

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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WASHINGTON STATE )  
DEPARTMENT OF LICENSING, )  
Petitioner, )  
v. ) No. 16-1498  
COUGAR DEN, INC., )  
Respondent. )  
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Pages: 1 through 79  
Place: Washington, D.C.  
Date: October 30, 2018

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## HERITAGE REPORTING CORPORATION

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4 DEPARTMENT OF LICENSING, )

5 Petitioner, )

6 v. ) No. 16-1498

7 COUGAR DEN, INC., )

8 Respondent. )

9 - - - - -

10 Washington, D.C.

11 Tuesday, October 30, 2018

12

13 The above-entitled matter came on for  
14 oral argument before the Supreme Court of the  
15 United States at 10:04 a.m.

16

17 APPEARANCES:

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19 Olympia, Washington; on behalf of the Petitioner.

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22 the United States, as amicus curiae, supporting  
23 the Petitioner.

24 ADAM G. UNIKOWSKY, ESQ., Washington, D.C.; on behalf  
25 of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	NOAH PURCELL, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ANN O'CONNELL, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioner	23
9	ORAL ARGUMENT OF:	
10	ADAM G. UNIKOWSKY, ESQ.	
11	On behalf of the Respondent	35
12	REBUTTAL ARGUMENT OF:	
13	NOAH PURCELL, ESQ.	
14	On behalf of the Petitioner	74
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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3  
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 16-1498, Washington State Department of Licensing versus Cougar Den.

Mr. Purcell.

ORAL ARGUMENT OF NOAH PURCELL  
ON BEHALF OF THE PETITIONER

MR. PURCELL: Mr. Chief Justice, and may it please the Court:

Washington's fuel tax taxes fuel, not highway travel. The tax is non-discriminatory and its incidence is off-reservation, so it applies to Cougar Den unless preempted by express federal law. Nothing in the Yakama treaty preempts this tax. The treaty guarantees the tribe the right in common with others to travel by public highway, but it says nothing that would preempt a generally applicable tax on goods like this one.

The contract --

JUSTICE SOTOMAYOR: I'm sorry.

MR. PURCELL: I'm sorry, Your Honor.

JUSTICE SOTOMAYOR: Could you tell me

1       could you tax the tribe's buying of the fuel in  
2       another state?

3               MR. PURCELL: Well, the treaty --

4               JUSTICE SOTOMAYOR: They take the  
5       truck, they leave your state, they go to  
6       another state, they buy the fuel. Can you tax  
7       them in the buying of that fuel?

8               MR. PURCELL: The other state could  
9       certainly tax them on that, Your Honor.  
10       They've conceded that. Whether we could tax  
11       them as a matter of state law, I don't think  
12       so, but -- but --

13              JUSTICE SOTOMAYOR: All right.

14              MR. PURCELL: -- but not -- certainly  
15       not under the treaty.

16              JUSTICE SOTOMAYOR: So the question  
17       is, in my mind, whether the travel rights to  
18       freely use the highways permit you to tax them  
19       for an incidence carrying the fuel from another  
20       state on a highway through your state, correct?  
21       Now the court below called this an importation  
22       tax.

23              MR. PURCELL: Right.

24              JUSTICE SOTOMAYOR: You've been  
25       resisting that, and you call it a use tax.

1 MR. PURCELL: Right.

2 JUSTICE SOTOMAYOR: But, if it's an  
3 importation tax, it's not equally applied.  
4 There are wholesalers of all kind who can  
5 import without paying the tax, correct?

6 MR. PURCELL: Not if they lack a  
7 license like Cougar Den, Your Honor. An  
8 unlicensed entity owes the tax when they bring  
9 the fuel into the state regardless of how they  
10 do so, and licensed entities that buy fuel in  
11 the state pay the tax immediately within the  
12 state. So this tax applies to fuel purchased  
13 in Washington or outside of Washington --

14 JUSTICE SOTOMAYOR: What is the -- the  
15 license? Is it a way to get them not to pay?  
16 Who pays for the fuel then once you're  
17 licensed? You're a wholesaler, you bring it  
18 in, I'm assuming by vessel or by pipeline.

19 MR. PURCELL: Well, then -- sorry.  
20 Sorry, Your Honor.

21 JUSTICE SOTOMAYOR: Then the person  
22 who buys the fuel uses it, correct?

23 MR. PURCELL: Well, if you're bringing  
24 it into a terminal or refinery, then -- then  
25 the tax is due when it's picked up at a

1 terminal or a refinery. Who actually pays the  
2 tax is a complicated question depending on  
3 whether the entity that owns the fuel in the  
4 tank is a supplier or not.

5 But that's when the tax is due.

6 JUSTICE SOTOMAYOR: If we accept that  
7 the travel provision entitled this tribe to  
8 travel with goods back and forth to a market  
9 without a tax, without a license, just like in  
10 the fishing rights case, then what gives you  
11 the right to charge them within the state?  
12 Meaning they're traveling free of tax, free of  
13 license, they go to the reservation, you can't  
14 tax them on the reservation.

15 MR. PURCELL: Right.

16 JUSTICE SOTOMAYOR: So I'm not quite  
17 sure what permits you to tax them at all.

18 MR. PURCELL: Well, there's two  
19 crucial --

20 JUSTICE SOTOMAYOR: If you can't tax  
21 them when they picked up the fuel.

22 MR. PURCELL: There's two crucial  
23 points about that, Your Honor. First of all,  
24 Cougar Den concedes that we could tax a  
25 purchase or sale that a Yakama member makes

1 outside of the reservation, even though that  
2 would not have been taxed in 1855. What's  
3 doing the work --

4 JUSTICE SOTOMAYOR: At the market.

5 MR. PURCELL: At the market, yes, but  
6 -- but --

7 JUSTICE SOTOMAYOR: But you've just  
8 admitted that at the market where they pick  
9 this up, you couldn't tax them.

10 MR. PURCELL: Well, the point is, Your  
11 Honor, the treaty did not preserve everything  
12 exactly as it was in 1855. The key point here  
13 is that this Court has adopted a clear rule  
14 that as to off-reservation taxes --  
15 off-reservation state taxes can be applied to  
16 tribes if -- if they're non-discriminatory and  
17 -- and if the incidence is off-reservation.  
18 And, here, that's the case, so --

19 JUSTICE KAGAN: Mr. Purcell --

20 JUSTICE SOTOMAYOR: Well, that --

21 JUSTICE KAGAN: -- there are a lot of  
22 issues in this case, but just to make it easier  
23 for me, could I ask you to assume a couple of  
24 them and then could -- we could focus on one?

25 MR. PURCELL: Sure.



1 JUSTICE KAGAN: So you know one issue  
2 is does the right to travel include the right  
3 to travel with goods, and I'm going to ask you  
4 to just assume that it does.

5 MR. PURCELL: Okay.

6 JUSTICE KAGAN: And then another  
7 question is, does this treaty preempt generally  
8 applicable taxes? And I'm -- that's -- you've  
9 been talking a lot about that. And I'm just  
10 going to ask you to assume that it does.

11 MR. PURCELL: Okay.

12 JUSTICE KAGAN: In other words, you  
13 know, if -- if -- if you have a toll on a road,  
14 for example, the fact that it's generally  
15 applicable, you still can't apply it to members  
16 of the Yakama Nation. I'm just going to ask  
17 you --

18 MR. PURCELL: Okay.

19 JUSTICE KAGAN: -- to assume that,  
20 okay?

21 MR. PURCELL: Uh-huh.

22 JUSTICE KAGAN: So, if both of those  
23 things are true, then it seems to me we come --  
24 to me, the hardest issue, which is how do we  
25 look at this tax? Do we look at it as a tax

1 that is preventing the Yakama from doing  
2 exactly what they bargained for in this treaty;  
3 in other words, it -- you know, it's not  
4 preventing but burdening the Yakama from  
5 traveling on roads with goods, or you keep on  
6 saying, well, no, because it's not targeted at  
7 that. It's not directed at that. It's a more  
8 broad tax on the possession of fuel.

9 And I guess what I want to ask you is  
10 why that matters. I mean, it -- it does seem  
11 to me that from the Yakama's point of view, and  
12 they're, after all, the people who entered into  
13 the treaty, from the Yakama's point of view,  
14 this tax is burdening exactly what they  
15 bargained to get, which is the ability to  
16 transport their goods without any burdens,  
17 without a tax.

18 MR. PURCELL: No, Your Honor. This  
19 tax applies to the fuel itself regardless of  
20 whether or how it's transported.

21 JUSTICE KAGAN: I -- know you -- I --  
22 I -- maybe I'm not making myself clear. You're  
23 sort of saying, well, the tax applies in other  
24 circumstances to people who aren't transporting  
25 fuel. But I'm saying, from the Yakama's point

1 of view, they're transporting goods on the  
2 road, exactly as the treaty says they can, and  
3 why do they care if you apply your tax in other  
4 circumstances as well? Why should they care?  
5 Why does it matter what the full scope of the  
6 tax is if, from the Yakama's point of view, the  
7 tax burdens exactly what they got as a result  
8 of its treaty?

9 MR. PURCELL: Because, Your Honor,  
10 this Court has never said that a person or a  
11 company can make an activity exempt from state  
12 law, an activity like fuel possession, by  
13 engaging in that activity while also engaged in  
14 a treaty-protected activity like travel.

15 If that's the rule, then a Yakama  
16 member could possess illegal firearms or  
17 illegal drugs or diseased apples in their car,  
18 to just gave a range of examples, and bring  
19 them into the state and say your laws against  
20 these things violate my right to travel by  
21 public highway. And that cannot possibly be  
22 the right approach, or else it would preempt  
23 any sort of state --

24 JUSTICE SOTOMAYOR: But even in the  
25 fishing rights case, which you don't see as --

1 as comparable, but others might argue it is,  
2 the state can regulate for public interest  
3 conservation points.

4 The Indian tribe has conceded that you  
5 can regulate for public interest on a highway.  
6 That wasn't superseded by the treaty. But what  
7 they bargained for was to -- to carry goods  
8 back and forth from the market without a  
9 burden. That was their bargain. Just as,  
10 under the fishing rights treaty, they can go  
11 and collect fish without paying a tax or  
12 getting a license for that fish.

13 MR. PURCELL: Your Honor, in Tulee,  
14 this Court said that the -- the state could not  
15 tax the very right at issue, the right to fish.  
16 But, here, that is not at all what's happening.

17 JUSTICE SOTOMAYOR: Or impose a toll  
18 to do it.

19 MR. PURCELL: Well, and the Court has  
20 never said that the state can generally  
21 regulate a fishing right in the public  
22 interest. It's only said that the state can  
23 regulate for the conservation of fish. So --

24 JUSTICE SOTOMAYOR: Well, that's the  
25 public interest.

1           MR. PURCELL: Well, but -- but -- but  
2 Cougar Den is seeking to expand that to say the  
3 state can do anything that would protect public  
4 safety. And this Court has never said that  
5 about the fishing right. So that's sort of a  
6 convenient addition that they've conceded, but  
7 it's not found anywhere in the treaty text.  
8 And so they're -- they're essentially asking  
9 this Court to -- to find kind of reasonable  
10 regulations that are okay without any basis in  
11 the treaty.

12           JUSTICE GORSUCH: Well, counsel, is  
13 that so? I mean, I thought the interpretation  
14 of the phrase "in common with" by the district  
15 court in Yakama Indian Nation was that it  
16 allowed the state to impose certain regulations  
17 that facilitate both native and non-native  
18 travel along the same highways. So --

19           MR. PURCELL: That's --

20           JUSTICE GORSUCH: -- safety  
21 regulations, speed limits, would facilitate  
22 travel in common.

23           MR. PURCELL: That's what the district  
24 court held in Yakama Indian Nation.

25           JUSTICE GORSUCH: Right.

1           MR. PURCELL: Of course, that wouldn't  
2 cover something like, for example, regulating  
3 firearm possession or diseased apple  
4 transportation.

5           JUSTICE GORSUCH: No, but that -- but  
6 -- but -- but it does regulate the questions  
7 that we've been talking about in terms of it  
8 does provide some safety regulations, for  
9 example, right?

10          MR. PURCELL: Well, presumably, that  
11 would allow, for example, a speed limit --

12          JUSTICE GORSUCH: Yeah, okay.

13          MR. PURCELL: -- but not any other  
14 sort of regulation on the goods themselves,  
15 which is what the state's trying to do here.

16                 I mean, what's odd under Cougar Den's  
17 theory is that the state --

18          JUSTICE GORSUCH: That's all that --  
19 under the Yakama Indian Nation holding, that's  
20 all that the treaty would allow you to do.

21                 And I guess I'm wondering in the first  
22 instance why -- why you're not estopped from  
23 arguing a different position today?

24          MR. PURCELL: For a number of reasons,  
25 Your Honor. First of all, treaty -- this Court

1 has always treated treaty interpretation as a  
2 question of law for this Court to decide de  
3 novo, and that's how this Court has always  
4 approached treaty interpretation.

5 It has never considered itself bound  
6 by legal conclusions reached by a lower court  
7 even in the same case.

8 JUSTICE GORSUCH: Why, I -- I don't  
9 feel bound. I wonder if you are, though.

10 (Laughter.)

11 MR. PURCELL: No, Your Honor. We  
12 explained in our reply brief as a matter of  
13 state law the argument is just completely wrong  
14 that we're bound by any of those statements in  
15 the ALJ's ruling or the superior court ruling.

16 But, more importantly, this Court has  
17 never considered itself bound by -- by what are  
18 really legal conclusions in a district court  
19 opinion.

20 And Yakama Indian Nation dealt with a  
21 very narrow issue of a fee as a precondition to  
22 use the highway. That is not what we have  
23 here.

24 Cougar Den and the Yakama Nation are  
25 free to use the highway and not pay this tax.

1 What they can't do is possess fuel and bring it  
2 into the state or purchase it in the state  
3 without paying the tax.

4 JUSTICE KAVANAUGH: But they were told  
5 at the time of the treaty that you could go on  
6 the roads to take your things to market, as if  
7 you would be treated off-reservation, as if you  
8 were still on the reservation.

9 MR. PURCELL: The first part they were  
10 told, Your Honor. The second part they were  
11 not. That is a misquote that the other side is  
12 using from the -- the -- the --

13 JUSTICE KAVANAUGH: But the effect --  
14 the effect was that, in taking your goods to  
15 market, which was the promise, in exchange for  
16 a huge area of land, an area of land the size  
17 of the State of Maryland that was given up by  
18 the tribe, that you could take your goods to  
19 market.

20 And this burdens, as Justice Kagan  
21 said, this burdens substantially their ability  
22 to take goods to market.

23 MR. PURCELL: Your Honor, the Yakama  
24 remain entirely free to take goods to market.  
25 And Cougar Den has conceded that the state can



1 tax their -- their trading of goods  
2 off-reservation, as they must. So the idea  
3 that the treaty preserved things exactly as  
4 they were in 1855, and the Yakama trading  
5 practices, is just -- just impractical.

6 JUSTICE KAGAN: But what the treaty  
7 seems to present -- prevent is the state from  
8 taxing either travel or, as Justice Kavanaugh  
9 says, travel with goods.

10 Isn't that exactly what they got in  
11 exchange for their land?

12 MR. PURCELL: No, Your Honor, the best  
13 reading of the treaty is that it does not  
14 preempt non-discriminatory taxes that apply  
15 equally to everyone. The treaty says it  
16 guarantees a right in common with others to  
17 travel by public highway.

18 And none of the reasons the Court  
19 deviated from that ordinary meaning in the  
20 fishing cases apply here.

21 But even if the Court decided that it  
22 guaranteed the Yakama some right beyond what it  
23 guaranteed others in terms of traveling without  
24 paying a fee for traveling, what we have here  
25 is not a fee for traveling. The -- the -- this

1 fee does not turn -- this tax does not turn in  
2 any way on use of the highway.

3 It's paid on fuel purchased in state,  
4 fuel purchased out of state. If Cougar Den  
5 brought this fuel into Washington and  
6 immediately put it into a tank on the other  
7 side of the state line, they would still owe  
8 the tax even if they never traveled any  
9 farther.

10 JUSTICE KAGAN: Well, the -- the --  
11 the tax legislation taxes a wide range of  
12 activities. One is it taxes fuel that's  
13 removed in the state from a refinery, but the  
14 one that's being applied here is that it taxes  
15 motor vehicle fuel entering into this state.

16 So entering into, this is a pretty  
17 standard importation tax, which is to say that  
18 it's taxing the travel of goods into the state,  
19 which, again, seems to be what the Yakama got  
20 as a result of this treaty: the ability to  
21 take goods to market and to take goods from  
22 market, regardless where that market is.

23 MR. PURCELL: But, again, Your Honor,  
24 the -- the fuel -- the tax applies to fuel  
25 purchased inside Washington and outside of

1 Washington and brought into Washington by any  
2 means. It would apply if they were bringing it  
3 in by private toll road. It is not a tax on  
4 using public highways.

5 And -- and the happenstance of where  
6 the state line is was not certainly a factor in  
7 the 1855 treaty negotiations.

8 What -- what Cougar Den is essentially  
9 arguing --

10 JUSTICE KAGAN: Do you -- do you  
11 contest -- I mean, if -- if you said what is  
12 Cougar Den doing, how would you describe what  
13 Cougar Den is doing, what its activity is?  
14 Because the way I would describe Cougar Den's  
15 activity is that it's bringing goods from  
16 market.

17 MR. PURCELL: Well, two things about  
18 that, Your Honor. First of all, the treaty  
19 does not --

20 JUSTICE KAGAN: I -- I just really  
21 asked how would you describe Cougar Den's  
22 activity.

23 MR. PURCELL: Sorry. I would describe  
24 it as possessing fuel in Washington, Your  
25 Honor. That is why they pay the tax.

1           Keep in mind, Cougar Den is not even  
2           doing the transporting here.

3           JUSTICE KAGAN: You would describe it  
4           as possessing fuel as opposed to transporting  
5           fuel?

6           MR. PURCELL: They owe the tax because  
7           they possess fuel. They are not transporting  
8           the fuel in light of the facts of this case.

9           JUSTICE KAGAN: So if Jack says I'm  
10          taking my pigs to market, and somebody says,  
11          what are you doing, Jack? He says, no, I'm  
12          taking my pigs to market. No, I think you're  
13          possessing your pigs, Jack.

14          MR. PURCELL: Well, if the state had a  
15          rule that diseased pigs could not leave a  
16          certain area, under the -- under *Crudenser*, the  
17          state could not apply that rule.

18          And -- and so this is a regulation of  
19          the goods, a tax to the goods, not a tax on the  
20          travel. That's the crucial point here.

21          That's -- that's one of the crucial  
22          points. The other crucial point is, under the  
23          best reading of the treaty, this is a  
24          non-discriminatory tax that applies to  
25          everyone. And so it would not be preempted

1 even if it were.

2 JUSTICE KAVANAUGH: That -- that  
3 reading of "in common with" was rejected by the  
4 Court in the fishing cases.

5 MR. PURCELL: It was, Your Honor, but  
6 none of the reasons the Court gave in those  
7 cases apply here. So the Court really gave  
8 three reasons.

9 And in the Tulee case, the Court said  
10 it was despite the phrase "in common with  
11 others" that it was going to read the fishing  
12 right as creating a greater right for the  
13 tribes than for non-Indians. And there were  
14 sort of historical, textual, and practical  
15 reasons.

16 And the practical reason, first and  
17 foremost, was an equal right would have left no  
18 fish for the Indians to take because they're so  
19 vastly outnumbered by non-Indians.

20 And that's just not the case here.  
21 Allowing equal access to the highway --

22 JUSTICE GORSUCH: We -- counsel, we  
23 normally read a -- a -- a phrase to bear the  
24 same meaning in all of its applications. And  
25 we wouldn't normally read the term "in common

1 with" to mean one thing when it's fishing and  
2 another thing when it's highways, would we?  
3 That would be kind of an extraordinary --

4 MR. PURCELL: Fair --

5 JUSTICE GORSUCH: -- reading of a  
6 statutory term.

7 MR. PURCELL: Fair enough, Your Honor,  
8 but in Tulee, this Court said it was sort of  
9 deviating from the normal meaning.

10 JUSTICE GORSUCH: What -- what -- what  
11 do you think about that, though?

12 MR. PURCELL: I think you had good  
13 reasons for deviating from the normal meaning  
14 in Tulee that do not apply here. And so I  
15 think the Court should give the phrase its  
16 normal meaning.

17 JUSTICE GORSUCH: But having adopted  
18 one reading of it, why wouldn't we be  
19 consistent?

20 MR. PURCELL: Because none of the  
21 reasons you gave in those cases apply here --

22 JUSTICE GORSUCH: Okay.

23 MR. PURCELL: -- the textual reasons  
24 and practical.

25 JUSTICE GORSUCH: The next -- next

1 concern would be then what do we do about the  
2 fact that this is also how the district court  
3 concluded it after very careful reading in  
4 Yakama Indian Nation about the history of the  
5 treaty --

6 MR. PURCELL: Well, it's the --

7 JUSTICE GORSUCH: -- and looking at  
8 the original understanding of both parties and  
9 its original meaning at that time, and that the  
10 Indians understood it not to mean a common  
11 regulation applicable to everybody, but, again,  
12 that they would be able to do the same things  
13 that they've always done, just with non-native  
14 persons present?

15 MR. PURCELL: The meaning of the  
16 treaty, of course, is a question of law for  
17 this Court to decide de novo. And if the Court  
18 doesn't want to reach that issue, of course,  
19 you can simply say that whatever the treaty  
20 means about travel, this is a tax on goods.

21 I'd like to reserve the remainder of  
22 my time for rebuttal if I may.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel. Not -- not so fast.

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: I did that  
2 once too.

3 Ms. O'Connell.

4 ORAL ARGUMENT OF ANN O'CONNELL,  
5 FOR THE UNITED STATES, AS AMICUS CURIAE,  
6 SUPPORTING THE PETITIONER

7 MS. O'CONNELL: Mr. Chief Justice, and  
8 may it please the Court:

9 Article III of the Yakama treaty does  
10 not exempt tribal members from paying  
11 Washington's motor fuel tax.

12 The treaty protects the right in  
13 common with others to travel upon the public  
14 highways. It does not give tribal members  
15 immunity from excise taxes on goods that  
16 they're carrying inside their trucks inside --  
17 that they're brought outside of the reservation  
18 or obtained outside of the reservation for  
19 trade or for any other purpose.

20 Respondent acknowledges that tribal  
21 members are not exempt from the economic  
22 framework for trading goods that has developed  
23 outside of the reservation.

24 If Respondent had obtained this fuel  
25 from a refinery in Washington, it could be



1       taxed for that transaction.

2               If Oregon had charged a tax on this  
3 transaction, the Respondent would have to pay  
4 it.

5               Washington's tax is an -- is an  
6 economic burden on the fuel that's being  
7 carried in the truck. It's not a restriction  
8 on their ability to use the highway in common  
9 with others.

10              JUSTICE BREYER: Assume I think you're  
11 mostly right, but what about the fact that it's  
12 gasoline? I mean, can -- can the state impose  
13 tolls on -- on the highway? Say they really  
14 want people to use mass transit. We're going  
15 to have a \$1,000 toll.

16              MS. O'CONNELL: I don't --

17              JUSTICE BREYER: Can they do that?

18              MS. O'CONNELL: The state -- well, the  
19 state could impose a \$1,000 toll if it was  
20 doing that for everybody. I think that --

21              JUSTICE BREYER: Yes, doing it for  
22 everybody. Now, by the way, nobody, or hardly  
23 anyone, can use the highways, including the  
24 tribe.

25              MS. O'CONNELL: I think that that

1 hypothetical is quite unlikely simply because  
2 the -- there's --

3 JUSTICE BREYER: I believe that they  
4 are unlikely to impose it. That's why it's a  
5 hypothetical.

6 MS. O'CONNELL: There's -- there's an  
7 antidiscrimination rule built into --

8 JUSTICE BREYER: No, no, everyone has  
9 to pay the thousand.

10 MS. O'CONNELL: Right. So I guess --

11 JUSTICE BREYER: Including the tribe.  
12 And then, if you were going to say they can do  
13 that, I really do find it difficult to  
14 distinguish this issue.

15 MS. O'CONNELL: There -- there could  
16 be some restrictions, Justice Breyer, like --

17 JUSTICE BREYER: There could?

18 MS. O'CONNELL: -- if you imposed a,  
19 you know, a million dollar tax on everybody's  
20 use --

21 JUSTICE BREYER: No, no, it's \$1,000,  
22 and, of course, as soon as you agree to that,  
23 I'm going to say it's only \$50, and then I'm  
24 going to say it's \$10.

25 MS. O'CONNELL: No, right.

1 JUSTICE BREYER: And then, when I'm  
2 driving up, I would have thought they can't do  
3 that, but if they can't do that, this is  
4 gasoline. And maybe all those Oregon and --  
5 and California and other places and everybody  
6 pays it, that's true, but if you pay a high  
7 gasoline tax, it's pretty hard to travel.

8 And they're supposed to be able to  
9 travel on the highway, just as if you get all  
10 the salmon out of the river, it's pretty hard  
11 to fish.

12 MS. O'CONNELL: I -- I suppose there  
13 could be circumstances where the restriction  
14 that's placed on travel on the highway are so  
15 severe that it undermines or --

16 JUSTICE BREYER: In Oregon, you say  
17 that they have the -- they cannot take steps to  
18 remove significant numbers of salmon from the  
19 stream -- stream, and they cannot take steps  
20 sufficient to significantly limit the right to  
21 travel on the highway by these people. Do what  
22 you want for the other citizens.

23 MS. O'CONNELL: So I think there's a  
24 couple of distinctions that we need to -- to  
25 draw between what you're hypothesizing and what

1 is happening here. The first is that, yes,  
2 there could be circumstances in which the  
3 restriction that's imposed is so severe that it  
4 burdens the actual ability or right to travel  
5 on the highway. But there's --

6 JUSTICE BREYER: How much is the tax?

7 MS. O'CONNELL: Excuse me?

8 JUSTICE BREYER: How much is the tax?

9 MS. O'CONNELL: Well, we don't think  
10 that -- I mean, I -- I don't know.

11 JUSTICE BREYER: I know you don't  
12 think it's relevant, but if I happened to think  
13 it was relevant and asked the question how much  
14 is the tax, what would the answer be?

15 MS. O'CONNELL: I -- I don't have a --

16 JUSTICE BREYER: You don't know?

17 MS. O'CONNELL: -- a number to give  
18 you. I think the, you know, district court  
19 could determine what -- what was too burdensome  
20 then actually --

21 JUSTICE BREYER: But they didn't make  
22 any of these arguments.

23 MS. O'CONNELL: No, that's correct.  
24 And I think the other thing is, even if you  
25 thought that the treaty preempted things like

1 fees to use the highway, such as a toll or a  
2 licensing fee that was issue -- at issue in  
3 Cree, so you adopted the Ninth Circuit's rule  
4 of what kinds of things are preempted, it still  
5 wouldn't preempt this tax, which isn't a fee to  
6 use the highway; it's a tax, an economic burden  
7 on the goods that are being carried in the  
8 truck.

9           The -- the text of Article III secures  
10 to the -- the Yakamas only the right in common  
11 with others to travel upon the public highways.  
12 And that right, by its plain terms, doesn't  
13 protect activities other than highway travel.  
14 There's nothing in the negotiating history  
15 either that could indicate --

16           JUSTICE SOTOMAYOR: Well, there's one  
17 central part, which is they traveled the  
18 highways for free. They weren't burdened by  
19 economic -- by economic manner in traveling the  
20 highway.

21           So we go back to Justice Breyer's  
22 question, which is whether it's 50 cents or a  
23 million dollars, you're saying if it's 50 cents  
24 or five or 10, presumably, it's okay, you can  
25 burden them with that. You just can't burden

1     them -- and I presume you would say every other  
2     citizen -- by imposing a million dollars? Is  
3     that your point?

4             MS. O'CONNELL: Well, I don't -- I  
5     don't think the state is ever going to impose a  
6     tax that is so burdensome that nobody can  
7     travel on the highways, but our -- yes, we  
8     believe that --

9             JUSTICE SOTOMAYOR: So you're going  
10    back to the point that Justice Gorsuch ended  
11    with, which is that you're reading "in common  
12    with all others" differently in this context  
13    than in the fishing rights context?

14            MS. O'CONNELL: Yes. And I think the  
15    reason that it's different in this context than  
16    in the fishing context is because of the right  
17    at issue. I think there are textual  
18    differences and historical differences between  
19    those two clauses of the treaty.

20            JUSTICE SOTOMAYOR: Well, the one  
21    difference that you can't get around is they  
22    didn't sign a treaty and give away that much  
23    real estate to get nothing in return, to be  
24    treated exactly like every other citizen in  
25    traveling the highway.

1           MS. O'CONNELL: No, I think one -- one  
2           thing that is really -- really important about  
3           this right to travel provision, the right to  
4           use the public highways, is that the -- the  
5           tribe was receiving an assurance from Governor  
6           Stevens that if they gave up the rest of the  
7           land in exchange for the reservation, they  
8           would still be able to leave the reservation,  
9           they would still be able to travel throughout  
10          the area, and that they would be able to do so  
11          without discrimination against them, without  
12          taxes imposed or without rules imposed that  
13          were unique to Indians.

14          JUSTICE SOTOMAYOR: You just said it:  
15          without taxes imposed.

16          MS. O'CONNELL: Without taxes imposed  
17          that were not applied to everybody else.

18          JUSTICE GORSUCH: What kind of --

19          JUSTICE KAVANAUGH: It doesn't say  
20          that.

21          JUSTICE GORSUCH: -- what kind of  
22          promise is that? Given the constitutional  
23          rights to travel and equal protection, is that  
24          a -- is that a -- is that an illusory promise,  
25          the promise you've just described?

1 MS. O'CONNELL: No. I mean, I think  
2 at the time it was -- it was just a reassurance  
3 to the tribe that Governor Stevens was giving.  
4 There are examples cited on page 38 of the  
5 Petitioner's brief where, at the time, in the  
6 mid-1800s, there were restrictions on tribal  
7 members leaving reservations. There are  
8 instances where people would report back to  
9 Congress that the -- the Indian agent on the  
10 reservation would issue a pass and tell the  
11 tribal members how long they could be gone from  
12 the reservation and for what purposes.

13 JUSTICE GORSUCH: Do you think any of  
14 that would hold up today?

15 MS. O'CONNELL: No.

16 JUSTICE GORSUCH: Okay.

17 MS. O'CONNELL: Certainly not. But,  
18 at the time, it was a reassurance from Governor  
19 Stevens that the tribe member --

20 JUSTICE KAVANAUGH: The -- the purpose  
21 wasn't -- the purpose wasn't just to leave the  
22 reservation, though. The purpose, as I  
23 understand it, was to leave for the -- for  
24 trade. And if you so burden the trade, that  
25 seems inconsistent with the purpose.



1           MS. O'CONNELL: I -- I don't think,  
2 Justice Kavanaugh, that -- that Respondent is  
3 even arguing that the trade can't be burdened  
4 once they leave the reservation. They  
5 acknowledge that the transaction, if they  
6 purchased the fuel in Washington, could be  
7 taxed, that it could be taxed if -- if Oregon  
8 were to impose a tax here. So it's not that  
9 they're exempt from the economic framework for  
10 trade that's going on outside the reservation.

11           If we could go back to the fishing  
12 cases for just a moment --

13           JUSTICE KAGAN: But I think what is at  
14 issue is the transport of goods to and from the  
15 market, which is what it seems the Yakama is  
16 engaging in here.

17           MS. O'CONNELL: That's true. I mean,  
18 they are transporting goods from market and  
19 they are -- when they come back from Oregon  
20 with the fuel, but that's not -- the treaty  
21 just protects the right in common with others  
22 to use the public highways.

23           JUSTICE KAGAN: But if -- if I  
24 disagree with you on that -- and I hadn't  
25 understood that you were taking that position

1 in your brief -- but if I disagree with you on  
2 that and I use -- and I understand "in common  
3 with" the way Tulee understood "in common  
4 with," then it seems, well, there they are,  
5 they're doing what this treaty says that the --  
6 that this -- they're doing exactly what this  
7 treaty protects, which is transporting goods to  
8 and from market.

9 MS. O'CONNELL: I think that, under  
10 that view, Justice Kagan, the -- the most you  
11 could get is to the Ninth Circuit's line where  
12 they've said that the state can't impose a -- a  
13 fee like a licensing fee or a toll or something  
14 like that to use the highway, even if it's  
15 being imposed across the board.

16 What's happening here is a different  
17 type of restriction. It's an economic burden  
18 on the goods that are being transported to and  
19 from market that the Respondent concedes it  
20 could be taxed for at the -- at the purchase  
21 point.

22 JUSTICE KAGAN: But not because of the  
23 -- but not at the movement point, not -- not  
24 when it -- the -- the goods go from one state  
25 to another on the highway.

1           MS. O'CONNELL: Right. But the -- the  
2           distinction between those things, I think, is  
3           pretty thin. Oregon could have -- could have  
4           taxed this transaction. It doesn't because  
5           Oregon, like Washington, doesn't place a tax on  
6           fuel that's headed out of the state. They  
7           assume that it will be taxed once it gets to  
8           the next state.

9           JUSTICE KAGAN: Well, it might be  
10          thin, but shouldn't we say that the state has  
11          to do things the right way, which is to say the  
12          state has to do things without violating the  
13          treaty. And if the state has another way to do  
14          it, go for it.

15          MS. O'CONNELL: I think the -- the  
16          state has tried many different ways to impose  
17          this tax that have been struck down by various  
18          courts. What the state has done here is  
19          basically followed this Court's advice in  
20          Wagnon, which is to move the incidence of the  
21          tax up the supply chain to off the reservation.  
22          Now --

23          JUSTICE KAGAN: But what the state has  
24          done is to tax exactly the activity that's  
25          protected under the treaty, which is the --

1 which is the transportation of goods to and  
2 from market.

3 MS. O'CONNELL: I -- I don't think so.  
4 There's -- I think there's a distinction  
5 between -- if you think that -- that the -- the  
6 tribe wouldn't be subject to a uniform tax if  
7 it taxed the very thing that they were trying  
8 to preserve, which was the ability to use the  
9 public highways, then that would just -- it  
10 would just mean that you couldn't charge them a  
11 fee to use the highway or something like that,  
12 not that you couldn't tax the goods that are in  
13 the truck. I think one -- thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Mr. Unikowsky.

17 ORAL ARGUMENT OF ADAM G. UNIKOWSKY  
18 ON BEHALF OF THE RESPONDENT

19 MR. UNIKOWSKY: Mr. Chief Justice, and  
20 may it please the Court:

21 The Yakama treaty preempts the  
22 application of the fuel tax to Respondent for  
23 two reasons. The first reason is that, when  
24 Respondent transports fuel, it exercises the  
25 right to travel secured by the Yakama treaty.

1 As such, it has right -- the right to do that  
2 without incurring a tax obligation, regardless  
3 of whether this tax is styled as one on  
4 possession or transportation.

5 Second, even if this case turned on  
6 what the tax is on, this really is a tax on  
7 transportation because that's what the statute  
8 says and that's how the state court construed  
9 it as a matter of state law.

10 CHIEF JUSTICE ROBERTS: So if -- if  
11 this -- these were apples coming into the State  
12 of Washington and there was a fee to -- but  
13 they inspected the apples to make sure they  
14 weren't diseased and the people who owned the  
15 apples had to pay that fee, is that problematic  
16 if it wasn't motor fuel, oil, but just apples,  
17 a fee to inspect the apples and prevent disease  
18 from spreading to other Washington apples?

19 MR. UNIKOWSKY: Your Honor, we  
20 wouldn't object to the inspection at all. We  
21 -- we might object to the fee. But the  
22 inspection is appropriate.

23 CHIEF JUSTICE ROBERTS: Well, that's  
24 kind of the -- well, in other words, everybody  
25 else bringing apples in has to pay the fee to

1 inspect the apples, but the tribe doesn't, even  
2 though -- or the -- the fee can't be assessed  
3 if the tribe is transporting the apples?

4 MR. UNIKOWSKY: Yeah, I think that if  
5 the -- all the tribe is doing is transporting  
6 the apples, we absolutely agree the -- the  
7 apples can be inspected. We agree that, for  
8 regulatory purposes, that's fine.

9 CHIEF JUSTICE ROBERTS: But -- but --  
10 but no fee can be assessed if the tribe is  
11 transporting the apples?

12 MR. UNIKOWSKY: Yeah, I think that a  
13 fee that goes into the -- you know, the general  
14 treasury of the states cannot -- cannot be  
15 assessed on the tribe when they're exercising  
16 the treaty right. But --

17 CHIEF JUSTICE ROBERTS: Even if the  
18 apples don't belong to the tribe? They're  
19 bringing them to somebody -- you know, they're  
20 just bringing them down the road?

21 MR. UNIKOWSKY: Well, it would depend  
22 on who has to pay the tax. So they're -- in  
23 this particular tax, if you just appoint an  
24 agent to transport it for you, you, the  
25 importer who appoints the agent, pays the tax.

1 So I think that if the tax was levied on the  
2 person who -- so if the taxpayer was the person  
3 who owned the apples and they just hired a --  
4 an Indian and a truck to bring it --

5 CHIEF JUSTICE ROBERTS: Yeah.

6 MR. UNIKOWSKY: -- but the state --  
7 yeah, then I think that the --

8 CHIEF JUSTICE ROBERTS: Isn't that  
9 what's going on here? I thought --

10 MR. UNIKOWSKY: No.

11 CHIEF JUSTICE ROBERTS: -- it was the  
12 owner -- I thought it was the owner of the fuel  
13 that is taxed, not the --

14 MR. UNIKOWSKY: Yes, that's Cougar  
15 Den.

16 CHIEF JUSTICE ROBERTS: -- not the  
17 transporter?

18 MR. UNIKOWSKY: Yes, that's Cougar  
19 Den, Your Honor. That's Respondent. The  
20 Indian owns the fuel.

21 CHIEF JUSTICE ROBERTS: So it's not  
22 who owns -- it -- it's not a -- a separation  
23 between the goods and the transport, right?

24 MR. UNIKOWSKY: No, Your Honor, what  
25 the statute does is it says it's the

1 transportation that's taxed, but the tax is  
2 imposed on the owner.

3 So, if you hire someone in a truck to  
4 transport for -- something for you, it would  
5 makes perfect sense that the state wouldn't  
6 want the trucker to have to pay this tax which  
7 will probably exceed the fee he's getting for  
8 transporting it.

9 So the state -- the statute imputes  
10 the act of transportation to the owner of the  
11 fuel. That's in the definition of motor  
12 vehicle fuel importer.

13 And so, in this case, Cougar Den  
14 transports the fuel both via an agent, which is  
15 a contractor, and also it uses its own trucks.  
16 There's a declaration in the record that says  
17 that sometimes it uses its own trucks,  
18 sometimes it hires a contractor, but Cougar Den  
19 --

20 CHIEF JUSTICE ROBERTS: So -- so, if  
21 it's the owner, why do you -- why does it  
22 interfere with a right to travel?

23 MR. UNIKOWSKY: Well, it's -- it's the  
24 -- it's the owner's transportation either  
25 itself or via an agent. The states never



1 distinguish, by the way, the transportation via  
2 Cougar Den's own trucks and via its agent.  
3 That's just the argument the state did not make  
4 in its brief.

5 And, you know, so, ultimately, it's  
6 the owner that pays the tax. And the idea is,  
7 if you hire a trucker, that's not different  
8 from just using the trucks that you own.

9 The point is the sine qua non of  
10 taxation under the statute is the  
11 transportation of goods to market. And whether  
12 you do it with your own truck or you hire  
13 someone else and a truck, it doesn't change the  
14 fact that you need to pay the tax.

15 CHIEF JUSTICE ROBERTS: Does it make a  
16 difference -- I think this is the argument on  
17 the other side -- that it's assessed per  
18 gallon, in other words, that suggests as  
19 opposed to per mile that you're carrying it?

20 MR. UNIKOWSKY: No. I --

21 CHIEF JUSTICE ROBERTS: It suggests  
22 that it's -- it's based on possession if it's  
23 based on right there at that moment how much do  
24 you have. They don't care where it's going.  
25 They don't care if you use it all up right at

1 the border or -- or whatever. It's -- has  
2 nothing to do with -- with travel. It's purely  
3 on the good itself.

4 MR. UNIKOWSKY: Well, I don't agree --  
5 I don't think that you could just say a tax is  
6 on a good. I think this Court has always  
7 required an analysis of the precise activity  
8 engaged in by the taxpayer.

9 So the Wagnon case, the argument that  
10 the tribe made in that case was that really  
11 this is a tax on the fuel that's sold at  
12 retail.

13 And the test this Court adopted was  
14 you've got to have this focused analysis of  
15 what is the taxpayer doing that triggers the  
16 application of the tax.

17 And in this case, the thing that the  
18 taxpayer is doing is importing the fuel. By  
19 its terms, the statute says that the taxable  
20 event is the entry of fuel into the state, so  
21 the traveling with the fuel.

22 And the taxpayer under the statute is  
23 defined as the importer. And so I think that  
24 just has to be a tax on importation.

25 And, incidentally, it's not even just

1 that it's the importer that pays the tax. The  
2 tax actually distinguishes for licensed  
3 importers between people who use highways and  
4 people who don't use highways. And -- I'm  
5 sorry.

6 JUSTICE ALITO: But what if the -- I  
7 mean, what if the statute said the first entity  
8 to possess the fuel in the state must pay the  
9 tax?

10 MR. UNIKOWSKY: So we would still say  
11 that's preempted, although our legal analysis  
12 might differ a little bit.

13 JUSTICE ALITO: Why would that be  
14 preempted?

15 MR. UNIKOWSKY: Well, first of all, I  
16 think that, as applied to fuel that comes in  
17 from out of state, really, first possession  
18 just is inherently importation.

19 In other words, you can't be the first  
20 possessor of fuel, at least that originates out  
21 of state, unless you're the one hauling it into  
22 the state.

23 So, in that context, I just think  
24 first possession kind of means it.

25 JUSTICE ALITO: Well, I thought you

1 just said we have to focus on what the statute  
2 says is being taxed, so if the statute says  
3 expressly it's -- that possession is being  
4 taxed, that doesn't matter.

5 MR. UNIKOWSKY: Okay. So we -- we  
6 have two arguments in our brief, a broader  
7 argument and a narrower argument. The broader  
8 argument actually doesn't depend on what the  
9 statute says. It depends on what the tribal  
10 member is doing.

11 So, if the tribal member can show that  
12 the only thing that they're doing is exercising  
13 a treaty right, which is to say transporting  
14 goods to market, then they don't pay the tax,  
15 no matter how the statute is styled.

16 JUSTICE ALITO: Well, then that's very  
17 artificial and you get into this metaphysical  
18 question of what they're doing. They're doing  
19 many things when they're -- you know, when the  
20 farmer is bringing his pigs to market, he's  
21 doing many things. He's traveling with the  
22 pigs. He's possessing the pigs. He's  
23 breathing. He may be doing all kinds of other  
24 things.

25 MR. UNIKOWSKY: Well, yeah, but I

1 think that things that are inherent in  
2 transportation, like breathing while you're  
3 transporting it, I think would be sort of  
4 wrapped up in transportation.

5 I mean, and on the facts of this case,  
6 what we have here is the -- an Indian  
7 distributor transporting fuel to an Indian  
8 reservation to be sold to an Indian retailer on  
9 the reservation and potentially to Indian  
10 customers.

11 Really, the only connection that  
12 Cougar Den has off-reservation is that it's  
13 hauling this fuel.

14 JUSTICE BREYER: This -- the -- the  
15 thing I don't understand is that many states  
16 have laws against bringing in diseased apples,  
17 all kinds of things. All right? So, if they  
18 don't bring it in, you can't transport it at  
19 all.

20 So, if your point is that they have a  
21 right to transport things, I would have thought  
22 you would have said a ban was worse because --  
23 but you don't. You say a ban is okay, but a  
24 tax isn't. That's your argument?

25 MR. UNIKOWSKY: Yes, that is our

1 argument, Your Honor.

2 JUSTICE BREYER: Okay. Now, if you  
3 tax what they do in this state, is they have a  
4 tax that says if you buy goods to use in your  
5 house somewhere else, you have to -- you have  
6 to pay a use tax when you bring it into our  
7 state.

8 And then another state says we're  
9 going to legalize marijuana, but we tax it  
10 pretty high, and another state says we have --  
11 you know, you -- I can go on and on and on.  
12 And you're saying, well, this tribe, it doesn't  
13 have to pay the tax on marijuana. It doesn't  
14 have to pay the ordinary sales tax, which take  
15 the form of a use tax in the state. And I  
16 could probably think of 10 other examples.

17 And, my goodness, I say why -- why  
18 not? Is that your position, what I said?

19 MR. UNIKOWSKY: No, it is not our  
20 position. We're not claiming that at all.

21 JUSTICE BREYER: Good. Now, fine.  
22 I'm glad it isn't because my own position I had  
23 a good argument against.

24 (Laughter.)

25 JUSTICE BREYER: But I'd like -- I'd

1     like -- like to -- I'd like to know what your  
2     position is then.

3             MR. UNIKOWSKY: We are not claiming  
4     exemption from sales taxes. We draw a  
5     distinction between the acquisition of  
6     something, which is not travel, and the  
7     transportation of something that is.

8             So if you --

9             JUSTICE BREYER: So especially for  
10    gas?

11            MR. UNIKOWSKY: Yeah, so if you buy --

12            JUSTICE BREYER: I didn't see that in  
13    your brief. I put the argument to them and I  
14    just didn't see that in your brief that you  
15    were saying but a tax on gas interferes with  
16    transportation.

17            MR. UNIKOWSKY: That -- that's not our  
18    position.

19            JUSTICE BREYER: That's not your  
20    argument either.

21            MR. UNIKOWSKY: Our position is not  
22    based on the fact that it's --

23            JUSTICE BREYER: Okay. What is your  
24    argument?

25            MR. UNIKOWSKY: Our argument is that

1 if you buy fuel and the state imposes a sales  
2 tax, as Your Honor referred to, then the  
3 acquisition of a good -- it could be fuel, it  
4 could be apples, it could be anything -- that  
5 can be taxed. That's not travel. But, here,  
6 that's happening out of state.

7 I don't think there would be a treaty  
8 problem with the taxation of that, but the  
9 state hasn't tried to tax that purchase in  
10 Oregon, and so that's -- that's out of the  
11 case.

12 And so the only thing that the state  
13 is taxing --

14 JUSTICE BREYER: Yes, yes.

15 MR. UNIKOWSKY: -- in the State of  
16 Washington is the transportation. So it's  
17 actually --

18 JUSTICE BREYER: What do you mean the  
19 -- does it say transportation? Does it say it  
20 taxes the transportation?

21 MR. UNIKOWSKY: I think it does. I  
22 mean, it talks about --

23 JUSTICE BREYER: It does?

24 MR. UNIKOWSKY: -- taxable --

25 JUSTICE BREYER: You know the statute



1 better than I. Does the statute say we impose  
2 a tax on the transportation of gasoline?

3 MR. UNIKOWSKY: Your Honor, I'll tell  
4 you the words of the statute and then what the  
5 state court said.

6 JUSTICE BREYER: What's the answer,  
7 yes or no?

8 MR. UNIKOWSKY: It doesn't use the  
9 word transport, but the state court said it  
10 taxes transportation, and the state court  
11 authoritatively construes state statutes.

12 JUSTICE KAGAN: Well, it uses the word  
13 enter.

14 JUSTICE BREYER: What is the word?

15 JUSTICE KAGAN: Enter is a --

16 MR. UNIKOWSKY: Yeah, it uses enter.  
17 It says entry of fuel.

18 JUSTICE KAGAN: It's a movement.

19 MR. UNIKOWSKY: The taxpayer is "the  
20 importer," and the state court --

21 JUSTICE BREYER: No, what is the word  
22 of the statute?

23 JUSTICE KAGAN: Enter.

24 MR. UNIKOWSKY: Entry. That is the  
25 taxable entry into the state.

1 JUSTICE BREYER: You get a tax. A tax  
2 is imposed when a good enters.

3 MR. UNIKOWSKY: Yes.

4 JUSTICE BREYER: A tax is imposed of  
5 90 percent when marijuana enters this state,  
6 and you just told me that would be okay.

7 MR. UNIKOWSKY: The taxpayer is  
8 defined as the importer and the state court  
9 construed the statute as a tax on  
10 transportation.

11 JUSTICE BREYER: An importer of  
12 marijuana must pay a tax of 90 percent.

13 MR. UNIKOWSKY: Yes. I think that --

14 JUSTICE BREYER: You say that is legal  
15 or illegal?

16 MR. UNIKOWSKY: I think if it was a  
17 tax on marijuana --

18 JUSTICE BREYER: I -- I just -- what I  
19 just said.

20 MR. UNIKOWSKY: I don't see a  
21 different between marijuana --

22 JUSTICE BREYER: Is it legal or  
23 illegal?

24 MR. UNIKOWSKY: If it was just a tax,  
25 it probably would be illegal, Your Honor.

1 JUSTICE BREYER: You heard what I  
2 said. A tax -- the statute says a tax on  
3 marijuana is imposed. Now what were the words  
4 you used -- I wanted to use the same ones --  
5 upon entry of the marijuana into the state.  
6 That's all. I'm just trying to --

7 MR. UNIKOWSKY: Yes. Our position  
8 does not depend on the good that's being  
9 imported. If it's a tax on fuel or a tax on  
10 marijuana, it would be the same thing.

11 JUSTICE BREYER: All right. So now  
12 what you're claiming is that -- and this is  
13 what's bothering me and I'm trying to get to  
14 it -- you're saying that the tribe, unlike  
15 anyone else in the state, can refuse to pay  
16 taxes that really have nothing to do with  
17 transportation but have to do with drug  
18 regulation, which have to do with keeping  
19 certain bad things out, which have to do with  
20 raising money for other reasons.

21 Now that -- you see what I'm saying?  
22 I'm saying the common sense of it is why would  
23 this treaty give a tribe the right not to pay  
24 taxes that have really nothing to do with  
25 transportation, that's just the way, et cetera.

1 MR. UNIKOWSKY: All right. Let me  
2 answer that in two ways.

3 JUSTICE BREYER: Yeah.

4 MR. UNIKOWSKY: The first answer is,  
5 if it's truly a regulatory fine, if it's like  
6 you can't possess marijuana and we are  
7 punishing you, then we don't view that as a  
8 tax. We view that as a regulation.

9 JUSTICE BREYER: All right.

10 MR. UNIKOWSKY: I think that, you  
11 know, the distinction between taxes and fines  
12 might in some cases be difficult to identify.  
13 Not in this case. This is definitely a -- a  
14 tax.

15 JUSTICE ALITO: So where do you get  
16 the difference between a regulation and a --  
17 and -- and a tax under the words of the treaty?

18 MR. UNIKOWSKY: So I -- I -- so we're  
19 following this Court's decision in Tulee and  
20 Yakama Indian Nation. I'm not trying to evade  
21 your question.

22 The words of the treaty, I think it's  
23 the "in common with" language that opens the  
24 door to certain types of regulatory rules. I  
25 think that, by implication, the fact that the

1 Yakama ceded rights in all of this land  
2 probably opens the door to the state to protect  
3 public safety in that land. Right?

4 So, if a person's carrying a firearm  
5 or diseased apples, which is going to cause  
6 other people to die, then there's a similar  
7 justification for permitting those laws as  
8 permitting speed limits.

9 JUSTICE ALITO: Where does that come  
10 from? There's what -- you -- you -- you  
11 prohibit certain things. You tax certain  
12 things. Where does that come from?

13 MR. UNIKOWSKY: Well, so this is the  
14 line the Court drew in the Tulee case with  
15 respect to the fishing clause and in the  
16 Puyallup case. There's like explicit language  
17 saying we distinguish between the two.

18 So we're following the Court's lead on  
19 this issue. And the Court has essentially said  
20 that a tax isn't necessary in the relevant  
21 sense. And so you don't need the tax to ensure  
22 that non-Indians can use the resource in common  
23 with Indians.

24 And, similarly, I don't think you --  
25 you need a tax to ensure, you know, public

1 safety in the relevant sense, whereas I think  
2 that you really need to prevent, you know,  
3 diseased apples or firearms in order to protect  
4 public safety.

5 JUSTICE KAVANAUGH: If an  
6 off-reservation sales tax is okay, as you say  
7 it is, why is an off-reservation possession tax  
8 not okay?

9 MR. UNIKOWSKY: Well, I don't think  
10 this is a possession tax, Your Honor. I think  
11 it's a -- it's a transportation tax.

12 JUSTICE KAVANAUGH: Suppose it is a  
13 possession tax. Is that then okay?

14 MR. UNIKOWSKY: So we -- we have a  
15 broader argument --

16 JUSTICE KAVANAUGH: An off-reservation  
17 possession tax?

18 MR. UNIKOWSKY: So we have a broader  
19 argument in our brief and a narrower one. So  
20 the broader one it's not, and the narrower one  
21 it is. So the broader argument in our brief is  
22 you've got to look at what the tribal member is  
23 doing. And because he can't -- it's like a tax  
24 on breathing, right? You can't transport  
25 something without possessing it, just like you

1 can't transport it without breathing it.

2 JUSTICE KAVANAUGH: That seems to be  
3 an argument that it's a sham, that it's really  
4 getting to transportation. "Sham" might be too  
5 strong a word, but it's not -- it's really  
6 about transportation, not possession. What if  
7 it's really about possession?

8 MR. UNIKOWSKY: So I think, under the  
9 broadest possible version of our argument, we  
10 probably -- but I'm not going to push this very  
11 hard -- I think it would be preempted, but I'm  
12 not going to push it very hard because I think  
13 that this really is a transportation tax.

14 I think it's actually quite helpful to  
15 look at why the statute is written the way it  
16 is, to understand why we really think this is a  
17 transportation tax. So I get that the overall  
18 goal of the state is to ensure that all fuel  
19 sold at retail is subject to a tax.

20 But the natural way to do that is to  
21 just to tax the retail sale, but this Court has  
22 held in the Chickasaw Nation case that those  
23 types of taxes are preempted. And, in fact,  
24 some Washington taxes were preempted.

25 And so what the state decided to do

1 is, as my colleague states, move the incidence  
2 outside the reservation. But the thing is, for  
3 tax -- for fuel like this, when you have an  
4 Indian distributor hauling it from out of state  
5 to the Indian reservation, to sale to an Indian  
6 retailer, the only connection between this fuel  
7 and off-reservation activity is that you're  
8 hauling it across this stretch of land. That's  
9 it.

10 CHIEF JUSTICE ROBERTS: Well, what if  
11 you have the -- the tank where the fuel is  
12 going to go in is -- is right by the border and  
13 it's a tax on fuel that goes into the tank?  
14 They don't care what you do with it; you can  
15 transport it, you can -- whatever you want to  
16 do with it. And it's owned by Cougar Den, the  
17 -- the -- the tank, and they then use it,  
18 transport it in their trucks.

19 In other words, the state doesn't care  
20 about transportation. It just wants -- as soon  
21 as it comes into the border, with no  
22 involvement by Cougar Den, it comes into --  
23 it's taxed in their tank, and then that's it.  
24 End of story as far as the state's concerned.

25 MR. UNIKOWSKY: I understand that



1 overall the state just wants the money in some  
2 sense. But the reason it's structured this tax  
3 this way is because it knows --

4 CHIEF JUSTICE ROBERTS: No, I'm  
5 talking about my hypothetical tax, okay? It's  
6 as soon as it goes into a tank, not one of the  
7 tanker trucks, then it's taxed on that. As  
8 soon as you -- it enters into a tank at the  
9 border and it's taxed, is that okay? Nothing  
10 to do about transportation at all.

11 MR. UNIKOWSKY: Well, if you're  
12 referring to like taking the -- the fuel from  
13 the truck and putting it into a big tank off  
14 the reservation at the border, if that's the  
15 hypothetical --

16 CHIEF JUSTICE ROBERTS: A non- --  
17 non-Indian truck.

18 MR. UNIKOWSKY: Yeah, that -- if  
19 that's the hypothetical, then that wouldn't be  
20 transportation. That would be delivery to some  
21 retailer, to some other tank, or something like  
22 that. So I -- I -- I think that we draw a --  
23 you have to look at the taxable event. If the  
24 event is the transportation, there's one  
25 result. If it's the delivery to a big tank,

1 outside the reservation --

2 JUSTICE BREYER: It doesn't say  
3 transportation.

4 MR. UNIKOWSKY: -- it's a different  
5 one.

6 JUSTICE BREYER: It -- it -- I -- it  
7 says bulk entry or something like that,  
8 non-bulk entry. And what I'm actually bothered  
9 about is people are going to buy millions of  
10 things online. And so a state says the  
11 following: We just want our sales tax. And so  
12 they pass a statute that looks like this. When  
13 something you've bought online enters into the  
14 state, a tax is due. You know, that's pretty  
15 close to this statute.

16 And what I'm having trouble is seeing  
17 how your argument -- that's why I have this  
18 other argument, where it's just fuel. But you  
19 don't accept that. Okay.

20 How your argument would permit the  
21 state to -- it would deny the state the right  
22 to tax the Indian tribe when they've done what  
23 everybody else has done, just bought things  
24 online, and they haven't yet paid the use tax  
25 or haven't yet paid the comparable sales tax.

1           Now that's what's really bothering me.  
2           And -- and if you can give me a minute or so on  
3           that, I would be helped.

4           MR. UNIKOWSKY: Yeah, I'm happy to.  
5           So on -- on the hypothetical of buying things  
6           online, I think it would depend on how the  
7           statute defined the taxable event. So, of  
8           course, there's -- there's some recent  
9           developments in the law in the Wayfair case  
10          involving out-of-state taxation.

11          So, if the state is capable of taxing  
12          the sale -- in other words, the taxable event  
13          is the transaction itself -- that wouldn't be a  
14          treaty issue. There might be other issues,  
15          dormant Commerce Clause, whatever. That  
16          wouldn't be a treaty issue. So if that -- that  
17          is the incidence, in some sense, of the tax,  
18          that's the thing that's being taxed, then that  
19          wouldn't necessarily be a treaty problem. So  
20          if --

21          JUSTICE GINSBURG: Incidence is --  
22          you're -- you're shipping -- shipping something  
23          into the state from out of state. That's what  
24          it was in the -- in the sales and compensating  
25          use tax case.

1           MR. UNIKOWSKY: Yes, Your Honor. So  
2 if -- in other words, it depends on what's  
3 being taxed. So, if it's the shipment on the  
4 highway and it's an Indian who's paying the  
5 tax, then I think that that would -- that would  
6 restrict the right to travel because --

7           JUSTICE GINSBURG: But it's a shipment  
8 of goods into our state. You're selling  
9 something to a state resident, you have to pay  
10 the tax on the goods that are sold to an  
11 in-state resident.

12           MR. UNIKOWSKY: I think that, again,  
13 this Court has really drawn a -- has not really  
14 talked about in terms of a tax on goods. The  
15 -- the Court has analyzed it in terms of a tax  
16 on the relevant activity. So there's a tax on  
17 the sale or a tax on the transportation, but  
18 you've got to look at what the taxpayer is --  
19 is specifically doing.

20           I think that's what the Wagnon -- so I  
21 don't mean to evade your hypothetical. I just  
22 -- I -- it just really depends on exactly how  
23 the statute is structured.

24           JUSTICE ALITO: Suppose the --

25           JUSTICE KAGAN: Mr. Unikowsky --

1           JUSTICE ALITO:  -- suppose the fuel  
2 arrives by tanker and it is taxed when it  
3 reaches the -- the port of Seattle, but  
4 everybody knows that, at that point, it's going  
5 to be transferred to trucks owned by Cougar  
6 Den.  Would that be -- what would your position  
7 be?

8           MR. UNIKOWSKY:  That would not be  
9 preempted.  First of all, it would probably be  
10 a non-Indian taxpayer who pays the tax because  
11 -- assuming the tanker truck is owned by  
12 someone who isn't an Indian.

13          JUSTICE ALITO:  Well, suppose it's  
14 somebody in the tribe.

15          MR. UNIKOWSKY:  Even so, I don't think  
16 so.  I think that -- the Wagnon case really, I  
17 think --

18          JUSTICE ALITO:  Why -- why would it  
19 not be?

20          MR. UNIKOWSKY:  Because the taxable  
21 transaction isn't the transportation of the  
22 fuel.  We don't read this treaty, as the state  
23 claims, to have -- to just have this broad  
24 umbrella protection of any trade that's in any  
25 way facilitated by highway travel.  What we say

1 is that you've got to have a very focused look  
2 at what precisely is being taxed.

3 JUSTICE ALITO: Why does it matter  
4 whether it arrives by sea or across the border  
5 from Oregon?

6 MR. UNIKOWSKY: Well, if the -- if the  
7 relevant taxable event is the entry into a port  
8 by a --

9 JUSTICE ALITO: If the relevant  
10 taxable event is the possession, the first  
11 possession within the border of Washington?

12 MR. UNIKOWSKY: Well, it depends -- in  
13 that scenario where it arrives by a tanker  
14 truck, the first possessor is someone who's  
15 using a big boat and is not traveling on public  
16 highways. So that possessor is not exercising  
17 any right under the treaty.

18 Now I understand there might be  
19 downstream economic consequences on Cougar Den,  
20 but I think that we're just trying to follow  
21 the analysis in the Wagnon case, which has  
22 required this specific analysis of what's being  
23 taxed. I -- I -- I think the Wagnon --

24 JUSTICE KAGAN: Mr. Unikowsky --

25 MR. UNIKOWSKY: Yes.

1           JUSTICE KAGAN: -- it seems to me you  
2 can look at this in one of two ways, and which  
3 way you look at it, in part, you know, suggests  
4 who should win.

5           The first is you -- you could say:  
6 What is the taxpayer here doing? Is what the  
7 taxpayer here doing within the terms of the  
8 treaty? And there, it just seems to me that  
9 you win because what the taxpayer is doing is  
10 transporting goods to and from market. You can  
11 say he's possessing the goods. You can say  
12 he's breathing while he's transporting the  
13 goods. But what he's doing is transporting  
14 goods to and from market. So -- so that  
15 suggests that you should win, where the focus  
16 is on the activity taxed.

17           But what I hear the state and the SG  
18 in its brief saying is you shouldn't focus on  
19 the thing that the taxpayer is doing, you  
20 should instead sort of look to the purpose of  
21 the state. You should look to what is the full  
22 scope of activities that the state is trying to  
23 tax and why they have this tax. And according  
24 to them, they have this tax because they want  
25 to get to every single taxpayer who possesses

1 fuel in the state. And this is what's  
2 necessary to get to Yakama taxpayers.

3 So what should we focus on: the  
4 activity that the taxpayer is doing or the  
5 purpose of the state legislation?

6 MR. UNIKOWSKY: So, of course, I think  
7 it's the activity. And I think that your  
8 question is really what this case boils down  
9 to.

10 And I think there's a lot of reasons  
11 why the former answer is correct and the latter  
12 is not. First of all, I just think that the  
13 treaty right focuses on the Indian's right. It  
14 says the Indian has the right to trade and --  
15 to travel, excuse me. I don't see a focus on  
16 sort of the holistic intent of the state and  
17 why it's enacting a particular tax.

18 Also, I think, in the Wagnon case, the  
19 whole argument by the tribe in that case is  
20 that what the state was really trying to do was  
21 burden things on the reservation. The Court  
22 said we don't look at these broad assessments  
23 of purpose. We -- we look at this formal  
24 analysis of the thing that's being taxed. And  
25 that's really just the analysis that we're



1 asking the Court to do here.

2 And, actually, in the right to fish  
3 cases, the Court has done the same thing.  
4 Look, the Court has understood the right to  
5 fish as essentially providing an easement on  
6 private property to fish that preempts any  
7 state laws that would prevent you to going on  
8 the property. Those laws were the ultimate  
9 generally applicable laws. They applied to  
10 Indians and non-Indians. They applied  
11 regardless of whether you're going on the  
12 property to fish or to do something else.

13 They had absolutely nothing whatsoever  
14 to do with fishing, but they were still held to  
15 be preempted because you looked at what the  
16 Indian was trying to do, which is fish, and the  
17 Court held that the treaty gave the Indian the  
18 right to do that.

19 I think that's also true, by the way,  
20 with like the on-reservation tax versus  
21 off-reservation tax distinction. Like in  
22 Chickasaw Nation, this Court held that a tax on  
23 -- on on-reservation activity was preempted.  
24 The tax at issue had -- was not targeting  
25 Indian reservations. It was a generally

1 applicable tax that applied to everybody, but  
2 as applied to protected activity, in that case  
3 on-reservation activity, the tax was preempted.

4 JUSTICE KAVANAUGH: Counsel, do you --

5 JUSTICE GINSBURG: But these retailers  
6 -- these are off-reservation -- the retailers  
7 of the fuel, they are off-reservation or  
8 on-reservation?

9 MR. UNIKOWSKY: The retailers are  
10 exclusively on the reservation. That's why the  
11 state doesn't -- isn't able to tax the sale,  
12 because it's an Indian retailer. All of the  
13 retailers that Cougar Den sells to are Yakama  
14 retailers on the reservation.

15 JUSTICE GINSBURG: And they sell to  
16 not people, not exclusively people on the  
17 reservation, right?

18 MR. UNIKOWSKY: That's true. Well we  
19 haven't disputed that the state can collect --  
20 order the retailer to collect the tax from  
21 non-Indian consumers.

22 So, if the state is concerned about  
23 collecting that tax, we haven't disputed that's  
24 the way to do it. And this is what the Court  
25 said in Chickasaw Nation. It says if the state

1 wants to make sure this tax is collected from  
2 non-Indian consumers, it could just amend its  
3 laws to -- to provide that. And we haven't  
4 disputed --

5 JUSTICE BREYER: I'm not talking about  
6 non-Indians. I'm talking about the Indian  
7 consumers.

8 I've now read the statute again, and  
9 it seems there are four relevant words. The  
10 tax on fuel applies when the fuel "enters into  
11 this state."

12 And now all I have to do is substitute  
13 for the word "fuel" things bought online, which  
14 could be anything at all, and then we can have  
15 diseased things or I don't know what,  
16 marijuana, and you are saying -- and I think  
17 you are saying this -- that this statute, which  
18 had to do with travel on the roads, applies to  
19 all those things as long as they use the words  
20 "the tax applies when it enters into this  
21 state."

22 Now I hope I'm wrong -- or maybe I'm  
23 right -- I don't know. I want to hear your  
24 answer.

25 MR. UNIKOWSKY: That's not exactly our

1 position because there's a few other things  
2 that have to be true.

3 So, first of all, the tax --

4 JUSTICE BREYER: Yes, it also, by the  
5 way, has to be the case that it goes by FedEx  
6 or it goes by UPS or it goes by a -- a truck or  
7 something like that. It can't just go by an  
8 airplane and be delivered by a drone. I've got  
9 that. Now what else?

10 MR. UNIKOWSKY: So, we -- again, we  
11 have a broader argument and a narrower  
12 argument. We do have one specific argument in  
13 our brief which focuses on the fact that this  
14 -- this traveled through the -- the ceded area.

15 Now I think that it would still be  
16 preempted even if it was outside the ceded  
17 area, but sort of the narrowest argument in our  
18 brief goes like this, right? To look at what  
19 the Indians secured, you have to look at what  
20 they had. And they had something special on  
21 this particular stretch of land, which is a tax  
22 immunity, and, therefore, if you want to look  
23 at what they kept, it's an immunity that  
24 applies specifically when the truck is going  
25 across that land.

1           Now I will say that for off -- for --  
2           for travel off the ceded area, I probably still  
3           would be arguing preemption given that the  
4           treaty by its terms applies to all public  
5           highways.

6           But the narrowest version of our  
7           argument in our brief really only applies to  
8           this particular travel because of the special  
9           rights that the tribe enjoyed on that stretch  
10          of land at the time of the treaty.

11          JUSTICE KAVANAUGH: The -- the  
12          language of the treaty does not distinguish,  
13          though --

14          MR. UNIKOWSKY: That's correct.

15          JUSTICE KAVANAUGH: -- between the  
16          ceded area and the other areas.

17          MR. UNIKOWSKY: So the textual hook  
18          for that would be the word "secured," which  
19          this Court has construed as requiring looking  
20          at what they already possessed when --

21          JUSTICE KAVANAUGH: Then another  
22          question, which is your -- your position  
23          depends on disaggregating possession and  
24          transportation, but you could possess something  
25          without transporting. You can obviously

1 transport without possessing fuel.

2 So the tax -- why -- why can't we  
3 disaggregate possession and transportation?

4 MR. UNIKOWSKY: Well, first of all, I  
5 think that in many ways these are state law  
6 questions. Like, there's this fundamental  
7 dispute in this case about whether this is just  
8 like one statute on first possession or a whole  
9 bunch of different subsections that are taxing  
10 different types of things, one of which is  
11 transportation.

12 And it -- it's kind of like a  
13 philosophical question. But I think that  
14 ultimately that's a state law question, not a  
15 federal question. It seems to me if the state  
16 court is construing authority --

17 JUSTICE KAVANAUGH: So, if a state  
18 court construed it differently from this state  
19 court, you would have a different position?

20 MR. UNIKOWSKY: I mean, I think I'd  
21 probably still try to argue preemption, but I  
22 think it would be much harder than the argument  
23 I'm currently making to you today, because the  
24 Court has held that the incidence of the tax is  
25 a question of state law.

1           It just seems to me that if -- if the  
2 state court is saying that this is a  
3 transportation tax, and transportation is  
4 treaty-protected activity, it just kind of  
5 follows like almost, like, inevitably that  
6 there's -- there's preemption because, you  
7 know, you're taxing treaty-protected activity  
8 based on the statute as it's authoritatively  
9 construed by the state court.

10           I'm -- I -- I just would like to say  
11 one thing about why I think that, you know,  
12 it's -- this -- what the state is doing here is  
13 quite inconsistent with I think what the  
14 expectation of the tribe would have been in  
15 1855, because the tribe was actually  
16 specifically concerned about transporting fuel  
17 along this route, right? And so Governor  
18 Stephens promised in the treaty minutes, you  
19 can take your goods to market to the river,  
20 which is a reference to the Columbia River.  
21 And this actually used to be their land.

22           So sort of as consideration for giving  
23 up this stretch of land, which at the time was  
24 their land, that they agreed that they would  
25 continue to -- to travel across it. They'd

1 have the right to travel.

2           And so I think it -- it is a little  
3 bit of a bait and switch to the Yakamas to say,  
4 well, now we're going to basically exploit the  
5 fact that you have to travel across this  
6 stretch of land to impose this tax that we  
7 wouldn't otherwise be able to impose, and, by  
8 the way, the effect of the tax is to mimic in a  
9 tax on the reservation -- on on-reservation  
10 retailers.

11           And I think that, you know, I haven't  
12 talked about the treaty canon so far because I  
13 think neutral principles are more than  
14 sufficient to resolve this case for Respondent,  
15 but at least under the -- the generous  
16 interpretation principles for Indians, I don't  
17 think that's what the Indians thought they were  
18 getting, that this exploitation of the travel  
19 on the very land they gave up, securing for  
20 themselves the right to travel across it.

21           I think that it's very natural and  
22 consistent with what I think the expectation of  
23 the Yakamas would have been, that they could  
24 continue traveling across that land with their  
25 goods as they were already doing it at the



1 time, and -- and that means -- that -- that  
2 means transporting without paying a fee or  
3 owing an obligation to the states.

4 JUSTICE SOTOMAYOR: Does it mean  
5 anything that this tax is literally on  
6 traveling the route, importing by a highway?  
7 There is no similar tax on importation by  
8 licensed people. They don't pay the tax. Only  
9 the user who buys it pays the tax, correct?

10 MR. UNIKOWSKY: Yes. I think that's  
11 actually a very important point in this case,  
12 because the state cast this as a first  
13 possession tax, but, honestly, that's just the  
14 state's gloss on it. That's not what it says.  
15 And, in fact, that's not even how it operates,  
16 because, if you're the first possessor via  
17 highway, you pay the tax. But, if you're a  
18 licensed importer and you're a first possessor  
19 via a boat, you don't.

20 CHIEF JUSTICE ROBERTS: Well, you want  
21 to characterize it as a transport tax, and the  
22 statute doesn't say that either.

23 MR. UNIKOWSKY: Well, I think that the  
24 state -- the state court is responsible for  
25 construing state law. It says import, which is

1 the importer pays the tax. On page 121 of the  
2 Joint Appendix, the taxpayer is defined as the  
3 importer. And the state court said, which I  
4 think is intuitive, that importation is a  
5 species of transportation.

6 And so there is an authoritative  
7 decision that this statute taxes  
8 transportation. So --

9 JUSTICE SOTOMAYOR: The problem in  
10 this is that it's not consistent. You're  
11 right, the wholesalers, licensed wholesalers  
12 are the importers, but they don't pay the tax.

13 MR. UNIKOWSKY: Yeah. So this is not  
14 a tax on first possession. It just doesn't  
15 work that way. And -- and the state is just  
16 adding this gloss that this is just one big tax  
17 on first possession, even though, obviously,  
18 when you just look at the words of the statute,  
19 it isn't one. And that's why I think the Court  
20 should just use the words of the statute which  
21 talk about importation and entry and the  
22 construction of that by the state court, rather  
23 than determining preemption, essentially by the  
24 gloss placed on the state's attorneys based on  
25 words that are not in the statute, nor did the

1 state court think those things to be true.

2 JUSTICE KAVANAUGH: To state the  
3 obvious, the value of -- current value of the  
4 land the tribe gave up is enormous, right?

5 MR. UNIKOWSKY: It's a third of the  
6 State of Washington, I believe, Your Honor.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Four minutes, Mr. Purcell.

11 REBUTTAL ARGUMENT OF NOAH PURCELL

12 ON BEHALF OF THE PETITIONER

13 MR. PURCELL: Thank you, Mr. Chief  
14 Justice.

15 I'd like to point out two crucial  
16 facts about what will happen if you accept  
17 Cougar Den's position.

18 First to Justice Breyer's point, if  
19 you accept their position, Yakama members can  
20 transport goods nationwide without taxation or  
21 regulation. That's why you see such a broad  
22 coalition of states joining an amicus brief on  
23 our side.

24 JUSTICE SOTOMAYOR: They don't have a  
25 treaty with everybody.

1           MR. PURCELL: They have a treaty with  
2 the United States, Your Honor. And as counsel  
3 just said --

4           JUSTICE SOTOMAYOR: No --

5           MR. PURCELL: -- the right to travel  
6 says on all public highways. It makes no sense  
7 to limit it to the ceded area.

8           Even historically, it wouldn't make  
9 any sense because the Yakama traveled beyond  
10 the ceded area. And -- and, also, Cougar Den  
11 is trying to use the history when it helps them  
12 by trying to limit the geography, but then not  
13 when it hurts them, like, you know, what goods  
14 can be transported or how it can be  
15 transported. Of course, the fuel and the  
16 highway, and these roads, did not exist at the  
17 time.

18           The second crucial point --

19           JUSTICE KAGAN: But on -- on that one,  
20 didn't Mr. Unikowsky say, consistent with our  
21 case law, that there's a difference between  
22 taxation and regulation?

23           MR. PURCELL: And -- and that's just a  
24 misrepresentation of the case law. The -- the  
25 fishing cases have said the state can regulate

1 fishing to conserve the fish -- to fish -- the  
2 -- the very thing that's the subject of the  
3 treaty. There's no similar -- there's no  
4 similar rationale here.

5 The Court has never said that we can  
6 regulate fishing more generally than that.  
7 There's no distinction in this Court's cases in  
8 treaty cases between taxing and regulation.  
9 More broadly, Mescalero actually rejected  
10 exactly that argument.

11 The second point is that, under their  
12 theory, we could completely ban the  
13 transportation of fuel by highway if we did it  
14 for a regulatory reason, like we decided it's  
15 not safe. We could just ban it outright and --  
16 and that would be fine. But we can't impose a  
17 generally applicable tax on goods like fuel  
18 because it happens to apply when Cougar Den  
19 travels on the highway. That makes absolutely  
20 no sense.

21 There's no plausible way to read the  
22 treaty that would lead to that result. This is  
23 a tax on fuel possession. It is not a tax on  
24 highway travel. The state court explicitly  
25 said it would apply regardless of whether

1 Cougar Den uses the highway.

2 It is not a tax on transportation. It  
3 is a tax on the fuel itself.

4 So -- so even if you accept much of  
5 Cougar Den's position here, it does not lead to  
6 a ruling in their favor.

7 And you can tell, as Justice Kavanaugh  
8 pointed out, that you can disaggregate  
9 transportation from possession here because the  
10 statute does and, in fact, on the facts of this  
11 case, they are disaggregated. Cougar Den is  
12 paying the tax even though they were not  
13 transporting fuel. They possessed the fuel.  
14 They owned the fuel. So, for all those reasons  
15 --

16 JUSTICE GORSUCH: Has Washington  
17 considered taxing non-tribal members for their  
18 purchases on tribal lands?

19 MR. PURCELL: Your Honor, that is the  
20 system that we had before we adopted this  
21 system, and it was struck down by a federal  
22 court in Washington. And then we adopted this  
23 tax, modeled on what this Court said was okay  
24 in Wagnon.

25 I'd also like to address Wagnon just

1 does not address the issue in this case.  
2 Wagon was about who the tax applies to and  
3 where the incidence of the tax is.

4 In this case, those things are  
5 undisputed. Cougar Den owes the tax and it's  
6 off reservation. So the rule is that the --  
7 the tax can apply unless preempted by express  
8 federal law.

9 And, here, there's nothing in the  
10 Yakama treaty that preempts this tax. There's  
11 just no plausible way to read the right to  
12 travel by public highway in common with others  
13 to preempt a tax on goods.

14 So -- so, you know, the -- Wagon just  
15 does not do what they're -- what they're asking  
16 it to do. Wagon described a tax that the  
17 State of Washington modeled its tax on.

18 And -- and I just think it's crucial  
19 also to understand that even their limited  
20 ceded area argument does not work. It does not  
21 work. It's -- it's contrary to the treaty  
22 text, which says a right to travel on all  
23 public highways, and it's -- and it's also  
24 refuted by the history that had the Yakama  
25 traveling beyond the ceded territory.

1                   So, if there's no further questions,  
2                   we'd ask the Court to reverse the state --  
3                   state supreme court and hold that the tax  
4                   applies to Cougar Den. Thank you.

5                   CHIEF JUSTICE ROBERTS: Thank you,  
6                   counsel. The case is submitted.

7                   (Whereupon, at 11:05 a.m., the case  
8                   was submitted.)

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24  
25



## Official

<b>\$</b>	<b>addition</b> [1] 12:6	<b>68:4,7 78:2</b>	<b>bargain</b> [1] 11:9
<b>\$1,000</b> [3] 24:15,19 25:21	<b>address</b> [2] 77:25 78:1	<b>apply</b> [12] 8:15 10:3 16:14, 20 18:2 19:17 20:7 21:14, 21 76:18,25 78:7	<b>bargained</b> [3] 9:2,15 11:7
<b>\$10</b> [1] 25:24	<b>admitted</b> [1] 7:8	<b>appoint</b> [1] 37:23	<b>based</b> [5] 40:22,23 46:22 70:8 73:24
<b>\$50</b> [1] 25:23	<b>adopted</b> [6] 7:13 21:17 28:3 41:13 77:20,22	<b>appoints</b> [1] 37:25	<b>basically</b> [2] 34:19 71:4
<b>1</b>	<b>advice</b> [1] 34:19	<b>approach</b> [1] 10:22	<b>basis</b> [1] 12:10
<b>10</b> [2] 28:24 45:16	<b>agent</b> [6] 31:9 37:24,25 39:14,25 40:2	<b>approached</b> [1] 14:4	<b>bear</b> [1] 20:23
<b>121</b> [1] 73:1	<b>agree</b> [4] 25:22 37:6,7 41:4	<b>appropriate</b> [1] 36:22	<b>behalf</b> [2] 35:18 74:12
<b>1855</b> [5] 7:2,12 16:4 18:7 70:15	<b>agreed</b> [1] 70:24	<b>area</b> [11] 15:16,16 19:16 30:10 67:14,17 68:2,16 75:7, 10 78:20	<b>believe</b> [3] 25:3 29:8 74:6
<b>3</b>	<b>airplane</b> [1] 67:8	<b>areas</b> [1] 68:16	<b>belong</b> [1] 37:18
<b>38</b> [1] 31:4	<b>alito</b> [12] 42:6,13,25 43:16 51:15 52:9 59:24 60:1,13, 18 61:3,9	<b>aren't</b> [1] 9:24	<b>best</b> [2] 16:12 19:23
<b>5</b>	<b>alj's</b> [1] 14:15	<b>argue</b> [2] 11:1 69:21	<b>better</b> [1] 48:1
<b>50</b> [2] 28:22,23	<b>allow</b> [2] 13:11,20	<b>arguing</b> [4] 13:23 18:9 32:3 68:3	<b>between</b> [15] 26:25 29:18 34:2 35:5 38:23 42:3 46:5 49:21 51:11,16 52:17 55:6 68:15 75:21 76:8
<b>9</b>	<b>allowed</b> [1] 12:16	<b>argument</b> [34] 14:13 23:4 35:17 40:3,16 41:9 43:7,7, 8 44:24 45:1,23 46:13,20, 24,25 53:15,19,21 54:3,9 57:17,18,20 63:19 67:11,12, 12,17 68:7 69:22 74:11 76:10 78:20	<b>beyond</b> [3] 16:22 75:9 78:25
<b>90</b> [2] 49:5,12	<b>allowing</b> [1] 20:21	<b>arguments</b> [2] 27:22 43:6	<b>big</b> [4] 56:13,25 61:15 73:16
<b>A</b>	<b>almost</b> [1] 70:5	<b>around</b> [1] 29:21	<b>bit</b> [2] 42:12 71:3
<b>ability</b> [6] 9:15 15:21 17:20 24:8 27:4 35:8	<b>already</b> [2] 68:20 71:25	<b>arrives</b> [3] 60:2 61:4,13	<b>board</b> [1] 33:15
<b>able</b> [7] 22:12 26:8 30:8,9, 10 65:11 71:7	<b>although</b> [1] 42:11	<b>article</b> [2] 23:9 28:9	<b>boat</b> [2] 61:15 72:19
<b>absolutely</b> [3] 37:6 64:13 76:19	<b>amend</b> [1] 66:2	<b>artificial</b> [1] 43:17	<b>boils</b> [1] 63:8
<b>accept</b> [5] 6:6 57:19 74:16, 19 77:4	<b>amicus</b> [2] 23:5 74:22	<b>assessed</b> [4] 37:2,10,15 40:17	<b>border</b> [7] 41:1 55:12,21 56:9,14 61:4,11
<b>access</b> [1] 20:21	<b>analysis</b> [7] 41:7,14 42:11 61:21,22 63:24,25	<b>assessments</b> [1] 63:22	<b>both</b> [4] 8:22 12:17 22:8 39:14
<b>according</b> [1] 62:23	<b>analyzed</b> [1] 59:15	<b>assume</b> [6] 7:23 8:4,10,19 24:10 34:7	<b>bothered</b> [1] 57:8
<b>acknowledge</b> [1] 32:5	<b>ann</b> [1] 23:4	<b>assurances</b> [1] 60:11	<b>bothering</b> [2] 50:13 58:1
<b>acknowledges</b> [1] 23:20	<b>another</b> [7] 8:6 21:2 33:25 34:13 45:8,10 68:21	<b>assurance</b> [1] 30:5	<b>bought</b> [3] 57:13,23 66:13
<b>acquisition</b> [2] 46:5 47:3	<b>answer</b> [6] 27:14 48:6 51:2,4 63:11 66:24	<b>attorneys</b> [1] 73:24	<b>bound</b> [4] 14:5,9,14,17
<b>across</b> [8] 33:15 55:8 61:4 67:25 70:25 71:5,20,24	<b>antidiscrimination</b> [1] 25:7	<b>authoritative</b> [1] 73:6	<b>breathing</b> [5] 43:23 44:2 53:24 54:1 62:12
<b>act</b> [1] 39:10	<b>appendix</b> [1] 73:2	<b>authoritatively</b> [2] 48:11 70:8	<b>breyer</b> [45] 24:10,17,21 25:3,8,11,16,17,21 26:1,16 27:6,8,11,16,21 44:14 45:2,21, 25 46:9,12,19,23 47:14,18, 23,25 48:6,14,21 49:1,4,11, 14,18,22 50:1,11 51:3,9 57:2,6 66:5 67:4
<b>activities</b> [3] 17:12 28:13 62:22	<b>apple</b> [1] 13:3	<b>authority</b> [1] 69:16	<b>breyer's</b> [2] 28:21 74:18
<b>activity</b> [19] 10:11,12,13, 14 18:13,15,22 34:24 41:7 55:7 59:16 62:16 63:4,7 64:23 65:2,3 70:4,7	<b>apples</b> [19] 10:17 36:11,13, 15,16,17,18,25 37:1,3,6,7, 11,18 38:3 44:16 47:4 52:5 53:3	<b>away</b> [1] 29:22	<b>brief</b> [14] 14:12 31:5 33:1 40:4 43:6 46:13,14 53:19, 21 62:18 67:13,18 68:7 74:22
<b>actual</b> [1] 27:4	<b>applicable</b> [6] 8:8,15 22:11 64:9 65:1 76:17	<b>B</b>	<b>bring</b> [5] 10:18 15:1 38:4 44:18 45:6
<b>actually</b> [12] 6:1 27:20 42:2 43:8 47:17 54:14 57:8 64:2 70:15,21 72:11 76:9	<b>application</b> [2] 35:22 41:16	<b>back</b> [7] 6:8 11:8 28:21 29:10 31:8 32:11,19	
<b>adam</b> [1] 35:17	<b>applications</b> [1] 20:24	<b>bad</b> [1] 50:19	
<b>adding</b> [1] 73:16	<b>applied</b> [8] 7:15 17:14 30:17 42:16 64:9,10 65:1,2	<b>bait</b> [1] 71:3	
	<b>applies</b> [11] 9:19,23 17:24 19:24 66:10,18,20 67:24	<b>ban</b> [4] 44:22,23 76:12,15	

## Official

<p><b>bringing</b> [7] 18:2, 15 36:25 37:19, 20 43:20 44:16</p> <p><b>broad</b> [4] 9:8 60:23 63:22 74:21</p> <p><b>broader</b> [7] 43:6, 7 53:15, 18, 20, 21 67:11</p> <p><b>broadest</b> [1] 54:9</p> <p><b>broadly</b> [1] 76:9</p> <p><b>brought</b> [3] 17:5 18:1 23:17</p> <p><b>built</b> [1] 25:7</p> <p><b>bulk</b> [1] 57:7</p> <p><b>bunch</b> [1] 69:9</p> <p><b>burden</b> [8] 11:9 24:6 28:6, 25, 25 31:24 33:17 63:21</p> <p><b>burdened</b> [2] 28:18 32:3</p> <p><b>burdening</b> [2] 9:4, 14</p> <p><b>burdens</b> [5] 9:16 10:7 15:20, 21 27:4</p> <p><b>burdensome</b> [2] 27:19 29:6</p> <p><b>buy</b> [4] 45:4 46:11 47:1 57:9</p> <p><b>buying</b> [1] 58:5</p> <p><b>buys</b> [1] 72:9</p>	<p>21 32:12 51:12 64:3 75:25 76:7, 8</p> <p><b>cast</b> [1] 72:12</p> <p><b>cause</b> [1] 52:5</p> <p><b>ceded</b> [9] 52:1 67:14, 16 68:2, 16 75:7, 10 78:20, 25</p> <p><b>central</b> [1] 28:17</p> <p><b>cents</b> [2] 28:22, 23</p> <p><b>certain</b> [6] 12:16 19:16 50:19 51:24 52:11, 11</p> <p><b>certainly</b> [2] 18:6 31:17</p> <p><b>cetera</b> [1] 50:25</p> <p><b>chain</b> [1] 34:21</p> <p><b>change</b> [1] 40:13</p> <p><b>characterize</b> [1] 72:21</p> <p><b>charge</b> [2] 6:11 35:10</p> <p><b>charged</b> [1] 24:2</p> <p><b>chickasaw</b> [3] 54:22 64:22 65:25</p> <p><b>chief</b> [23] 22:23 23:1, 7 35:14, 19 36:10, 23 37:9, 17 38:5, 8, 11, 16, 21 39:20 40:15, 21 55:10 56:4, 16 72:20 74:8, 13</p> <p><b>circuit's</b> [2] 28:3 33:11</p> <p><b>circumstances</b> [4] 9:24 10:4 26:13 27:2</p> <p><b>cited</b> [1] 31:4</p> <p><b>citizen</b> [2] 29:2, 24</p> <p><b>citizens</b> [1] 26:22</p> <p><b>claiming</b> [3] 45:20 46:3 50:12</p> <p><b>claims</b> [1] 60:23</p> <p><b>clause</b> [2] 52:15 58:15</p> <p><b>clauses</b> [1] 29:19</p> <p><b>clear</b> [2] 7:13 9:22</p> <p><b>close</b> [1] 57:15</p> <p><b>coalition</b> [1] 74:22</p> <p><b>colleague</b> [1] 55:1</p> <p><b>collect</b> [3] 11:11 65:19, 20</p> <p><b>collected</b> [1] 66:1</p> <p><b>collecting</b> [1] 65:23</p> <p><b>columbia</b> [1] 70:20</p> <p><b>come</b> [4] 8:23 32:19 52:9, 12</p> <p><b>comes</b> [3] 42:16 55:21, 22</p> <p><b>coming</b> [1] 36:11</p> <p><b>commerce</b> [1] 58:15</p>	<p><b>common</b> [18] 12:14, 22 16:16 20:3, 10, 25 22:10 23:13 24:8 28:10 29:11 32:21 33:2, 3 50:22 51:23 52:22 78:12</p> <p><b>company</b> [1] 10:11</p> <p><b>comparable</b> [2] 11:1 57:25</p> <p><b>compensating</b> [1] 58:24</p> <p><b>completely</b> [2] 14:13 76:12</p> <p><b>complicated</b> [1] 6:2</p> <p><b>conceded</b> [3] 11:4 12:6 15:25</p> <p><b>concedes</b> [2] 6:24 33:19</p> <p><b>concern</b> [1] 22:1</p> <p><b>concerned</b> [3] 55:24 65:22 70:16</p> <p><b>concluded</b> [1] 22:3</p> <p><b>conclusions</b> [2] 14:6, 18</p> <p><b>congress</b> [1] 31:9</p> <p><b>connection</b> [2] 44:11 55:6</p> <p><b>consequences</b> [1] 61:19</p> <p><b>conservation</b> [2] 11:3, 23</p> <p><b>conserve</b> [1] 76:1</p> <p><b>consideration</b> [1] 70:22</p> <p><b>considered</b> [3] 14:5, 17 77:17</p> <p><b>consistent</b> [4] 21:19 71:22 73:10 75:20</p> <p><b>constitutional</b> [1] 30:22</p> <p><b>construction</b> [1] 73:22</p> <p><b>construed</b> [5] 36:8 49:9 68:19 69:18 70:9</p> <p><b>construes</b> [1] 48:11</p> <p><b>construing</b> [2] 69:16 72:25</p> <p><b>consumers</b> [3] 65:21 66:2, 7</p> <p><b>contest</b> [1] 18:11</p> <p><b>context</b> [5] 29:12, 13, 15, 16 42:23</p> <p><b>continue</b> [2] 70:25 71:24</p> <p><b>contractor</b> [2] 39:15, 18</p> <p><b>contrary</b> [1] 78:21</p> <p><b>convenient</b> [1] 12:6</p> <p><b>correct</b> [4] 27:23 63:11 68:</p>	<p>14 72:9</p> <p><b>cougar</b> [30] 6:24 12:2 13:16 14:24 15:25 17:4 18:8, 12, 13, 14, 21 19:1 38:14, 18 39:13, 18 40:2 44:12 55:16, 22 60:5 61:19 65:13 74:17 75:10 76:18 77:1, 5, 11 78:5</p> <p><b>couldn't</b> [3] 7:9 35:10, 12</p> <p><b>counsel</b> [7] 12:12 20:22 22:24 35:15 65:4 74:9 75:2</p> <p><b>couple</b> [2] 7:23 26:24</p> <p><b>course</b> [7] 13:1 22:16, 18 25:22 58:8 63:6 75:15</p> <p><b>court</b> [65] 7:13 10:10 11:14, 19 12:4, 9, 15, 24 13:25 14:2, 3, 6, 15, 16, 18 16:18, 21 20:4, 6, 7, 9 21:8, 15 22:2, 17, 17 23:8 27:18 35:20 36:8 41:6, 13 48:5, 9, 10, 20 49:8 52:14, 19 54:21 59:13, 15 63:21 64:1, 3, 4, 17, 22 65:24 68:19 69:16, 18, 19, 24 70:2, 9 72:24 73:3, 19, 22 74:1 76:5, 24 77:22, 23</p> <p><b>courts</b> [1] 34:18</p> <p><b>court's</b> [4] 34:19 51:19 52:18 76:7</p> <p><b>cover</b> [1] 13:2</p> <p><b>creating</b> [1] 20:12</p> <p><b>cree</b> [1] 28:3</p> <p><b>crucial</b> [8] 6:19, 22 19:20, 21, 22 74:15 75:18 78:18</p> <p><b>crudenser</b> [1] 19:16</p> <p><b>curiae</b> [1] 23:5</p> <p><b>current</b> [1] 74:3</p> <p><b>currently</b> [1] 69:23</p> <p><b>customers</b> [1] 44:10</p> <hr/> <p><b>D</b></p> <hr/> <p><b>de</b> [2] 14:2 22:17</p> <p><b>dealt</b> [1] 14:20</p> <p><b>decide</b> [2] 14:2 22:17</p> <p><b>decided</b> [3] 16:21 54:25 76:14</p> <p><b>decision</b> [2] 51:19 73:7</p> <p><b>declaration</b> [1] 39:16</p> <p><b>defined</b> [4] 41:23 49:8 58:7 73:2</p> <p><b>definitely</b> [1] 51:13</p>
--	--	--	---

## Official

<p><b>definition</b> [1] 39:11</p> <p><b>delivered</b> [1] 67:8</p> <p><b>delivery</b> [2] 56:20,25</p> <p><b>den</b> [24] 6:24 12:2 14:24 15:25 17:4 18:8,12,13 19:1 38:15,19 39:13,18 44:12 55:16,22 60:6 61:19 65:13 75:10 76:18 77:1,11 78:5</p> <p><b>den's</b> [6] 13:16 18:14,21 40:2 74:17 77:5</p> <p><b>deny</b> [1] 57:21</p> <p><b>depend</b> [4] 37:21 43:8 50:8 58:6</p> <p><b>depending</b> [1] 6:2</p> <p><b>depends</b> [5] 43:9 59:2,22 61:12 68:23</p> <p><b>describe</b> [5] 18:12,14,21,23 19:3</p> <p><b>described</b> [2] 30:25 78:16</p> <p><b>despite</b> [1] 20:10</p> <p><b>determine</b> [1] 27:19</p> <p><b>determining</b> [1] 73:23</p> <p><b>developed</b> [1] 23:22</p> <p><b>developments</b> [1] 58:9</p> <p><b>deviated</b> [1] 16:19</p> <p><b>deviating</b> [2] 21:9,13</p> <p><b>die</b> [1] 52:6</p> <p><b>differ</b> [1] 42:12</p> <p><b>difference</b> [4] 29:21 40:16 51:16 75:21</p> <p><b>differences</b> [2] 29:18,18</p> <p><b>different</b> [10] 13:23 29:15 33:16 34:16 40:7 49:21 57:4 69:9,10,19</p> <p><b>differently</b> [2] 29:12 69:18</p> <p><b>difficult</b> [2] 25:13 51:12</p> <p><b>directed</b> [1] 9:7</p> <p><b>disaggregate</b> [2] 69:3 77:8</p> <p><b>disaggregated</b> [1] 77:11</p> <p><b>disaggregating</b> [1] 68:23</p> <p><b>disagree</b> [2] 32:24 33:1</p> <p><b>discrimination</b> [1] 30:11</p> <p><b>disease</b> [1] 36:17</p> <p><b>diseased</b> [8] 10:17 13:3 19:15 36:14 44:16 52:5 53:3 66:15</p> <p><b>dispute</b> [1] 69:7</p>	<p><b>disputed</b> [3] 65:19,23 66:4</p> <p><b>distinction</b> [6] 34:2 35:4 46:5 51:11 64:21 76:7</p> <p><b>distinctions</b> [1] 26:24</p> <p><b>distinguish</b> [4] 25:14 40:1 52:17 68:12</p> <p><b>distinguishes</b> [1] 42:2</p> <p><b>distributor</b> [2] 44:7 55:4</p> <p><b>district</b> [5] 12:14,23 14:18 22:2 27:18</p> <p><b>doing</b> [29] 7:3 9:1 18:12,13 19:2,11 24:20,21 33:5,6 37:5 41:15,18 43:10,12,18,18,21,23 53:23 59:19 62:6,7,9,13,19 63:4 70:12 71:25</p> <p><b>dollar</b> [1] 25:19</p> <p><b>dollars</b> [2] 28:23 29:2</p> <p><b>done</b> [6] 22:13 34:18,24 57:22,23 64:3</p> <p><b>door</b> [2] 51:24 52:2</p> <p><b>dormant</b> [1] 58:15</p> <p><b>down</b> [4] 34:17 37:20 63:8 77:21</p> <p><b>downstream</b> [1] 61:19</p> <p><b>draw</b> [3] 26:25 46:4 56:22</p> <p><b>drawn</b> [1] 59:13</p> <p><b>drew</b> [1] 52:14</p> <p><b>driving</b> [1] 26:2</p> <p><b>drone</b> [1] 67:8</p> <p><b>drug</b> [1] 50:17</p> <p><b>drugs</b> [1] 10:17</p> <p><b>due</b> [2] 6:5 57:14</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>easement</b> [1] 64:5</p> <p><b>easier</b> [1] 7:22</p> <p><b>economic</b> [8] 23:21 24:6 28:6,19,19 32:9 33:17 61:19</p> <p><b>effect</b> [3] 15:13,14 71:8</p> <p><b>either</b> [5] 16:8 28:15 39:24 46:20 72:22</p> <p><b>enacting</b> [1] 63:17</p> <p><b>end</b> [1] 55:24</p> <p><b>ended</b> [1] 29:10</p> <p><b>engaged</b> [2] 10:13 41:8</p> <p><b>engaging</b> [2] 10:13 32:16</p> <p><b>enjoyed</b> [1] 68:9</p>	<p><b>enormous</b> [1] 74:4</p> <p><b>enough</b> [1] 21:7</p> <p><b>ensure</b> [3] 52:21,25 54:18</p> <p><b>enter</b> [4] 48:13,15,16,23</p> <p><b>entered</b> [1] 9:12</p> <p><b>entering</b> [2] 17:15,16</p> <p><b>enters</b> [6] 49:2,5 56:8 57:13 66:10,20</p> <p><b>entirely</b> [1] 15:24</p> <p><b>entitled</b> [1] 6:7</p> <p><b>entity</b> [2] 6:3 42:7</p> <p><b>entry</b> [9] 41:20 48:17,24,25 50:5 57:7,8 61:7 73:21</p> <p><b>equal</b> [3] 20:17,21 30:23</p> <p><b>equally</b> [1] 16:15</p> <p><b>especially</b> [1] 46:9</p> <p><b>essentially</b> [5] 12:8 18:8 52:19 64:5 73:23</p> <p><b>estate</b> [1] 29:23</p> <p><b>estopped</b> [1] 13:22</p> <p><b>et</b> [1] 50:25</p> <p><b>evade</b> [2] 51:20 59:21</p> <p><b>even</b> [22] 7:1 10:24 14:7 16:21 17:8 19:1 20:1 27:24 32:3 33:14 36:5 37:1,17 41:25 60:15 67:16 72:15 73:17 75:8 77:4,12 78:19</p> <p><b>event</b> [7] 41:20 56:23,24 58:7,12 61:7,10</p> <p><b>everybody</b> [10] 22:11 24:20,22 26:5 30:17 36:24 57:23 60:4 65:1 74:25</p> <p><b>everybody's</b> [1] 25:19</p> <p><b>everyone</b> [3] 16:15 19:25 25:8</p> <p><b>everything</b> [1] 7:11</p> <p><b>exactly</b> [13] 7:12 9:2,14 10:2,7 16:3,10 29:24 33:6 34:24 59:22 66:25 76:10</p> <p><b>example</b> [4] 8:14 13:2,9,11</p> <p><b>examples</b> [3] 10:18 31:4 45:16</p> <p><b>exceed</b> [1] 39:7</p> <p><b>exchange</b> [3] 15:15 16:11 30:7</p> <p><b>excise</b> [1] 23:15</p> <p><b>exclusively</b> [2] 65:10,16</p>	<p><b>excuse</b> [2] 27:7 63:15</p> <p><b>exempt</b> [4] 10:11 23:10,21 32:9</p> <p><b>exemption</b> [1] 46:4</p> <p><b>exercises</b> [1] 35:24</p> <p><b>exercising</b> [3] 37:15 43:12 61:16</p> <p><b>exist</b> [1] 75:16</p> <p><b>expand</b> [1] 12:2</p> <p><b>expectation</b> [2] 70:14 71:22</p> <p><b>explained</b> [1] 14:12</p> <p><b>explicit</b> [1] 52:16</p> <p><b>explicitly</b> [1] 76:24</p> <p><b>exploit</b> [1] 71:4</p> <p><b>exploitation</b> [1] 71:18</p> <p><b>express</b> [1] 78:7</p> <p><b>expressly</b> [1] 43:3</p> <p><b>extraordinary</b> [1] 21:3</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>facilitate</b> [2] 12:17,21</p> <p><b>facilitated</b> [1] 60:25</p> <p><b>fact</b> [11] 8:14 22:2 24:11 40:14 46:22 51:25 54:23 67:13 71:5 72:15 77:10</p> <p><b>factor</b> [1] 18:6</p> <p><b>facts</b> [4] 19:8 44:5 74:16 77:10</p> <p><b>fair</b> [2] 21:4,7</p> <p><b>far</b> [2] 55:24 71:12</p> <p><b>farmer</b> [1] 43:20</p> <p><b>farther</b> [1] 17:9</p> <p><b>fast</b> [1] 22:24</p> <p><b>favor</b> [1] 77:6</p> <p><b>federal</b> [3] 69:15 77:21 78:8</p> <p><b>fedex</b> [1] 67:5</p> <p><b>fee</b> [19] 14:21 16:24,25 17:1 28:2,5 33:13,13 35:11 36:12,15,17,21,25 37:2,10,13 39:7 72:2</p> <p><b>feel</b> [1] 14:9</p> <p><b>fees</b> [1] 28:1</p> <p><b>few</b> [1] 67:1</p> <p><b>find</b> [2] 12:9 25:13</p> <p><b>fine</b> [4] 37:8 45:21 51:5 76:16</p> <p><b>finer</b> [1] 51:11</p>
--	---	--	--

## Official

<p><b>firearm</b> [2] 13:3 52:4  <b>firearms</b> [2] 10:16 53:3  <b>first</b> [28] 6:23 13:21,25 15:9 18:18 20:16 27:1 35:23 42:7,15,17,19,24 51:4 60:9 61:10,14 62:5 63:12 67:3 69:4,8 72:12,16,18 73:14,17 74:18  <b>fish</b> [13] 11:11,12,15,23 20:18 26:11 64:2,5,6,12,16 76:1,1  <b>fishing</b> [17] 6:10 10:25 11:10,21 12:5 16:20 20:4,11 21:1 29:13,16 32:11 52:15 64:14 75:25 76:1,6  <b>five</b> [1] 28:24  <b>focus</b> [6] 7:24 43:1 62:15,18 63:3,15  <b>focused</b> [2] 41:14 61:1  <b>focuses</b> [2] 63:13 67:13  <b>follow</b> [1] 61:20  <b>followed</b> [1] 34:19  <b>following</b> [3] 51:19 52:18 57:11  <b>follows</b> [1] 70:5  <b>foremost</b> [1] 20:17  <b>form</b> [1] 45:15  <b>formal</b> [1] 63:23  <b>former</b> [1] 63:11  <b>forth</b> [2] 6:8 11:8  <b>found</b> [1] 12:7  <b>four</b> [2] 66:9 74:10  <b>framework</b> [2] 23:22 32:9  <b>free</b> [5] 6:12,12 14:25 15:24 28:18  <b>fuel</b> [70] 6:3,21 9:8,19,25 10:12 15:1 17:3,4,5,12,15,24,24 18:24 19:4,5,7,8 23:11,24 24:6 32:6,20 34:6 35:22,24 36:16 38:12,20 39:11,12,14 41:11,18,20,21 42:8,16,20 44:7,13 47:1,3 48:17 50:9 54:18 55:3,6,11,13 56:12 57:18 60:1,22 63:1 65:7 66:10,10,13 69:1 70:16 75:15 76:13,17,23 77:3,13,13,14  <b>full</b> [2] 10:5 62:21</p>	<p><b>fundamental</b> [1] 69:6</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>gallon</b> [1] 40:18  <b>gas</b> [2] 46:10,15  <b>gasoline</b> [4] 24:12 26:4,7 48:2  <b>gave</b> [8] 10:18 20:6,7 21:21 30:6 64:17 71:19 74:4  <b>general</b> [1] 37:13  <b>generally</b> [7] 8:7,14 11:20 64:9,25 76:6,17  <b>generous</b> [1] 71:15  <b>geography</b> [1] 75:12  <b>gets</b> [1] 34:7  <b>getting</b> [4] 11:12 39:7 54:4 71:18  <b>ginsburg</b> [4] 58:21 59:7 65:5,15  <b>give</b> [6] 21:15 23:14 27:17 29:22 50:23 58:2  <b>given</b> [3] 15:17 30:22 68:3  <b>gives</b> [1] 6:10  <b>giving</b> [2] 31:3 70:22  <b>glad</b> [1] 45:22  <b>gloss</b> [3] 72:14 73:16,24  <b>goal</b> [1] 54:18  <b>goodness</b> [1] 45:17  <b>goods</b> [47] 6:8 8:3 9:5,16 10:1 11:7 13:14 15:14,18,22,24 16:1,9 17:18,21,21 18:15 19:19,19 22:20 23:15,22 28:7 32:14,18 33:7,18,24 35:1,12 38:23 40:11 43:14 45:4 59:8,10,14 62:10,11,13,14 70:19 71:25 74:20 75:13 76:17 78:13  <b>gorsuch</b> [20] 12:12,20,25 13:5,12,18 14:8 20:22 21:5,10,17,22,25 22:7 29:10 30:18,21 31:13,16 77:16  <b>got</b> [8] 10:7 16:10 17:19 41:14 53:22 59:18 61:1 67:8  <b>governor</b> [4] 30:5 31:3,18 70:17  <b>greater</b> [1] 20:12  <b>guaranteed</b> [2] 16:22,23  <b>guarantees</b> [1] 16:16  <b>guess</b> [3] 9:9 13:21 25:10</p>	<p style="text-align: center;"><b>H</b></p> <hr/> <p><b>happen</b> [1] 74:16  <b>happened</b> [1] 27:12  <b>happening</b> [4] 11:16 27:1 33:16 47:6  <b>happens</b> [1] 76:18  <b>happenstance</b> [1] 18:5  <b>happy</b> [1] 58:4  <b>hard</b> [4] 26:7,10 54:11,12  <b>harder</b> [1] 69:22  <b>hardest</b> [1] 8:24  <b>hardly</b> [1] 24:22  <b>hauling</b> [4] 42:21 44:13 55:4,8  <b>headed</b> [1] 34:6  <b>hear</b> [2] 62:17 66:23  <b>heard</b> [1] 50:1  <b>held</b> [6] 12:24 54:22 64:14,17,22 69:24  <b>helped</b> [1] 58:3  <b>helpful</b> [1] 54:14  <b>helps</b> [1] 75:11  <b>high</b> [2] 26:6 45:10  <b>highway</b> [31] 10:21 11:5 14:22,25 16:17 17:2 20:21 24:8,13 26:9,14,21 27:5 28:1,6,13,20 29:25 33:14,25 35:11 59:4 60:25 72:6,17 75:16 76:13,19,24 77:1 78:12  <b>highways</b> [17] 12:18 18:4 21:2 23:14 24:23 28:11,18 29:7 30:4 32:22 35:9 42:3,4 61:16 68:5 75:6 78:23  <b>hire</b> [3] 39:3 40:7,12  <b>hired</b> [1] 38:3  <b>hires</b> [1] 39:18  <b>historical</b> [2] 20:14 29:18  <b>historically</b> [1] 75:8  <b>history</b> [4] 22:4 28:14 75:11 78:24  <b>hold</b> [1] 31:14  <b>holding</b> [1] 13:19  <b>holistic</b> [1] 63:16  <b>honestly</b> [1] 72:13  <b>honor</b> [27] 6:23 7:11 9:18 10:9 11:13 13:25 14:11 15:10,23 16:12 17:23 18:18,25</p>	<p>20:5 21:7 36:19 38:19,24 45:1 47:2 48:3 49:25 53:10 59:1 74:6 75:2 77:19  <b>hook</b> [1] 68:17  <b>hope</b> [1] 66:22  <b>house</b> [1] 45:5  <b>huge</b> [1] 15:16  <b>hurts</b> [1] 75:13  <b>hypothesizing</b> [1] 26:25  <b>hypothetical</b> [7] 25:1,5 56:5,15,19 58:5 59:21</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> [2] 16:2 40:6  <b>identify</b> [1] 51:12  <b>iii</b> [2] 23:9 28:9  <b>illegal</b> [5] 10:16,17 49:15,23,25  <b>illusory</b> [1] 30:24  <b>immediately</b> [1] 17:6  <b>immunity</b> [3] 23:15 67:22,23  <b>implication</b> [1] 51:25  <b>import</b> [1] 72:25  <b>important</b> [2] 30:2 72:11  <b>importantly</b> [1] 14:16  <b>importation</b> [6] 17:17 41:24 42:18 72:7 73:4,21  <b>imported</b> [1] 50:9  <b>importer</b> [10] 37:25 39:12 41:23 42:1 48:20 49:8,11 72:18 73:1,3  <b>importers</b> [2] 42:3 73:12  <b>importing</b> [2] 41:18 72:6  <b>impose</b> [13] 11:17 12:16 24:12,19 25:4 29:5 32:8 33:12 34:16 48:1 71:6,7 76:16  <b>imposed</b> [11] 25:18 27:3 30:12,12,15,16 33:15 39:2 49:2,4 50:3  <b>imposes</b> [1] 47:1  <b>imposing</b> [1] 29:2  <b>impractical</b> [1] 16:5  <b>imputes</b> [1] 39:9  <b>incidence</b> [7] 7:17 34:20 55:1 58:17,21 69:24 78:3  <b>incidentally</b> [1] 41:25  <b>include</b> [1] 8:2  <b>including</b> [2] 24:23 25:11</p>
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## Official

<p><b>inconsistent</b> [2] 31:25 70:13</p> <p><b>incurring</b> [1] 36:2</p> <p><b>indian</b> [26] 11:4 12:15,24 13:19 14:20 22:4 31:9 38:4, 20 44:6,7,8,9 51:20 55:4,5, 5 57:22 59:4 60:12 63:14 64:16,17,25 65:12 66:6</p> <p><b>indians</b> [8] 20:18 22:10 30:13 52:23 64:10 67:19 71:16,17</p> <p><b>indian's</b> [1] 63:13</p> <p><b>indicate</b> [1] 28:15</p> <p><b>inevitably</b> [1] 70:5</p> <p><b>inherent</b> [1] 44:1</p> <p><b>inherently</b> [1] 42:18</p> <p><b>inside</b> [3] 17:25 23:16,16</p> <p><b>inspect</b> [2] 36:17 37:1</p> <p><b>inspected</b> [2] 36:13 37:7</p> <p><b>inspection</b> [2] 36:20,22</p> <p><b>instance</b> [1] 13:22</p> <p><b>instances</b> [1] 31:8</p> <p><b>in-state</b> [1] 59:11</p> <p><b>instead</b> [1] 62:20</p> <p><b>intent</b> [1] 63:16</p> <p><b>interest</b> [4] 11:2,5,22,25</p> <p><b>interfere</b> [1] 39:22</p> <p><b>interferes</b> [1] 46:15</p> <p><b>interpretation</b> [4] 12:13 14:1,4 71:16</p> <p><b>intuitive</b> [1] 73:4</p> <p><b>involvement</b> [1] 55:22</p> <p><b>involving</b> [1] 58:10</p> <p><b>isn't</b> [10] 16:10 28:5 38:8 44:24 45:22 52:20 60:12, 21 65:11 73:19</p> <p><b>issue</b> [16] 8:1,24 11:15 14:21 22:18 25:14 28:2,2 29:17 31:10 32:14 52:19 58:14,16 64:24 78:1</p> <p><b>issues</b> [2] 7:22 58:14</p> <p><b>itself</b> [7] 9:19 14:5,17 39:25 41:3 58:13 77:3</p>	<p style="text-align: center;"><b>K</b></p> <p><b>kagan</b> [29] 7:19,21 8:1,6, 12,19,22 9:21 15:20 16:6 17:10 18:10,20 19:3,9 32:13,23 33:10,22 34:9,23 48:12,15,18,23 59:25 61:24 62:1 75:19</p> <p><b>kavanaugh</b> [18] 15:4,13 16:8 20:2 30:19 31:20 32:2 53:5,12,16 54:2 65:4 68:11, 15,21 69:17 74:2 77:7</p> <p><b>keep</b> [2] 9:5 19:1</p> <p><b>keeping</b> [1] 50:18</p> <p><b>kept</b> [1] 67:23</p> <p><b>key</b> [1] 7:12</p> <p><b>kind</b> [8] 12:9 21:3 30:18,21 36:24 42:24 69:12 70:4</p> <p><b>kinds</b> [3] 28:4 43:23 44:17</p> <p><b>knows</b> [2] 56:3 60:4</p>	<p><b>licensed</b> [4] 42:2 72:8,18 73:11</p> <p><b>licensing</b> [2] 28:2 33:13</p> <p><b>light</b> [1] 19:8</p> <p><b>limit</b> [4] 13:11 26:20 75:7, 12</p> <p><b>limited</b> [1] 78:19</p> <p><b>limits</b> [2] 12:21 52:8</p> <p><b>line</b> [4] 17:7 18:6 33:11 52:14</p> <p><b>literally</b> [1] 72:5</p> <p><b>little</b> [2] 42:12 71:2</p> <p><b>long</b> [2] 31:11 66:19</p> <p><b>look</b> [18] 8:25,25 53:22 54:15 56:23 59:18 61:1 62:2,3, 20,21 63:22,23 64:4 67:18, 19,22 73:18</p> <p><b>looked</b> [1] 64:15</p> <p><b>looking</b> [2] 22:7 68:19</p> <p><b>looks</b> [1] 57:12</p> <p><b>lot</b> [3] 7:21 8:9 63:10</p> <p><b>lower</b> [1] 14:6</p>	<p>24 72:1,2</p> <p><b>member</b> [6] 6:25 10:16 31:19 43:10,11 53:22</p> <p><b>members</b> [8] 8:15 23:10, 14,21 31:7,11 74:19 77:17</p> <p><b>mescalero</b> [1] 76:9</p> <p><b>metaphysical</b> [1] 43:17</p> <p><b>mid-1800s</b> [1] 31:6</p> <p><b>might</b> [8] 11:1 34:9 36:21 42:12 51:12 54:4 58:14 61:18</p> <p><b>mile</b> [1] 40:19</p> <p><b>million</b> [3] 25:19 28:23 29:2</p> <p><b>millions</b> [1] 57:9</p> <p><b>mimic</b> [1] 71:8</p> <p><b>mind</b> [1] 19:1</p> <p><b>minute</b> [1] 58:2</p> <p><b>minutes</b> [2] 70:18 74:10</p> <p><b>misquote</b> [1] 15:11</p> <p><b>misrepresentation</b> [1] 75:24</p> <p><b>modeled</b> [2] 77:23 78:17</p> <p><b>moment</b> [2] 32:12 40:23</p> <p><b>money</b> [2] 50:20 56:1</p> <p><b>most</b> [1] 33:10</p> <p><b>mostly</b> [1] 24:11</p> <p><b>motor</b> [4] 17:15 23:11 36:16 39:11</p> <p><b>move</b> [2] 34:20 55:1</p> <p><b>movement</b> [2] 33:23 48:18</p> <p><b>ms</b> [30] 23:3,7 24:16,18,25 25:6,10,15,18,25 26:12,23 27:7,9,15,17,23 29:4,14 30:1,16 31:1,15,17 32:1,17 33:9 34:1,15 35:3</p> <p><b>much</b> [7] 27:6,8,13 29:22 40:23 69:22 77:4</p> <p><b>must</b> [3] 16:2 42:8 49:12</p> <p><b>myself</b> [1] 9:22</p>
<p style="text-align: center;"><b>J</b></p> <p><b>jack</b> [3] 19:9,11,13</p> <p><b>joining</b> [1] 74:22</p> <p><b>joint</b> [1] 73:2</p> <p><b>justification</b> [1] 52:7</p>	<p style="text-align: center;"><b>L</b></p> <p><b>land</b> [17] 15:16,16 16:11 30:7 52:1,3 55:8 67:21,25 68:10 70:21,23,24 71:6,19,24 74:4</p> <p><b>lands</b> [1] 77:18</p> <p><b>language</b> [3] 51:23 52:16 68:12</p> <p><b>latter</b> [1] 63:11</p> <p><b>laughter</b> [3] 14:10 22:25 45:24</p> <p><b>law</b> [13] 10:12 14:2,13 22:16 36:9 58:9 69:5,14,25 72:25 75:21,24 78:8</p> <p><b>laws</b> [7] 10:19 44:16 52:7 64:7,8,9 66:3</p> <p><b>lead</b> [3] 52:18 76:22 77:5</p> <p><b>least</b> [2] 42:20 71:15</p> <p><b>leave</b> [5] 19:15 30:8 31:21, 23 32:4</p> <p><b>leaving</b> [1] 31:7</p> <p><b>left</b> [1] 20:17</p> <p><b>legal</b> [5] 14:6,18 42:11 49:14,22</p> <p><b>legalize</b> [1] 45:9</p> <p><b>legislation</b> [2] 17:11 63:5</p> <p><b>levied</b> [1] 38:1</p> <p><b>license</b> [3] 6:9,13 11:12</p>	<p style="text-align: center;"><b>M</b></p> <p><b>made</b> [1] 41:10</p> <p><b>manner</b> [1] 28:19</p> <p><b>many</b> [5] 34:16 43:19,21 44:15 69:5</p> <p><b>marijuana</b> [11] 45:9,13 49:5,12,17,21 50:3,5,10 51:6 66:16</p> <p><b>market</b> [27] 6:8 7:4,5,8 11:8 15:6,15,19,22,24 17:21, 22,22 18:16 19:10,12 32:15, 18 33:8,19 35:2 40:11 43:14,20 62:10,14 70:19</p> <p><b>maryland</b> [1] 15:17</p> <p><b>mass</b> [1] 24:14</p> <p><b>matter</b> [6] 10:5 14:12 36:9 43:4,15 61:3</p> <p><b>matters</b> [1] 9:10</p> <p><b>mean</b> [18] 9:10 12:13 13:16 18:11 21:1 22:10 24:12 27:10 31:1 32:17 35:10 42:7 44:5 47:18,22 59:21 69:20 72:4</p> <p><b>meaning</b> [8] 6:12 16:19 20:24 21:9,13,16 22:9,15</p> <p><b>means</b> [5] 18:2 22:20 42:</p>	<p style="text-align: center;"><b>N</b></p> <p><b>narrow</b> [1] 14:21</p> <p><b>narrower</b> [4] 43:7 53:19, 20 67:11</p> <p><b>narrowest</b> [2] 67:17 68:6</p> <p><b>nation</b> [11] 8:16 12:15,24 13:19 14:20,24 22:4 51:20</p>

## Official

<p><b>54:22 64:22 65:25</b>  <b>nationwide</b> [1] 74:20  <b>native</b> [1] 12:17  <b>natural</b> [2] 54:20 71:21  <b>necessarily</b> [1] 58:19  <b>necessary</b> [2] 52:20 63:2  <b>need</b> [5] 26:24 40:14 52:21, 25 53:2  <b>negotiating</b> [1] 28:14  <b>negotiations</b> [1] 18:7  <b>neutral</b> [1] 71:13  <b>never</b> [8] 10:10 11:20 12:4 14:5, 17 17:8 39:25 76:5  <b>next</b> [3] 21:25, 25 34:8  <b>ninth</b> [2] 28:3 33:11  <b>noah</b> [1] 74:11  <b>nobody</b> [2] 24:22 29:6  <b>non</b> [2] 40:9 56:16  <b>non-bulk</b> [1] 57:8  <b>non-discriminatory</b> [3] 7:16 16:14 19:24  <b>none</b> [3] 16:18 20:6 21:20  <b>non-indian</b> [4] 56:17 60:10 65:21 66:2  <b>non-indians</b> [5] 20:13, 19 52:22 64:10 66:6  <b>non-native</b> [2] 12:17 22:13  <b>non-tribal</b> [1] 77:17  <b>nor</b> [1] 73:25  <b>normal</b> [3] 21:9, 13, 16  <b>normally</b> [2] 20:23, 25  <b>nothing</b> [8] 28:14 29:23 41:2 50:16, 24 56:9 64:13 78:9  <b>novo</b> [2] 14:3 22:17  <b>number</b> [2] 13:24 27:17  <b>numbers</b> [1] 26:18</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>object</b> [2] 36:20, 21  <b>obligation</b> [2] 36:2 72:3  <b>obtained</b> [2] 23:18, 24  <b>obvious</b> [1] 74:3  <b>obviously</b> [2] 68:25 73:17  <b>o'connell</b> [31] 23:3, 4, 7 24:16, 18, 25 25:6, 10, 15, 18, 25 26:12, 23 27:7, 9, 15, 17, 23 29:4, 14 30:1, 16 31:1, 15, 17</p>	<p><b>32:1, 17 33:9 34:1, 15 35:3</b>  <b>odd</b> [1] 13:16  <b>off-reservation</b> [13] 7:14, 15, 17 15:7 16:2 44:12 53:6, 7, 16 55:7 64:21 65:6, 7  <b>oil</b> [1] 36:16  <b>okay</b> [21] 8:5, 11, 18, 20 12:10 13:12 21:22 28:24 31:16 43:5 44:23 45:2 46:23 49:6 53:6, 8, 13 56:5, 9 57:19 77:23  <b>once</b> [3] 23:2 32:4 34:7  <b>one</b> [29] 7:24 8:1 17:12, 14 19:21 21:1, 18 28:16 29:20 30:1, 1 33:24 35:13 36:3 42:21 53:19, 20, 20 56:6, 24 57:5 62:2 67:12 69:8, 10 70:11 73:16, 19 75:19  <b>ones</b> [1] 50:4  <b>online</b> [5] 57:10, 13, 24 58:6 66:13  <b>only</b> [9] 11:22 25:23 28:10 43:12 44:11 47:12 55:6 68:7 72:8  <b>on-reservation</b> [5] 64:20, 23 65:3, 8 71:9  <b>opens</b> [2] 51:23 52:2  <b>operates</b> [1] 72:15  <b>opinion</b> [1] 14:19  <b>opposed</b> [2] 19:4 40:19  <b>oral</b> [2] 23:4 35:17  <b>order</b> [2] 53:3 65:20  <b>ordinary</b> [2] 16:19 45:14  <b>oregon</b> [9] 24:2 26:4, 16 32:7, 19 34:3, 5 47:10 61:5  <b>original</b> [2] 22:8, 9  <b>originates</b> [1] 42:20  <b>other</b> [32] 8:12 9:3, 23 10:3 13:13 15:11 17:6 19:22 23:19 26:5, 22 27:24 28:13 29:1, 24 36:18, 24 40:17, 18 42:19 43:23 45:16 50:20 52:6 55:19 56:21 57:18 58:12, 14 59:2 67:1 68:16  <b>others</b> [10] 11:1 16:16, 23 20:11 23:13 24:9 28:11 29:12 32:21 78:12  <b>otherwise</b> [1] 71:7</p>	<p><b>out</b> [12] 17:4 26:10 34:6 42:17, 20 47:6, 10 50:19 55:4 58:23 74:15 77:8  <b>outnumbered</b> [1] 20:19  <b>out-of-state</b> [1] 58:10  <b>outright</b> [1] 76:15  <b>outside</b> [9] 7:1 17:25 23:17, 18, 23 32:10 55:2 57:1 67:16  <b>overall</b> [2] 54:17 56:1  <b>owe</b> [2] 17:7 19:6  <b>owes</b> [1] 78:5  <b>owing</b> [1] 72:3  <b>own</b> [6] 39:15, 17 40:2, 8, 12 45:22  <b>owned</b> [6] 36:14 38:3 55:16 60:5, 11 77:14  <b>owner</b> [6] 38:12, 12 39:2, 10, 21 40:6  <b>owner's</b> [1] 39:24  <b>owns</b> [3] 6:3 38:20, 22</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>page</b> [2] 31:4 73:1  <b>paid</b> [3] 17:3 57:24, 25  <b>part</b> [4] 15:9, 10 28:17 62:3  <b>particular</b> [4] 37:23 63:17 67:21 68:8  <b>parties</b> [1] 22:8  <b>pass</b> [2] 31:10 57:12  <b>pay</b> [22] 14:25 18:25 24:3 25:9 26:6 36:15, 25 37:22 39:6 40:14 42:8 43:14 45:6, 13, 14 49:12 50:15, 23 59:9 72:8, 17 73:12  <b>paying</b> [7] 11:11 15:3 16:24 23:10 59:4 72:2 77:12  <b>pays</b> [8] 6:1 26:6 37:25 40:6 42:1 60:10 72:9 73:1  <b>people</b> [13] 9:12, 24 24:14 26:21 31:8 36:14 42:3, 4 52:6 57:9 65:16, 16 72:8  <b>per</b> [2] 40:17, 19  <b>percent</b> [2] 49:5, 12  <b>perfect</b> [1] 39:5  <b>permit</b> [1] 57:20  <b>permits</b> [1] 6:17  <b>permitting</b> [2] 52:7, 8  <b>person</b> [3] 10:10 38:2, 2</p>	<p><b>persons</b> [1] 22:14  <b>person's</b> [1] 52:4  <b>petitioner</b> [2] 23:6 74:12  <b>petitioner's</b> [1] 31:5  <b>philosophical</b> [1] 69:13  <b>phrase</b> [4] 12:14 20:10, 23 21:15  <b>pick</b> [1] 7:8  <b>picked</b> [1] 6:21  <b>pigs</b> [7] 19:10, 12, 13, 15 43:20, 22, 22  <b>place</b> [1] 34:5  <b>placed</b> [2] 26:14 73:24  <b>places</b> [1] 26:5  <b>plain</b> [1] 28:12  <b>plausible</b> [2] 76:21 78:11  <b>please</b> [2] 23:8 35:20  <b>point</b> [20] 7:10, 12 9:11, 13, 25 10:6 19:20, 22 29:3, 10 33:21, 23 40:9 44:20 60:4 72:11 74:15, 18 75:18 76:11  <b>pointed</b> [1] 77:8  <b>points</b> [3] 6:23 11:3 19:22  <b>port</b> [2] 60:3 61:7  <b>position</b> [16] 13:23 32:25 45:18, 20, 22 46:2, 18, 21 50:7 60:6 67:1 68:22 69:19 74:17, 19 77:5  <b>possess</b> [6] 10:16 15:1 19:7 42:8 51:6 68:24  <b>possessed</b> [2] 68:20 77:13  <b>possesses</b> [1] 62:25  <b>possessing</b> [7] 18:24 19:4, 13 43:22 53:25 62:11 69:1  <b>possession</b> [24] 9:8 10:12 13:3 36:4 40:22 42:17, 24 43:3 53:7, 10, 13, 17 54:6, 7 61:10, 11 68:23 69:3, 8 72:13 73:14, 17 76:23 77:9  <b>possessor</b> [5] 42:20 61:14, 16 72:16, 18  <b>possible</b> [1] 54:9  <b>possibly</b> [1] 10:21  <b>potentially</b> [1] 44:9  <b>practical</b> [3] 20:14, 16 21:</p>
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## Official

<p>24  <b>practices</b> [1] 16:5  <b>precise</b> [1] 41:7  <b>precisely</b> [1] 61:2  <b>precondition</b> [1] 14:21  <b>preempt</b> [5] 8:7 10:22 16:14 28:5 78:13  <b>preempted</b> [14] 19:25 27:25 28:4 42:11,14 54:11,23,24 60:9 64:15,23 65:3 67:16 78:7  <b>preemption</b> [4] 68:3 69:21 70:6 73:23  <b>preempts</b> [3] 35:21 64:6 78:10  <b>present</b> [2] 16:7 22:14  <b>preserve</b> [2] 7:11 35:8  <b>preserved</b> [1] 16:3  <b>presumably</b> [2] 13:10 28:24  <b>presume</b> [1] 29:1  <b>pretty</b> [6] 17:16 26:7,10 34:3 45:10 57:14  <b>prevent</b> [4] 16:7 36:17 53:2 64:7  <b>preventing</b> [2] 9:1,4  <b>principles</b> [2] 71:13,16  <b>private</b> [2] 18:3 64:6  <b>probably</b> [8] 39:7 45:16 49:25 52:2 54:10 60:9 68:2 69:21  <b>problem</b> [3] 47:8 58:19 73:9  <b>problematic</b> [1] 36:15  <b>prohibit</b> [1] 52:11  <b>promise</b> [4] 15:15 30:22,24,25  <b>promised</b> [1] 70:18  <b>property</b> [3] 64:6,8,12  <b>protect</b> [4] 12:3 28:13 52:2 53:3  <b>protected</b> [2] 34:25 65:2  <b>protection</b> [2] 30:23 60:24  <b>protects</b> [3] 23:12 32:21 33:7  <b>provide</b> [2] 13:8 66:3  <b>providing</b> [1] 64:5</p>	<p><b>provision</b> [2] 6:7 30:3  <b>public</b> [21] 10:21 11:2,5,21,25 12:3 16:17 18:4 23:13 28:11 30:4 32:22 35:9 52:3,25 53:4 61:15 68:4 75:6 78:12,23  <b>punishing</b> [1] 51:7  <b>purcell</b> [46] 6:15,18,22 7:5,10,19,25 8:5,11,18,21 9:18 10:9 11:13,19 12:1,19,23 13:1,10,13,24 14:11 15:9,23 16:12 17:23 18:17,23 19:6,14 20:5 21:4,7,12,20,23 22:6,15 74:10,11,13 75:1,5,23 77:19  <b>purchase</b> [4] 6:25 15:2 33:20 47:9  <b>purchased</b> [4] 17:3,4,25 32:6  <b>purchases</b> [1] 77:18  <b>purely</b> [1] 41:2  <b>purpose</b> [8] 23:19 31:20,21,22,25 62:20 63:5,23  <b>purposes</b> [2] 31:12 37:8  <b>push</b> [2] 54:10,12  <b>put</b> [2] 17:6 46:13  <b>putting</b> [1] 56:13  <b>puyallup</b> [1] 52:16</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>qua</b> [1] 40:9  <b>question</b> [14] 6:2 8:7 14:2 22:16 27:13 28:22 43:18 51:21 63:8 68:22 69:13,14,15,25  <b>questions</b> [2] 13:6 69:6  <b>quite</b> [4] 6:16 25:1 54:14 70:13</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>raising</b> [1] 50:20  <b>range</b> [2] 10:18 17:11  <b>rather</b> [1] 73:22  <b>rationale</b> [1] 76:4  <b>reach</b> [1] 22:18  <b>reached</b> [1] 14:6  <b>reaches</b> [1] 60:3  <b>read</b> [7] 20:11,23,25 60:22 66:8 76:21 78:11</p>	<p><b>reading</b> [7] 16:13 19:23 20:3 21:5,18 22:3 29:11  <b>real</b> [1] 29:23  <b>really</b> [28] 14:18 18:20 20:7 24:13 25:13 30:2,2 36:6 41:10 42:17 44:11 50:16,24 53:2 54:3,5,7,13,16 58:1 59:13,13,22 60:16 63:8,20,25 68:7  <b>reason</b> [5] 20:16 29:15 35:23 56:2 76:14  <b>reasonable</b> [1] 12:9  <b>reasons</b> [12] 13:24 16:18 20:6,8,15 21:13,21,23 35:23 50:20 63:10 77:14  <b>reassurance</b> [2] 31:2,18  <b>rebuttal</b> [2] 22:22 74:11  <b>receiving</b> [1] 30:5  <b>recent</b> [1] 58:8  <b>record</b> [1] 39:16  <b>reference</b> [1] 70:20  <b>referred</b> [1] 47:2  <b>referring</b> [1] 56:12  <b>refinery</b> [3] 6:1 17:13 23:25  <b>refuse</b> [1] 50:15  <b>refuted</b> [1] 78:24  <b>regardless</b> [5] 9:19 17:22 36:2 64:11 76:25  <b>regulate</b> [7] 11:2,5,21,23 13:6 75:25 76:6  <b>regulating</b> [1] 13:2  <b>regulation</b> [9] 13:14 19:18 22:11 50:18 51:8,16 74:21 75:22 76:8  <b>regulations</b> [4] 12:10,16,21 13:8  <b>regulatory</b> [4] 37:8 51:5,24 76:14  <b>rejected</b> [2] 20:3 76:9  <b>relevant</b> [8] 27:12,13 52:20 53:1 59:16 61:7,9 66:9  <b>remain</b> [1] 15:24  <b>remainder</b> [1] 22:21  <b>remove</b> [1] 26:18  <b>removed</b> [1] 17:13  <b>reply</b> [1] 14:12  <b>report</b> [1] 31:8</p>	<p><b>required</b> [2] 41:7 61:22  <b>requiring</b> [1] 68:19  <b>reservation</b> [27] 6:13,14 7:1 15:8 23:17,18,23 30:7,8 31:10,12,22 32:4,10 34:21 44:8,9 55:2,5 56:14 57:1 63:21 65:10,14,17 71:9 78:6  <b>reservations</b> [2] 31:7 64:25  <b>reserve</b> [1] 22:21  <b>resident</b> [2] 59:9,11  <b>resolve</b> [1] 71:14  <b>resource</b> [1] 52:22  <b>respect</b> [1] 52:15  <b>respondent</b> [10] 23:20,24 24:3 32:2 33:19 35:18,22,24 38:19 71:14  <b>responsible</b> [1] 72:24  <b>rest</b> [1] 30:6  <b>restrict</b> [1] 59:6  <b>restriction</b> [4] 24:7 26:13 27:3 33:17  <b>restrictions</b> [2] 25:16 31:6  <b>result</b> [4] 10:7 17:20 56:25 76:22  <b>retail</b> [3] 41:12 54:19,21  <b>retailer</b> [5] 44:8 55:6 56:21 65:12,20  <b>retailers</b> [6] 65:5,6,9,13,14 71:10  <b>return</b> [1] 29:23  <b>rights</b> [7] 6:10 10:25 11:10 29:13 30:23 52:1 68:9  <b>river</b> [3] 26:10 70:19,20  <b>road</b> [4] 8:13 10:2 18:3 37:20  <b>roads</b> [4] 9:5 15:6 66:18 75:16  <b>roberts</b> [20] 22:23 23:1 35:14 36:10,23 37:9,17 38:5,8,11,16,21 39:20 40:15,21 55:10 56:4,16 72:20 74:8  <b>route</b> [2] 70:17 72:6  <b>rule</b> [7] 7:13 10:15 19:15,17 25:7 28:3 78:6  <b>rules</b> [2] 30:12 51:24</p>
---	--	---	--

## Official

<p><b>ruling</b> [3] 14:15,15 77:6</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>safe</b> [1] 76:15</p> <p><b>safety</b> [6] 12:4,20 13:8 52:3 53:1,4</p> <p><b>sale</b> [6] 6:25 54:21 55:5 58:12 59:17 65:11</p> <p><b>sales</b> [7] 45:14 46:4 47:1 53:6 57:11,25 58:24</p> <p><b>salmon</b> [2] 26:10,18</p> <p><b>same</b> [7] 12:18 14:7 20:24 22:12 50:4,10 64:3</p> <p><b>saying</b> [14] 9:6,23,25 28:23 45:12 46:15 50:14,21,22 52:17 62:18 66:16,17 70:2</p> <p><b>says</b> [27] 10:2 16:9,15 19:9,10,11 33:5 36:8 38:25 39:16 41:19 43:2,2,9 45:4,8,10 48:17 50:2 57:7,10 63:14 65:25 72:14,25 75:6 78:22</p> <p><b>scenario</b> [1] 61:13</p> <p><b>scope</b> [2] 10:5 62:22</p> <p><b>sea</b> [1] 61:4</p> <p><b>seattle</b> [1] 60:3</p> <p><b>second</b> [4] 15:10 36:5 75:18 76:11</p> <p><b>secured</b> [3] 35:25 67:19 68:18</p> <p><b>secures</b> [1] 28:9</p> <p><b>securing</b> [1] 71:19</p> <p><b>see</b> [7] 10:25 46:12,14 49:20 50:21 63:15 74:21</p> <p><b>seeing</b> [1] 57:16</p> <p><b>seeking</b> [1] 12:2</p> <p><b>seem</b> [1] 9:10</p> <p><b>seems</b> [12] 8:23 16:7 17:19 31:25 32:15 33:4 54:2 62:1,8 66:9 69:15 70:1</p> <p><b>sell</b> [1] 65:15</p> <p><b>selling</b> [1] 59:8</p> <p><b>sells</b> [1] 65:13</p> <p><b>sense</b> [9] 39:5 50:22 52:21 53:1 56:2 58:17 75:6,9 76:20</p> <p><b>separation</b> [1] 38:22</p> <p><b>severe</b> [2] 26:15 27:3</p> <p><b>sg</b> [1] 62:17</p> <p><b>sham</b> [2] 54:3,4</p>	<p><b>shipment</b> [2] 59:3,7</p> <p><b>shipping</b> [2] 58:22,22</p> <p><b>shouldn't</b> [2] 34:10 62:18</p> <p><b>show</b> [1] 43:11</p> <p><b>side</b> [4] 15:11 17:7 40:17 74:23</p> <p><b>sign</b> [1] 29:22</p> <p><b>significant</b> [1] 26:18</p> <p><b>significantly</b> [1] 26:20</p> <p><b>similar</b> [4] 52:6 72:7 76:3,4</p> <p><b>similarly</b> [1] 52:24</p> <p><b>simply</b> [2] 22:19 25:1</p> <p><b>sine</b> [1] 40:9</p> <p><b>single</b> [1] 62:25</p> <p><b>size</b> [1] 15:16</p> <p><b>sold</b> [4] 41:11 44:8 54:19 59:10</p> <p><b>somebody</b> [3] 19:10 37:19 60:14</p> <p><b>someone</b> [4] 39:3 40:13 60:12 61:14</p> <p><b>sometimes</b> [2] 39:17,18</p> <p><b>somewhere</b> [1] 45:5</p> <p><b>soon</b> [4] 25:22 55:20 56:6,8</p> <p><b>sorry</b> [2] 18:23 42:5</p> <p><b>sort</b> [11] 9:23 10:23 12:5 13:14 20:14 21:8 44:3 62:20 63:16 67:17 70:22</p> <p><b>sotomayor</b> [17] 6:6,16,20 7:4,7,20 10:24 11:17,24 28:16 29:9,20 30:14 72:4 73:9 74:24 75:4</p> <p><b>special</b> [2] 67:20 68:8</p> <p><b>species</b> [1] 73:5</p> <p><b>specific</b> [2] 61:22 67:12</p> <p><b>specifically</b> [3] 59:19 67:24 70:16</p> <p><b>speed</b> [3] 12:21 13:11 52:8</p> <p><b>spreading</b> [1] 36:18</p> <p><b>standard</b> [1] 17:17</p> <p><b>statements</b> [1] 14:14</p> <p><b>states</b> [8] 23:5 37:14 39:25 44:15 55:1 72:3 74:22 75:2</p> <p><b>state's</b> [4] 13:15 55:24 72:14 73:24</p> <p><b>statute</b> [32] 36:7 38:25 39:9 40:10 41:19,22 42:7 43:1,2,9,15 47:25 48:1,4,22 49:9 50:2 54:15 57:12,15 58:7 59:23 66:8,17 69:8 70:8 72:22 73:7,18,20,25 77:10</p>	<p><b>statutes</b> [1] 48:11</p> <p><b>statutory</b> [1] 21:6</p> <p><b>steam</b> [1] 26:19</p> <p><b>stephens</b> [1] 70:18</p> <p><b>steps</b> [2] 26:17,19</p> <p><b>stevens</b> [3] 30:6 31:3,19</p> <p><b>still</b> [11] 8:15 15:8 17:7 28:4 30:8,9 42:10 64:14 67:15 68:2 69:21</p> <p><b>story</b> [1] 55:24</p> <p><b>stream</b> [1] 26:19</p> <p><b>stretch</b> [5] 55:8 67:21 68:9 70:23 71:6</p> <p><b>strong</b> [1] 54:5</p> <p><b>struck</b> [2] 34:17 77:21</p> <p><b>structured</b> [2] 56:2 59:23</p> <p><b>styled</b> [2] 36:3 43:15</p> <p><b>subject</b> [3] 35:6 54:19 76:2</p> <p><b>subsections</b> [1] 69:9</p> <p><b>substantially</b> [1] 15:21</p> <p><b>substitute</b> [1] 66:12</p> <p><b>sufficient</b> [2] 26:20 71:14</p> <p><b>suggests</b> [4] 40:18,21 62:3,15</p> <p><b>superior</b> [1] 14:15</p> <p><b>superseded</b> [1] 11:6</p> <p><b>supplier</b> [1] 6:4</p> <p><b>supply</b> [1] 34:21</p> <p><b>supporting</b> [1] 23:6</p> <p><b>suppose</b> [5] 26:12 53:12 59:24 60:1,13</p> <p><b>supposed</b> [1] 26:8</p> <p><b>switch</b> [1] 71:3</p> <p><b>system</b> [2] 77:20,21</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>talked</b> [2] 59:14 71:12</p> <p><b>talks</b> [1] 47:22</p> <p><b>tank</b> [11] 6:4 17:6 55:11,13,17,23 56:6,8,13,21,25</p> <p><b>tanker</b> [4] 56:7 60:2,11 61:13</p> <p><b>targeted</b> [1] 9:6</p>	<p><b>targeting</b> [1] 64:24</p> <p><b>taxable</b> [9] 41:19 47:24 48:25 56:23 58:7,12 60:20 61:7,10</p> <p><b>taxation</b> [5] 40:10 47:8 58:10 74:20 75:22</p> <p><b>taxed</b> [23] 7:2 24:1 32:7,7 33:20 34:4,7 35:7 38:13 39:1 43:2,4 47:5 55:23 56:7,9 58:18 59:3 60:2 61:2,23 62:16 63:24</p> <p><b>taxes</b> [20] 7:14,15 8:8 16:14 17:11,12,14 23:15 30:12,15,16 46:4 47:20 48:10 50:16,24 51:11 54:23,24 73:7</p> <p><b>taxing</b> [8] 16:8 17:18 47:13 58:11 69:9 70:7 76:8 77:17</p> <p><b>taxpayer</b> [16] 38:2 41:8,15,18,22 48:19 49:7 59:18 60:10 62:6,7,9,19,25 63:4 73:2</p> <p><b>taxpayers</b> [1] 63:2</p> <p><b>term</b> [2] 20:25 21:6</p> <p><b>terminal</b> [1] 6:1</p> <p><b>terms</b> [8] 13:7 16:23 28:12 41:19 59:14,15 62:7 68:4</p> <p><b>territory</b> [1] 78:25</p> <p><b>test</b> [1] 41:13</p> <p><b>text</b> [3] 12:7 28:9 78:22</p> <p><b>textual</b> [4] 20:14 21:23 29:17 68:17</p> <p><b>themselves</b> [2] 13:14 71:20</p> <p><b>theory</b> [2] 13:17 76:12</p> <p><b>therefore</b> [1] 67:22</p> <p><b>there's</b> [31] 6:18,22 25:2,6,6 26:23 27:5 28:14,16 35:4,4 39:16 52:6,10,16 56:24 58:8,8 59:16 63:10 67:1 69:6 70:6,6 75:21 76:3,3,7,21 78:9,10</p> <p><b>they've</b> [4] 12:6 22:13 33:12 57:22</p> <p><b>thin</b> [2] 34:3,10</p> <p><b>third</b> [1] 74:5</p> <p><b>though</b> [8] 7:1 14:9 21:11 31:22 37:2 68:13 73:17 77:12</p> <p><b>thousand</b> [1] 25:9</p>
--	--	--	---



## Official

<p><b>three</b> <sup>[1]</sup> 20:8</p> <p><b>throughout</b> <sup>[1]</sup> 30:9</p> <p><b>today</b> <sup>[3]</sup> 13:23 31:14 69:23</p> <p><b>toll</b> <sup>[7]</sup> 8:13 11:17 18:3 24:15,19 28:1 33:13</p> <p><b>tolls</b> <sup>[1]</sup> 24:13</p> <p><b>trade</b> <sup>[7]</sup> 23:19 31:24,24 32:3,10 60:24 63:14</p> <p><b>trading</b> <sup>[3]</sup> 16:1,4 23:22</p> <p><b>transaction</b> <sup>[6]</sup> 24:1,3 32:5 34:4 58:13 60:21</p> <p><b>transferred</b> <sup>[1]</sup> 60:5</p> <p><b>transit</b> <sup>[1]</sup> 24:14</p> <p><b>transport</b> <sup>[15]</sup> 9:16 32:14 37:24 38:23 39:4 44:18,21 48:9 53:24 54:1 55:15,18 69:1 72:21 74:20</p> <p><b>transportation</b> <sup>[43]</sup> 13:4 35:1 36:4,7 39:1,10,24 40:1,11 44:2,4 46:7,16 47:16,19,20 48:2,10 49:10 50:17,25 53:11 54:4,6,13,17 55:20 56:10,20,24 57:3 59:17 60:21 68:24 69:3,11 70:3,3 73:5,8 76:13 77:2,9</p> <p><b>transported</b> <sup>[4]</sup> 9:20 33:18 75:14,15</p> <p><b>transporter</b> <sup>[1]</sup> 38:17</p> <p><b>transporting</b> <sup>[21]</sup> 9:24 10:1 19:2,4,7 32:18 33:7 37:3,5,11 39:8 43:13 44:3,7 62:10,12,13 68:25 70:16 72:2 77:13</p> <p><b>transports</b> <sup>[2]</sup> 35:24 39:14</p> <p><b>travel</b> <sup>[46]</sup> 6:7,8 8:2,3 10:14,20 12:18,22 16:8,9,17 17:18 19:20 22:20 23:13 26:7,9,14,21 27:4 28:11,13 29:7 30:3,9,23 35:25 39:22 41:2 46:6 47:5 59:6 60:25 63:15 66:18 68:2,8 70:25 71:1,5,18,20 75:5 76:24 78:12,22</p> <p><b>traveled</b> <sup>[4]</sup> 17:8 28:17 67:14 75:9</p> <p><b>traveling</b> <sup>[13]</sup> 6:12 9:5 16:</p>	<p>23,24,25 28:19 29:25 41:21 43:21 61:15 71:24 72:6 78:25</p> <p><b>travels</b> <sup>[1]</sup> 76:19</p> <p><b>treasury</b> <sup>[1]</sup> 37:14</p> <p><b>treated</b> <sup>[3]</sup> 14:1 15:7 29:24</p> <p><b>treaty</b> <sup>[64]</sup> 7:11 8:7 9:2,13 10:2,8 11:6,10 12:7,11 13:20,25 14:1,4 15:5 16:3,6,13,15 17:20 18:7,18 19:23 22:5,16,19 23:9,12 27:25 29:19,22 32:20 33:5,7 34:13,25 35:21,25 37:16 43:13 47:7 50:23 51:17,22 58:14,16,19 60:22 61:17 62:8 63:13 64:17 68:4,10,12 70:18 71:12 74:25 75:1 76:3,8,22 78:10,21</p> <p><b>treaty-protected</b> <sup>[3]</sup> 10:14 70:4,7</p> <p><b>tribal</b> <sup>[9]</sup> 23:10,14,20 31:6,11 43:9,11 53:22 77:18</p> <p><b>tribe</b> <sup>[26]</sup> 6:7 11:4 15:18 24:24 25:11 30:5 31:3,19 35:6 37:1,3,5,10,15,18 41:10 45:12 50:14,23 57:22 60:14 63:19 68:9 70:14,15 74:4</p> <p><b>tribes</b> <sup>[2]</sup> 7:16 20:13</p> <p><b>tried</b> <sup>[2]</sup> 34:16 47:9</p> <p><b>triggers</b> <sup>[1]</sup> 41:15</p> <p><b>trouble</b> <sup>[1]</sup> 57:16</p> <p><b>truck</b> <sup>[13]</sup> 24:7 28:8 35:13 38:4 39:3 40:12,13 56:13,17 60:11 61:14 67:6,24</p> <p><b>trucker</b> <sup>[2]</sup> 39:6 40:7</p> <p><b>trucks</b> <sup>[8]</sup> 23:16 39:15,17 40:2,8 55:18 56:7 60:5</p> <p><b>true</b> <sup>[7]</sup> 8:23 26:6 32:17 64:19 65:18 67:2 74:1</p> <p><b>truly</b> <sup>[1]</sup> 51:5</p> <p><b>try</b> <sup>[1]</sup> 69:21</p> <p><b>trying</b> <sup>[11]</sup> 13:15 35:7 50:6,13 51:20 61:20 62:22 63:20 64:16 75:11,12</p> <p><b>tulee</b> <sup>[7]</sup> 11:13 20:9 21:8,14 33:3 51:19 52:14</p> <p><b>turn</b> <sup>[2]</sup> 17:1,1</p> <p><b>turned</b> <sup>[1]</sup> 36:5</p>	<p><b>two</b> <sup>[10]</sup> 6:18,22 18:17 29:19 35:23 43:6 51:2 52:17 62:2 74:15</p> <p><b>type</b> <sup>[1]</sup> 33:17</p> <p><b>types</b> <sup>[3]</sup> 51:24 54:23 69:10</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>ultimate</b> <sup>[1]</sup> 64:8</p> <p><b>ultimately</b> <sup>[2]</sup> 40:5 69:14</p> <p><b>umbrella</b> <sup>[1]</sup> 60:24</p> <p><b>under</b> <sup>[15]</sup> 11:10 13:16,19 19:16,16,22 33:9 34:25 40:10 41:22 51:17 54:8 61:17 71:15 76:11</p> <p><b>undermines</b> <sup>[1]</sup> 26:15</p> <p><b>understand</b> <sup>[7]</sup> 31:23 33:2 44:15 54:16 55:25 61:18 78:19</p> <p><b>understanding</b> <sup>[1]</sup> 22:8</p> <p><b>understood</b> <sup>[4]</sup> 22:10 32:25 33:3 64:4</p> <p><b>undisputed</b> <sup>[1]</sup> 78:5</p> <p><b>uniform</b> <sup>[1]</sup> 35:6</p> <p><b>unikowsky</b> <sup>[79]</sup> 35:16,17,19 36:19 37:4,12,21 38:6,10,14,18,24 39:23 40:20 41:4 42:10,15 43:5,25 44:25 45:19 46:3,11,17,21,25 47:15,21,24 48:3,8,16,19,24 49:3,7,13,16,20,24 50:7 51:1,4,10,18 52:13 53:9,14,18 54:8 55:25 56:11,18 57:4 58:4 59:1,12,25 60:8,15,20 61:6,12,24,25 63:6 65:9,18 66:25 67:10 68:14,17 69:4,20 72:10,23 73:13 74:5 75:20</p> <p><b>unique</b> <sup>[1]</sup> 30:13</p> <p><b>united</b> <sup>[2]</sup> 23:5 75:2</p> <p><b>unless</b> <sup>[2]</sup> 42:21 78:7</p> <p><b>unlike</b> <sup>[1]</sup> 50:14</p> <p><b>unlikely</b> <sup>[2]</sup> 25:1,4</p> <p><b>up</b> <sup>[12]</sup> 6:21 7:9 15:17 26:2 30:6 31:14 34:21 40:25 44:4 70:23 71:19 74:4</p> <p><b>ups</b> <sup>[1]</sup> 67:6</p> <p><b>user</b> <sup>[1]</sup> 72:9</p> <p><b>uses</b> <sup>[5]</sup> 39:15,17 48:12,16</p>	<p>77:1</p> <p><b>using</b> <sup>[4]</sup> 15:12 18:4 40:8 61:15</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>value</b> <sup>[2]</sup> 74:3,3</p> <p><b>various</b> <sup>[1]</sup> 34:17</p> <p><b>vastly</b> <sup>[1]</sup> 20:19</p> <p><b>vehicle</b> <sup>[2]</sup> 17:15 39:12</p> <p><b>version</b> <sup>[2]</sup> 54:9 68:6</p> <p><b>versus</b> <sup>[1]</sup> 64:20</p> <p><b>via</b> <sup>[6]</sup> 39:14,25 40:1,2 72:16,19</p> <p><b>view</b> <sup>[7]</sup> 9:11,13 10:1,6 33:10 51:7,8</p> <p><b>violate</b> <sup>[1]</sup> 10:20</p> <p><b>violating</b> <sup>[1]</sup> 34:12</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wagon</b> <sup>[12]</sup> 34:20 41:9 59:20 60:16 61:21,23 63:18 77:24,25 78:2,14,16</p> <p><b>wanted</b> <sup>[1]</sup> 50:4</p> <p><b>wants</b> <sup>[3]</sup> 55:20 56:1 66:1</p> <p><b>washington</b> <sup>[17]</sup> 17:5,25 18:1,1,24 23:25 32:6 34:5 36:12,18 47:16 54:24 61:11 74:6 77:16,22 78:17</p> <p><b>washington's</b> <sup>[2]</sup> 23:11 24:5</p> <p><b>way</b> <sup>[20]</sup> 17:2 18:14 24:22 33:3 34:11,13 40:1 50:25 54:15,20 56:3 60:25 62:3 64:19 65:24 67:5 71:8 73:15 76:21 78:11</p> <p><b>wayfair</b> <sup>[1]</sup> 58:9</p> <p><b>ways</b> <sup>[4]</sup> 34:16 51:2 62:2 69:5</p> <p><b>whatever</b> <sup>[4]</sup> 22:19 41:1 55:15 58:15</p> <p><b>whatsoever</b> <sup>[1]</sup> 64:13</p> <p><b>whereas</b> <sup>[1]</sup> 53:1</p> <p><b>whether</b> <sup>[9]</sup> 6:3 9:20 28:22 36:3 40:11 61:4 64:11 69:7 76:25</p> <p><b>whole</b> <sup>[2]</sup> 63:19 69:8</p> <p><b>wholesalers</b> <sup>[2]</sup> 73:11,11</p> <p><b>who's</b> <sup>[2]</sup> 59:4 61:14</p> <p><b>wide</b> <sup>[1]</sup> 17:11</p>
--	---	--	--

## Official

**will** <sup>[4]</sup> 34:7 39:7 68:1 74:16  
**win** <sup>[3]</sup> 62:4,9,15  
**within** <sup>[3]</sup> 6:11 61:11 62:7  
**without** <sup>[22]</sup> 6:9,9 9:16,17 11:8,11 12:10 15:3 16:23 30:11,11,12,15,16 34:12 36:2 53:25 54:1 68:25 69:1 72:2 74:20  
**wonder** <sup>[1]</sup> 14:9  
**wondering** <sup>[1]</sup> 13:21  
**word** <sup>[7]</sup> 48:9,12,14,21 54:5 66:13 68:18  
**words** <sup>[17]</sup> 8:12 9:3 36:24 40:18 42:19 48:4 50:3 51:17,22 55:19 58:12 59:2 66:9,19 73:18,20,25  
**work** <sup>[4]</sup> 7:3 73:15 78:20,21  
**worse** <sup>[1]</sup> 44:22  
**wrapped** <sup>[1]</sup> 44:4  
**written** <sup>[1]</sup> 54:15

---

**Y**


---

**yakama** <sup>[27]</sup> 6:25 8:16 9:1,4 10:15 12:15,24 13:19 14:20,24 15:23 16:4,22 17:19 22:4 23:9 32:15 35:21,25 51:20 52:1 63:2 65:13 74:19 75:9 78:10,24  
**yakamas** <sup>[3]</sup> 28:10 71:3,23  
**yakama's** <sup>[4]</sup> 9:11,13,25 10:6