No. 18-984

In the Supreme Court of the United States

KING MOUNTAIN TOBACCO COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the Petition for Writ of Certiorari remains accurate.

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ARGUMENT

The circuit split presented by this petition is deep and will continue to plague the lower courts in the absence of intervention by this Court. Pet. 12-20; *compare* Pet. App. 1a-34a, 56a-61a *with Lazore v. Commissioner*, 11 F.3d 1180 (3d Cir. 1993); *Chickasaw Nation v. United States,* 208 F.3d 871, 884 (10th Cir. 2000), *aff'd*, 534 U.S. 84 (2001); *Holt v. Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966); *Cook v. United States,* 32 Fed. Cl. 170 (Fed. Cl. 1994), *aff'd,* 86 F.3d 1095 (Fed. Cir. 1996).[1] In its brief in opposition, the United States does not refute the repeated statements by the circuit courts, noted scholars and the district court below that the Ninth Circuit is in conflict with every other circuit that has considered the standard for using Indian canons of construction in a federal tax case. *See id*. Similarly, the United States appears to concede that this split raises an issue of federal law that directly impacts the treaty rights of Native Americans.

The Government's sole bases for urging this Court to deny certiorari are that (1) the split may just be a "minor disagreement" among the circuit courts, Br. in Opp. 17, and (2) if the Ninth Circuit had applied the standard used by the other circuits, the United States would still prevail on the merits, *id*. 11-14. The thin reeds to which the Government clings are unavailing.

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[1] The majority rule is frequently referred to as the *Lazore* test.

I. REVIEW BY THIS COURT IS WARRANTED.

The split among the five circuit courts[2] is real and gives rise to great practical concerns. Native Americans are subject to different standards for how their treaty rights will be construed based solely on the circuit in which their reservation is located. The Government seeks to delay the resolution of this split by characterizing it as a "minor disagreement" among the circuits. *Id.* at 17. This case illustrates that the split between the Ninth Circuit and every other circuit to have considered this issue is far from minor.

Here, the district court concluded that the stringent standard adopted by the Ninth Circuit precluded the district court from even considering extrinsic evidence in determining important rights under the Treaty Between the United States and the Yakama Nation of Indians, 12 Stat. 951 (June 9, 1855) ("the Treaty"). *See* Pet. App. at 85a, 91a, 97a, 140a-142a. On appeal, the Ninth Circuit affirmed the district court's conclusion that it was required, under Ninth Circuit precedent, to exclude extrinsic evidence – regardless of how probative that evidence may be of the parties' intent.[3] *See* Pet. App. 28a. More importantly, the Ninth Circuit reiterated that

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[2] The majority of federal Indian Reservations are located in the Third, Eighth, Ninth and Tenth Circuits. Pet. 20. The Federal Circuit appears to have also weighed in on this issue. *Id.* at 18.

[3] In contrast, the Washington Supreme Court in *Cougar Den* considered extrinsic evidence in concluding that the Yakamas' right to travel cannot be restricted by taxing that right. *Cougar Den, Inc. v. Dep't of Licensing*, 392 P.3d 1014, 1017 (Wash. 2017), *aff'd,* 139 S. Ct. 1000 (2019).

under its more stringent test, the exclusive focus is the "Government's intent to exempt the Yakama from federal taxation" – regardless of how the Yakama people read the Treaty at the time. Pet. App. 31a; *see id.* at 27a; Br. in Opp. at 8. As this Court's recent decision in *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019) illustrates, the ability to consider extrinsic evidence and the lens by which a Treaty is considered (i.e., that of the United States versus Native Americans) is often outcome determinative.

Moreover, little question exists that the United States has a moral and fiduciary obligation to protect the treaty rights of Native Americans. Having taken the lands of the Yakama people 164 years ago, our Nation must not disregard its continuing obligation to preserve the terms of the Treaty as the Yakamas understood it. *See Herrara v. Wyoming,* No. 17-532, slip op. at 19 (May 20, 2019). As a result, the Ninth Circuit's decision is not consistent with Indian canons of construction and stands as an outlier among the other circuits. Attempting to characterize the circuit split as a "minor disagreement" is misplaced.

II. THE GOVERNMENT'S MERITS ARGUMENT IS PREMATURE AND DOES NOT STAND AS A BASIS FOR DENYING THE PETITION.

The Government's principal argument is that certiorari should be denied because the United States would prevail even if the Ninth Circuit had applied the test used by the majority of circuit courts

(which is more favorable to Native Americans than the Ninth Circuit's test). Br. in Opp. 16-18. On past occasions, the United States has urged this Court not to determine whether a case is cert-worthy based on whether the Petitioner will ultimately prevail. *See, e.g., WesternGeco LLC v. ION Geophysical Corp.,* Br. of U.S. as Amicus 22 (filed Dec. 6, 2017) (in urging this Court to grant cert, the United States argued that an alternative defense that may bar the merits of the dispute from ever being reached "does not pose an obstacle to this Court resolving the Question Presented"). Not only is the Government's merits argument premature, it is incorrect.

1. The Government essentially argues that regardless of whether this Court were to (1) adopt the test of the Ninth Circuit, (2) adopt that of the Third, Eighth, Tenth or Federal Circuits, or (3) create an entirely different standard, "the outcome would be the same." Br. in Opp. 16. In making this argument, the United States wholly ignores the fact that the Ninth Circuit focused on the intent of the Government and refused to consider any extrinsic evidence bearing on the intent of the Yakamas. Because the extrinsic evidence that was available to and considered by the Washington courts in *Cougar Den* was rejected by the district court and the Ninth Circuit, the merits cannot be decided on the present record. The issue before this Court is the appropriate standard for construing a treaty's impact on a federal tax. That unsettled question must be resolved before fairly determining how this Treaty should be read and construed.

2. The United States argues that Article III of the Yakama Treaty is not applicable because the Fair and Equitable Tobacco Reform Act ("FETRA"), 7 U.S.C. § 518-519, is analogous to a tax on the manufacturing of tobacco products – rather than a restriction on transporting tobacco products. Br. in Opp. 13. The plain language of FETRA, however, shows that the assessment is a fee – not a tax. 7 U.S.C. § 518d(b)(1). Moreover, that fee is not triggered by the act of manufacturing a tobacco product.[4] Instead, FETRA refers to the imposition of a fee on manufacturers who sell tobacco products. *Id.* A sale for purposes of determining a FETRA assessment arises when tobacco products are removed from the manufacturing plant (i.e., the act of transporting cigarettes) – regardless of whether the tobacco products have actually been sold to a purchaser. 7 U.S.C. § 518d(h).

FETRA's plain language provides absolutely no support for the Government's assertion that FETRA should be treated as a tax on manufacturing – and therefore does not implicate the Yakamas rights under Article III of the Treaty to transport goods without restriction. This merits argument is premature and is weak at best. The Government errs in asserting that the petition is not an appropriate vehicle for resolving this significant circuit split.

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[4] The United States asserts that "the close textual relationship" should result in the FETRA assessment being viewed as a fee "on the privilege of manufacture." Br in Opp. 13.

3. The Government's arguments on the merits of the federal tobacco tax, 26 U.S.C. § 5701-5703, are equally unavailing. The Government concedes, as it must, that the federal tobacco tax is not triggered until Petitioner's trucks carrying tobacco products roll out of the company's gates en route to the marketplace. *See* Br. in Opp. 2. The tax arises not at the instant a tobacco product is manufactured, but at the instant such a product is removed from Petitioner's plant and transported for sale or distribution. Pet. 29-30.

Under the federal tobacco tax statute and its accompanying regulations, Petitioner is not obligated to pay the tax until after the act of removing the products from the plant (i.e., having the goods at issue roll out the factory's front gate) has occurred. *Id.* The tobacco tax is triggered by the removal/transportation of tobacco products – not the act of manufacturing a tobacco product. A substantial portion of tobacco products manufactured in the United States is not subject to any tax – because the cigarettes are destined for export. *See* 27 C.F.R. § 44.61. When, however, tobacco products intended for export are diverted to the U.S. market, the federal excise tax is triggered at the instant the products are transported into the domestic market.

The petition sets out in detail the various statutes and regulations that expressly provide that that the tobacco tax is triggered by transportation of tobacco products – not the manufacture of those products. Pet. 29-30 (citing 7 U.S.C. § 518d; 26 U.S.C. §§ 5701, 5702, 5703; 27 C.F.R. §§ 40.252,

40.253, 40.284). The brief in opposition offers no response to these numerous provisions. Rather than discussing the current statutes and rules, the United States' response instead centers on an 82-year-old decision by this Court that discusses a superseded version of the tobacco tax statute. Br. in Opp. 12-13 (citing *Liggett & Myers Tobacco Co. v. United States*, 299 U.S. 383 (1937)).

In *Liggett,* this Court was asked to determine whether Massachusetts was obligated to pay a tobacco tax on cigarettes that the State provided to patients at a state-owned hospital. The federal tobacco tax at issue in *Liggett*, Section 401 of the Revenue Act of 1926, provided for a tax of 18 cents per pound on tobacco "sold by the manufacturer or importer, or removed for consumption or sale." Revenue Act of 1926, 44 Stat. 9, ch. 27, § 401(a) (Feb. 26, 1926). This Court concluded that a sovereign State, such as Massachusetts, was not immune from the payment of this tax because the effect on the State was indirect. 299 U.S. at 386. In dicta, the Court noted that Section 401 "indicate[s] that Congress regarded it as an excise on manufacture." *Id.* at 387.

The Government's reliance on *Liggett* is questionable at best. In *Liggett,* the Court was not being asked whether a tax that is triggered by the removal/transportation of tobacco products from a manufacturing plant on reservation lands implicates the Yakamas' Right to Travel under Article III of the Treaty. Moreover, Section 401 of the Revenue Act of 1926 is simply not comparable to the current tobacco tax statutes. 26 U.S.C. §§ 5701-5703.

Unlike Section 401, the current statutes provide that only in the case of unlawfully manufactured tobacco products or other statutory noncompliance shall the tax "be due and payable immediately upon manufacture." 26 U.S.C. § 5703(b)(F). The myriad of differences between the current tobacco statute and the Revenue Act of 1926 highlight that *Liggett's* dicta is essentially irrelevant. Under the current statute, no tax arises when manufactured tobacco products are destroyed by fire or other casualty prior to transportation to the marketplace. 27 C.F.R. § 40.284. Similarly, no tobacco tax arises on the manufacture of a cigarette that is disassembled and reused – if proper documentation occurs and the destruction takes place prior to transportation into the marketplace. 27 C.F.R. § 40.252. The same is true of tobacco products that are intentionally destroyed before being transported to market. 27 C.F.R. § 40.253. The Government's brief in opposition is completely silent with respect to these and numerous other statutory and regulatory provisions, *see* Pet. 29-30, that make clear that the current statute is effectively a tax on the transportation/removal of goods from the manufacturer's plant to the marketplace.

The relevant inquiry is not what label or nomenclature has been used by Congress, the U.S. Tobacco Tax and Trade Bureau or this Court with respect to a superseded statute. *Pace v. Burgess,* 92 U.S. 372, 376 (1876) ("[W]e must regard things rather than names."); *see Cougar Den*, 139 S. Ct. at 1019 (Gorsuch, J., concurring); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564-65 (2012).

Rather, the appropriate inquiry is whether a tax that is unambiguously triggered by the transportation of goods to the marketplace is a restriction on travel that implicates Article III of the Yakama Treaty. Once this Court determines the threshold issue of whether the Ninth Circuit's test or the *Lazore* test should be used, the merits of this case (i.e., the application of Article III of the Treaty to the tax at issue) should be addressed. The Government's near-exclusive reliance on a merits argument in its brief in opposition demonstrates that the United States lacks a sound basis for opposing certiorari.

The present petition is an adequate vehicle for resolving this circuit split. Once this Court resolves this split, the case should be remanded to the Ninth Circuit with instructions to apply the applicable standard (if the Ninth Circuit erred). The Ninth Circuit will then have the opportunity to apply the correct standard in evaluating the appropriateness of the taxes and fees at issue.

The petition presents a significant and well-entrenched split. Below, Petitioner urged the Ninth Circuit to bring its application of Indian canons of construction into line with the precedents of this Court, as well as the decisions of every other circuit to have addressed this issue. The Ninth Circuit, however, refused to do so and denied rehearing en banc. Pet. App. 148a, 149a. Review is required to resolve the circuit split.

III. ALTERNATIVELY, THE COURT SHOULD GRANT, VACATE AND REMAND IN LIGHT OF THIS COURT'S DECISION IN *WASHINGTON STATE DEP'T OF LICENSING v. COUGAR DEN, INC.*

On March 19, 2019, this Court – while the present petition was pending – decided *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019). There, the Court considered and construed the Yakamas' Right to Travel under Article III of the Yakama Treaty – the exact treaty provision that is at issue in the present petition. The Ninth Circuit did not have the benefit of this Court's decision in *Cougar Den* at the time that the Ninth Circuit issued its opinions below. Like the fuel tax at issue in *Cougar Den*, the taxes and assessments here (which are triggered by the removal of goods from Petitioner's property) "operates on the Yakamas exactly like a tax on transportation would." 139 S. Ct. 1010 (plurality opinion). In contrast to the Ninth Circuit's judgment, the Treaty does not "permit encumbrances on the ability of tribal members to bring their goods to and from market." *Id.* at 1018 (Gorsuch, J., concurring). This Court's decision in *Cougar Den* would have changed the Ninth Circuit's analysis and would have likely altered the outcome before the Ninth Circuit.

Petitioner urges this Court to grant certiorari and set the matter for argument so that this circuit split may be resolved, and consistency created in this important area of federal law. Following this Court's resolution of that circuit split, this Court should

remand to the Ninth Circuit with directions to apply the correct standard for construing an Indian treaty.

Alternatively, this Court should grant the petition, vacate the Ninth Circuit's decision and remand for further consideration in light of this Court's decision in *Cougar Den*.

CONCLUSION

For the reasons set forth in the petition and this reply brief, the Petition for Writ of Certiorari should be granted to resolve the Questions Presented. Alternatively, this Court should grant, vacate and remand for further consideration by the Ninth Circuit in light of this Court's March 19, 2019 decision in *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019).

Respectfully submitted.

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