16-1498

No. _____

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 SUPREME COURT OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

The question presented is:

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

PARTIES

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

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

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explicitly rejected the idea that Article III creates a "right to trade" off the reservation free from state taxes. *King Mountain*, 768 F.3d at 998.

Contradicting these Ninth Circuit holdings, the Washington court ruled for Cougar Den, granting it a massive tax exemption. It found that the Yakamas' treaty "right, in common with citizens of the United States, to travel upon all public highways," implicitly exempted Cougar Den from state wholesale fuel taxes, even though the tax "is assessed regardless of whether Cougar Den uses the highway" and no Yakama transported the fuel. App. 13a-14a. The court inferred this new right "[b]ased on the historical interpretation of the Tribe's essential need to travel." App. 16a.

The Washington Supreme Court's untenable interpretation of a federal treaty cries out for this Court's review. It not only conflicts with the Ninth Circuit's reading of the same language, but it also infers a tax exemption despite this Court repeatedly holding that "Indians going beyond reservation boundaries" are subject to non-discriminatory state taxes "[a]bsent *express* federal law to the contrary," and that "tax exemptions are not granted by implication." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 156 (1973) (emphasis added). The ruling will cost Washington hundreds of millions of dollars in fuel tax revenue and means that whether any other state tax—including cigarette taxes—is preempted as to the Yakama will now depend primarily on whether the tax is challenged in state or federal court. No State should face this dilemma, certainly not based on a state court's atextual approach to treaty interpretation long-rejected by this Court. The Court should grant certiorari.

OPINIONS BELOW

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

JURISDICTION

The Washington Supreme Court entered its opinion on March 16, 2017. App. 1a. The opinion is a final judgment and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES

Article III of the Yakama Treaty of 1855 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.

Treaty With the Yakamas, art. III, ¶ 1, 12 Stat. 951, 952-53 (June 9, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859).

STATEMENT OF THE CASE

A. Washington's Motor Vehicle Fuel Tax

Washington, like other states, taxes motor vehicle fuels. Wash. Rev. Code 82.36 (gasoline);

Wash. Rev. Code 82.38 (diesel fuel);[1] App. 4a; 51a. Washington imposes its tax when wholesale fuel is removed from bulk storage (such as when a tanker truck obtains fuel from a refinery), or when wholesale fuel in a tanker truck or rail car "enters into this state" after being removed from bulk sources outside the state. Wash. Rev. Code § 82.36.020(2)(c); Wash. Rev. Code § 82.38.030(7)(c); App. 51a-52a ("Fuel taxes are imposed at the wholesale level, when fuel is removed from the terminal rack or imported into the state."). The tax does not apply to those who transport fuel; it applies to the wholesale fuel supplier or distributor, regardless of how the fuel is transported, whether by rail, tanker truck, barge, pipeline, or otherwise. *See* Wash. Rev. Code § 82.36.020; Wash. Rev. Code § 82.38.030. Most states impose this type of tax at the wholesale level.[2]

Washington collects its fuel taxes through a license system administered by the Department of Licensing. App. 52a; Wash. Rev. Code § 82.36.080; Wash. Rev. Code § 82.38.090. When licensed fuel distributors purchase wholesale fuel from a bulk facility within Washington (typically a refinery or tank farm), the seller pays the tax. Wash. Rev. Code § 82.36.026; Wash. Rev. Code § 82.38.035. But if a

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[1] Citations refer to the 2013 Revised Code of Washington, in effect when the events in this case occurred. In 2016, Wash. Rev. Code 82.36 and Wash. Rev. Code 82.38 were merged without substantive change into a single chapter, Wash. Rev. Code 82.38. *See* 2013 Wash. Sess. Laws, page nos. 1322-1405 (ch. 225); 2015 Wash. Sess. Laws, page no. 1178 (ch. 228, § 40).

[2] Fed'n of Tax Admins., *State Motor Fuel Tax Points of Taxation Charts*, https://www.taxadmin.org/assets/docs/Motor Fuel/other-data/2012_pointstax.pdf.

distributor buys wholesale fuel from a bulk facility outside Washington and brings it into the State, then the tax applies when that fuel enters Washington and the distributor pays the tax after bringing the fuel into the State. App. 53a; Wash. Rev. Code §§ 82.36.026, .031, .035; Wash. Rev. Code §§ 82.38.030(9)(b), (c), .035(3). If an unlicensed person deals in wholesale fuel, the tax applies plus a penalty for acting without a license. App. 53a; Wash. Rev. Code §§ 82.36.100, .045, .080; Wash. Rev. Code § 82.38.170(6). The Department may assess taxes, penalties, and interest if it finds that taxes have been avoided. App. 53a; Wash. Rev. Code § 82.36.045; Wash. Rev. Code § 82.38.170. A Department assessment may be challenged in an agency hearing, followed by judicial review under the state Administrative Procedure Act, which occurred in this case. App. 53a.

Washington adopted its current fuel tax structure in 2007, after a federal district court ruled that the prior version of the statutes put the incidence of the tax on fuel retailers (gas stations). That ruling affected collection of taxes on fuel sold at Indian-owned gas stations within Indian reservations. App. 20a-22a. The 2007 amendments moved the incidence of the tax up the supply chain to persons who supply the fuel to retailers. *See* 2007 Wash. Sess. Laws, page nos. 2426, 2436 (ch. 515, §§ 20, 33) ("the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state"); Wash. Rev. Code § 82.36.022; Wash. Rev. Code § 82.38.031; App. 21a-22a; *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995) ("[I]f a State is unable to enforce a tax because the legal incidence of the impost is on Indians or

Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence."). As a result, since 2007 Washington fuel taxes have mirrored the tax upheld in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (Kansas fuel tax imposed outside Indian country on fuel wholesalers is valid notwithstanding economic effect on tribal gas station within Indian country).

B. Cougar Den Is a Yakama Indian Owned Company that Did Not Pay State Taxes on Wholesale Fuel Brought into Washington

The Yakama Nation is a federally recognized Indian tribe. App. 62a-63a; *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 415 (1989). It is the successor in interest to tribes and bands that executed a treaty in 1855 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 Washington Territory. Treaty with the Yakamas, art. I, 12 Stat. 951, 951 (1855). In Article II, the treaty reserved a tract known today as the Yakama Indian Reservation. 12 Stat. at 952. Roughly twenty percent of the reservation's 1.3 million acres are owned in fee by individual land-owners, with the remainder held in trust by the United States. *Brendale*, 492 U.S. at 415. "Most of the fee land is found in Toppenish, Wapato, and Harrah," three state-incorporated cities located within the reservation. *Id.* "The remaining fee land is scattered throughout the reservation in a 'checkerboard' pattern." *Id.* State highways and county roads funded by state fuel taxes serve these cities and the reservation. *See* Wash. Rev. Code § 46.68.090.

Respondent Cougar Den is owned by a Yakama member and incorporated under Yakama law. App. 2a, 63a (Stip. Facts 5-7). It has never applied for or held a Washington license to distribute wholesale fuel. App. 49a, 63a. It obtained an Oregon fuel dealer license in 2012 and used it to purchase wholesale fuel in Portland, Oregon. App. 63a, 64a. Cougar Den avoided paying Oregon fuel taxes by representing that its fuel would be exported wholesale across the state line into Washington under a tribal license. *See* Or. Rev. Stat. § 319.240. Cougar Den stipulated that it wholesaled millions of gallons of fuel in a matter of months without paying Washington state taxes. App. 64a (Stip. Facts 12-14). Cougar Den contracted with KAG West, a non-tribal company and subsidiary of North America's largest tank truck transporter, to transport its fuel from Oregon to Washington in KAG West's trucks. App. 40a. In this case, Cougar Den sold its fuel to Yakama-owned retail gas stations in Wapato, within the Yakama Reservation. App. 50a. Those stations sold the fuel to the general public. App. 50a.

After learning that Cougar Den brought millions of gallons of fuel into Washington without paying taxes, the Department assessed $3.6 million in taxes, penalties, and interest for wholesale fuel activities between March 2013 (when Cougar Den started its wholesale operation) and October 2013. App. 49a. Cougar Den continued to bring untaxed wholesale fuel into Washington and deliver it to retail stations without paying taxes. The Department continued to assess taxes, and later assessments are stayed in various administrative or judicial reviews, involving tens of millions of dollars in

avoided taxes. Similarly situated Yakama-owned businesses have expanded operations into California, shipping untaxed fuel to several Indian reservations there. App. 28a.

C. The Department of Licensing Rejected Cougar Den's Treaty Defense to Taxation in an Administrative Proceeding

In an administrative hearing challenging the assessment, Cougar Den raised only legal issues. It did not dispute that the tax applied outside the reservation or the amount that would be owed. But it claimed the tax violated Article III of the treaty, which provides for a "right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. at 953.

The Director of Licensing entered a final order rejecting Cougar Den's argument that the treaty encompassed a right to trade in untaxed fuel. App. 56a-58a. The order relied on three legal conclusions. First, the "Structure of Washington Fuel Tax Laws" showed that the tax was imposed on wholesale fuel distributors outside the reservation. App. 51a-53a. Cougar Den did not dispute this conclusion. Second, the order relied on this Court's rule that "[o]utside of Indian reservations, Indians are subject to state taxes and regulations absent express federal law to the contrary." App. 54a (citing *Mescalero*, 411 U.S. at 48-49). Third, the order examined prior federal decisions concerning the treaty right to travel on highways. Relying on those decisions, the order held that no treaty language expresses a right to engage in wholesale fuel trading free from the state's tax and without the required

license. App. 56a-58a. The taxes do not violate a treaty right because they "are not a charge for Cougar Den's use of public highways" but relate to the wholesale fuel itself. App. 58a.[3]

D. The Washington Supreme Court Holds that the Yakama Have a Right to Trade Wholesale Fuel Outside Reservation Boundaries that Preempts State Taxation

Cougar Den sought judicial review of the final order, challenging the legal conclusions concerning the meaning of the treaty. A superior court agreed with Cougar Den, ruling that the treaty "shields the transport of fuel, owned by Cougar Den," if fuel is moved on public highways from Oregon "across the Columbia River and into the State of Washington." App. 39a. The Department appealed directly to the Washington Supreme Court. The Yakama Nation appeared as amicus, endorsed Cougar Den's positions, and argued on its behalf.

The Washington Supreme Court affirmed the superior court in a divided decision. Moving quickly past the treaty language, the majority focused on how it thought the Yakama would have understood the treaty when it was signed. App. 6a-9a, 16a. In doing so, the majority relied primarily on the district court and appellate opinions in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). *Cree* involved "various Washington truck license and overweight permit fees," i.e., fees

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[3] Cougar Den first presented its arguments to an administrative law judge, who issued an initial order in Cougar Den's favor. App. 44a. On review, the Director reversed and upheld the tax. App. 59a.

paid in order to use highways. *Id.* at 764. There, the Ninth Circuit held, based on the Yakamas' treaty-time understanding, that "the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of *fees for that use*." *Id.* at 769 (emphasis added). The majority recognized that this case was different because here "the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway." App. 13a-14a. But the Court held that this was "immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway." App. 14a.

To support expanding *Cree*'s holding beyond fees for using a highway, the majority cited *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), calling it "nearly identical to this case." App. 13a. *Smiskin* rejected prosecution of two Yakama members under the Federal Contraband Cigarette Trafficking Act, which makes it illegal to possess or transport cigarettes without paying state taxes or complying with state law. Washington law allows transport of untaxed cigarettes only if the transporter gives the State advance notice. The Ninth Circuit held that "applying the State's pre-notification requirement to the Smiskins violates the right to travel guaranteed in Article III of the Treaty." *Smiskin*, 487 F.3d at 1264. The majority deemed *Smiskin* controlling because "[i]n both cases, the State placed a condition on travel that affected the Yakamas' treaty right to transport goods to market without restriction." App. 13a.

The majority sought to distinguish *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1452 (2015). *King Mountain* involved a Yakama-owned cigarette company that grew tobacco on the reservation, shipped it to Tennessee and North Carolina for processing and blending, then back to the reservation where it was made into cigarettes the company sold "throughout Washington and in about sixteen other states." *Id.* at 994. The company argued that Article III of the Treaty exempted it from paying escrow fees the State imposes on cigarette manufacturers. The Ninth Circuit rejected that reading: "the Treaty is not an express federal law that exempts King Mountain from state economic regulations." *Id.* at 994. The Ninth Circuit also held that there was no need to "engage in an exhaustive review of the meaning the Yakama would have given to the Treaty as of 1855" because "the relevant text of the Yakama Treaty is not ambiguous and the plain language of the Treaty does not provide a federal exemption from the Washington escrow statute." *Id.* at 994, 995.

The majority below dismissed *King Mountain*, asserting that "travel was not at issue" in that case. App. 13a. The majority reasoned that "[w]here trade does not involve travel on public highways, the right to travel provision in the treaty is not implicated." App. 13a. But, the majority concluded, "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." App. 16a.

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

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

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

that use.'" App. 25a (quoting *Cree v. Flores*, 157 F.3d at 769).

The dissent also pointed out the further conflict with *King Mountain*'s holding that the treaty language was unambiguous and could not be read to create a "right to trade" that preempted economic laws of the states. App. 25a. The dissent concluded that wholesale fuel excise taxes are indistinguishable from the tobacco escrow payments challenged in *King Mountain*, because neither burdened travel on highways and both imposed financial burdens on goods. App. 26a. This distinction could not be avoided simply by transporting goods because "[w]ithout travel, most goods have no market." App. 26a. "The necessity to bring its burdened goods to market did not entitle King Mountain to an exemption on its escrow obligation." App. 26a.

The dissent concluded that the majority "puts at risk . . . Washington's, and potentially other states', ability to tax goods consumed within its borders." App. 27a (citing avoidance of California fuel excise tax by a Yakama Indian fuel dealer). Moreover, "[n]othing indicates any of the parties understood the Treaty of 1855 to provide for such a right." App. 28a.

REASONS WHY THE PETITION SHOULD BE GRANTED

A. The Washington Supreme Court and Ninth Circuit Are Split on Whether this Treaty Creates a Right to Trade Without State Economic Regulation or Taxes

The Washington Supreme Court and the Ninth Circuit have addressed the same language

in the same treaty but reached completely different conclusions. The Ninth Circuit held that "the Treaty is not an express federal law that exempts [Yakama businesses] from state economic regulations," including taxes and state charges directed at goods sold by Yakamas. *King Mountain*, 768 F.3d at 994. Indeed, the Ninth Circuit held that the treaty language is unambiguous and leaves no room to rewrite it based on allegations about historical understandings. In contrast, the Washington Supreme Court, relying entirely on inferences and alleged historical understandings, held below that "any trade, traveling, and importation that requires the use of public roads" by the Yakama is exempt from taxation under the treaty. App. 16a. As a result, the state court granted Cougar Den an exemption from taxes on wholesale fuel that apply off-reservation and "regardless of whether Cougar Den uses the highway." App. 13a-14a. This genuine conflict and its significant impact on state revenues should be resolved by this Court.

1. The Ninth Circuit interprets this treaty to allow use of highways without paying "fees for that use" or advance notice, but not to preempt other taxes or regulations

The Ninth Circuit has interpreted the treaty language at issue here several times. It has held that the treaty preempts a state tax imposed *for using highways* and requirements that the Yakama obtain state approval prior to traveling, but that the treaty does not preempt other charges, taxes, or regulations directed at goods themselves, like those at issue here.

The Ninth Circuit first interpreted this treaty language in *Cree v. Waterbury*, 78 F.3d 1400, 1402 (9th Cir. 1996) ("No prior decision has interpreted the Treaty's highway right."). It rejected the district court's ruling that the meaning of Article III had already been determined in cases interpreting other sections of the treaty. *Id.* at 1403-04. It remanded to the district court for it "to examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right." *Id.* at 1405.

The district court conducted that inquiry and the case returned to the Ninth Circuit in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). Based on extensive consideration of the treaty's language, *id.* at 769-72, and the district court's factual findings, *id.* at 772-73, the court held that the treaty right to travel on highways preempted "various Washington truck license and overweight permit fees," i.e., "fees imposed for use of the public highways," when Yakamas used highways to transport logs to off-reservation mills. *Id.* at 764, 768. The court explained that this "guarantee[d] the Yakamas the right to transport goods to market over public highways without payment of *fees for that use*." *Id.* at 769 (emphasis added).

The Ninth Circuit, however, quickly made clear that this treaty right was limited and did not extend even to federal highway taxes. In *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812 (2003), the United States had assessed Kip Ramsey (Cougar Den's owner) for unpaid taxes for using heavy trucks and diesel fuel on public highways

in his logging business. Ramsey challenged the taxes, invoking the right to travel provision and arguing that *Cree* controlled. The Ninth Circuit disagreed. The court held that a different approach to treaty interpretation applies depending on whether a state or federal tax is at issue. *Ramsey*, 302 F.3d at 1078. As to both types of tax, "tax laws applied to Indians outside of Indian country . . . are presumed valid absent express federal law to the contrary." *Id.* at 1077 (internal quotation marks omitted). With a federal tax, the court said, there must be "express exemptive language" in the treaty before the court even considers canons of construction to determine whether "the exemption applies to the tax at issue." *Id.* at 1079. By contrast, the court said, when a court evaluates a state tax, "there is no requirement to find express exemptive language *before* employing the canon of construction favoring Indians." *Id.* at 1079. Applying this standard, the court held that the treaty "contains no 'express exemptive language'" and thus creates no treaty right to avoid federal taxes on fuel used by trucks on the highway. *Id.* at 1080.[4]

The Ninth Circuit also limited its reasoning in the only other case in which it has found preemption of state law under the Article III right to travel on public highways. In *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), the court held that the

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[4] The State is unaware of any other Circuit applying this rule that courts should take a different approach to interpreting treaties depending on whether a state or federal tax is at issue. Ultimately this idiosyncratic rule makes no difference to the conflict here, because the Washington Supreme Court's decision conflicts with the Ninth Circuit's approach even as to *state* taxes, as demonstrated by the *King Mountain* decision.

treaty guaranteed the Yakamas the right to travel on public highways without obtaining prior approval from the State. *Smiskin*, 487 F.3d at 1267. The court therefore held that the treaty barred prosecution of two Yakama members for transporting unstamped (i.e., untaxed) cigarettes without first notifying the State. *Id.* at 1267. Importantly, the *Smiskin* court never suggested that the treaty preempted state cigarette tax as to the Yakama, only that it preempted the requirement of providing notice in advance of using a highway. *See also United States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008) (the treaty did not preempt prosecution of a Yakama for conspiring to violate federal law by agreeing to transport unstamped cigarettes in violation of state law, because the untaxed cigarettes were contraband).

The Ninth Circuit summarized and further clarified the scope of the treaty right in its most recent decision addressing Article III. In *King Mountain*, 768 F.3d 989, the court considered whether the treaty preempted a state fee that tobacco manufacturers had to pay on each unit of cigarettes they sold to help offset the long-term healthcare costs created by tobacco use. *Id.* at 991-92. King Mountain was a Yakama-owned tobacco manufacturer that engaged in extensive interstate trade as part of its manufacturing process, *id.* at 991, and it argued that Article III of the Treaty and *Smiskin* exempted it from paying into the escrow fund.

The Ninth Circuit emphatically rejected this argument. The court first underscored that regardless of whether a state or federal tax is at issue, the key question in assessing whether a treaty preempts a tax applied off-reservation is whether "an express federal

law" exempts the tribal "business from state regulation." *King Mountain*, 768 F.3d at 994. The court noted that because a state tax was at issue, it would consider canons of construction in assessing whether the treaty amounted to an "express federal law" exempting King Mountain from tax. *Id.* at 995. But it emphasized that "the canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *Id.* (alterations in original) (quoting *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986)). Applying this principle, the court found no need to "engage in an exhaustive review of the meaning the Yakama would have given to the Treaty as of 1855" because "the relevant text of the Yakama Treaty is not ambiguous and the plain language of the Treaty does not provide a federal exemption from the Washington escrow statute." *Id.* at 994, 995. While "the plain text of Article III . . . reserved to the Yakama the right 'to travel upon all public highways,'" nothing in the treaty's text created a "right to trade" free of state taxes or regulations. *Id.* at 997. Thus, no alleged "meaning to the Yakama people [could] overcome the plain and unambiguous text of the Treaty." *Id.* at 998. This Court denied certiorari after the Yakama Nation urged that the Ninth Circuit's reliance on language was contrary to this Court's precedent. *Confederated Tribes & Bands of the Yakama Indian Nation v. McKenna*, 135 S. Ct. 1542 (No. 14-947, Petition for Writ of Certiorari denied Mar. 9, 2015).

The Ninth Circuit has thus made clear its view of the limits to this treaty right, rooted in the Treaty's text. The Treaty guarantees Yakama members a "right to travel" that exempts them from paying state fees for using the highways or obtaining state approval to use the highways. *Cree v. Flores*, 157 F.3d at 764; *Smiskin*, 487 F.3d at 1264. But the Treaty is not an express federal law exempting the Yakama from taxes incidental to trade, even if the trade makes use of the highways, because the Treaty contains no "right to trade" free of taxes. *King Mountain*, 768 F.3d at 998; *Ramsey*, 302 F.3d at 1080. Under this reasoning, the Treaty would not preempt the wholesale fuel tax at issue here because, as even the majority below acknowledged, the tax applies "regardless of whether Cougar Den uses the highway." App. 13a-14a.[5]

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[5] District courts have consistently applied the Ninth Circuit view during the past decade. In *United States v. King Mountain Tobacco Co., Inc.*, No. 1:14-cv-3162-RMP, 2015 WL 4523642 (E.D. Wash. July 17, 2015), *appeal docketed*, No. 16-35956 (9th Cir. Nov. 17, 2016), the company objected to assessments under the federal Fair and Equitable Tobacco Reform Act. The court held that the assessments "do not constitute a 'restriction' or 'condition' on the use of public highways." *Id.* at *15. "[T]he Yakama Treaty does not guarantee the right to trade unencumbered." *Id.*

The same court also rejected, twice, the argument that a federal excise tax on tobacco interfered with "free access . . . to the nearest public highway" under the treaty, saying that the Yakama Indian was "not being taxed for using on-reservation roads. It is being taxed for manufacturing tobacco products." *King Mountain Tobacco Co., Inc. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061, 1068 (E.D. Wash. 2014) (quoting *Ramsey*, 302 F.3d at 1076-77), 1069, *vacated on other grounds sub nom. Confederated Tribes & Bands of the Yakama*

2. The Washington Supreme Court creates a conflict by declaring that "any trade, traveling, and importation that requires the use of public roads" cannot be taxed

The Washington Supreme Court majority's view of the treaty is diametrically opposed to the Ninth Circuit's. This leads to its contrary result, holding that the State's wholesale fuel tax is preempted as to Cougar Den even though it is undisputed that the tax applies "regardless of whether Cougar Den uses the highway." App. 13a-14a.

The Washington court began its opinion by acknowledging that "[a]bsent express federal law to the contrary," Indians going beyond reservation boundaries are subject to non-discriminatory state taxes. App. 17a (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). And it recognized that the tax at issue here is non-discriminatory and its incidence is off-reservation. *Id.* at 4a-5a.

In finding that the Treaty amounted to "an express federal law" preempting state taxes, however, the court quickly skipped over the Treaty's actual language and went directly to exploring how the Yakama allegedly would have understood it

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Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau, 843 F.3d 810 (9th Cir. 2016); *United States v. King Mountain Tobacco Co., Inc.*, No. CV-12-3089-RMP, 2014 WL 279574 (E.D. Wash. Jan. 24, 2014), *appeal docketed*, No. 14-36055 (9th Cir. Dec. 11, 2014); *see also Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258, 1267-68 (E.D. Wash. 2010) (rejecting claim that treaty preempts state taxes on cigarettes), *aff'd on other grounds*, 658 F.3d 1078 (9th Cir. 2011).

historically. App. at 5a. This was contrary to both this Court's approach (as explained in Part B, below) and the Ninth Circuit's. *See King Mountain*, 768 F.3d at 997 ("As shown by the plain text of Article III, the Treaty reserved to the Yakama the right 'to travel upon all public highways.' Nowhere in Article III is the right to trade discussed."); *Ramsey*, 302 F.3d at 1080 ("[T]here is no express exemptive language in the Treaty to exempt the Yakama from the generally applicable, federal heavy vehicle and diesel fuel taxes."); *Cree v. Flores*, 157 F.3d at 770 (trial court "evaluated the public highways clause on its own and in terms of the Treaty as a whole"); *Cree v. Waterbury*, 78 F.3d at 1403 ("To determine the parties' intent, the court must examine the treaty language as a whole, the circumstances surrounding the treaty, and the conduct of the parties since the treaty was signed."). Thus, the state court never mentioned that the treaty says nothing about a right to trade or to avoid taxes on goods, or any words suggesting an exception to future state or federal laws governing trade using highways. But by using this approach, untethered from text, the state court declared a treaty right far broader than any recognized by the Ninth Circuit: "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." App. 16a.

The state court sought to justify its holding based on readings of Ninth Circuit opinions that are irreconcilable with those opinions and that the Ninth Circuit itself repudiates. The state court split from the Ninth Circuit's holdings in three crucial respects.

First, the Washington court cited *Cree* to assess the Yakamas' alleged understanding of the treaty and

to find an implied "right to trade" free of state taxes. App. 6a-9a. But the issue in *Cree* was limited to a tax imposed for using the highway. *Cree v. Flores*, 157 F.3d at 765. Here, the majority acknowledged that the tax is not for using the highway, but rather is for engaging in distribution and sale of wholesale fuel. App. 14a. As to this type of tax, which is not directly related to highway use, the Ninth Circuit has made clear that no resort to historical analysis is necessary because nothing in the treaty language can be interpreted as creating an exemption from such a tax. *King Mountain*, 768 F.3d at 994-95, 998.

Second, the state court made pervasive misuse of *Smiskin*. The state court relied on dicta in *Smiskin* describing a "right to travel outside reservation boundaries, *with no conditions attached*." App. 10a (citing *Smiskin*, 487 F.3d at 1266 (emphasis in *Smiskin*)). But the "condition" at issue in *Smiskin* was *not* taxation of cigarettes—the court never suggested that the State's taxes were invalid; the condition was requiring notice before using a highway. *Smiskin*, 487 F.3d at 1264 ("critical question" is whether applying state "pre-notification requirement to Yakama tribal members who possess and transport unstamped cigarettes violates the Yakama Treaty of 1855"); *King Mountain*, 768 F.3d at 998 (reading *Smiskin* as concerning a notice "requirement" that "imposes a condition on travel").[6] The state court treats this

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[6] *See also Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, No. CV-08-3056-RHW, 2010 WL 9113878 (E.D. Wash. Order dated Nov. 9, 2010) (*Smiskin* held "only that the prenotification requirement in particular impermissibly infringed on Yakamas' right to travel"), *aff'd on other grounds*, 658 F.3d 1078 (9th Cir. 2011); App. 24a (dissent).

phrase in *Smiskin,* however, as though it declared a nearly infinite treaty right to avoid anything directed at trade while traveling, by holding that a tax or regulation of property transported over a highway is a "condition" on travel. App. 10a (quoting *Smiskin*).

The state court's strained reading of *Smiskin* cannot be reconciled with *King Mountain*, which rejected this same argument and held that paying escrow charges on cigarettes is not a "condition" or restriction on travel under the treaty. *King Mountain*, 768 F.3d at 997 (rejecting argument that *Smiskin* and *Cree* prohibit "imposition of economic restrictions or pre-conditions on the Yakama people's Treaty right to engage in the trade of tobacco products"). There is thus no merit to the state court majority's conclusion that "*Smiskin* is nearly identical to this case." App. 13a. Read fairly and in light of subsequent cases, *Smiskin* provides no support for the state court holding that a tax on wholesale fuel inventories is a "condition on travel that affect[s] the Yakamas' treaty right to transport goods to market without restriction." App. 13a.

The state court's final and most glaring conflict with Ninth Circuit precedent has to do with *King Mountain.* The Washington court quickly dispensed with *King Mountain*, opining that "[t]he difference between *Smiskin* and *King Mountain* is that in *King Mountain,* travel was not at issue." App. 13a. The Ninth Circuit opinion in *King Mountain* refutes that statement. "King Mountain ships its tobacco crop to Tennessee where it is threshed. Then the tobacco is sent to a factory in North Carolina where more tobacco is purchased and blended with reservation tobacco." *King Mountain*, 768 F.3d at 994. King

Mountain then has its tobacco "sent back to the reservation, where much of it is made into cigarettes. King Mountain sells its tobacco products throughout Washington and in about sixteen other states." *King Mountain*, 768 F.3d at 994.

If *King Mountain* did not sufficiently involve travel, then neither does this case, which involves simple importation of fuel from Oregon into Washington. The wholesale fuel tax and the charges and taxes on tobacco are equally directed to Yakama-owned goods transported over the same highways. Indeed, the majority opinion admitted that highway use is entirely incidental to the fuel tax because the tax applies "regardless of whether Cougar Den uses the highway." App. 13a. The majority then found the absence of taxation related to highway use "immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway." App. 14a. The majority did not explain how this point distinguished this case from *King Mountain*, while the dissent pointed out how this was no distinction at all because virtually all goods require transportation to be marketed. App. 26a.

In short, under *King Mountain*, the Ninth Circuit would have upheld application of the State's wholesale fuel tax to Cougar Den. Yet the Washington court found the tax preempted and declared a far broader treaty right than the Ninth Circuit has ever recognized. This conflict warrants this Court's review. No other court can reconcile these starkly different results and eliminate the resulting harm to the State, its taxpayers, and its businesses facing the competitive disadvantage of tax avoidance by a Yakama business.

B. The Washington Supreme Court Decision Conflicts with this Court's Holdings on Construing Indian Treaties and Preemption of State Laws

The Washington Supreme Court ruling also warrants review because it conflicts with this Court's case law. First, it defies this Court's fundamental rule that state taxes and regulations apply to Indians outside reservation boundaries absent an express federal law providing for preemption. Second, it contradicts this Court's long-standing rules for interpreting Indian Treaties because the state court relied on subjective inferences about historical understanding to supply a right that does not exist in the treaty language itself.

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero*, 411 U.S. at 148-49; *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) ("Unless federal law provides differently, Indians going beyond reservation boundaries are subject to any generally applicable state law." (internal quotation marks omitted) (citing *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005))).

This principle applies with special force to tax laws. Tribes and their members are subject to generally applicable off-reservation taxes "[a]bsent a 'definitely expressed' exemption." *Mescalero*, 411 U.S. at 156 (quoting *Choteau v. Burnet*, 283 U.S. 691, 696 (1931)). "[T]ax exemptions are not granted by

implication." *Mescalero*, 411 U.S. at 156 (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943)). They must be "clearly expressed." *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (citing *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) ("[E]xemptions from taxation . . . must be unambiguously proved")). This rule is not merely a tool of interpretation; it is a critical "bright-line standard" "to ensure efficient tax administration" by the states. *Wagnon*, 546 U.S. at 113.

The Washington Supreme Court cited this rule in passing, but gave it no effect. App. 4a-5a (citing *Mescalero*, 411 U.S. at 148). The majority noted that "[a] treaty constitutes an express federal law," App. 4a, but that truism ignores that the relevant question is what the treaty Congress ratified actually says. And the majority never explained how the Yakamas' "right, in common with citizens of the United States, to travel upon all public highways," could possibly create an "express exemption" from a wholesale fuel tax that even the majority acknowledged "is assessed regardless of whether Cougar Den uses the highway." App. 13a-14a. The conflict with this Court's "express exemption" requirement is palpable.

The Washington court also departed from this Court's case law by relying upon the claimed historical understanding of the Yakama in order to read into the treaty a right to avoid taxation that does not exist anywhere in the treaty language itself. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995) ("liberal construction cannot [overcome] a clear geographic limit in the Treaty"). Only if language is ambiguous will this

Court seek to construe it "in accordance with the tenor of the treaty," while "stop[ping] short of varying its terms to meet alleged injustices." *Northwest Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945).

The Ninth Circuit has correctly held that this treaty unambiguously includes no right to engage in tax-free trade. *King Mountain*, 768 F.3d at 998. But the Washington Supreme Court layered inference on top of implication in finding such a right "[b]ased on the historical interpretation of the Tribe's essential need to travel extensively for trade purposes." App. 16a. This is precisely the type of rewriting of a treaty based on inferred understandings this Court uniformly rejects. This rewriting based on alleged historical understanding is particularly troubling given that for at least 125 years after the treaty was signed, neither party to the treaty interpreted it the way the Washington Supreme Court now has. Prior to 1980, neither the Yakama Tribe nor any of its members had claimed a right to transport goods via public highways free of state taxation. *Yakima Indian Nation v. Flores*, 955 F. Supp. 1229, 1254-55 (E.D. Wash. 1997). And the United States still rejects such an understanding. When it opposed certiorari in *Ramsey v. United States*, No. 02-1547 (denied Oct. 6, 2003), the government rebutted Yakama arguments that a right to engage in tax-free interstate trade

could be found anywhere in the treaty, disclaiming a historical understanding of tax-free highway trading.[7]

The bottom line is that the Washington court found a tax exemption based not on any express exemption, but on inferences about alleged understandings that bear no relation to the treaty's text. Based on the tribe's "right, in common with citizens of the United States, to travel upon all public highways," the court found an exemption from wholesale fuel taxes even when no Yakama member had traveled on a public highway to transport the fuel and even though the tax applies regardless of whether the fuel is transported by highway. This is not an "express exemption," and no textual ambiguity justifies this untenable reading. The Court should grant the petition to address these conflicts with its precedent.

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[7] In *Ramsey,* the United States Brief in Opposition pointed out that the Yakama argument claiming avoidance of taxation was contrary to the "settled principle" "that exemptions from taxation are not to be implied; they must be unambiguously proved" even in the context of an Indian treaty. BIO at 7 (quoting *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988)) (citing *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939) ("Exemptions from taxation do not rest upon implication.")). It pointed out that *Mescalero* applied to the treaty, because there was no language to create any right to avoid diesel taxes. BIO at 7. "The treaty does *not* refer to taxation at all." BIO at 8 (emphasis in original). "In providing the Yakama a right 'in common with citizens of the United States,' the treaty *expressly* gives the Yakama a right equal to, not superior to, the right of other citizens to travel on public highways." BIO at 9 (emphasis in original). As noted above, these observations apply equally to this case.

C. The Question Presented Is Important Because It Concerns the Critical State Power of Taxation

This Court has long recognized the critical importance of state taxing powers. "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. City of Chicago*, 78 U.S. 108, 110 (1870). The enormous tax consequences of this case call out for this Court's immediate review. The $3.6 million in state revenues directly at issue in this case covers only taxes incurred during a seven month period in 2013. But the outcome of this case will control tens of millions in additional taxes that have been assessed against Cougar Den for later tax periods, in addition to taxes payable by similarly situated Yakama businesses. The harm to Washington taxpayers from this ruling will easily top hundreds of millions in the near future.

This issue matters beyond Washington because Cougar Den has demonstrated its intent to engage in fuel tax avoidance in other states. Cougar Den has obtained or is seeking fuel exporter licenses in Idaho (license number 004673649), Nevada (license number MCEX00046868), and Washington (application pending). Such licenses will permit it to obtain untaxed fuel for transport to lucrative markets in other states, where it will undoubtedly refuse to pay the tax imposed by the state where its fuel is

wholesaled. This includes markets such as southern California, where on-reservation retailers have already taken advantage of Yakama-supplied tax-free fuel. App. 28a-29a. In a short time, this state court ruling will allow a Yakama member to evade this Court's holding in *Wagnon*, with the potential to harm every state with wholesale fuel taxes like the Kansas tax upheld there. Without prompt review, states will lose critical revenues during disputes or relitigate the same legal question in other forums, wasting State and judicial resources.

Moreover, fuel taxes are not the only taxes likely affected by the ruling below. The Washington court held that "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." App. 16a. Thus, any good that the Yakamas transport (or contract to have transported, as here) is now potentially exempt from state taxation, at least if the tax is litigated in state court. This Court has recognized that "tax administration requires predictability." *Oklahoma Tax Comm'n*, 515 U.S. at 459-60. This ruling guarantees unpredictability.

This unpredictability will also extend beyond Washington, because Yakama businesses have already cited the Treaty to avoid taxes as to other (non-fuel) products in other states. *See, e.g.*, *New York v. King Mountain Tobacco Co.*, 953 F. Supp. 2d 385, 391 (E.D.N.Y. 2013) (noting defendant's argument that Yakama Treaty forecloses New York's regulatory

authority over defendant Yakama cigarette maker). And the same treaty language is found in treaties with at least two tribes in other states. Treaty With the Nez Percés, art. III, ¶ 1, 12 Stat. 957, 958 (June 11, 1855, ratified Mar. 8, 1859, proclaimed Apr. 29, 1859); Treaty With the Flatheads, art. III, ¶ 1, 12 Stat. 975, 976 (July 16, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859).

Given the hundreds of millions of dollars at stake for Washington, the uncertainty this ruling creates as to other taxes, and the threats to other States, this Court should promptly review the Washington Supreme Court's extraordinary holding.

D. This Case Provides a Perfect Vehicle to Determine if the Yakama Treaty Creates a Right to Avoid Taxes on Goods Shipped over Public Highways

There is no vehicle problem that would interfere with this Court's resolution of this case. The state court ruling is limited to one issue: the federal question regarding the meaning of the treaty. App. 4a. Because its decision is based on a summary judgment record and previously decided cases, the issues in this case are entirely questions of law. *See Houchins v. KQED, Inc.*, 429 U.S. 1341, 1342-43 (1977) (interpretation of prior judicial rulings presents a question of law). Moreover, this Court's ruling would entirely resolve this case: the state court agreed that, but for this alleged treaty right, the tax indisputably applies. App. 5a. The Court would thus be able to decide cleanly the important question whether the treaty language creates an exemption from off-

reservation taxes for Yakama-owned businesses using the public highways.

CONCLUSION

The Washington Supreme Court's decision creates a clear conflict with decisions of the Ninth Circuit and this Court, will have enormous financial implications for Washington and other States, and offers a perfect opportunity to address the question presented. The Court should grant certiorari.

RESPECTFULLY SUBMITTED.

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June 14, 2017