No. 16-1498

In The
Supreme Court of the United States

WASHINGTON STATE
DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,
a Yakama Nation Corporation,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Treaty of 1855 between the Yakama Nation and the United States secures to the Yakama Nation the right to travel upon the public highways. The question presented is whether the imposition of a Washington state tax upon a member of the Yakama Indian Tribe for importing fuel into Washington upon the public highways is preempted by the treaty, as has been consistently held by both the Ninth Circuit and now the Washington Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Respondent is Cougar Den, Inc. There is no parent or publicly held company owning 10% or more of its stock.

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The opinion of the Washington Supreme Court is reported at 188 Wash. 2d 55, 392 P.3d 1014 (2017). Petitioner's App. 1a-29a. The order of the Yakima County Superior Court is unreported. Pet. App. 30a-43a. The administrative order of Pat Kohler, the Director of the Department of Licensing, is unreported. Pet. App. 44a-61a. The order of Administrative Law Judge Stephen K. Leavell is unreported. Resp. App. 1-17.

TREATY AND STATUTES INVOLVED

Article III of the Treaty of June 9, 1855, between the Confederated Bands of the Yakama Nation and the United States, 12 Stat. 951, 952-953, which states:

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

Former Revised Code of Washington § 82.36.010, et seq. (Motor Vehicle Fuel Tax). Resp. App. 18-20.

Former Revised Code of Washington § 82.38.010, et seq. (Special Fuel Tax Act). Resp. App. 21-23.

STATEMENT OF THE CASE

This case is another chapter in the Petitioner's long campaign to maximize revenue by infringing on treaty rights. It is the continuation of a local revenue dispute between Washington and the sovereign Yakama Nation. The Washington state court's decision below turned on the application of a statutory term in Washington's fuel tax code and its conflict with a treaty provision found in only two other treaties. This is not an issue of national importance. The decision below is consistent with Ninth Circuit precedent and presents no reason to grant certiorari.

I. Factual Background

A. The Yakama Indian Nation

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") is a federally recognized Indian tribe located in central Washington. Pet. App. 62a. The modern Yakama Nation was formed in 1855 when the United States government executed a treaty with the fourteen tribes and bands that would comprise the Nation. *Id.* That treaty provided for a reservation and defined the rights of the Yakamas, in exchange for the Yakama Nation's agreement to "cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them" in the Washington Territory. Treaty with the Yakamas, Art. I, 12 Stat. 951 (1855).

To the members of the Yakama Nation the Treaty is a sacred document: "[the Treaty] embodies spiritual as well as legal meaning for the tribe; it enumerates basic rights secured to the Yakamas that encompass their entire way of life." *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1237-38 (E.D. Wash. 1997), *aff'd, Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (*"Cree II"*).

The Yakama Nation forever ceded 10 million acres – over ninety percent of its territory – in exchange for rights reserved by the Treaty. The basic rights reserved include those contained in Article III:

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

Treaty with the Yakamas, Art. III, 12 Stat. 951 (1855).

Of these rights, the Right to Travel was particularly important to the Yakama Nation. No other tribal treaty in Washington contains a right to travel. Before the treaty, travel was "an intrinsic ingredient of virtually every aspect of Yakama culture." *Yakama Indian Nation*, 955 F. Supp. at 1238.[1] "Travel was particularly important for the purpose of trade" and at the time of the Treaty the Yakamas' "proclivity for trade was equal to that of the whites, as the Yakamas constantly moved goods back and forth between the Coast and Interior and obtained access to goods from the Plains." *Id.* This occurred in part because "[t]he Yakamas' way of life depended on goods that were not available in the immediate areas," including items "of vital religious and ceremonial importance." *See id.* at 1238-39. Sensitive to these trading practices, government agents promised the Yakamas that they would "have the same liberties outside the reservation . . . *to go on the roads to market*." *Id.* at 1244. Relying on the promises of the government agents – and in exchange for most of their traditional homeland – "the Yakamas agreed to the Treaty provisions in good faith on June 9, 1855." *Id.* at 1245.

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[1] As will be shown below, the historical findings contained in *Yakama Indian Nation v. Flores* are of central interpretive importance in this case, and were unchallenged by the Petitioner below.

B. Respondent Cougar Den

Cougar Den, Inc. is a private business owned by an enrolled member of the Yakama Nation and organized under the laws of the Yakama Nation. Pet. App. 63a. Established as a means of supplying fuel to members of the Yakama Nation, Cougar Den verifies that its sales are to enrolled members of the Yakama Nation by placing the enrollment number of its buyers on its sales invoices. CP 471, 474-79.

The Yakama Nation appointed Cougar Den as its agent "for the purpose of collecting and transmitting tribal fuel taxes to the Yakama Indian Nation on a monthly basis and for the purpose of obtaining petroleum products for sale and delivery to its members." *See* Pet. App. 66a (referencing Exhibit 3). The Yakama Nation has also issued a license for Cougar Den to import fuel for every year at issue, and granted Cougar Den "the privilege of taking delivery of petroleum in bulk without assessment of state fuel taxes [p]rovided that compliance is maintained with the laws of the Yakama Nation." *Id.* (referencing Exhibit 4). Pursuant to this license, Cougar Den assesses federal and tribal taxes on its sales, but does not assess state taxes. Pet. App. 63a-64a.

Cougar Den began hauling fuel from Oregon to the Yakama Reservation on March 20, 2013. *Id.* Cougar Den used its own trucks and those of KAG West, an agent of Cougar Den that hauls fuel at Cougar Den's direction. CP 471. At all relevant times Cougar Den's trucks remained in either Oregon, the Ceded Area of

the Yakama Nation, or the Yakama Reservation. Pet. App. 64a. Each month, Cougar Den filed reports with the Oregon Department of Transportation showing the number of gallons exported. *Id.*

C. The Washington State Department of Licensing Issues Assessment No. 756M

In December 2013, the Washington State Department of Licensing ("Department") issued Assessment No. 756M against Kip Ramsey, as the owner of Cougar Den. Pet. App. 65a. The Assessment alleged that Mr. Ramsey owed $3,630,954.61,[2] including $1,292,913.02 in penalties, for not having a Washington import license during the months of March through October 2013. Pet. App. 65a (referencing Exhibit 7). This was the first notice to Cougar Den of any taxes, penalties, or interest owing for Cougar Den's fuel business. CP 471.

D. The History of Washington State's Fuel Taxation System

To support the Assessment, the Department cited Washington's motor and special fuel tax codes and a proposed Fuel Tax Agreement with the Yakama Nation that the Yakama Nation General Council had vetoed before it would have taken effect. CP 215-223. The Department's pursuit of this Assessment is indicative of

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[2] The tax was assessed at a rate of 37.5 cents per gallon. Former Wash. Rev. Code §§ 82.36.025 & 82.38.030.

Washington State's ongoing efforts to infringe on tribal treaty rights for the sake of taxing motor vehicle fuels sold by tribal retailers.

Washington's fuel tax system is premised on a four-tier distribution chain, consisting of "suppliers," "distributors," "retailers," and "consumers," with suppliers at the top of the chain. Suppliers are (a) refineries and (b) those who bring fuel into Washington State by pipeline, cargo vessel, and ground transportation. Wash. Rev. Code § 82.36.020(1), (2). Washington currently imposes fuel taxes at the wholesale level when fuel is removed from the terminal rack or "imported" into the state. Wash. Rev. Code §§ 82.36.020(2) & 82.38.030(7).[3] Fuel is "imported" when a party brings it into Washington by means of conveyance other than the fuel supply tank of a motor vehicle. Former Wash. Rev. Code §§ 82.36.020(2) & 82.38.030(7) (2007).

Though this is the current fuel taxation scheme, the Washington Legislature has repeatedly amended its fuel tax collection system in a series of attempts to alter the legal incidence of the tax. These efforts began in response to this Court's decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), and

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[3] Washington state imposes taxes on motor vehicle fuel and taxes on special fuel, including diesel, under former Revised Code of Washington chapters 82.36 & 82.38. In 2013, the Legislature combined the two chapters and recodified them, but did not substantively amend them. H.B. 1883, 63d Leg., Reg. Sess. (Wash. 2013). In this brief, Respondent cites exclusively to the statutes as they existed during the relevant time period, prior to recodification.

continued in the wake of a series of judicial decisions prohibiting the Department from collecting tax on fuels sold on tribal lands. *See, e.g.*, *Squaxin Island Tribe v. Stephens*, 2006 WL 521715 (W.D. Wash. Mar. 2, 2006) (permanently enjoining state from "imposing or collecting motor vehicle fuel taxes, or otherwise seeking to enforce RCW chapter 82.36 with respect to motor vehicle fuels, delivered to, received by, or sold by [tribal plaintiffs'] retail fuel stations within their respective Indian Country" after recognizing 1998 fuel tax amendments failed to move the incidence off of tribal retailers); *Automotive United Trades Org. v. State*, 183 Wash. 2d 842, 845-46, 357 P.3d 615 (2015) (detailing Washington's attempts to collect tribal fuel taxes following *Oklahoma Tax Commission v. Chickasaw Nation*). The *Squaxin Island* decision resulted in the current tax scheme, enacted in 2007, which purports to place the incidence of the fuel tax at the supplier level, away from retailers. *See Automotive United*, 183 Wash. 2d at 848-49; Wash. Rev. Code §§ 82.36.020(2) (2007) & 82.38.030(7) (2007); *but see Automotive United*, 183 Wash. 2d at 848-50 (recognizing that the federal injunction is still in effect and that "no court has ever analyzed whether the 2007 legislation successfully moved the legal incidence of the tax off of tribal retailers").

Concurrent with its attempts to move the legal incidence of the tax, the Washington Legislature also authorized the Governor or the Governor's designee (generally the Director of the Department of Licensing) to enter fuel tax agreements with federally recognized

tribes operating or licensing retail gas stations on their lands. *See* former Wash. Rev. Code §§ 82.36.450 & 82.38.210 (2007). Under these agreements, tribes agree to purchase the fuel sold at tribally owned retail gas stations from state-licensed fuel distributors with the state fuel tax included. These agreements are limited to motor vehicle fuel (gasoline) and special fuel (diesel) taxes included in the price of fuel delivered to a tribally licensed retail gas station entirely owned by a tribe, tribal enterprise, or tribal member on reservation or trust land. Since 2007, Washington has entered many "75 Percent Refund/25 Percent (75/25) State Tax Agreements" with tribes who operate gas stations. *See* Wash. State Dep't of Licensing, Tribal Fuel Tax Agreement Report: June 2013, at 1-2 (2013). These tribes report their purchases to the Department and receive 75 percent of the state fuel tax revenue collected as a refund; the state retains 25 percent as state tax. *Id.* at 3. These agreements have mollified Washington State, resolving most of the litigation between it and the tribes.[4] *See Automotive United*, 183 Wash. 2d at 848-51.

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[4] Washington State's fuel tax agreements with the tribes upset others in the fuel industry, including the Automotive United Trades Association and Washington Oil Marketers Association, who believe that these agreements give tribal retailers an unfair competitive advantage and enable tribal retailers to undercut nontribal retailers' fuel prices. *See Automotive United Trades Org. v. State*, 175 Wash. 2d 214, 285 P.3d 52 (2012); *Automotive United*, 183 Wash. 2d at 845-46. None of the tribes that entered these agreements executed treaties reserving the right to travel.

E. There Is No Fuel Tax Agreement with the Yakama Nation

But there is no fuel tax agreement with the Yakama Nation. Indeed, this case is merely the latest disagreement between members of the Yakama Nation and the Department regarding Washington State's fuel taxation authority under state law. *See, e.g.*, *id.*; Wash. State Dep't of Licensing, Tribal Fuel Tax Agreement Report: November 2014, at 1-2 (2014).

To address these disagreements, the Yakama Nation Tribal Counsel and the Department participated in a series of mediation sessions in 2013. These sessions resulted in a proposed fuel tax agreement that would have gone into effect November 22, 2013. *See* Pet. App. 66a (referencing Exhibit 6). However, the Yakama Nation General Council (a body of the general membership) vetoed the proposed resolution on November 7, 2013. *See id.* The Yakama Nation sent notice of the veto to the Washington State Attorney General on November 19, 2013. CP 575.

The Department issued Assessment No. 756M to Cougar Den shortly thereafter. Pet. App. 65a.

II. Course of Proceedings

Kip Ramsey and Cougar Den filed a timely appeal of the Assessment with the Department.[5] On appeal,

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[5] The Department moved to dismiss Mr. Ramsey on March 31, 2014. Pet. App. 65a. Cougar Den was the sole defendant below and is the only respondent on appeal.

Administrative Law Judge Stephen K. Leavell invalidated the Assessment. *See* Resp. App. 1-17. He cited the extensive factual record developed in an earlier federal action, *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997). *Yakama Indian Nation* was an action on remand from the Ninth Circuit; the Ninth Circuit directed the federal court to conduct "a factual investigation into the historical context and parties' intent at the time the Treaty was signed [in order to] determine the precise scope of the highway right." *See Cree v. Waterbury*, 78 F.3d 1400, 1405 (9th Cir. 1996) ("*Cree I*"). The district court accomplished this by "examin[ing] the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed." *Yakama Indian Nation*, 955 F. Supp. at 1235 (quoting *Cree I*, 78 F.3d at 1405). Following this hearing, the court entered extensive Findings of Fact and Conclusions of Law. *See generally* 955 F. Supp. 1229.

Relying on these findings, this Court's canons of treaty construction, and a series of Ninth Circuit opinions addressing the scope of the Yakama's Right to Travel, ALJ Leavell granted Cougar Den's motion for summary judgment and held that the Assessment was an impermissible restriction on travel under the Treaty. *See* Resp. App.

The Department sought review of this order. The Department's Director, Pat Kohler, reversed the ALJ decision. Pet App. 44a-61a. Director Kohler had represented the Department in the 2013 mediations with the Yakamas, arguing for a narrow interpretation of

the Treaty and the Right to Travel. *See* Pet. App. 41a-43a. On review of ALJ Leavell's order, Director Kohler – this time acting as a decision-maker on the scope of the Treaty rather than as an advocate – held that the Treaty did not preempt the taxes, license requirements, and penalties sought against Cougar Den. Pet. App. 59a.

Cougar Den appealed to the Yakima County Superior Court, which reversed the Director, finding that the Assessment violated Article III of the Treaty and that Director Kohler violated the appearance of fairness doctrine by failing to disqualify herself on an issue where she had previously acted as advocate. Pet. App. 30a-35a. The Department then appealed directly to the Washington Supreme Court, which affirmed on statutory and treaty grounds; it did not reach the appearance of unfairness issue. Pet. App. 1a-16a.

Though every objectively neutral court or adjudicative authority to consider this issue has rejected the Department's arguments and ruled in favor of Cougar Den, the Department now seeks certiorari.

ARGUMENT

I. The Meaning of the Treaty Right to Travel

This Court construes Indian Treaties as the Indians would have understood them.

> The Indian Nations did not seek out the United States and agree upon an exchange of

> lands in an arms-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them. . . .

Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970) (citations omitted) (citing *Jones v. Meehan*, 175 U.S. 1, 11 (1988); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)). This principle of construction requires courts to examine the language of Indian Treaties as such terms were understood by the Indians. *See Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (*"Cree II"*); *see also Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-78, *modified*, 444 U.S. 816 (1979). Treaties are interpreted broadly, with doubtful or ambiguous terms resolved in the Indians' favor. *Choctaw Nation*, 397 U.S. at 631.

The seminal case construing the historical meaning of the Right to Travel language in Article III of the Treaty of 1855 is *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1237-38 (E.D. Wash. 1997), *aff'd*, *Cree II*. The district court decision followed a remand from the Ninth Circuit with instructions to "examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right" found at Article III. *See Cree v. Waterbury*, 78 F.3d 1400, 1405 (9th Cir. 1996). The district court held an extensive bench trial on the issue of the intent of the parties to the Treaty. After

hearing testimony from the Yakama Indian Nation and the Department, including testimony from three expert witnesses, two plaintiffs, and two Washington State employees, the district court entered extensive Findings of Fact and Conclusions of Law that have guided every subsequent inquiry into the meaning of the Treaty Right to Travel. *Yakama Indian Nation*, 955 F. Supp. at 1236-56. These are unchallenged in this case.

The district court's factual findings highlighted the importance of travel for the purposes of trade: "The record as a whole unquestionably depicts a tribal culture whose manner of existence was ultimately dependent on the Yakamas' ability to travel." *Id.* at 1239. The court also found that Governor Stevens, who was responsible for treating with the Yakama Nation on behalf of the United States, knew of the importance of travel during his negotiations and that this knowledge was specifically illustrated by the unique promises given to the Yakamas regarding their ability to travel off reservation. *Id.* at 1240. During negotiations, the court emphasized Governor Steven's promise that "'[tribal members] shall have the same liberties outside the reservation . . . *to go on the roads to market*.'" *Id.* at 1244 (alteration in original).

The court rejected the government's contention that the term "in common with" "placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." *Id.* at 1247. It instead concluded that "the term was understood by the Yakamas and [the United

States] alike to mean that the [Yakamas] retained the *right* to travel the public roads, on and off reservation." *Id.*

The court also spoke to the agreement between the parties. In exchange for the right to travel off reservation "without restriction," the court observed that the Nation agreed to cede over 10 million acres of their traditional territory and to live on reservation. *Id.* at 1248. Specifically, the court found that the bargain provided that

> the tribe must agree to allow roads, including railroads, to be constructed within the reservation boundaries. These were the terms of the bargain; ***no reference is made to other conditions such as payment for or maintenance of public roads***, either on or off reservation. Rather, the accessibility of the public roads was described as an advantage for the Yakamas, without any mention of possible disadvantages, such as paying for or maintaining public roads.

Id. (emphasis added). The district court concluded by expressly finding that "the public highways clause reserves to the Yakamas the right to travel the public highways without restriction." *Id.* at 1249.

The Ninth Circuit affirmed on appeal. *Cree II*, 157 F.3d 762 (1998). That court referenced and reiterated the district court's factual findings and conclusions of law before confronting and rejecting each of the defendants' arguments – arguments that the Department recycles in its Petition. *See id.* at 766-68, 770-73.

Specifically, the Ninth Circuit affirmed each of the district court's findings and conclusions regarding the treaty language, the historical context of the Yakama Treaty, and the district court's "practical construction" of the Treaty. *Id.* at 770-73.

Accordingly, the district court's findings and conclusions in *Yakama Indian Nation* have been the foundation of any analysis of the Treaty Right to Travel.

II. Reasons for Denying the Petition

Three issues are presented by the Petition.

The first issue concerns the Washington Supreme Court's holding that the Treaty's reservation of the Yakamas' Right to Travel, which the Ninth Circuit has repeatedly interpreted to include the right to bring goods to market without the payment of fees, preempts Washington State's tax assessed for the importation of fuel into Washington. The Department argues this decision conflicts with Ninth Circuit precedent, specifically with the holding in *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). There is no conflict: the holding flows directly from the line of Ninth Circuit cases interpreting Article III of the Treaty, including *King Mountain Tobacco*. The allegation of a conflict in authority is unfounded and provides no basis for the writ to issue.

Second, the Department challenges the Washington Supreme Court's reliance on the factual record

regarding the historical meaning, context, and understanding of the Right to Travel provision by the Yakamas, arguing that this Court's precedent requires a plain language inquiry to determine whether the Treaty preempts Washington's import tax. But this argument is flatly incorrect. The state court properly applied well-settled principles of treaty construction. The state court's ultimate holding is consistent with this Court's decisions interpreting analogous provisions of the same treaty for over 80 years.

Finally, the Department is implicitly asking this Court to correct the Washington Supreme Court's interpretation of the function of Washington state's "import" tax, former Revised Code of Washington sections 82.36.020(2) & 82.38.030(7). The Department's challenge to a state court's construction and application of a unique state law does not merit certiorari. Regardless, the Department cannot demonstrate any error.

A. The Washington Supreme Court Faithfully Applied a Line of Ninth Circuit Decisions Interpreting the Right to Travel Under Article III of the Treaty

1. The Ninth Circuit Has Consistently Held That the Treaty Preempts State Law Restrictions on Travel, Including Restrictions on the Right to Bring Goods to Market, But Not Restrictions on Trade That Are Unconnected to Travel

Following *Cree II*, the Ninth Circuit construed Article III of the 1855 Treaty several times, most significantly in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), and *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). These cases reaffirmed that the Treaty guarantees the Yakama Nation and its members the "'*right to transport goods to market without restriction.*'" *King Mountain Tobacco*, 768 F.3d at 998 (quoting *Smiskin*, 487 F.3d at 1266) (emphasis in original). Critically, these cases, along with *Cree II*, also define the scope of the Treaty Right to Travel.

The Ninth Circuit first refused to divorce trade from the Right to Travel in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). *Smiskin* considered whether a Washington state law requiring persons who were not licensed wholesalers and who transported unstamped cigarettes to "give[] notice to the [Liquor Control Board] in advance of the commencement of transportation" violated the Treaty Right to Travel. Under state law, the failure to give notice or

pay the tax rendered the cigarettes contraband. *Id.* at 1263. The Smiskins, both Yakama Nation citizens, were arrested for transporting cartons of unstamped cigarettes from an Indian reservation in Idaho to smoke shops on various Indian reservations throughout Washington.

As the starting point for its analysis, the Ninth Circuit reaffirmed that the 1855 Treaty language guarantees the Yakama Nation "'the right to transport goods to market over public highways without payment of fees for that use'" and expressly rejected the position that the Department advocates here by holding that the Right to Travel is not limited to providing protection from state fees. *Compare id.* at 1265 (declining to draw the state government's fee-based distinction), *with* Petition at 15 (arguing that the right is limited to protection against fees imposed for public use of highways).

The Ninth Circuit then rejected each of the government's arguments. First, the court dismissed the government's attempt to limit *Cree II* to its facts and to hold that the Treaty only preempted fees. Relying on the factual findings and analysis in *Cree II*, the court instead held that the Treaty preempts *any* "restriction" or "condition" on travel, not merely fees. *Smiskin*, 487 F.3d at 1266. Next, the court expressly rejected the government's attempt to draw "an arbitrary line between travel and trade" in the context of transporting goods to market. *Id.* The court continued:

> We have already established that the Right to Travel provision "guarantee[s] the Yakamas the right to transport goods to *market*" for "*trade* and other purposes." Thus, whether the goods at issue are timber or tobacco products, the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent. *See Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 397 (1968) ("To construe the treaty as giving the Indians no rights but such as they would have without the treaty would be an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the Nation for more.").

Smiskin, 487 F.3d at 1266-67 (internal quotations and citations omitted, alterations in original). The court held that the pre-notification requirement, like the fee-based requirements discussed in the *Cree* cases, violated the Right to Travel and affirmed the district court's order dismissing the charges against the Smiskins. *Id.* at 1271.

The Ninth Circuit expressly affirmed this holding in *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). There, the Ninth Circuit considered Revised Code of Washington chapter 70.157 (2013), an escrow statute created to offset smoking-related health-care costs. A Master Settlement Agreement required participating manufacturers to make payments, in

perpetuity, to offset smoking tobacco's impact on the healthcare system. Washington's statute required any non-participating manufacturers to make a flat-fee payment into escrow for each qualifying unit of tobacco sold. Wash. Rev. Code § 70.157.020(b)(1). King Mountain Tobacco, which was owned and operated by an enrolled member of the Yakama Nation and which grew some of its tobacco on the Yakama Reservation, did not participate in the Master Settlement Agreement. It filed an action for declaratory and injunctive relief, arguing that the Right to Travel preempted the statutory escrow requirement because it enjoyed an unfettered right to trade. *King Mountain Tobacco*, 768 F.3d at 990-91.

The Ninth Circuit disagreed, distinguishing the Right to Travel, including travel "for the purpose of bringing goods to market" at issue in *Cree II* and *Smiskin*, from the unfettered right to trade asserted by King Mountain Tobacco.

The court began by expressly reaffirming the holdings in *Cree II* and *Smiskin*. *Id.* at 997-98. The court acknowledged the factual findings in *Yakama Indian Nation* and its holding in *Cree II*, which "reasoned that the Treaty was evidence of the importance of the Right to Travel to the Yakamas and concluded that 'the Treaty must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use.'" *Id.* at 997 (quoting *Cree II*, 157 F.3d at 769) (citations omitted). Addressing *Smiskin*, the court reiterated

that "'[a]pplying [the notice] requirement to the Yakamas imposes a condition on travel that violates *their treaty right to transport goods to market without restriction*.'" *Id.* at 998 (quoting *Smiskin*, 487 F.3d at 1266).

However, the court emphasized that the escrow statute in *King Mountain Tobacco* did not restrict or place conditions on travel. Rather, the condition or restriction imposed by the escrow statute was a mandatory flat-fee payment for every unit of tobacco sold. *Id.* at 991-92; Wash. Rev. Code § 70.157.020(b)(1). Accordingly, the Ninth Circuit held that the restriction did not and could not burden travel in any way, and was therefore not preempted by the Treaty. *Id.* at 998.

The Ninth Circuit's decisions addressing the Treaty Right to Travel are clear and consistent: the Treaty preempts state laws that restrict or place conditions on (1) travel (*Cree II*), (2) travel encompassing trade, i.e., "bringing goods to market" (*Smiskin*), but not (3) encumbrances on the sale of goods, i.e., "trade" (*King Mountain Tobacco*).

2. The Washington Supreme Court Properly Found That the State Import Tax Impermissibly Burdened the Yakamas' Right to Bring Goods to Market

Working within the framework set forth by the Ninth Circuit, the Washington Supreme Court in the case below concluded that Washington's fuel import

tax was analogous to the restriction on bringing goods to market addressed in *Smiskin* and accordingly held that the Treaty preempted the tax.

The court recognized the distinction between pure trade and the Right to Travel – and "bring goods to market" – that the Ninth Circuit addressed in *King Mountain Tobacco*, and it adhered to that distinction. The state high court focused on the nature of the burden placed on the Yakamas by the state law at issue. *Accord Cree II*, 157 F.3d at 773 ("[t]he proper focus, however, is on the type of tax at issue"). Focusing on the nature of the Department's import tax, the state court quickly recognized and dismissed the Department's analogy to the *King Mountain Tobacco* decision. *See* Pet. App. 13a (holding that unlike *Smiskin*, the regulation at issue in *King Mountain Tobacco* had nothing to do with travel).

The Washington Supreme Court recognized that the tax in Assessment 756M was assessed the moment that Cougar Den's trucks carrying fuel to sell on reservation crossed the border into Washington State. Pet. App. 2a, 13a-14a. As in *Smiskin*, "the [burdening] requirement was triggered by the transportation of [goods] into the state." *Id.* at 14a. The Washington Supreme Court plainly adhered to *Smiskin* and *King Mountain Tobacco*, holding that Washington's import tax was "a condition on travel that affected the Yakamas' treaty right to transport

goods to market without restriction."[6] *Id.* at 13a. Therefore, the Department cannot tax Cougar Den for transporting fuel through Washington, from Oregon on U.S. Highway 97, to market on the Yakama Nation Reservation.

Nonetheless, the Department reiterates this argument here, doubling down on its belief that travel was at issue in *King Mountain Tobacco* because "'King Mountain ships its tobacco crop to Tennessee where it is threshed. Then the tobacco is sent to a factory in North Carolina where more tobacco is purchased and blended with reservation tobacco.'" Petition at 23 (quoting *King Mountain Tobacco*, 768 F.3d at 994). But those facts are irrelevant because the burden on the tribal member in *King Mountain Tobacco* – the escrow fee imposed on the sale of tobacco – had nothing to do with travel. *See King Mountain Tobacco*, 768 F.3d at 991-92 (describing Washington's escrow fee, Wash. Rev. Code chapter 70.157, as requiring a flat-fee payment for every unit of tobacco sold, before holding that the escrow fee did not burden the Right to Travel).

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[6] The Department also relies on *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002). But in *Ramsey*, the Ninth Circuit expressly distinguished the *Cree II* line of cases on the grounds that a different standard applied to federal tax exemptions. 302 F.3d at 1078 (holding that "*Cree II* analysis is inapplicable to federal taxes because there is a different standard for exemptions from federal taxation."). "The different standards stem from the state and federal government's distinct relationship with Indian tribes," further noting that "[t]he federal government has plenary and exclusive power to deal with tribes." *Id. Ramsey* is plainly irrelevant here, as this case turns on the meaning of a state tax.

Under any fair reading of the cases, the Washington Supreme Court decision below is in complete harmony with both *Smiskin* and *King Mountain Tobacco.* It is unfortunate that the State has resorted to mischaracterizing these basic holdings in an effort portray a conflict that does not exist.

B. The Washington Supreme Court's Holding Does Not Conflict with any Decision of This Court

The Department also represents that the decision below conflicts with various decisions of this Court. Neither of the Department's arguments in support of this contention are sustainable.

The Department's first argument, that the Washington Supreme Court "defied this Court's fundamental rule that state taxes and regulations apply to Indians outside reservation boundaries absent an express federal law," merits little discussion. There is no doubt that the Washington Supreme Court recognized this rule: the question presented was whether the 1855 Treaty was such an "express federal law" and the court held that it was. Pet. App. 4a-5a. This purported argument in favor of certiorari is merely the Department's disagreement with the Washington Supreme Court's conclusion.

Nor can the Department show that the Washington Supreme Court reached this conclusion by misapplying this Court's rules of treaty construction. Indeed,

the Department advocates for a plain meaning construction of the Treaty, an interpretation that is ignorant of the history of the negotiation of the Treaty and how the Treaty would have been understood by the Yakamas at the time.

This Court employs well-settled principles in construing treaties between the United States and a tribe. Owing to the "'unique trust relationship between the United States and the Indians,'" these principles of construction include a historical analysis. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)). Contrary to the Department's argument, "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Id.* Rather,

> [i]t is [the Court's] responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Tulee v. State of Wash., 315 U.S. 681, 684-85 (1942); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 207 n.17 (1978) ("[i]n interpreting Indian treaties and statutes, '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'") (second alteration in original, internal

quotations omitted) (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973)).

This Court "has often held that treaties with the Indians must be interpreted as they would have understood them . . . and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Blackfeet*, 471 U.S. at 766; *see also State v. Buchanan*, 138 Wash. 2d 186, 201-02, 978 P.2d 1070 (1999) (analysis of parties' intention "begins with the language of the treaty and the context in which the written words are used"); *Yakama Indian Nation*, 955 F. Supp. at 1235-36.

This Court has applied these rules of construction to Article III of the 1855 Treaty: "This rule, in fact has thrice been explicitly relied on by the Court in broadly construing these very treaties in the Indian's favor." *Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979). More recently (and as discussed above), the Ninth Circuit has confirmed that a historical inquiry is necessary whenever the Right to Travel under Article III of the Yakama Treaty is at issue:

> We had previously found ambiguity in Article III's right to travel, and required application of the Indian canon of construction to clarify the extent of that right. . . . But the right to travel is express in Article III of the Yakama Treaty, and the *Cree* cases involved the right to travel (driving trucks on public roads) for the purpose of transporting goods to market.

> In *Smiskin*, we rejected the government's argument that the right to travel did not apply when the Yakama were engaged in commerce. 487 F.3d at 1266-67 ("[T]he right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent."). These cases clarified the extent of the right to travel found in Article III of the Yakama Treaty.
>
> But there is no right to trade in the Yakama Treaty.

King Mountain Tobacco, 768 F.3d at 998.

There is no question that this Court's principles of treaty interpretation do not permit courts to ignore treaty language that, viewed in its historical context and given a fair appraisal, would run counter to the tribe's claims. *See Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); Petition at 26-27. But the Department's rhetoric on this point is overblown: there is also no doubt that a historical inquiry is essential when evaluating the rights reserved under this Treaty. The Department's naked "plain language" inquiry ignores the historical context mandated by this Court.

The Washington Supreme Court's decision examines the Treaty language along with the historical context of that language within the Treaty. This is the approach mandated by this Court and employed by the

Ninth Circuit in each of its decisions addressing the Treaty language. There is no conflict meriting certiorari.

C. The Holding Below Is Correct

Given the absence of any cognizable conflict between the Washington Supreme Court's decision and the decision of any other court, the Department's Petition is one for error correction. That is, of course, not normally the stuff of certiorari, and even if it were, there is no error here.

The Washington Supreme Court quickly recognized that this case turned on (1) the meaning of the "Right to Travel" language in the Treaty and (2) the nature of the restriction or condition imposed by Washington State's import tax. *Accord Cree II*, 157 F.3d at 773 ("[t]he proper focus [] is on the type of tax at issue"). The decision fits squarely within this Court's decisions on treaty construction generally, as well as with this Court's and the Ninth Circuit's decisions interpreting this specific Treaty.

1. The Washington Supreme Court Properly Relied on the Factual Record Addressing the Historical Meaning of the Right to Travel Developed in *Yakama Indian Nation*

To interpret the meaning of the "Right to Travel" language in the Treaty, the state court turned to the factual record and legal conclusions developed in

Yakama Indian Nation. *See* Pet. App. 6a-9a. The court emphasized the findings that:

> The treaty and right to travel provision in particular was of tremendous importance to the Yakama Nation at the time the treaty was signed. Travel was woven into the fabric of Yakama life in that it was necessary for hunting, gathering, fishing, grazing, recreation, political, and kinship purposes. Importantly, at the time, the Yakamas exercised free and open access to transport goods as a central part of a trading network running from the western coastal tribes to the eastern plains tribes.

Id. at 7a (citing *Yakama Indian Nation*, 955 F. Supp. at 1239). The court further highlighted findings that (1) the agents of the United States "repeatedly emphasized in negotiations that tribal members would retain the 'same liberties . . . *to go on the roads to market*'" and (2) that "'both parties to the treaty expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, *with no conditions attached*.'" *Id.* at 7a-8a (quoting *Yakama Indian Nation*, 955 F. Supp. at 1244, 1251) (first emphasis in original). The state court then noted that the Ninth Circuit expressly adopted these findings in *Cree II*, observing that "the treaty secured for the Yakamas the right to use future roads and to *trade* their goods." *Id.* at 9a (emphasis added).

The Washington Supreme Court then considered the Ninth Circuit's subsequent decisions in *Smiskin* and *King Mountain Tobacco*. Pet. App. 9a-12a. These

cases establish that the Treaty preempts state laws that restrict or place conditions on travel, to include travel for the purposes of trade (i.e., bringing goods to market), but not state laws restricting trade alone. *See King Mountain Tobacco*, 768 F.3d at 998.

The state court concluded that "[t]he Department taxes the importation of fuel, which is the transportation of fuel," Pet. App. 16a, and that "travel on public highways is directly at issue." The court analogized this case to the notice requirement at issue in *Smiskin* and distinguished the escrow fee assessed solely on the sale of goods in *King Mountain Tobacco*. *Id.* at 13a-14a. Thus, the court held that the Yakamas' right to transport goods to market permitted Cougar Den to import fuel from Oregon to the Yakama reservation on public highways, without the payment of fees. *Id.* at 16a.

This interpretation of the Treaty language is further supported by additional language in the Treaty and this Court's holding addressing the analogous fishing clause in this same treaty. *See Cree II*, 157 F.3d at 771 ("The district court's interpretation of the term 'in common with' is consistent with the Supreme Court's interpretation of that term in the fishing rights cases.") (quoting *Tulee v. State of Wash.*, 315 U.S. 681, 684 (1942) ("'Article III conferred upon the Yakamas continuing rights, *beyond those which other citizens may enjoy*'") (emphasis in original)). These cases reject the oft-asserted proposition that the Treaty language should be interpreted to place the Yakamas "on equal footing" with non-Indians:

> The fishing clause speaks of "securing" certain fishing rights, a term the Court has previously interpreted as synonymous with "reserving" rights previously exercised. Because the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive a "reservation" of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters. Moreover, the phrasing of the clause quite clearly avoids placing each individual Indian on an equal footing with each individual citizen of the State.

Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979) (internal citations omitted).

2. The Department Seeks Certiorari Because It Disagrees with the Washington Supreme Court's Construction of Washington's Fuel Taxation Statutes

The Department does not meaningfully disagree with either the Washington Supreme Court's or Cougar Den's understanding of *Cree*, *Smiskin*, or *King Mountain Tobacco*. *See* Petition at 14 (treaty preempts taxes and requirements aimed at travel, but "does not preempt other charges, taxes, or regulations directed at the goods themselves").

Nor has the Department disputed the historical findings of the federal court in *Yakama Indian Nation*, 955 F. Supp. at 1237-38, though the Department itself was a party to that case in 1997 and presented evidence in support of its narrow reading of the Right to Travel language. *See id.* Those historical findings were the basis of *Cree II*, *Smiskin*, and *King Mountain Tobacco*. Here, the Department disagrees only with the state court's conclusion that the state-imposed restrictions at issue are more analogous to *Smiskin* than to *King Mountain Tobacco.* Yet to get there, the Department asks this Court to review the Washington Supreme Court's interpretation of Washington state statutes, Wash Rev. Code §§ 82.36.020(2) & 82.38.030(7), to determine whether Washington's fuel "import" tax is a tax on "bringing goods to market" or a tax directed at the goods themselves, similar to the escrow fee at issue in *King Mountain Tobacco*. This question of state law does not merit this Court's review.

The Washington Supreme Court has addressed and rejected the Department's arguments that the import taxes assessed under Revised Code of Washington sections 82.36.020(2) and 82.38.030(7) are "not incident to use of or travel on the roads or highways," but rather are "assessed based on incidents of ownership or possession of fuel." Pet. App. 12a-13a ("[the Department] argues that the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway."). The court's holding, that the "importation of fuel" is "the transportation of fuel," is supported by

the plain language of the import statute and consistent with Washington's well-established principles of statutory construction.

Washington's fuel tax statutes define "import" as "to bring . . . fuel into [the] state," other than through a "pipeline or vessel," and subject to other exceptions. Former Wash. Rev. Code §§ 82.36.010(10) & 82.38.020(12). Fuel located in "the fuel supply tank of a motor vehicle" is exempt, as is wholesale fuel that passes through Washington to another out-of-state market, such as Idaho. *Id.* "Bring," the operative verb in the definition, is a transitive verb meaning "to take or carry someone or something to a place or a person." Further, the tax is levied "at the time and place of the first taxable event and upon the first taxable person within [Washington]." Former Wash. Rev. Code §§ 82.36.022 & 82.38.031. Taken together, these provisions make clear that the state of Washington taxes the transportation of fuel into Washington for the purpose of sale in Washington.

Moreover, it is undisputed that the Department issued Assessment 756M and all subsequent assessments against Cougar Den because Cougar Den transported fuel into the Yakama Reservation. The tax was imposed when Cougar Den "imported" – that is, brought fuel across the state border – en route to its market on the Yakama Reservation. The Washington Supreme Court properly analogized the effect of this statute to the notification-based restriction at issue in *Smiskin*. Pet. App. 13a-14a.

D. The Department's Inflated Claims of Harm Do Not Merit Certiorari

Finally, the Department's revenue concerns are overstated and an inappropriate basis for certiorari. It would of course be premature to construe the Washington Supreme Court's decision beyond its facts.

Moreover, there are only two other tribes which were granted similar "Right to Travel" language in their treaties. One tribe is located within Idaho, and another is located within Montana. And while the state of Idaho has sought to be heard via an amicus brief in this matter, the state of Montana has not. Nor has the state of Oregon, the state where Cougar Den lawfully purchased the fuel at issue. Washington State's concern is evidently not uniformly shared.

It is well settled that the Department cannot abrogate the Yakama Nation's rights merely so that the Department might "pursu[e] the most efficient remedy" to enforce valid fuel taxes on Washington drivers. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991). If Washington State wishes to lawfully tax fuel consumption by non-Indians, without placing the incidence of the tax on tribal retailers selling on reservation or otherwise violating treaty rights, it has adequate resources to do so and can amend its statutes accordingly, as it has done in the past. Unless and until Congress amends the treaty promises at issue here, the Department must abide by them.

CONCLUSION

The Washington Supreme Court's holding is squarely within the bounds of the Ninth Circuit's decisions regarding the Treaty and the Department fails to identify a conflict with any decision of this Court. The Department's Petition for Certiorari should be denied.

DATED this 16th day of August, 2017.

Respectfully submitted,

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