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* SACRED GROUND LEGAL SERVICES IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Amicus is a nonprofit legal services provider serving low income members of the Yakama Nation and other federally recognized tribes in central Washington State.

Counsel for *amicus* served as legal counsel for the Yakama Nation from 1989 to 1995 and was trial counsel in *Cree v. Waterbury*, 873 F. Supp. 404 (E.D. Wash. 1994) and *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *affirmed sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). *Amicus* was counsel for the Yakama Nation Commerce Association in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007).

Counsel for *amicus* was directly and extensively involved in the cases primarily relied upon by the Washington State Supreme Court. As such, the participation of *amicus* will be helpful to the Court.[1]

SUMMARY OF ARGUMENT

Petitioner State of Washington conveniently failed to disclose that the Washington State Constitution requires that the tax petitioner seeks to collect is dedicated exclusively for the purpose of maintenance of

[1] Petitioner consented to the filing of this brief. Respondent has also consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* or its counsel made a monetary contribution for the preparation or submission of this brief.

public roads. Yakama Indians were guaranteed the free use of and access to public roads in the Treaty between the United States and the Yakama Nation.

The State has previously litigated the issue of whether it may impose its excise taxes upon Yakama Nation travel and should be bound by those judgments.

According comity to the decision of the Washington State Supreme Court in a case interpreting the applicability of the State's own laws will not result in the "tremendous loophole" the State and the United States contend.

The Washington State Legislature created its own difficulty in collecting its fuel tax when it undertook to move the incidence of the tax from retailers to distributors importing fuel into the State. It was never contemplated by the State in enacting such legislation that a tax exempt treaty Indian might possess the temerity, resources or audacity to successfully become a fuel distributor.

Established principles of equity preclude courts from extricating the State from a problem created by itself.

The State possesses authority to assess and collect motor vehicle fuel excise taxes from the ultimate purchasers of the fuel from tribal retailers. The fact that the State lacks the political courage to do so does not merit this Court varying from established law.

ARGUMENT

A. The Washington State Constitution expressly states that motor vehicle fuel excise tax revenues are to be used exclusively for the maintenance of public roads. The Yakama Treaty guaranteed that the Yakama Nation would not be charged for the maintenance of public roads.

1. The State of Washington conveniently omits from its brief any information on *how* the tax it seeks to collect is *used*. The tax must be used for the purpose of construction, maintenance and improvement of public roads in the State of Washington. As stated in the Washington State Constitution:

> Art. 2 Section 40 HIGHWAY FUNDS. All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, *shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes.* Such highway purposes shall be construed to include the following:
>
> (a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets;
>
> (b) The *construction, reconstruction, maintenance, repair, and betterment of public*

> *highways,* county roads, bridges and city streets; including the cost and expense of (1) acquisition of rights-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the state of public highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road, or city street;

Washington Const., Art. 2, §40 (emphasis added).

According to the Washington State Department of Transportation, the history of tribal transportation pre-dates contacts with Europeans when tribes had extensive transportation routes for travel and exchange of goods:

> For many tribes the history of tribal transportation begins with the trails of the animals, which became the trails the tribes used.

Tribal Transportation Planning Guide for Washington State, Washington State Department of Transportation (2009),[2] p. 9. Most public highways in Washington State were located upon trails which were used since Time Immemorial by the original inhabitants of the Pacific Northwest, in particular the Yakama Indians. Over time, those existing Indian routes developed into wagon roads—including the Mullan, Kentuck, Colville, Texas, and Old Territorial roads—that carried miners

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[2] https://www.wsdot.wa.gov/NR/rdonlyres/D9668173-F25F-448B-B571-57EB32122036/0/TribalTransportationPlanningGuideforWashingtonState.pdf.

and settlers in and out of the interior, in addition to their continued use by area tribal members who used them to reach hunting, gathering, and fishing sites and to visit other Indian communities to socialize, trade, and form political alliances:[3]

> The Yakama Indian guides with the survey party encouraged McClellan[4] to continue north to Snoqualmie Pass, but he refused. That pass would later be explored by Lieutenant Abiel Tinkham (ca. 1824-1871), who Stevens sent into the Cascades in January 1854 after McClellan, this time making the attempt from the west side, failed a second time to cross the mountains, again citing heavy snow. Approaching from the east, Tinkham hired Indian guides to take him through Yakima Pass into the Cedar River drainage.

Id. McClellan, meeting with Yakama head chief Kamiakin in 1854, informed the latter that "it was the intention of the whites to make a wagon road across the mountains, and many would undoubtedly pass through their country" and that "their coming would be an advantage to his people."[5]

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[3] *See Walla Walla to Seattle Historic Wagon Roads* (2014), http://www.historylink.org/File/10757.

[4] In 1853, U.S. Army Lieutenant George McClellan was commissioned by then Secretary of War Jefferson Davis and Washington Territorial Governor Isaac Stevens to survey potential military roads to the Pacific Northwest. *Walla Walla to Seattle Historic Wagon Roads*, *supra.*

[5] *Annual Report of the Commissioner of Indian Affairs* (1854) (U.S. Govt. Printing Office), p. 385. http://digicoll.library.wisc.edu/

Unlike other tribes within what is now *Western* Washington State whose treaties had an express clause limiting their *trading* activities, *United States v. Wilbur,* 674 F.3d 1160 (9th Cir. 2012); *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995), no such limitation upon *travel* appears in the Yakama Treaty.[6] A treaty is in its nature a contract between nations. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232-1233 (2014) (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.)). Like federal laws, agreements embodied in treaties are accorded status as the Supreme Law of this nation. U.S. Const., Art. VI, cl. 2 (Supremacy Clause).[7] Great nations, like great men [and women] keep their word. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

The 1855 Treaty between the United States and the tribes and bands comprising the Yakama Nation secured to Yakama Indians a right to free use of and access to public highways in common with citizens of the United States. Nowhere in the Treaty, nor in the

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cgi-bin/History/History-idx?type=turn&entity=History.AnnRep54.p0235&id=History.AnnRep54&isize=M.

[6] "[T]he Medicine Creek Treaty did not expressly grant any right to the Puyallup Tribe . . . [the] ambiguous treaty language stands in stark contrast to the text of the Yakama Treaty." *United States v. Smiskin*, *supra* at 1267.

[7] "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

journal of treaty negotiations kept by the United States negotiators, is it mentioned that Yakamas would be charged a tax or fee for their travel upon such highways. *See Official Proceedings of the Council in the Walla Walla Valley, June 9 & 11, 1855*.[8]

Certainly, outside Indian Country in the absence of a right reserved by Treaty, the State may impose nondiscriminatory State taxes upon an individual member of an Indian Tribe on the same basis as other citizens. However, where as in this case imposition of a State tax burdens the exercise of a Treaty right it may not be imposed.

Just as the Petitioner fails to address the importance of the Washington State Constitution's mandate that the State's motor vehicle fuel taxes are for the use of public roads, the United States attempts to minimize the breadth of rights reserved in the Yakama Treaty. Certainly, as stated by the Government, "one of the United States' major aims in entering into the treaty was to enable the construction of public highways and railroads in the region." (U.S. *Amicus* Brief at 2). However, this was merely *one* of *many* aims of the United States in entering the Treaty. The Treaty was also intended to further Yakamas "for the instruction of the Indians in trades and to assist them in the same." Yakama Treaty, Art. V (Joint Appendix 83a).

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[8] https://www.lib.uidaho.edu/mcbeth/governmentdoc/1855council.htm.

Given the numerous cessions the Yakama made[9] which benefitted the United States, it could not have been contemplated that payment of a tax would be required of Yakama Indians to obtain fuel necessary to power the industries promised they could engage in.

Finally, the Court should note the State's portrayal of this case as merely involving application of Washington State's fuel tax to Respondent Cougar Den, "a fuel company owned by a member of the Yakama Nation". Brief of Petitioner State of Washington Department of Licensing, 1. Respondent Cougar Den is designated by the governing body of the Yakama Nation as the exclusive distributor of motor vehicle fuel to tribal retailers within the Yakama Reservation (Joint Appendix 99a) and serves:

> [A]s an *agent* of the Yakima Indian Nation for the purpose of collecting and transmitting Tribal taxes to the Yakima Indian Nation on a monthly basis and for the purpose of obtaining petroleum products for sale and delivery to the Yakima Indian Nation and its members.

Id. (emphasis added). *See also* Oregon Department of Transportation OAH Case No. 1102410 at 3, 10 ("Cougar Den acts as the agent for the Yakama Nation to obtain fuel in Oregon for export to the Yakama Nation"). The issue in this case is the applicability of the Washington motor vehicle fuel excise tax to a tribal importer of fuel. The brief of *amicus curiae* United States

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[9] *See* Joint Appendix 101a (map of area ceded to United States).

explicitly frames the Question Presented as involving the applicability of "a tax imposed by the State of Washington on fuel purchased out-of-state *and imported into Washington*" (Brief of United States at I) (emphasis added). The State of Washington's own statutory scheme states *inter alia* as follows:

> "Importer" means a person who imports fuel into the state by a means other than the bulk transfer-terminal system. If the importer of record is acting as an agent, *the person for whom the agent is acting is the importer.*

RCW 82.38.020(18) (emphasis added).[10] Washington's characterization of this case as a dispute between the State of Washington and an individual tribal member owned business is therefore deceptive. Since Cougar Den serves as an agent of the Yakama Nation, the "importer" of the fuel in this case is the respondent's *tribe*. Indian tribes are immune by virtue of sovereign immunity from State taxation. *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505 (1991). Such immunity extends to off-reservation commercial activities. *Richardson v. Mount Adams Furniture (In Re Greene)*, 980 F.2d 590 (9th Cir. 1992); *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn. 2d 108 (2006).

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[10] *See also* the Yakama Nation's designation of Respondent as agent (Joint Appendix 99a) and the State of Oregon Administrative Law Judge's opinion concluding Respondent was agent of Yakama Nation for purposes of obtaining Oregon fuel distributor license (Oregon Department of Transportation OAH Case No. 1102410) (Feb. 7, 2012).

Since resolution of this case should be as simple as that, perhaps this Court in the interest of Comity should consider merely remanding or certifying the case to the Washington court to confirm that the respondent was indeed acting in the capacity of agent for respondent's tribe—in which case the tribe's immunity would preclude the State's efforts to collect the tax. *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940).[11]

B. Accepting the arguments of the State and the United States which place Yakama Indians on the same basis as all State citizens would render their treaty right meaningless.

The essence of the State's argument is that the Yakama Treaty merely placed Yakamas on the same basis as all other citizens. *See* Brief of Petitioner State of Washington, at 42-43 (affirming the Washington State Supreme Court would give Yakamas an "unfair advantage"). Such arguments have been routinely

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[11] That Washington considered the respondent's tribe to be the real party in interest upon whom the tax was imposed and which bore ultimate liability is demonstrated by the State's open admission that, although it moved the incidence of the tax from fuel retailers to fuel importers in response to the 2005 decision in *Squaxin Island Tribe, supra* (Brief of Petitioner at 6), Washington negotiated with the Yakama *Tribe* through November 2013 rather than the *respondent* for payment of the tax (*see* Oil Marketers Brief at 6, "state settles with tribe for $9 million"). *See also* Joint Appendix 107a (tribe vetoes settlement agreement).

rejected by this Court. As stated in *United States v. Winans,* 198 U.S. 371 (1905):

> [I]t was decided [below] that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more and give the word of the Nation for more.

Such an argument was similarly rejected by this Court in *Washington v. Washington Passenger Fishing Vessel Association*, 443 U.S. 658, 681 (1979). *See also Seufert Brothers Company v. United States*, 249 U.S. 194, 198 (1919) and *Tulee v. Washington*, 315 U.S. 681, 684 (1942), both holding that treaty Indians had rights, "beyond those which other citizens may enjoy." *Passenger Fishing Vessel, supra*.

C. The State should be estopped from repeatedly relitigating the applicability of taxes on Yakama's use of public roads and should be bound by its own contrary statements in previous cases in this Court.

The similarity of the State's conduct in this case and prior cases in which the State of Washington sought to disregard tribal treaty rights is striking. The State has presented these same arguments—that the State may charge the respondents a tax or fee for the purpose of maintaining public roads—in numerous

federal trial and appellate courts and been rejected,[12] not to mention in the courts of its own State. *See Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *affirmed sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998); *Cougar Den Inc. v. Washington State Department of Licensing*, 188 Wn. 2d 55 (2017); *see also* the citations to numerous Washington State district court prosecutions referenced in *Flores*, 955 F. Supp. at 1245.

Flores involved an attempt by the State of Washington to impose a regulatory fee upon logging trucks owned by Richard "Kip" Ramsey, a member of the Yakama Nation. Ramsey is also the owner of the respondent in this cause, Cougar Den, Inc. According to principles established by this Court, "[a] party that has once litigated a factual or legal issue and lost may be precluded from litigating the same issue in a subsequent proceeding." *See Montana v. United States,* 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210 (1978); *Allen v. McCurry,* 449 U.S. 90, 94, 101 S. Ct. 411, 414-15, 66 L. Ed. 2d 308 (1980); *Connors v. Tanoma Min. Co.,* 953 F.2d 682, 684 (D.C. Cir. 1992). That this case involves the same issues which were previously litigated by the State with the same *de facto* party is demonstrated by *Flores*, where the district court noted:

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[12] "Despite the unambiguous promises made to the Yakamas, defendants argue that the Yakamas 'must' have known that 'in common with' meant that tribal members stood on the same legal ground as non-Indians for the purposes of financing and maintaining public roads." *Flores, supra* at 1249.

> Given the fact that Stevens and his agents viewed the Yakamas and other tribes at the Council as unlearned savages, it is highly unlikely that he would have expected payment from them in order to maintain public highways.

In this appeal, both the State and the United States argue that the motor vehicle fuel excise tax is not imposed for the *use* of roads but rather is imposed upon the *possession* of a product (*Amicus* Brief of United States, 12). The duplicity of such arguments is shown by the opposite positions that were taken by the State and United States in *Colville, supra*, where the State of Washington argued that the State's motor vehicle excise tax was for the "use" of State highways rather than a personal property tax. As stated by this Court:

> The next issue concerns the challenge in the *Colville* case to the Washington motor vehicle and mobile home, camper and travel trailer taxes. Although not identical, these taxes are quite similar. Each is denominated an excise tax for the "privilege" of *using* the covered vehicle in the State, each is assessed annually at a certain percentage of fair market value, and each is sought to be imposed upon vehicles owned by the Tribe or its members and *used* both on and off the reservation[.]

447 U.S. at 162 (emphasis added):

> [T]he only difference between the taxes now before us and the one struck down in *Moe* is that these are called excise taxes and imposed

> for the privilege of using the vehicle in the State, while the Montana tax was labeled a personal property tax. . . . In the present case, the State continues, the taxable event is the use *within the State* of the vehicle in question.

Id. The pertinence of this point is that the Washington State Constitution dedicates *all* motor vehicle excise taxes and motor vehicle fuel excise taxes to pay for roads used by motor vehicles. Wash. Const., Art. 2, *supra*. The State and United States *now* argue that such taxes are *not* for the *use* of roads but rather are in the nature of a personal property tax imposed for the *possession* of fuel within the State. (Brief of United States at 12). Such a disingenuous reversal of positions formerly argued before this Court should not be tolerated.

Clearly, the Respondent delivers fuel exclusively to tribal retailers on the Yakama Reservation (Joint Appendix *passim*).[13] The admitted motivation for the Washington State Legislature in moving the incidence[14] of the tax to importers was to target tribal

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[13] According to the Washington Oil Marketers Association, 90% of the fuel transported by Cougar Den is delivered to two tribally licensed retail fuel filling stations. *See* Brief of *Amicus Curiae* Washington Oil Marketers, at p. 10, n. 9. The remainder is delivered to business owned by Cougar Den's owner, Kip Ramsey (a member of the Yakama Nation), in the unincorporated reservation community of White Swan, Washington. Id. According to the most recent United States Census information, the population of White Swan is approximately 90% Native American.

[14] Whether Washington's attempt to move the incidence of the tax "upstream" was actually successful is an issue that was not addressed by the lower courts and may merit remand for consideration.

businesses delivering fuel for on-reservation sales by tribal retailers. The revised statute is a back-handed way of imposing a tax upon reservation sales by tribal retailers to tribal customers which the State could not directly impose. The *burden* of the tax, however, is ultimately upon tribal persons whose vehicles are primarily used within the reservation and which, by virtue of their treaty rights, are exempt from paying a tax for their use of public roads in Washington.

It is unquestionable that motor vehicle fuel is for use in motor vehicles. The principle that State of Washington may not tax a Yakama Indian for the use or possession of fuel within the Yakama Reservation is similarly unquestionable. The only time the fuel is possessed in the State of Washington is on the 27 mile stretch of road from the boundary of Oregon to the boundary of the Yakama Reservation. Under such circumstances, the tax may not validly be applied, either by virtue of the tribe's treaty right to free use of the roads or because the State's motor vehicle fuel excise tax is not pro-rated to reflect an apportionment between on-reservation and off-reservation use of the fuel in motor vehicles. *Colville, supra* 447 U.S. at 163; *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1259-1260 (E.D. Wash. 1997), *affirmed sub nom. Cree v. Flores, supra.*

Notwithstanding that the State has previously fully litigated and lost on the issue in this case it continues to attempt to impose taxes for the maintenance of public roads upon Yakama Indians. The State openly

admits that it went so far as attempting to move the incidence of its motor vehicle fuel tax from imposition upon retailers to fuel "importers" in response to an adverse decision in *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005). This caused tribal filling stations like Cougar Den to necessarily obtain their fuel supplies from outside the State of Washington, since the State of Washington Department of Licensing prohibited the sale of tax exempt fuel to tribal retailers by fuel distributors licensed to do business in Washington State. Targeting legislation or regulatory measures at a specific class of persons is reminiscent of the principle enunciated by this Court that statutes and regulations aimed at and motivated to disadvantage particular classes of persons violate constitutional protections of the Fourteenth Amendment. *United States v. Guest*, 383 U.S. 745 (1966) (violation of right to travel from State to State).[15] *See also*, the numerous pronouncement of this Court striking down State zoning laws which constituted exclusionary zoning.

Such machinations, including invoking the jurisdiction of this Court for the purpose of frustrating the adverse judgments of the federal and State appellate courts, should not be encouraged. Such conduct is reminiscent of the State's "extraordinary machinations" to resist the effect of federal court judgments referenced in *Puget Sound Gillnetters Association v. United States District Court*, 573 F.2d 1123 (9th Cir. 1978):

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[15] The Right to Travel embodied in the Yakama Treaty is similarly subject to Constitutional protection. U.S. Const., Art. VI, cl. 2 (Supremacy Clause).

> Except for some desegregation cases (see *Morgan v. Kerrigan*, 530 F.2d 401 (1st Cir.), *cert. denied sub nom. McDonough v. Morgan*, 426 U.S. 935, 96 S.Ct. 2649, 49 L.Ed.2d 386 (1976); *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042, 97 S.Ct. 743, 50 L.Ed.2d 755 (1977)), the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.

This case is another chapter in the Petitioner's long campaign to maximize revenue by infringing on treaty rights and is another chapter in the State of Washington's attempt to place Yakama Indians on the same basis as all other citizens by denying Yakama retailers the ability to provide fuel for tribal vehicles unless a State tax is paid for the maintenance of all State highways—the free use of which the signers of the Yakama Treaty were guaranteed in return for relinquishing title to some 11 million acres of land (*see* Joint Appendix, 101a).

D. Petitioner State of Washington's and the United States' arguments that affirming the Washington Supreme Court will create an enormous loophole or result in the widespread transport of tax exempt fuel to other States is unfounded.

The State's argument that affirming the decision of its own supreme court will result in impairment of the State's ability to maintain roads is specious. *See*

also Oil Marketers Brief at 19 ("impact on State revenues will be nothing short of catastrophic") describing a "virtual tax immunity." Such inflated claims conceal the fact that the State of Washington receives extensive federal funding for reservation roads and the United States Bureau of Indian Affairs and the Yakama Nation maintain many of the reservation roads and that the Respondent's *tribe* imposes its *own* motor vehicle fuel tax on *all* sales of fuel by tribally licensed retailers, whether the fuel is sold to a member or nonmember of the tribe. Joint Appendix 91a.

Tribal vehicle travel is primarily upon roads within the reservation. The State of Washington receives extensive federal funding for the maintenance of Indian reservation roads. *See, e.g.*, Act of May 26, 1928, Public Law 520 (establishing Indian Reservation Roads Program), 25 U.S.C. §318(a) as do Indian tribes themselves; *see also* the Surface Transportation Assistance Act of 1982 (23 U.S.C. Chapter 2).[16]

Affirming the Washington State Supreme Court's interpretation of its own laws will not, as the petitioner contends, "create a massive loophole in State tax regimes" (Brief of Petitioner, at 2).[17] Cougar Den's tribal retail fuel stations are situated on the Yakama Reservation, 80% of which is tribal land and 20% of which is

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[16] Indian Reservation Road "means a public road that is located within or provides access to an Indian reservation or Indian trust land, or restricted Indian land." 25 C.F.R. §170 (2004).

[17] Only one other tribal treaty *in the nation* has a clause similar to that in Yakama Treaty. Treaty With the Nez Percés, 12 Stat. 957 (1859).

situated in unincorporated agricultural communities. *Brendale v. Confederated Tribes*, 492 U.S. 408, 415 (1989). 807,000 acres of the Tribe's 1.3 million acres are vacant forested lands within the reservation's "Closed Area", which is so named because it has been closed to the general public at least since 1972, when the Bureau of Indian Affairs restricted the use of federally maintained roads in the area to members of the Yakama Nation and to its permittees, who must be record landowners or associated with the Tribe. Id. A mere 25,000 primarily agricultural acres are not tribal lands held in trust by the United States government. 492 U.S. at 415. Most land in the "open area" is zoned General Rural, "one of three use districts governing *agricultural* properties". *Brendale, supra* at 417 (emphasis added). The State of Washington provides for refunds from its retail sales and use taxes, and certain motor vehicle fuel excise taxes, on sales for agricultural use. Revised Code of Washington §§82.08.865, 82.12.865. *See also* Washington Administrative Code §458-20-126(3)(e). A primary purpose of the United States for establishing the Yakama Reservation was agriculture. *Ecology v. Yakima Reservation Irrigation District*, 121 Wn. 2d 257 (1993).

Given such demographics, as Washington State law and administrative regulations *already* exempt fuel sold within the Yakama Reservation from taxation, the petitioner's claims of a massive loss of fuel tax revenues appears unfounded, especially when considered in light of the numerous district and court decisions holding that 4 U.S.C. §104, commonly known as

the Hayden-Cartwright Act, conferred *no* authority upon States to even impose motor vehicle fuel excise taxes on Indian reservations. *See, e.g., Marty Indian School Board v. South Dakota*, 824 F.2d 684 (8th Cir. 1987); *Goodman Oil Co. v. Idaho State Tax Comm'n*, 136 Idaho 53, 28 P.3d 996 (2001), *cert. denied*, 534 U.S. 1129 (2002).

The scare tactics of the United States should similarly be disregarded. The Government argues that:

> If the Washington Supreme Court's decision is affirmed, respondent could claim a right to ship fuel from those States all over the United States and avoid paying similar fuel-import taxes in States to which it transports fuel by highway.

(Brief of *Amicus Curiae* United States, 23-24). Nowhere does such language appear in the Treaty. Rather, the scope of the right secured in the Yakama Treaty is in common with other citizens and the scope of this litigation is limited to the applicability of Washington State's fuel excise tax. Courts do not render advisory opinions on issues or involving parties not before it. *Muskrat v. United States*, 219 U.S. 346 (1911).[18]

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[18] *Amicus* is thoroughly confused by the inclusion of arguments in petitioner's and *amici*'s briefs referencing possible exemptions from various state cigarette taxes. *See, e.g.*, *Amicus* Brief of Public Health Organizations. Such issue is not before the court and such fear mongering should not be tolerated. Unlike motor vehicle fuel, tribal retailers selling cigarettes absent proof of payment of state taxes are subject to the Contraband Cigarette

The State of Washington and *amicus* United States are not the only entities seeking to inflate the effect of the Washington State Supreme Court decision. The brief of Washington Oil Marketers inaccurately states that "the State settled with the Yakamas for $9 million" (Oil Marketers Brief at 6, n. 3). Such settlement was vetoed by the governing body of the Yakama Nation (Joint Appendix, 107a, *et seq*.)[19]

The State of Washington argues that recognition of a Treaty-based exemption from the fuel taxes it imposes would create a tremendous loophole resulting in a loss of revenue. However, Washington conveniently fails to disclose the numerous "loopholes" it has already made which enable various classes of persons and entities to avoid its tax. *See* the "refunds and credits" from the State's motor vehicle fuel excise tax enumerated in RCW 82.38.010.[20]

Trafficking Act, 18 U.S.C. §§2341, *et seq. United States v. Wilbur*, 674 F.3d 1160 (9th Cir. 2012).

[19] Counsel for *amicus* was present and seconded the motion to disapprove the proposed settlement agreement. *See* Joint Appendix, 106a).

[20] Any person may obtain a refund of the tax for off-road, farm and certain heavy equipment use; for fuel used in power pumping and take-off equipment; fuel used for logging operations; and for certain private and public transportation providers. RCW 82.38.010. *See also* RCW 82.38.080 (exemptions). Tribal Indians apparently lack the lobbying resources necessary to effect favorable state legislation. *See* RCW 82.38.180 ("fuel distributed to a federally recognized Indian tribal reservation located within the state of Washington is not considered exported outside this state").

Additionally, Cougar Den's license from the Yakama Nation *only* permits it to deliver fuel to retail fuel filling stations on the Yakama Reservation which are licensed by Yakama tribal government (Joint Appendix 99a), and Washington admits that virtually all other tribes in Washington that have gas stations within their reservation have already entered fuel tax agreements with Washington (Brief of Petitioner, at 8, text at n. 4) which would preclude them from purchasing fuel from respondent and which require payment of an agreed percentage of Washington's motor vehicle fuel excise tax. Washington's claim of a tremendous loss of state revenue therefore appears unfounded.

E. Equitable principles disfavor Courts extricating litigants from problems created by themselves.

In this case, the State of Washington's inability to collect its fuel excise tax from a Yakama fuel distributor importing fuel stems from its *own* decision to seek legislation "moving" the incidence of its tax from retailers to fuel *importers* (*see* Brief of Petitioner at 6)[21] rather than moving the incidence of the tax from fuel retailers to the *customers* of fuel retailers. It has long been established that the State of Washington may impose a tax upon purchase of goods from tribal retailers

[21] "Most recently, the State significantly changed its approach to collecting fuel taxes in response to *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005). There, the court held that the incidence of the tax at the time fell on retailers (gas stations)[.]" Brief of Petitioner, p. 6.

by *non-tribal* members. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980).[22]

The fact that collection of the tax from non-tribal State citizens presents certain practical and political difficulties does not merit the intervention of this Court.[23] It is an established principle of equity that courts should not assist a party in extricating themselves from circumstances that he or she created. *See generally* J. Adams, *The Law of Equity* (1881) *passim*. Established principles of federalism and comity should similarly discourage this Court from reversing a decision of the supreme court of a State interpreting its own excise fuel tax statute.[24]

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[22] Although the Colville court held that principles of sovereignty did not preclude Washington from taxing the non-Indian customers of tribal retailers, it did not address whether a tribal treaty precluded such taxation.

[23] For example, States may enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax or seek relief from Congress. *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 514 (1991).

[24] *Lehman Brothers v. Schein*, 416 U.S. 386 (1974).

CONCLUSION

Amicus respectfully urge the Court to affirm the decision of the Washington State Supreme Court.

Respectfully submitted,

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