washington by truck.

The decision below is not supported by the Ninth Circuit decisions upon which the court relied. Washington's motor-fuel tax is distinguishable from the state laws at issue in those cases, which required a tribal member to comply with certain requirements in connection with the use of the public highways to transport its goods for trade, or required tribal businesses to notify the State before transporting certain goods on the highways. Even assuming those decisions were correct, Washington's motor-fuel tax does not impose requirements on the Tribe's highway use, but rather imposes a per-gallon tax on the possession of a good in commerce. Respondent would thus be subject to Washington's motor-fuel tax even under the Ninth Circuit's framework for interpreting the Treaty right.

## ARGUMENT

### ARTICLE III OF THE 1855 TREATY DOES NOT EXEMPT RESPONDENT FROM PAYING WASHINGTON'S MOTOR-FUEL TAX

The "right, in common with citizens of the United States, to travel upon all public highways" protected by the 1855 Treaty, art. III, 12 Stat. 952-953, is not violated by the tax at issue here, which taxes the introduction of a good into the state stream of commerce, no matter where the good originates or how it enters the State. Washington's motor-fuel tax is a tax on the first possession of fuel within the State, which always occurs outside the boundaries of the Tribe's Reservation and is thus subject to state taxation. The Washington Su-

preme Court erred in concluding that Article III exempts respondent from paying Washington's motor-fuel tax.

### A. Article III Of The 1855 Treaty Secures The Right Of The Tribe And Its Members To Free Access From The Reservation To Public Highways And To Travel Upon The Public Highways

1. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973). If a federal treaty recognizes in the Indians a right to engage in certain activities outside the reservation, however, such rights "may . . . not be qualified by the State." *Antoine* v. *Washington*, 420 U.S. 194, 207 (1975) (quoting *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 398 (1968)). Here, the State of Washington has imposed a tax on motor fuel that is triggered at the time fuel enters into Washington (or when fuel is removed from an in-state terminal or refinery), which occurs outside of the Tribe's Reservation. See *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005). Accordingly, respondent is subject to the tax unless Article III of the 1855 Treaty exempts members of the Tribe from complying with the state law.

In determining the scope of an Indian treaty right, courts must construe the language of a treaty "in the sense in which [it] would naturally be understood by the Indians" at the time the treaty was negotiated, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (*Fishing Vessel*) (citation omitted), looking "beyond the written words to the larger context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and

the practical construction adopted by the parties.'" *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943)); see *Tulee* v. *Washington*, 315 U.S. 681, 684-685 (1942); *United States* v. *Winans*, 198 U.S. 371, 380-381 (1905). Doubtful or ambiguous expressions are to be "resolved in the Indians' favor." *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 630-631 (1970). Courts may not, however, ignore "clear * * * limit[s]" appearing in the treaty. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 466 (1995).

2. Applying those principles, Article III of the 1855 Treaty, as relevant here, secures for the Tribe only a right to travel upon the public highways in common with others, not a more general and preferential right to engage in trade using the highways free of state regulation or taxation.

a. Article III secures to the Yakamas a "right of way, with free access from the [Reservation] to the nearest public highway," and "also the right, in common with citizens of the United States, to travel upon all public highways." 1855 Treaty, art. III, 12 Stat. 952-953. Whatever the precise preemptive scope of the latter clause with regard to regulation and taxation of highway use as such, see pp. 27-29, *infra*, that provision of Article III, by its plain text, recognizes only a right of tribal members to travel upon public highways in common with others. It does not confer any right to possess goods that may incidentally be transported on the highways, or to do so free of state regulation or taxation. The court should respect that limit on the rights appearing in the Treaty's text. See *Chickasaw Nation*, 515 U.S. at 465-466 (stating that "treaties should be construed

liberally in favor of * * * Indians," but concluding that tools of construction could not overcome a "clear geographic limit" in the treaty's text) (citation omitted).

The Ninth Circuit—the federal circuit that encompasses the Tribe's reservation and ceded lands (and the only federal court of appeals to have addressed the Treaty right)—has recognized that the text of Article III is limited to protecting a right to travel upon public highways and that the Treaty right does not preempt state regulation of the trade of goods that involves highway travel. In *King Mountain Tobacco Co.* v. *McKenna*, 768 F.3d 989 (2014), cert. denied, 135 S. Ct. 1542 (2015), the Ninth Circuit held that Article III of the 1855 Treaty did not exempt members of the Tribe from complying with a state law that required cigarette companies to place money into an escrow account for every qualifying unit of tobacco sold subject to the State's cigarette tax, in order to reimburse the State for public-health expenses related to the use of tobacco products. *Id.* at 990-992.

The court of appeals in *King Mountain* rejected the Tribe's argument that Article III of the 1855 Treaty "prohibit[s] imposition of economic restrictions or preconditions on the Yakama people's Treaty right to engage in the trade of tobacco products." 768 F.3d at 997. The tribal business in that case shipped its tobacco crop to Tennessee and North Carolina for processing, and the finished product was then shipped back to the reservation, where it was taken to market throughout Washington and other States. *Id.* at 991. The court explained that while the Treaty secures for the Tribe a "right to *travel* * * * for the purpose of transporting goods to market" without state interference, it does not secure any right to *trade* beyond the right, in common

with others, to transport goods on the highways. *Id.* at 998 (emphasis added). The court analyzed the Washington escrow statute and determined that it was not a burden or tax on transportation as such, but rather a generally applicable provision focusing on a subject distinct from transportation that required cigarette companies to place money in escrow for each unit of tobacco sold. *Id.* at 991-992. The court held that Article III did not exempt Yakama members from complying with the escrow law, and it based that conclusion on "the plain text of Article III," which, it stated, "reserve[s] to the Yakama the right 'to travel upon all public highways,'" but does not discuss trade. *Id.* at 997 (quoting 1855 Treaty, art. III, 12 Stat. 952-953).

b. Moreover, although courts must look "beyond the written words to the larger context that frames [an Indian] [t]reaty" and construe a treaty's language in the way it would have been understood by the Indians, *Mille Lacs*, 526 U.S. at 196; *Fishing Vessel*, 443 U.S. at 676, the available historical materials do not demonstrate that the Tribe would have understood Article III of the 1855 Treaty to extend to activities other than what is expressly stated in the text.

In this case, the Washington courts adopted findings of fact and conclusions of law regarding the historic understanding of the Treaty right made by a federal district court in *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1236-1246 (E.D. Wash. 1997), aff'd *sub nom. Cree* v. *Flores*, 157 F.3d 762 (9th Cir. 1998). See Pet. App. 31a-35a (Yakima County Superior Court's findings of fact and conclusions of law); *id.* at 5a-7a & n.3; see also *Cree*, 157 F.3d at 769, 773 (Ninth Circuit concluding that district court's factual findings in *Yakima Indian Nation* were not clearly erroneous). The

historical materials show that travel in pursuance of trade was crucial to the Yakamas' historic way of life, see *Yakama Indian Nation*, 955 F. Supp. at 1238-1239, and that travel was "particularly important for the purpose of trade" because the Yakamas "were a central part" of a tribal trading network "due to their location between Northwest Coast tribes to the west and the Plains tribes to the east," *id.* at 1238. The materials likewise show that representatives of the United States repeatedly indicated during talks that the Yakamas' ability to travel in order to pursue trade would be preserved by the Treaty. They represented, for example, that the Yakamas would "be allowed to go on the roads to take [their] things to market, [their] horses and cattle"; that they would "be permitted to travel the roads outside the reservation"; and that they would have "the privilege of traveling over roads." *Id.* at 1243-1244 (citations and emphasis omitted).

The historical record does not show, however, that the Yakamas understood the Treaty to confer a right to trade goods outside the reservation free from generally applicable regulation and taxation—only the right to use the public highways in common with others to engage in such trading endeavors. *Yakama Indian Nation*, 955 F. Supp. at 1253. The historical record therefore fully aligns with the limited terms of the Treaty's text. As the Ninth Circuit observed in *King Mountain*, "there is no right to trade in the [1855] Treaty," and the Indian canon of construction "'does not permit reliance on ambiguities that do not exist.'" 768 F.3d at 998 (quoting *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986)); see *ibid.* (Indian canon was inapplicable because "the Treaty's meaning to the Yakama

people cannot overcome the plain and unambiguous text of the Treaty," which provides only a right to travel).

### B. Washington's Motor-Fuel Tax Does Not Infringe On Tribal Members' Right To Travel Upon The Public Highways

Washington's motor-fuel tax does not infringe on the right under Article III of the 1855 Treaty of tribal members to travel on public highways in common with others. Rather, it is a tax on the possession of goods in Washington outside the Tribe's Reservation, which falls within the State's taxing authority and is imposed on respondent in common with others who undertake the first possession of motor fuel in the State, whether that first possession occurs on a public highway or elsewhere. Because Article III of the 1855 Treaty recognizes only a right to travel on public highways, the Treaty does not exempt respondent from paying Washington's motor-fuel tax.

1. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)). Reading Washington's motor-fuel tax as a whole demonstrates that it is not a tax upon highway travel, at least for purposes of assessing its validity under Article III of the Treaty. To the contrary, fuel licensees must pay the tax regardless of whether they remove fuel from an in-state terminal or refinery or import fuel into the State—and, if they import (and the fuel is not bound for an in-state terminal or refinery, see p.3 n.3, *supra*), regardless of what means of transport they use. Wash.

Rev. Code Ann. §§ 82.36.020(2)(a)-(c) (West 2012), 82.38.030(7)(a)-(c) (West 2008).

Imposition of the tax, in other words, does not depend on a taxpayer's use of the highways. The tax is assessed per gallon of fuel, at a set rate, without regard to how the fuel enters the state stream of commerce. Wash. Rev. Code Ann. §§ 82.36.020(1), 82.36.025 (West 2012), 82.38.030 (West 2008); cf. *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 190 (1931) (state tax imposed on bus operator was a tax on doing business in the State that violated the dormant Commerce Clause, rather than a tax on the use of state roads, where tax liability did not "rise with an increase in mileage travelled, or even with the number of passengers actually carried * * * [n]or [wa]s it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights"). Imposition of the motor-fuel tax and the amount of tax liability do not turn on the licensee's use of the highways.

Washington's motor-fuel tax thus is a general assessment of the same type as the escrow requirement in *King Mountain*. Like the escrow requirement, which was imposed on each qualifying unit of tobacco sold, Washington's motor-fuel tax is imposed on each gallon of fuel entering the state stream of commerce, irrespective of whether and how it is transported into the State. The tax "has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington." Pet. App. 26a (Fairhurst, C.J., dissenting). The tax therefore is appropriately viewed as an excise tax on the first instance of possession of fuel within Washington, see *id.* at 17a, not as a tax or burden on the right to travel on public

highways in common with others within the meaning of Article III.

The fact that the first possession for some regulated parties will occur on a highway does not convert an excise tax on that possession into a tax on the use of the highway—or a burden on the "right, in common with citizens of the United States, to travel upon all public highways," 1855 Treaty, art. III, 12 Stat. 952-953—any more than a state law banning the possession of a certain product would be a ban on highway travel simply because the ban encompasses the situation in which the person has brought the product in from out of state via a highway. In both the hypothetical and the present case, the highway is only relevant because someone has chosen it as the setting for undertaking an act (here, possession of fuel) that is subject to a general regulation or financial assessment, wherever the act takes place.

2. The history of Washington's motor-fuel tax further demonstrates that it is designed as an excise tax on the fuel itself, not as a tax on highway travel. Before the Washington Legislature enacted the current version of the fuel tax, a federal district court had concluded that a previous version of the tax had placed the incidence on fuel retailers. That posed an obstacle with respect to taxation of on-reservation Indian retailers due to the established rule that States generally may not tax Indian activities in Indian country. *Squaxin Island Tribe* v. *Stephens*, 400 F. Supp. 2d 1250, 1262 (W.D. Wash. 2005); see Pet. 5; Pet. App. 20a-22a.

In *Oklahoma Tax Commission* v. *Chickasaw Nation, supra*, this Court held that although a State cannot impose a tax on fuel sold by a tribe in Indian country, "the State generally is free to amend its law to shift the tax's legal incidence." 515 U.S. at 460. Following that

guidance, the Washington Legislature amended the previous version of the motor-fuel tax by shifting its legal incidence up the supply chain, such that the fuel is taxed before it arrives on an Indian reservation. *Ibid.*; Pet. 5-6. The statute itself explains that the Legislature's purpose was to impose the motor-fuel tax "at the time and place of the first taxable event and upon the first taxable person within th[e] state." Wash. Rev. Code Ann. §§ 82.36.022 (West 2012), 82.38.031 (West 2008).

The Washington tax therefore operates in the same way as the Kansas tax upheld by this Court in *Wagnon*, which was imposed on fuel distributors upon "their initial receipt of motor fuel," where the distributors were permitted but not required to pass the tax down the distribution chain to retailers, including retailers on an Indian reservation. 546 U.S. at 99-100. That the State now taxes fuel when it is first possessed by a distributor in the State—whether when removed from a refinery or terminal rack at a bulk storage facility in the State, or brought in from out of State—thus reflects the State's effort to ensure that the incidence of the tax is not on Indian retailers operating on Indian reservations. It does not reflect an effort to impose any conditions or restrictions on using the public highways. And it does not interfere with the Treaty right to use the public highways in common with others for trading and other endeavors. Article III therefore does not exempt respondent from paying Washington's motor-fuel tax on fuel that it imports from Oregon using a public highway.

### C. The Washington Supreme Court Erred In Holding That Article III Of The 1855 Treaty Exempts Respondent From Paying Washington's Motor-Fuel Tax

1. The Washington Supreme Court concluded that the state motor-fuel tax is a tax on the use of public highways because it "taxes the importation of fuel, which is the transportation of fuel." Pet. App. 16a. The court therefore held that the tax could not be enforced against respondent in light of Article III of the 1855 Treaty. *Ibid.* In characterizing the tax as one targeting highway travel, the court focused on the fact that, in respondent's case, the tax was triggered when respondent moved fuel across the state line inside a tanker truck. *Id.* at 13a-14a. The court recognized that the tax would be assessed "regardless of whether [respondent] uses the highway." *Ibid.* But the court considered that feature "immaterial" because "in this case, it was impossible for [respondent] to import fuel without using the highway." *Id.* at 14a. That analysis of the state fuel tax for purposes of Article III does not withstand scrutiny.

Characterizing a tax—especially for purposes of determining its validity under the 1855 Treaty—based on only one of the types of events that trigger its application improperly severs that trigger from the larger statutory context. Cf. *Brown & Williamson*, 529 U.S. at 133 (courts must "interpret [a] statute 'as a symmetrical and coherent regulatory scheme'") (citation omitted); *Utility Air Reg. Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) ("[R]easonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'") (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Read as a whole, Washington's motor-fuel tax does not depend upon use of the highways, even

if respondent happened to be using a highway at the time application of the tax to respondent was triggered.

As discussed above (pp. 20-21, *supra*), Washington's revised statutory regime taxes the first possession of fuel in the State, regardless of how or where that possession occurs. Wash. Rev. Code Ann. §§ 82.36.020(2)(a)-(c) (West 2012), 82.38.030(7) (West 2008). The Washington Supreme Court did not appear to dispute that the Treaty would not bar application of the tax to respondent if it obtained the motor fuel from a refinery or terminal rack within the State, even if the fuel was withdrawn from the refinery or terminal rack into a tanker truck and respondent then used the truck to transport the fuel over public highways to the Tribe's reservation. There is no reason for a different result if respondent obtains the fuel from a refinery or terminal rack outside the State and brings it into the State by truck. That respondent allegedly *must* use the highways to import motor fuel, see Pet. App. 16a, does not alter the analysis. Because respondent's decision to obtain fuel out of state rather than within has no bearing on its liability for the state tax, the fact that respondent happens to be dependent on the highways to bring fuel into Washington from out of state is immaterial to the question whether Washington's tax is preempted by the Treaty.

Moreover, to construe Article III to confer a right on tribal members to avoid excise taxes on the possession of goods that are transported by highway could have an impact beyond the State of Washington. Petitioner states that respondent has obtained fuel exporter licenses in other States. Pet. Br. 40. If the Washington Supreme Court's decision is affirmed, respondent could claim a right to ship fuel from those States all over the United States and avoid paying similar fuel-import

taxes in States to which it transports fuel by highway. Pet. App. 27a-28a (Fairhurst, C.J., dissenting).

2. The Washington Supreme Court further erred in concluding that the historic evidence of the parties' understanding of the Treaty right supported a reading of Article III that would encompass a right to be free of state taxation when engaging in activities, including trade, that make incidental use of the highways. Pet. App. 6a-8a. The court grounded its reasoning in two decisions of the Ninth Circuit, in which members of the Tribe had invoked Article III to claim an exemption from paying the fees and complying with the licensing requirements contained in other Washington statutes. See *Cree*, 157 F.3d at 765; *United States* v. *Smiskin*, 487 F.3d 1260, 1264 (2007). Those decisions, even assuming they were correct (but see pp. 27-29, *infra*), do not support the Washington Supreme Court's conclusion that Article III exempts respondent from paying Washington's motor-fuel tax. The Ninth Circuit has interpreted Article III to provide certain rights for members of the Tribe to travel on public highways free from state taxation or other measures (except for non-revenue-raising regulations that are needed to safeguard public safety), but Washington's motor-fuel tax does not operate in the same way as the restrictions imposed by Washington in those cases.

a. In *Cree, supra*, the Ninth Circuit considered whether members of the Tribe were exempt from Washington laws that required registration and licensing of logging trucks along with payment of fees according to gross weight, as well as log-tolerance permits and an associated fee for overweight trucks. 157 F.3d at 765. The Tribe and some of its members brought a suit for declaratory and injunctive relief after state officials

issued traffic citations to drivers employed by tribal logging businesses that had refused to obtain the necessary licenses or permits. *Ibid.* The Tribe contended that Article III recognized a right in its members to haul timber from the reservation to off-reservation markets without restriction and that the State therefore could not impose licensing fees or permit requirements on logging trucks owned by the Tribe or its members. *Ibid.*

To determine how Article III would have been understood by the Indians when the Treaty was adopted, the district court conducted an extensive inquiry into the Treaty's history. See pp. 16-17, *supra*; *Yakama Indian Nation*, 955 F. Supp. at 1236-1246. The court observed that at the time the Treaty was negotiated, tribal members traveled extensively for the purpose of trade. 955 F. Supp. at 1238. Based on the language of the Treaty, the importance of travel to the Tribe, and representations made by federal negotiators, the court concluded that tribal members would have understood Article III to secure a right to use public highways for transporting logs from the Reservation to market without limitations such as fees. *Id.* at 1246-1249. The court held, however, that the Tribe and its members must comply with state registration requirements for purposes of identification, to the extent the requirements did not impose a fee or surcharge on the Treaty right. *Id.* at 1260.

The Ninth Circuit affirmed, holding that the 1855 Treaty exempted tribal logging companies from compliance with state licensing and permitting requirements, and payment of associated fees, for trucks hauling logs from the Reservation on public highways. *Cree*, 157 F.3d at 769. The court determined that Article III, read as

the Tribe would have understood it, secured for the Tribe and its members "the right to transport goods to market over public highways without payment of fees for that use." *Ibid.*

b. In the other Ninth Circuit case relied upon by the Washington Supreme Court, *Smiskin*, *supra*, the United States charged two Yakama members with violating the federal Contraband Cigarette Trafficking Act, 18 U.S.C. 2342(a), which makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes," and incorporates state law to define what is contraband. See 487 F.3d at 1263. The basis for the prosecution was that the defendants had failed to comply with a Washington state law that required persons other than licensed wholesalers to give notice to state officials before transporting "unstamped" cigarettes—*i.e.*, cigarettes without either a "tax paid" or "tax exempt" stamp affixed to the packaging —within the State. *Ibid.* The federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) had seized 4205 cartons of unstamped cigarettes from a defendant's residence because ATF agents suspected the defendants were transporting unstamped cigarettes from smoke shops on an Idaho Indian reservation to smoke shops on various Indian reservations in Washington. *Ibid.* The Ninth Circuit held that the defendants' violation of Washington's pre-notification requirement could not provide a valid basis for a federal prosecution under Section 2342(a) because applying that requirement to tribal members violated Article III of the 1855 Treaty. *Id.* at 1264.

The Ninth Circuit again took as its interpretive baseline this Court's rule that "[t]he text of a treaty must be

construed as the Indians would naturally have understood it at the time of the treaty." *Smiskin*, 487 F.3d at 1264 (citing *Mille Lacs*, 526 U.S. at 196, 200). Based on the history of the Treaty described by the district court in *Yakama Indian Nation*, *supra*, the court of appeals concluded that the pre-notification requirement was a restriction and condition on the right to travel that violated Article III. *Smiskin*, 487 F.3d at 1266. The court saw no distinction between a fee that applied to highway travel and a pre-notification requirement insofar as the Treaty right was concerned. *Ibid.* Applying either to Yakama tribal members engaged in public-highway travel, the Ninth Circuit reasoned, "imposes a condition on travel that violates their treaty right to transport goods to market without restriction." *Ibid.*

In the view of the United States, the Ninth Circuit erred in concluding that the pre-notification requirement at issue in *Smiskin* was a restriction on the right to travel on public highways barred by Article III. The purpose and effect of Washington's pre-notification requirement was to enforce (prevent evasion of) the collection of the State's tax on cigarettes. Such a tax may be validly 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.*, *Washington* v. *Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154-157 (1980). The pre-notification requirement imposed by Washington law was not directed to the use of public highways as such; it imposed only a modest regulatory requirement as part of a comprehensive cigarette-tax regime. And because the Tribe and its members were not exempt from enforcement of the State's overall cigarette-tax re-

gime, there is no reason to conclude that Article III exempted the Tribe from that one feature, to which travel was merely incidental.

c. To resolve this case, the Court need not decide the extent, if any, to which the Ninth Circuit is correct in its underlying premise that Article III of the 1855 Treaty preempts certain state fees or other regulation of highway travel itself.[5] We do note, however, that Article III secures to the Yakamas only "the right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. 952-953. That language does not on its face confer any right greater than what other citizens share or suggest that the Yakamas are exempt from generally applicable regulations or financial assessments related to use of the highways in Washington (much less elsewhere), such as tolls or regulation or taxation of trucks based on size. It is thus instructive in this regard that the first paragraph of Article III of the

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[5] The United States has argued in a brief in opposition to a certiorari petition that Article III of the 1855 Treaty does not preempt certain federal fees and taxes on trucks that use the highways and diesel fuel used by those trucks. See U.S. Br. in Opp. at 6-10, *Ramsey* v. *United States*, No. 02-1547 (June 26, 2003). The issue in *Ramsey* was not, as here, the extent to which the Treaty preempts *state* regulation, but rather the extent to which the Treaty exempts the Tribe from a general, nationwide tax and fee enacted by Congress. See 302 F.3d 1074, 1078 (9th Cir. 2002), cert. denied, 540 U.S. 812 (2003). The Ninth Circuit uses a different framework to determine whether Indian treaties create an exemption from federal taxes, looking to whether the treaty contains "express exemptive language." *Ibid.*; see *United States* v. *King Mountain Tobacco Co., Inc.*, No. 14-36055 (9th Cir. Aug. 13, 2018), slip op. 12 n.4. The United States argued in *Ramsey* that the text of Article III did not contain such express exemptive language regarding the federal taxes at issue. U.S. Br. in Opp. at 5-15, *Ramsey, supra* (No. 02-1547).

1855 Treaty provides two different rights to the Yakamas. The first is a special "right of way, with *free access* from [the Reservation] to the nearest public highway"; the second is a "right, in common with the citizens of the United States, to travel upon all public highways." *Ibid.* (emphasis added). The Yakamas' special right of "free access" to highways is guaranteed only between the Reservation and the nearest public highways. That phrase does not, however, modify the right to travel upon public highways, which is granted only "in common with citizens of the United States." *Ibid.*[6]

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[6] The phrase "in common with" also appears in the second paragraph of Article III of the 1855 Treaty, which "secure[s] to [the Yakamas] * * * the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." 12 Stat. 953. The Court has interpreted that provision to grant the Yakamas a right broader than simply "access to fishing sites 'in common with'" non-Indians, to include the "right to harvest a share of the runs of anadromous fish" at their usual fisheries. *Fishing Vessel*, 443 U.S. at 675. The Court reached that conclusion, however, "[b]ecause the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters" and thus would be unlikely to view the Treaty right "as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters." *Id.* at 678-679. The Court also determined, in light of apportionment standards rooted in the "Anglo-American common law," that the tribes should be permitted to take up to a 50% share of the first harvest. *Id.* at 685-686 & n.27.

But unlike the fisheries, which were a pre-existing resource from which Indians were taking fish at "usual and accustomed places" at the time of the 1855 Treaty, 12 Stat. 953, the public highways discussed in paragraph one of Article III were not natural resources, were not yet in place, and were to be built and maintained by non-Indian authorities. See *Yakima Indian Nation*, 955 F. Supp. at 1244 (discussing construction of roads). There accordingly is reason to doubt that the "in common with" language in the first paragraph of Article III gives the Yakamas a preferential right to use

However that may be, the motor-fuel tax at issue in this case is distinguishable from the state laws that the Ninth Circuit determined could not be applied to members of the Tribe in *Cree* and *Smiskin*. The Washington motor-fuel tax is thus not preempted even under the Ninth Circuit's framework for interpreting the Treaty right.

The state laws in *Cree* and *Smiskin* required tribal members to comply with certain requirements in connection with use of the public highways to transport their goods for trade. Tribal members were required to obtain licenses and permits and to pay fees as a precondition to operating logging trucks on the highways, see *Cree*, 157 F.3d at 765, or to pre-notify state officials when transporting unstamped cigarettes on the highways, see *Smiskin*, 487 F.3d at 1262. Washington's motor-fuel tax, by contrast, is levied on each gallon of fuel withdrawn from a refinery or terminal rack in the State or brought into the State, regardless of how the fuel is imported. Wash. Rev. Code Ann. § 82.36.020(1) (West 2012). That the tax is imposed by reference to the moment when motor fuel enters the state stream of commerce does not transform the tax into an impermissible burden on the use of the highways. To the contrary, for fuel that is imported, the tax is imposed when the fuel enters the State because the Legislature wanted to make clear that the tax was being imposed at the first moment of possession of motor fuel in Washington. *Id.* §§ 82.36.022 (West 2012), 82.38.031 (West 2008).

In the Washington Supreme Court's view, Washington's motor-fuel tax is indistinguishable from the prenotification requirement in *Smiskin* because "[i]n both

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the highways free of state regulation and assessments for their construction, maintenance, and safe use.

cases, the State placed a condition on travel that affected the Yakamas' treaty right to transport goods to market." Pet. App. 13a. The motor-fuel tax, however, is not a "condition on travel." *Ibid.* It is an excise tax imposed by the gallon on the possession of fuel. The tax "has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington." *Id.* at 26a (Fairhurst, C.J., dissenting).

That was also true of the escrow requirement in *King Mountain*, which the Ninth Circuit concluded was not preempted by the Tribe's right to use the public highways. The Washington Supreme Court distinguished that case on the ground that "in *King Mountain*, travel was not at issue." Pet. App. 13a. But that reading of *King Mountain* is misconceived. The Tribe made *King Mountain* about travel by invoking Article III to claim an exemption from the escrow requirement for goods that tribal businesses brought to market in Washington. 768 F.3d at 991, 997-998. That escrow requirement imposed a financial burden on the Tribe's trading endeavors—unrelated to highway use—in the same way as the motor-fuel tax in this case. The court's effort to distinguish *King Mountain* is unpersuasive.

The 1855 Treaty reserves only a right for the Tribe to use the public highways. It does not exempt tribal members from taxation of goods that they transport by highway while conducting business outside the Tribe's Reservation. Respondent is therefore not exempt from the state motor-fuel tax.

## CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

Respectfully submitted.

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