No. 16-1498

IN THE

Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,
Petitioner,

v.

COUGAR DEN, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1944, the National Congress of American Indians ("NCAI") is the nation's oldest and largest association of Native American and Alaska Native tribal governments, representing hundreds of federally recognized Indian tribes and many individuals. NCAI serves as a forum for consensus-based policy development among its member tribes from every region of the country. Its mission is to protect the rights of Indian tribes, to improve the welfare of American Indians, and to inform and to educate the public, the federal government and state governments about treaty rights, tribal self-government, and a broad range of public policy issues affecting Native nations, tribes and pueblos.

The issue in this case is whether the Yakama Treaty of 1855 – which guarantees "free access" from the Yakama Indian Reservation "to the nearest public highway," and "also the right, in common with citizens of the United States, to travel upon all public highways" – preempts the application of a Washington state fuel tax to fuel imported by a Yakama corporation into the Reservation from out of state over the public highways. The answer to that question turns on the nature and scope of the right to travel guaranteed by the 1855 Treaty, because Indian treaties are the supreme law of the land and thus

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[1] Pursuant to Supreme Court Rule 37, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amicus curiae* and its counsel made any monetary contribution toward the preparation and submission of this brief. Counsel of record for all parties gave their written consent to the filing of this brief.

preempt state laws that would constrain or abrogate treaty rights.

NCAI submits that the construction of an Indian treaty must ensure that the Indians receive the benefit of the bargain they negotiated in consideration for the extensive lands and rights they relinquished to the United States. This means that the treaty cannot be interpreted as a statute enacted by Congress would be read. Nor can it be read narrowly to maximize the State's taxing power. Instead, as this Court has held for nearly two centuries, a treaty must be read liberally as the Indians would have understood it under the circumstances, including the promises and assurances made during treaty negotiations by agents of the United States government.

STATEMENT OF THE CASE

1. This case involves the interpretation of an 1855 Treaty between the United States and the Yakama Nation in which the United States obtained the land necessary to establish the State of Washington. The specific question is whether the Treaty's "right to travel" provision prevents application of a Washington fuel tax to Cougar Den, a Yakama corporation that imports fuel into the Yakama Reservation from out of state over the public highways. The Washington Supreme Court held that imposing the fuel import tax would be inconsistent with the Yakamas' treaty right.

2. The "right to travel" provision, which is in Article III of the Treaty, provides:

> [I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is

> secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

12 Stat. 951, 952-53 (1855).

The state fuel taxes at issue "are imposed at the wholesale level, when fuel is removed from the terminal rack or imported into the state." Pet. App. 4a (citing Wash. Rev. Code §§ 82.36.020(2), 82.38.030(7) (2007)). Assuming that these taxes would apply to Cougar Den's importation of fuel unless that would abridge the Indians' treaty rights, the Washington Supreme Court rightly focused on determining the Treaty's meaning, using the "rule of treaty interpretation" developed by this Court. Pet. App. 5a. It noted that "Indian treaties must be interpreted as the Indians would have understood them," and that "[t]reaties are broadly interpreted, with doubtful or ambiguous expressions resolved in the Indians' favor." *Id.* at 5a-6a (citations omitted).

3. To determine how the Indians would have understood the treaty right to travel, the court relied on the history of the provision, which was the subject of extensive fact-finding in *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997) ("*Flores*"), *aff'd sub nom. Cree* v. *Flores*, 157 F.3d 762 (9th Cir. 1998) ("*Cree II*"). The court noted that this approach is consistent with other federal court decisions that have relied on the historical record examined and established in *Flores* in assessing the nature and scope of the 1855 Treaty's right to travel. See Pet. App. 9a-15a (discussing *United States* v. *Smiskin*, 487 F.3d 1260, 1265-67, 1269-71 (9th Cir. 2007); *Cree II*, 157 F.3d at 774; *King Mountain Tobacco Co.* v. *McKenna*, 768 F.3d 989, 997-98 (9th Cir. 2014)).

The Washington Supreme Court summarized the *Flores* court's historical findings:

> [T]he treaty and the 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, recreational, 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. The court found that the record unquestionably depicted a tribal culture whose manner of existence was dependent on the Yakamas' ability to travel.

Pet. App. 7a (citing *Flores*¸ 955 F. Supp. at 1239). The *Flores* court further found that "agents of the United States knew of the Yakamas' reliance on travel," and that this "right to travel off reservation had been repeatedly broached" during negotiations, and "assurances were made that entering into the treaty would not infringe on or hinder their tribal practices" and that tribal members would retain the "'same liberties . . . *to go on the roads to market*'" with "'no conditions attached.'" Pet App. 7a-8a (citing and quoting *Flores*, 955 F. Supp. at 1243, 1244, 1251).

4. The Washington Supreme Court concluded that "[i]n reliance on these vital promises," the "Yakamas forever ceded 90 percent of their land in exchange for these rights." Pet App. 8a. As the court explained, "[t]here was no mention of any sort of restriction on hunting, fishing, or travel other than the condition that the government be permitted to construct wagon roads and a railroad through the reservation." *Id.* Significantly, "although the United States negotiated

with many Northwest tribes, only the treaties with the Yakamas and Nez Perce contained highway clauses like this one." *Id.* (citing *Cree II*, 157 F.3d at 772).

The Washington Supreme Court also rejected the Department's argument that the fuel taxes "are assessed based on incidents of ownership or possession of fuel, and not incident to use of or travel on the roads or highways." Pet. App. 13a. The court found that the tax directly affects "travel on public highways" because it is "*an importation tax*." *Id.* (emphasis added); see also *id.* at 14a ("the Department requires that companies obtain a license prior to hauling goods into the state: the purpose of the licensing requirement is to collect taxes").

The Washington Supreme Court therefore held that the tax cannot be applied to Cougar Den because it is a tax on "the importation of fuel, which is the transportation of fuel," and the treaty right to travel protects the Yakamas' right to "travel extensively for trade purposes." Pet. App. 16a.

SUMMARY OF ARGUMENT

For nearly two centuries, this Court has applied special rules of interpretation to Indian treaties that reflect the United States' obligation to honor and fully respect the commitments made to the Indian nations that relinquished the vast majority of their lands and other rights to the United States. The terms of Indian treaties are not to be construed strictly or as they would be understood by learned lawyers – either today or in the past – but liberally in the sense that they would have been understood by the Indians who lacked knowledge of the American legal system and could not even read the text of the treaty documents they signed with a mark. See *e.g.*, *Jones* v.

Meehan, 175 U.S. 1, 10-12 (1899). If there is doubt or ambiguity, it should be resolved in favor of the Indians to ensure that they receive the benefit of the bargain. See *infra* § I.A.

The United States as *amicus curiae* affirms these bedrock canons. United States Amicus Br. 13-14. The Department, however, appears to propose an entirely different canon: that Indian treaties must be interpreted more strictly to maximize the State's power to tax activity outside of Indian country. This proposal is without merit. Although this Court has cautioned that federal *statutes* should not be interpreted to provide a tax exemption unless the exemption is "clearly expressed," that is a canon of construction to help judges discern the intent of Congress in enacting the statute. The Court assumes that Congress intends taxes to be generally applicable, and thus will not interpret a statute to grant an exemption by implication.

But different rules apply to Indian *treaties*. In a case involving an Indian treaty, the question is not what Congress intended, but what the parties to the treaty intended. See, *e.g.*, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n* ("*Fishing Vessel*"), 443 U.S. 658, 661-62 (1979). Indian treaties are the supreme law of the land that, under the Supremacy Clause of the United States Constitution, preempt any state law that qualifies or negates treaty rights. This Court has long used the Indian treaty canons to determine the parties' intent about the scope of Indians' treaty rights, including in cases involving state taxation. See, *e.g.*, *Carpenter* v. *Shaw*, 280 U.S. 363, 366-67 (1930), and *infra* § I.B.

The Washington Supreme Court thus correctly held that to decide whether the right to travel provision in the 1855 Treaty preempts the imposition of state fuel

tax and licensing fees on a Yakama corporation that imports fuel to the Yakama Reservation over the public highways, it must apply the Indian treaty canons established by this Court. The court thus appropriately considered the text of the treaty, the history of the treaty negotiations, and the circumstances under which the treaty was adopted to determine how the Yakama Indians understood the right to travel. And because the history confirmed the clear import of the text – that the Indians would have understood any travel or importation that requires the use of the public highways is protected by the right to travel – the court properly held that the treaty precludes the Department from taxing the importation of fuel to the Yakama Reservation. See *infra* § I.C.

ARGUMENT

I. THIS COURT MUST DETERMINE THE 1855 TREATY'S MEANING USING RULES THIS COURT HAS APPLIED FOR CENTURIES

The Department and its *amici* essentially fault the Washington Supreme Court for failing to interpret the 1855 Treaty the way a court might interpret a statute enacted by Congress in 2018. They invoke the rule that "[i]f Congress wants to preempt state taxes, it must 'say so in plain words,'" Br. 20-21 (citation omitted), and argue that the Treaty cannot preempt the Washington import tax because its plain language "says nothing about a tax exemption." Br. 23; see also States' Amicus Br. 6-7 ("preemption of state taxation powers [must] be expressed on the face of the treaty"). The Washington Supreme Court correctly recognized, however, that Indian treaties are not statutes and that they are subject to different interpretive rules.

As discussed below, Indian treaties must be interpreted broadly, as the Indians would have understood them, with ambiguities resolved in the Indians' favor. And because Indian treaties are the supreme law of the land, state law is preempted where, as here, its application would qualify or abrogate Indian treaty rights reflected in the text and confirmed by the history of the treaty negotiations.

A. The Origins And Continuing Authority Of The Treaty-Interpretation Canons

"A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Fishing Vessel*, 443 U.S. at 675. "Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret treaties." *Id.*

For nearly two centuries, this Court has applied special rules of interpretation to determine the intention of the parties in Indian treaties. These interpretive rules arise directly from the United States' unique relationship with Indian nations and the United States' obligation to honor and fully respect the treaties in which tribes gave up the vast majority of their lands in reliance on the United States' solemn commitments, as the Yakama Nation did here. The rules reflect the reality that to determine the parties' intent, the court must understand the unique relationship between the United States and Indian nations and the context and nature of the negotiations that led to the treaty's text.

The canons specific to treaty interpretation are that the terms are construed "in the sense in which they would naturally be understood by the Indians," *Jones*, 175 U.S. at 11, and that ambiguities should be "resolved from the standpoint of the Indians," *Winters*

v. *United States*, 207 U.S. 564, 576 (1908). These cannons "are rooted in the unique trust relationship between the United States and the Indians." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

As Chief Justice Marshall explained in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 581 (1832), Indians have, through various treaties, "placed themselves under the protection of the United States." Indian nations "look to our government for protection;" and the United States has an obligation to act as a guardian to them. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). As a result,

> [t]he language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.

Worcester, 31 U.S. at 582.

The Indian treaty canons also reflect this Court's recognition of the historical relationship between the parties and the circumstances under which the treaties were drafted and signed. One aspect of that relationship was the imbalance of power between the United States and the Indian nations, which resulted in agreements in which the tribes were forced to make vast concessions of tribal land, resources and autonomy. "[T]reaties were imposed upon [Indians] and they had no choice but to consent." *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970).

This Court has directly linked the coercive nature of the transaction and the important rights the tribes relinquished to the requirement that a treaty be read

as Indians would have understood it and with ambiguities resolved in their favor:

> [T]he document is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions. . . . "At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico . . . . In return for their promises to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country."

McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973) (quoting *Williams* v. *Lee*, 358 U.S. 217, 221 (1959)); see also, *e.g.*, *Choctaw Nation* v. *Oklahoma*, 397 U.S. at 630 ("these treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of land in an arms-length transaction"). Application of the Indian canons is intended to ensure that Indian nations receive the benefit of their bargain in these inherently coercive transactions. See, *e.g.*, *United States* v. *Winans*, 198 U.S. 371, 380-81 (1905) (Indian treaty canons "counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules'") (quoting *Choctaw Nation* v. *United States*, 119 U.S. 1, 28 (1886)).

The Indian treaty canons also address a second important aspect of the circumstances surrounding the execution of the treaties: the linguistic and cultural barriers to tribal understanding of the text drafted by officials of the United States government.

> In construing any treaty between the United States and an Indian tribe, it must always … be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; … .

Jones, 175 U.S. at 10-11.

As a result, "it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government." *Winters*, 207 U.S. at 577.

The "treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones*, 175 U.S. at 11; see also *Fishing Vessel*, 443 U.S. at 676 (citing cases in which this rule of construction "has thrice been explicitly relied on by the Court in broadly interpreting the [1855 Treaty with the Yakama] in the Indians' favor"). Thus, courts must look "beyond the written words to the larger context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and the practical construction adopted

by the parties.'" *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943)).

Of course, application of the Indian treaty canons does not lead to the conclusion that the proper construction must be different from the ordinary meaning of the language used. See, *e.g.*, *Choctaw Nation* v. *United States*, 318 U.S. at 432. Significantly, however, the Court has made clear that such meaning must be considered in conjunction with the Indians' understanding and historic circumstances of the adoption of a treaty. See *id.* (interpreting agreement "according to its unambiguous language" where there is no finding that "the two tribes intended to agree on something different from that appearing on the face of [the] agreement"); *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 772 (1985) ("The historical record of the lengthy negotiations between the Tribe and the United States provides no reason to reject" the conclusion that the text "fairly describes the entire understanding between the parties"). Put differently, the canon requiring interpretation of a treaty as the Indians understood it in its historical context uniformly applies, although the canon requiring interpretation favoring the tribes does not apply (or may not be needed) if the treaty's meaning is clear in context.

B. The Treaty-Interpretation Canons Apply When Deciding Whether A Treaty Exempts Members Of A Tribe From Complying With State Law, Including Off-Reservation State Taxes

Citing *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), and *Chickasaw Nation* v. *United States*, 534 U.S. 84 (2001), the Department claims that a

treaty must expressly address preemption of state taxes. Br. 16; see also States' Amicus Br. 11-12. But those cases involved federal statutes, not a treaty like the 1855 Treaty at issue here. The Department's proposed canon cannot be squared with this Court's precedent involving Indian treaties.

Indian treaties, once ratified, are "the supreme law of the land." *Antoine* v. *Washington*, 420 U.S. 194, 204 (1975). "State qualification of [Indian treaty] rights is therefore precluded by force of the Supremacy Clause." *Id*. at 205.

The Indian treaty canons have long been used to determine the scope of Indian treaty rights, including "in tax cases." *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912) (citing early cases). Thus,

> [w]hile in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government. Such provisions are to be liberally construed. . . . "If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." . . . And they must be construed not according to their technical meaning but in the "sense in which they would naturally be understood by the Indians."

Carpenter, 280 U.S. at 366-67 (citations omitted).

This Court's modern cases have adhered to this analytical approach, including in cases where a state sought to tax or regulate activity occurring off the reservation. See, *e.g.*, *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 466 (1995) (treaty

does not insulate members who live outside of Indian country from state income tax because even with liberal construction it "applies only to persons and property 'within [the Nation's] limits'"); *McClanahan*, 411 U.S. at 174-75 (treaty liberally construed in accordance with Indian treaty canons precludes application of state income tax); *Tulee* v. *Washington*, 315 U.S. 681, 684-85 (1942) (terms of the 1855 Treaty with the Yakama Nation, construed "in accordance with the meaning they were understood to have by the tribal representatives at the council," preclude application of "revenue producing" fish licensing fee to Indians who fished off the reservation).

Chickasaw Nation and *Mescalero*, on which the Department relies (Br. 22), do not support a different approach. *Chickasaw Nation* dealt not with the preemptive scope of an *Indian treaty*, but with the entirely different question whether one federal statute (the Indian Gaming Regulatory Act) exempts tribes from paying gambling-related taxes imposed by another federal statute (the Internal Revenue Code). *Mescalero* concerned the breadth of tax immunity under the Indian Reorganization Act. The answer to such a *statutory* question turns on congressional intent and related canons of statutory interpretation. See *Chickasaw Nation*, 534 U.S. at 94; *Mescalero*, 411 U.S. at 155-58. That is not the case where the relevant federal law is a treaty.

There are, of course, many canons that "help judges determine the Legislature's intent as embodied in particular statutory language." *Chickasaw Nation*, 534 U.S. at 94. With respect to such canons of statutory interpretation, this Court has recognized that "other circumstances evidencing congressional intent can overcome their force." *Id.*

That does not remotely support the Department's proposal that the Indian *treaty* canons, designed to discern and protect the Indians' benefit of the bargain in a treaty, must give way when state taxes are concerned. Indeed, *Chickasaw Nation* specifically distinguished the analysis of a federal statute from the analysis where "an Indian treaty is at issue." *Id.* at 95. And the analysis must be different when an Indian treaty is at issue, because application of the "clear statement" canon that the Department proposes could result in the very thing the Indian treaty canons were intended to avoid: an interpretation that benefits the United States and does not reflect what the Indians would have understood the agreement to provide.

C. The Washington Supreme Court Correctly Applied The Treaty-Interpretation Canons

The Washington Supreme Court thus correctly recognized that to decide whether the "right to travel provision" in the 1855 Treaty "precludes the State from demanding unpaid taxes, penalties, and licensing fees for hauling the fuel across state lines," it must interpret the text following the "rule of treaty interpretation" established by this Court. Pet. App. 5a. This Court's Indian treaty cases foreclose the Department's assertion that, because the right to travel provision does not mention "taxes," the Treaty cannot preempt the State's fuel tax. Br. 24.

For example, in *McClanahan* v. *Arizona State Tax Commission*, this Court held that an 1868 treaty between the United States and the Navajo Nation precluded Arizona from applying its income tax to reservation Indians whose income derived wholly from reservation sources even though the "treaty nowhere explicitly states that the Navajos were to be free from

state law or exempt from state taxes." 411 U.S. at 174. Considering the "circumstances under which the agreement was reached" and the rule that "'[d]oubtful expressions are to be resolved in favor'" of the Indians, the Court found "it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos" and to preclude extension of state tax law to Indians on the reservation. *Id.* at 174-75 (quoting *Carpenter*, 280 U.S. at 367).

Similarly, in *Tulee* v. *Washington*, this Court held that a different provision of the same 1855 Treaty at issue in this case precluded the State from charging the Yakamas a licensing "fee for fishing" even though the Treaty did not specifically mention fees or taxes. 315 U.S. at 685. *Tulee* involved the scope of the "right of taking fish" provision of Article III, which states in relevant part:

> 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 … .

Id. at 683. To determine the scope of that language, this Court considered a report of "the proceedings in the long council at which the treaty agreement was reached," which showed the Yakama Indians' "strong desire" to "retain the right to hunt and fish in accordance with the immemorial customs of their tribes." *Id.* at 684. Noting its "responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were under-

stood to have by the tribal representatives at the council," *id*., the Court held that "exaction of fees as a prerequisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty." *Id.* at 685.

Notably, the Court reached that result even though the licensing fee at issue in *Tulee* was generally applicable to all who fished in the State, and even though the treaty said the right to take fish was "in common with citizens of the Territory." The Court noted that it had held in *United States* v. *Winans*, 198 U.S. 371, that, "despite the phrase 'in common with citizens of the Territory,' Article III conferred upon the Yakamas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area." *Tulee*, 315 U.S. at 684. And even though the licensing fee was generally applicable, "it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Id*. at 685. The phrase "in common with citizens" thus was not read to limit the Tribe's right to take fish to the rights held by any citizen, but to protect the Tribe's right from infringement as it was at the time of the Treaty.

The Washington Supreme Court cited *Tulee* and similarly looked at both the text of the Treaty and the history of the treaty negotiations to determine how the Yakama Indians understood the scope of the provision guaranteeing the right to travel. Pet. App. 5a-8a. And as discussed above, the court examined the way this provision had been interpreted by federal courts, with particular attention to the district court's findings in *Flores*, following a trial and affirmed on appeal, that the Treaty prohibited the State from imposing permit fees on Yakama trucks carrying lum-

ber from the reservation to mills off the reservation. See *supra* at 3-5,

The court explained that "the Yakamas' right to travel off reservation had been repeatedly broached" during the treaty negotiations, and agents of the United States "repeatedly emphasized" that "tribal members would retain 'the same liberties … *to go on the roads to market.*" Pet. App. 7a-8a (quoting *Flores*, 955 F. Supp. at 1244). In addition,

> The treaty was presented as a means to preserve Yakama customs and protect against further encroachment by white settlers. There was no mention of any sort of restriction on hunting, fishing, or travel other than the condition that the government be permitted to construct wagon roads and a railroad through the reservation. Finally, … "the Treaty was clearly intended to reserve the Yakamas' right to travel on the public highways to engage in *future* trading endeavors."

Pet. App. 8a (quoting *Flores*, 955 F. Supp. at 1243). "In reliance on these vital promises," and "in exchange for these rights," the "Yakamas forever ceded 90 percent of their land." Pet. App. 8a.

The court quite reasonably concluded that the history, as "determined by the federal courts," confirms the most natural reading of the text – that "any trade, traveling, and importation that requires the use of public roads fall within the scope of the right to travel provision of the treaty." Pet. App. 16a. And the Department violates that right by "tax[ing] the importation of fuel, which is the transportation of fuel" to the Yakama Reservation. *Id*.

CONCLUSION

For the foregoing reasons, *amicus* NCAI respectfully requests that this Court affirm the judgment of the Washington Supreme Court.

Respectfully submitted,

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