No. 18-984

In the Supreme Court of the United States

KING MOUNTAIN TOBACCO COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Article III of the Treaty of June 9, 1855, between the United States and the Yakama Nation of Indians, 12 Stat. 952-953, secures to the Yakamas "free access" from the reservation "to the nearest public highway" and "the right, in common with citizens of the United States, to travel upon all public highways." Article VI of the same Treaty, 12 Stat. 954, incorporates by reference Article 6 of the Treaty with the Omahas, Mar. 16, 1854, 10 Stat. 1044-1045, which provides that reservation lands allotted to individual Indians "shall be exempt from levy, sale, or forfeiture." The question presented is:

Whether the 1855 Treaty grants exemptions to the Yakamas from the federal excise tax and fee imposed on the manufacture of tobacco products under 26 U.S.C. 5701-5703 and 7 U.S.C. 518-519, respectively.

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OPINIONS BELOW

The opinion of the court of appeals concerning the federal tobacco excise tax, 26 U.S.C. 5701-5703 (Pet. App. 1a-34a) is reported at 899 F.3d 954. The order of the district court granting summary judgment to the government on liability for the tax (Pet. App. 35a-37a) is not published in the Federal Supplement but is available at 2014 WL 279574. The order of the district court granting summary judgment to the government on the amount of tax due (Pet. App. 38a-55a) is unreported.

The opinion of the court of appeals concerning the fee imposed on tobacco manufacturers, 7 U.S.C. 518-519 (Pet. App. 56a-61a) is not published in the Federal Reporter but is reprinted at 745 Fed. Appx. 700. The order of the district court dismissing petitioner's claim for declaratory and injunctive relief against the fee assess-

ments (Pet. App. 62a-102a) is not published in the Federal Supplement but is available at 2015 WL 4523642. The order of the district court denying summary judgment to petitioner (Pet. App. 103a-121a) is reported at 131 F. Supp. 3d 1088. The order of the district court granting summary judgment to the government (Pet. App. 122a-127a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered in each case on August 13, 2018. The petitions for rehearing were denied on October 22, 2018 (Pet. App. 148a, 149a-150a). The petition for a writ of certiorari was filed on January 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Federal law imposes an excise tax on the manufacture of tobacco products in the United States. 26 U.S.C. 5701. The rate of tax varies according to the type of tobacco product. *Ibid.* For cigars (except large cigars), cigarettes, cigarette tubes, and cigarette papers, the tax is imposed at set rates per unit; for pipe and roll-your-own tobacco, the tax is imposed at set rates per pound. *Ibid.* The statute provides that the tax is to be determined at the time of "removal" of the tobacco products, 26 U.S.C. 5703(b)(1), which it defines, as relevant here, as "[r]emoval * * * from the factory," 26 U.S.C. 5702(j)—*i.e.*, from the manufacturer's premises, see 27 C.F.R. 40.11.[1] The manufacturer is liable

[1] The statute exempts certain transfers (i) between the bonded premises of manufacturers, in which case the transferee becomes liable for the tax upon removal; and (ii) between the bonded premises of manufacturers and export warehouse proprietors, as exports

for the tax, 26 U.S.C. 5703(a), which must be paid on a semi-monthly basis, 27 C.F.R. 270.161-270.165 (1999).

To conduct business as a manufacturer of tobacco products, a person must apply for a permit and file a bond. See 26 U.S.C. 5711(a) (requiring bond); 26 U.S.C. 5713 (prohibiting manufacture without permit); see also 26 U.S.C. 5712 (prescribing application for permit). The manufactured tobacco products must be packaged and must bear such marks, labels, and notices as prescribed by regulation, before they can be removed from the manufacturer's premises. See 26 U.S.C. 5723(a) and (b).

b. As part of the Fair and Equitable Tobacco Reform Act of 2004 (FETRA), Pub. L. No. 108-357, Tit. VI, §§ 611-612, 118 Stat. 1522-1524, Congress repealed the comprehensive system of quotas and price supports applicable to tobacco farmers, dating back to the Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31, and the Agricultural Act of 1949, ch. 792, 63 Stat. 1051, respectively. See generally 7 U.S.C. 1311 *et seq.* (repealed 2004); 7 U.S.C. 1445, 1445-1, 1445-2 (repealed 2004). Congress did so to ensure the long-term viability of the U.S. tobacco industry and to protect the economic stability of American tobacco farmers and their rural communities. See, *e.g.*, 150 Cong. Rec. 21,783-21,784 (2004).

To ease the transition from a highly regulated market to a free market, FETRA directed the government to make annual payments, over a ten-year period, to owners of farms that held an established tobacco marketing quota under the 1938 Act, 7 U.S.C. 518a, and to other persons who had been engaged in the production of tobacco, 7 U.S.C. 518b. The payments were financed by quarterly assessments imposed, as relevant here, on

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are exempt from the tax under 26 U.S.C 5704(b). See 26 U.S.C. 5703(a)(2). Those exemptions are not at issue here.

domestic manufacturers of tobacco products who sold tobacco in the United States from 2005 to 2014. 7 U.S.C. 518d(b)(1). To compute those quarterly assessments, Congress first allocated the estimated cost of the transition program among six classes of tobacco products, including cigarettes and roll-your-own tobacco. 7 U.S.C. 518d(b)(2) and (c)(1); see 7 C.F.R. 1463.4, 1463.5. It then apportioned the amount that each class owed among manufacturers based on the manufacturers' market shares of the "gross domestic volume" of tobacco products removed (and not exempt from the excise tax when removed). 7 U.S.C. 518d(a)(2) and (f)-(h); see 7 C.F.R. 1463.3, 1463.7(b). In other words, the FETRA assessments derived from the volume of tobacco products reported by the manufacturers for excise-tax purposes. Compare 7 U.S.C. 518d(g) and (h), with 26 U.S.C. 5701.

FETRA assessment were generally payable on a quarterly basis. 7 U.S.C. 518d(d)(3)(A); 7 C.F.R. 1463.9(a). The statute, however, required the government to notify each manufacturer of the amount of its quarterly assessment at least 30 days before payment was due. 7 U.S.C. 518d(d)(1) and (2); see 7 C.F.R. 1463.8.

2. In the mid-nineteenth century, the United States entered into a series of treaties with Indian tribes in what is now the State of Washington. *Tulee* v. *Washington*, 315 U.S. 681, 682-683 (1942). A confederation of tribes and bands of Indians now known as the Yakama Indian Nation (the Tribe) agreed in one of those treaties to cede vast tracts of land within that territory to the United States, reserving for itself a much smaller reservation. *Ibid.* One of the United States' major aims in entering into the treaty was to enable the construction of public highways and railroads in the region, including

through the Tribe's reservation. *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1240-1241 (E.D. Wash. 1997), aff'd *sub nom. Cree* v. *Flores*, 157 F.3d 762 (9th Cir. 1998). To secure from the Tribe the concession that roads could be built through the reservation, the United States made certain representations regarding the Tribe's access to and use of public roads. *Id.* at 1243-1244. Specifically, Article III of the Treaty of June 9, 1855, between the United States and the Yamaha Nation of Indians (1855 Treaty or Treaty), provides:

> [I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

12 Stat. 952-953 (Pet. App. 155a).

Article VI of the 1855 Treaty, 12 Stat. 954 (reprinted at Pet. App. 159a), incorporates Article 6 of the Treaty with the Omahas, Mar. 16, 1854, 10 Stat. 1044-1045. That treaty provides in pertinent part that any reservation land allotted to individual Indians "shall be exempt from levy, sale, or forfeiture." *Ibid.*

3. a. Before his death in 2016, Delbert Wheeler, Sr., an enrolled member of the Tribe, owned petitioner, a corporation organized under the laws of the Yakama Nation. Pet. App. 3a & n.1, 129a. Petitioner received a federal tobacco manufacturer's permit in February 2007. *Id.* at 3a. Petitioner manufactures cigarettes and roll-your-own tobacco in a plant located on the Yakama Nation Reservation on property held in trust by the United States for the beneficial use of Wheeler. *Ibid.* In addition to its manufacturing operations, petitioner grows tobacco on trust land within the Reservation,

some of which was allotted to Wheeler. *Ibid.* The bulk of petitioner's tobacco products are manufactured by blending tobacco grown on the Reservation with other tobacco grown outside the Reservation. *Id.* at 4a. Petitioner also manufactures "'traditional use tobacco' that is intended for Indian . . . traditional ceremonial use" and that consists entirely of tobacco grown on trust property. *Ibid.*

b. Although petitioner initially paid excise taxes on its tobacco products, it began to fall behind in 2009 and eventually ceased paying the taxes altogether. Pet. App. 5a. Petitioner at times paid portions of its FETRA assessments, and at other times failed to pay the assessments at all. *Id.* at 66a. After the excise taxes and FETRA assessments went unpaid for several years, the government brought two collection suits; petitioner counterclaimed for declaratory and injunctive relief against the assessments. *Id.* at 36a, 63a, 70a. The suit to collect tobacco excise taxes involves a total liability of approximately $58 million as of June 2013. *Id.* at 7a. The FETRA suit involves a total liability of approximately $6.4 million as of November 2014. *Id.* at 66a.

In both cases, petitioner contended, as relevant here, that the 1855 Treaty exempted it from the tobacco excise tax and the FETRA assessment. Pet. App. 12a. According to petitioner, imposition of the tax and the fee was precluded by language in Article III of the Treaty, which grants the Yakama "free access" from the Reservation "to the nearest public highway" and "the right, in common with the citizens of the United States, to travel upon all public highways." Pet. App. 144a (quoting, *inter alia*, 12 Stat. 952-953).

The district court granted summary judgment to the government in both cases. Pet. App. 35a-37a, 122a-

127a. As relevant here, the court rejected petitioner's argument that it was exempt from the tax and the fee under Article III of the 1855 Treaty. *Id.* at 35a-37a, 62a-102a.

In the tax case, the district court incorporated by reference, Pet. App. 36a, an earlier ruling in a related suit that had been brought by petitioner, Wheeler, and the Tribe for declaratory and injunctive relief against the imposition of the tax, *id.* at 128a-147a. In that earlier ruling, the court had concluded that "the 'free access' language" in the 1855 Treaty "is not express exemptive language applicable to [petitioner's] manufactured tobacco products." *Id.* at 145a. The court had stressed that petitioner "is not being taxed for using on-reservation roads. It is being taxed for manufacturing tobacco products." *Ibid.* The court had thus concluded that "the only exemptive language in Article III, the 'free access' language * * * , does not apply to this case," meaning that petitioner remained subject to the tobacco excise tax. *Ibid.*; see *id.* at 146a.[2]

In the FETRA case, the district court relied on the same prior opinion. Pet. App. 92a-93a. It again explained that, although "'Article III provides "free access" on roads running throughout the reservation to the public highways[,] [petitioner] is not being taxed for

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[2] In the earlier case, the district court determined that the Anti-Injunction Act, 26 U.S.C. 7421(a), barred petitioner's and Wheeler's claims, but that the Tribe's claims fell within an exception recognized in *South Carolina* v. *Regan*, 465 U.S. 367 (1984). See Pet. App. 6a. It then determined that the 1855 Treaty did not preclude the imposition of the tobacco excise tax on petitioner. *Id.* at 144a-146a. On appeal, the court of appeals vacated and remanded with instructions to dismiss for lack of subject matter jurisdiction, holding that the Anti-Injunction Act barred the entire suit. See *id.* at 6a.

using on-reservation roads,' but rather 'for manufacturing tobacco products.'" *Id.* at 92a (quoting *id.* at 145a). The court emphasized that "[t]he FETRA assessments are imposed against [petitioner] as a manufacturer of cigarettes and roll your own tobacco, not as a driver on the roads." *Id.* at 93a. As a result, the court determined that "Article III's 'free access' language does not apply to the facts of this case" and that "[t]here is no ambiguity that must be resolved in [petitioner's] favor." *Ibid.*

4. The court of appeals affirmed in both cases. Pet. App. 1a-34a, 56a-61a.

a. In the tax case, the court of appeals noted that "the federal government enjoys plenary and exclusive power over Indian tribes." Pet. App. 11a. The court explained that, as a result, "Indians—like all citizens—are subject to federal taxation unless expressly exempted by a treaty or congressional statute." *Id.* at 12a. The court further explained that "[t]he requisite 'language need not explicitly state that Indians are exempt from the specific tax at issue; it must only provide evidence of the federal government's intent to exempt Indians *from taxation*.'" *Id.* at 27a (quoting *Ramsey* v. *United States*, 302 F.3d 1074, 1078 (9th Cir. 2002), cert. denied, 540 U.S. 812 (2003)).

The court of appeals determined that the 1855 Treaty created no such exemption with respect to the tobacco excise tax. Pet. App. 24a-33a. The court first rejected petitioner's reliance on Article III of the treaty, which "reserves to the Yakama the right to travel on public highways and the right to fish and hunt." *Id.* at 25a. The court noted that treaty negotiations underscored "the economic purpose of the Yakama's right to travel" for trading purposes. *Id.* at 26a.

And it determined that, contrary to petitioner's assertion, the tobacco excise tax did not amount to "an excise tax on the right to travel." *Id.* at 31a n.11 (citation omitted). The court explained that, when evaluating an excise tax, "'[i]t is [the] distinct *privilege* which is the subject of taxation,' not discrete acts associated with the privilege." *Ibid.* (quoting *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 162 (1911)) (emphases added; brackets in original).

The court of appeals next rejected petitioner's contention, raised for the first time on appeal, that Article VI of the 1855 Treaty implied an exemption from the excise tax. Pet. App. 32a-33a. The court noted that Article VI, 12 Stat. 954, incorporates Article 6 of the Treaty with the Omahas, which provides in relevant part that allotted land "shall be exempt from levy, sale, or forfeiture." Pet. App. 32a (quoting 10 Stat. 1044-1045). The court explained that Article VI "distinctly imposes a few enumerated 'restrictions upon alienation,'" and that those restrictions "do not implicate federal taxation." *Id.* at 33a (citation omitted). Although 26 U.S.C. 5763(d) provides for forfeiture of property that has been used in criminal violations of the tobacco tax provisions, the court stated that Section 5763(d) does not apply to allotted land because the United States is already the titleholder. Pet. App. 33a n.12; see *id.* at 22a-23a (noting that 26 C.F.R. 301.6321-1 prohibits the attachment of federal tax liens to or the forfeiture of such land). It also added that petitioner is not the allottee of any trust land. *Id.* at 22a.

Given the lack of any express exemptive language under either provision of the 1855 Treaty, the court of appeals declined to apply "[t]he canon of construction

favoring Indians when ambiguities are present in a statute or treaty." Pet. App. 28a (citation and internal quotation marks omitted). It concluded that nothing in the Treaty exempts petitioner from the tobacco excise taxes that it owes. *Id.* at 34a.

b. In the FETRA case, the court of appeals likewise concluded that the 1855 Treaty does not prohibit the imposition of the fees. Pet. App. 58a. The court noted that "[t]he 'express exemptive language' test applies to federal laws generally, not just to federal taxes." *Ibid.* And it explained that, just as the Treaty does not exempt petitioner from a federal excise tax on tobacco products, "the Treaty does not entitle [petitioner] to exemption from FETRA assessments." *Ibid.*

ARGUMENT

Petitioner renews its contention (Pet. 11-31) that the 1855 Treaty exempts it from the federal excise tax on the manufacture of tobacco and the fee imposed on such manufacture by FETRA. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly determined that the imposition of the tobacco excise tax and FETRA fee does not violate the 1855 Treaty.

The Constitution grants Congress "plenary power to legislate in the field of Indian affairs." *United States* v. *Lara*, 541 U.S. 193, 200 (2004) (citation omitted). Congress also has the "comprehensive" power to lay and collect taxes, *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 581-582 (1937), as well as the power to regulate interstate commerce, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), and commerce with the In-

dian tribes, *Lara*, 541 U.S. at 200. And the federal government, unlike state governments, is not subject to restrictions on the taxation of commercial activity on Indian reservations. See, *e.g.*, *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973).

Indians are subject to the same requirement to pay federal taxes as non-Indians, unless exempted by a treaty or agreement between the United States and the Indian's tribe or an Act of Congress dealing with Indian affairs. See *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956). In imposing excise taxes on tobacco products, 26 U.S.C. 5701, and FETRA fees on certain manufacturers of those products, 7 U.S.C. 518d, Congress did not exempt Indians. Thus, unless the Tribe is exempted by another federal law or a treaty, petitioner is subject to both the tax and the fee. Contrary to petitioners' contention (Pet. 24 n.8, 26-31), neither Article III nor Article VI of the 1855 Treaty creates such an exemption.

a. The court of appeals correctly rejected petitioner's primary reliance (Pet. 26-31) on Article III of the 1855 Treaty, 12 Stat. 952-953. Article III secures to the Yakama Indians "free access" from their Reservation to the nearest public highway and the "right, in common with citizens of the United States, to travel upon all public highways." *Ibid.* It does not address the manufacture of tobacco products, which is the basis for both the excise tax and the FETRA fee.

In *Washington State Department of Licensing* v. *Cougar Den, Inc.*, 139 S. Ct. 1000 (2019), this Court recently considered the scope of Article III of the 1855 Treaty in concluding that it preempted a Washington motor-vehicle fuel tax. *Id.* at 1016 (opinion of Breyer, J.). A plurality of the Court explained that the state statute

at issue "taxes the importation of fuel by public highway." *Id.* at 1008. In the plurality's view, the tax was accordingly "not a tax on possession or importation," but rather a tax on "travel by ground transportation with fuel." *Id.* at 1009. "Put another way," the plurality explained, "the State must prove that [the Yakama corporation subject to the tax] *traveled by highway* in order to apply its tax." *Ibid.*; see *ibid.* ("Washington does not just tax possession of fuel, or even importation of fuel, but instead taxes importation by ground transportation."). For that reason, the plurality determined that the tax violated Article III of the 1855 Treaty, which it construed as protecting "the right to travel on the public highways without [tax] burdens" for "traveling with certain goods." *Id.* at 1013. The plurality specifically distinguished taxes that might "appl[y] irrespective of transport or its means." *Id.* at 1015. Two Justices concurred in the judgment, reasoning that the treaty's terms "do not permit encumbrances on the ability of tribal members to bring their goods to and from market." *Id.* at 1017 (Gorsuch, J., concurring in the judgment). In their view, the Washington tax was "about taxing a good as it passes to and from market—exactly what the treaty forbids." *Ibid.*

Cougar Den confirms that the tax and fee at issue here do not implicate Article III of the 1855 Treaty. Both the tax and the fee are imposed on the privilege of *manufacturing*, not on the action of bringing the manufactured tobacco products to market. This Court has long evaluated a tobacco excise tax as a tax on the manufacture of tobacco. See *Liggett & Myers Tobacco Co.* v. *United States*, 299 U.S. 383, 386 (1937) (describing "the true nature of the exaction" as a tax "upon the manufacture of tobacco"). In *Liggett & Myers*, the Court

emphasized that the rate of tax applicable to a particular tobacco product is the same, no matter what the price at which the goods are sold. *Ibid.* Because the tax is determined by weight or unit, depending on the product, it "is laid * * * irrespective of intrinsic value or price obtained upon sale." *Ibid.*; see 26 U.S.C. 5701. Although the tax is determined at the time of removal, 26 U.S.C. 5703(b)(1), the Court explained that "this is a privilege designed to mitigate the burden; it indicates no purpose to impose the tax upon either sale or removal." *Liggett & Myers*, 299 U.S. at 386. This Court's determination of the incidence of the federal excise tax as instead "upon the manufacture of tobacco," *ibid.*, is controlling here. Cf. *Cougar Den*, 139 S. Ct. at 1010 (opinion of Breyer, J.) (Washington Supreme Court's determination of incidence of state tax is controlling).

Like the tobacco excise tax, the FETRA fee is imposed on manufacturers and is determined at removal. 7 U.S.C. 518d. Each manufacturer's fee reflects its share of the "gross domestic volume" of tobacco products removed, as reported for purposes of the excise tax. 7 U.S.C. 518d(a)(2) and (f)-(h); 7 C.F.R. 1463.3, 1463.7(b). Given the close textual relationship between the two statutory schemes, and the fact that the FETRA fee is designed to reflect the amount of tobacco products removed by the manufacturers for purposes of assessing the excise tax on tobacco manufacturing, the FETRA fee is also imposed on the privilege of manufacture.

In contrast with the state statute at issue in *Cougar Den*, neither the federal tax nor the FETRA fee encumbers the Yakamas' free use of the public highways guaranteed to them by Article III. The tobacco excise tax and FETRA fee "appl[y] irrespective of transport or its means." *Cougar Den*, 139 S. Ct. at 1015 (opinion of

Breyer, J.). Whatever the precise scope of the Yakamas' right to travel freely on public roads, that right does not protect activities—such as manufacturing—that do not relate to access to highways or travel upon them.

Petitioner's contrary argument (Pet. 26), that the excise tax and FETRA fee impermissibly "restrict the movement of goods from the Yakama Reservation to the marketplace over the public highways," is incorrect. The tax and fee are not, as petitioner believes (Pet. 29), imposed "on the transportation of tobacco products from the factory to the marketplace." The fact that the tax and fee may be assessed upon removal of a tobacco product from a manufacturer's premises, see 27 C.F.R. 40.11, does not mean that they apply to the transport of those products, as the Court explained in *Liggett & Myers*. 299 U.S. at 386. And at a minimum it does not mean that the tax and fee apply to the transport of tobacco products "*by highway,*" as opposed to any other means. *Cougar Den*, 139 S. Ct. at 1009 (opinion of Breyer, J.).

b. The court of appeals also correctly rejected petitioner's passing contention (Pet. 24 n.8) that the prohibition on levy or forfeiture of allotted lands contained in Article VI of the 1855 Treaty, 12 Stat. 954 (which incorporates by reference Article 6 of the Treaty with the Omahas, 10 Stat. 1044-1045), supports an exemption from the tobacco excise tax. No prohibited encumbrance could result here. To begin with, the tax at issue is imposed on petitioner, not Wheeler, and petitioner is not itself an allottee of any trust land. Pet. App. 22a. Moreover, as the court of appeals noted, the threat of property forfeiture under 26 U.S.C. 5763(d) does not apply to allotted land because the United States is already

the titleholder, and 26 C.F.R. 301.6321-1 likewise prohibits the attachment of federal tax liens to or the forfeiture of such land. Pet. App. 33a n.12; see *id.* at 22a-23a.[3]

c. Indian canons of construction do not suggest a different result.

As petitioner points out (Pet. 10 n.3), ambiguous provisions in an Indian treaty are generally to be resolved in favor of Indian interests. See, *e.g.*, *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247-248 (1985); *Jones* v. *Meehan*, 175 U.S. 1, 11-12 (1899); *Choctaw Nation* v. *United States*, 119 U.S. 1, 27-28 (1886). The principle that treaties are to be construed liberally in favor of Indians, however, requires only that reasonable, not artificial, ambiguities be resolved in the Indians' favor. *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986); cf. *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001) (rejecting application of pro-

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[3] In addition, forfeitures under 26 U.S.C. 5763 and 7302 do not result from the failure to pay a tax standing alone, but only from willful violations in which the property is used in such a violation. See 26 U.S.C. 7327 (providing that forfeitures under the internal revenue laws are subject to remission or mitigation on the same terms as under the customs laws); 19 U.S.C. 1618 (providing that a penalty may be remitted or mitigated if it was incurred "without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law," or if "mitigating circumstances" exist); see also *United States* v. *United States Coin & Currency*, 401 U.S. 715, 723 (1971). To be subject to forfeiture under Section 7302, moreover, the property must be used as an "active aid" in the violation of the internal revenue laws. *United States* v. *One 1954 Rolls Royce Silver Dawn, Serial No. SNF107*, 777 F.2d 1358, 1360-1361 (9th Cir. 1985). And because petitioner has obtained a permit and posted a bond, it is not an "illicit" manufacturer to which a forfeiture would apply under 26 U.S.C. 5763(c) (emphasis omitted).

Indian canon where statute was not "'fairly capable' of two interpretations") (citation omitted). As this Court explained in *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943), "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."

The 1855 Treaty is not ambiguous with respect to the tax and fee at issue here. Both the plurality and the concurrence in *Cougar Den* determined that Article III of the Treaty prohibits burdens on traveling with goods. See 139 S. Ct. at 1013 (opinion of Breyer, J.); *id.* at 1017 (Gorsuch, J., concurring in the judgment). But no Justice suggested that the Treaty secures a far more sweeping right to manufacture and trade goods free of all generally applicable federal taxes and regulations. The "clear terms" of the Treaty, *Choctaw Nation*, 318 U.S. at 432, thus do not prohibit taxes on the privilege of manufacturing tobacco products. The act of manufacture occurs prior to any transportation of the manufactured goods to market, and the tax and fee apply regardless of where or how those products may be transported. As a result, this case presents no serious question of any infringement on the rights of access to or use of the public roads secured to the Yakama by the 1855 Treaty.

2. Petitioner asserts (Pet. 12-20) that this Court's review is warranted because a conflict exists among the lower courts regarding the proper analysis for determining whether Indians are exempted from a generally applicable federal tax. But the decision below does not implicate any disagreement among the courts of appeals, as the outcome would be the same under any approach.

According to petitioner (Pet. 12-14), the Ninth Circuit requires that a treaty contain "express exemptive language" or a "definitely expressed exemption" before it will be construed to exempt Indians from a generally applicable federal tax. Pet. 14 (citations omitted); see, *e.g.*, *Ramsey* v. *United States*, 302 F.3d 1074, 1078 (9th Cir. 2002), cert. denied, 540 U.S. 812 (2003). By contrast, petitioner asserts (Pet. 15-18) that three other courts of appeals require that a treaty contain only language that could "reasonably be construed" to exempt Indians from federal taxation. See, *e.g.*, *Chickasaw Nation* v. *United States*, 208 F.3d 871, 884 (10th Cir. 2000), aff'd, 534 U.S. 84 (2001); *Lazore* v. *Commissioner*, 11 F.3d 1180, 1185 (3d Cir. 1993); *Holt* v. *Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967); see also *Cook* v. *United States*, 86 F.3d 1095, 1097 (Fed. Cir.), cert. denied, 519 U.S. 932 (1996).

It is not clear to what extent there are differences in substance in these formulations, for the Ninth Circuit in this case made clear that the "requisite language need not explicitly state that Indians are exempt from the specific tax at issue." Pet. App. 27a (citation and internal quotation marks omitted). It is sufficient, the court said, if there is express language from which the court "can discern an intent to exempt the Yakama" from the tax, *id.* at 30a (citation omitted)—that is, language that "provide[s] sufficient evidence" of an intent to furnish such an exemption, *id.* at 31a. But to the extent a minor disagreement exists among the courts of appeals about the precise standard for recognizing a treaty-based exemption from federal taxation for Indians, any such disagreement is irrelevant here. As explained above, petitioner identifies no language in the

1855 Treaty that could be construed—reasonably, expressly, or otherwise—to exempt the Yakama from generally applicable federal taxes or fees on the manufacture of tobacco products. See pp. 12-14, *supra*. As a result, the court of appeals reached the correct result under any formulation. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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