No. 16-1498

In the Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING, PETITIONER

v.

COUGAR DEN, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Article III of the Treaty of June 9, 1855, between the United States and the Yakama Nation of Indians, 12 Stat. 952-953, secures to the Yakamas the "right, in common with citizens of the United States, to travel upon all public highways." The question presented is:

Whether Article III precludes application to Yakama tribal members of a tax imposed by the State of Washington on fuel purchased out-of-state and imported into Washington, as part of a comprehensive state scheme that also imposes the tax on fuel removed from an in-state terminal or refinery.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. In the mid-nineteenth century, the United States entered into a series of treaties with Indian tribes in what is now the State of Washington. *Tulee* v. *Washington*, 315 U.S. 681, 682-683 (1942). A group of Indians now known as the Yakama Indian Nation (the Tribe) agreed in one of those treaties to cede vast tracts of land within that territory to the United States, reserving for itself a much smaller reservation. *Ibid.* 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, including through the Tribe's

reservation. *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1240-1241 (E.D. Wash. 1997), aff'd *sub nom. Cree* v. *Flores*, 157 F.3d 762 (9th Cir. 1998). To secure from the Tribe the concession that roads could be built through the reservation, the United States made certain representations regarding the Tribe's access to and use of public roads. Specifically, 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.

Treaty of June 9, 1855, between the United States and the Yakama Nation of Indians (1855 Treaty), art. III, 12 Stat. 952-953.

2. a. The Washington state law at issue imposes a per-gallon motor-fuel tax on "licensees," a category of persons that includes suppliers, exporters, blenders, distributors, and—as relevant here—importers of motor-vehicle fuel. Wash. Rev. Code Ann. §§ 82.36.010(12), 82.36.020 (West 2012), 82.38.020(12), 82.38.030 (West 2008).[1] The tax applies both to fuel originating in the State (for example, when a tanker truck is filled with fuel from a refinery or bulk storage facility) and to fuel brought into the State after being removed from a refinery or bulk storage facility outside of Washington. For fuel removed from an in-state refinery or terminal,

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[1] Citations are to the 2008 and 2012 Revised Code of Washington Annotated, which was in effect when the relevant conduct took place. The State has recodified the cited provisions without substantive change. See Pet. 4 n.1; Br. in Opp. 7 n.3.

the State imposes the tax at the time of removal (with certain exceptions not relevant here). *Id.* §§ 82.36.020(2)(a)-(b) (West 2012), 82.38.030(7) (West 2008). For fuel that "enters into" Washington from another State, the tax is imposed upon entry. *Id.* §§ 82.36.020(2)(c) (West 2012), 82.38.030(7)(c) (West 2008). Those who bring wholesale fuel into the State via the highways must pay the same per-gallon tax as those who bring fuel into the stream of commerce through other means. *Id.* §§ 82.36.020 (West 2012), 82.38.030 (West 2008).

b. Before the current motor-fuel tax was enacted, a federal court had determined that a previous version of the tax placed the incidence of the tax on fuel retailers (*i.e.*, gas stations). See *Squaxin Island Tribe* v. *Stephens*, 400 F. Supp. 2d 1250, 1262 (W.D. Wash. 2005). That court had therefore held that the previous fuel-tax regime, as it pertained to Indian retailers operating on Indian lands, ran afoul of the rule that States generally may not tax Indian activities in Indian country absent congressional authorization. *Id.* at 1261-1262; see *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 458-459 (1995); *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 475-480 (1976).

In *Chickasaw Nation*, this Court held that a State could not apply its motor-fuel tax to fuel sold by a tribe to non-Indians in Indian country, but it noted that "if 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." 515 U.S. at 460. Following that guidance, the Washington Legislature moved the incidence of its motor-fuel tax up the supply chain to entities that supply fuel to retailers, imposing the tax before the fuel

arrives on Indian reservations. See Pet. 5-6; see also *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 99, 115 (2005) (holding that *Chickasaw Nation*'s bar on imposing state excise tax on a tribe or tribal members for sales in Indian country did not apply to a state tax imposed on the off-reservation receipt of fuel by a non-Indian distributor who subsequently delivered the fuel to a tribally owned gas station on the reservation). The Washington Legislature's intent and purpose set forth in the statute is to impose a per-gallon tax on motor fuel "at the time and place of the first taxable event and upon the first taxable person within th[e] state." Wash. Rev. Code Ann. §§ 82.36.022 (West 2012), 82.38.031 (West 2008).

3. Respondent, Cougar Den, Inc., is a business incorporated under Yakama Nation law. Its owner and president is an enrolled member of the Tribe. Pet. App. 2a. Beginning in 2013, respondent used public highways to transport fuel from Oregon to the Tribe's reservation in Washington. *Ibid.* Respondent contracted with a trucking company, KAG West, to have the fuel transported over the Oregon-Washington border. *Ibid.*[2] Respondent sold more than 90% of its fuel to Yakama-owned retail gas stations on the Tribe's reservation, which in turn sold the fuel to customers. *Id.* at 50a-51a. Respondent did not obtain a fuel-importer license or pay the Washington motor-fuel tax when either it or KAG West brought fuel into Washington. *Id.* at 2a. In December 2013, petitioner, the Washington State De-

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[2] Under the Washington statute, where an entity importing fuel into the State is acting as an agent, "the person for whom the agent is acting is the importer." Wash. Rev. Code Ann. § 82.36.010(16) (West 2012).

partment of Licensing (the Department), issued an assessment against respondent, demanding payment of $3.6 million in unpaid taxes, penalties, and licensing fees. *Ibid.*

Respondent appealed the assessment to an administrative law judge in the Department, who held that the assessment violated Article III of the 1855 Treaty, which secures to the Yakamas the "right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. 952-953; see Pet. App. 2a-3a. The Department's director overturned the administrative law judge's order. Pet. App. 44a-61a. The director reasoned that Article III did not exempt respondent from paying the state motor-fuel tax because respondent "is not being taxed for using public highways"; rather, respondent "is being taxed for importing fuel." *Id.* at 58a. The director concluded that respondent "needs a Washington fuel importer license to bring fuel into this state." *Ibid.*

4. Respondent petitioned for review in Yakima County Superior Court, and the Superior Court set aside the director's order. Pet. App. 30a-43a. The court concluded that respondent's transport of fuel into Washington "falls within its [r]ight to [t]ravel" under the 1855 Treaty, and that because the Washington tax "places a restriction on the [r]ight to [t]ravel," the "taxes, penalties, interest, and licensing requirements" imposed by the state law "are preempted and barred by the Treaty." *Id.* at 34a.

5. The Washington Supreme Court granted direct review and affirmed. Pet. App. 1a-29a.

a. The Washington Supreme Court rejected petitioner's contention that Article III of the 1855 Treaty permits the State to restrict or regulate a specific good

that is incidentally brought over a highway. Pet. App. 6a. The court reasoned that petitioner's interpretation of Article III "ignores the historical significance of travel to the Yakama Indians" and the established rule of treaty interpretation that "Indian treaties must be interpreted as the Indians would have understood them." *Id.* at 5a-6a (citing *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 630-631 (1970)).

The Washington Supreme Court observed that when the Treaty was signed, the Tribe "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," and it concluded that the Treaty was intended to preserve the Tribe's ability to travel on the public highways to engage in trade. Pet. App. 7a-8a. The court found support for its conclusion in cases in which the Ninth Circuit had held that a Washington law imposing license and overweight-permit fees on persons who hauled logs from the Tribe's reservation to off-reservation mills (see *Cree*, *supra*), and a Washington law that required individuals other than licensed wholesalers to give notice to the state liquor control board before transporting "unstamped" cigarettes within the State (see *United States* v. *Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007)), could not be enforced against members of the Tribe. Pet. App. 9a-11a.

The Washington Supreme Court distinguished the Ninth Circuit's decision in *King Mountain Tobacco Co.* v. *McKenna*, 768 F.3d 989 (2014), cert. denied, 135 S. Ct. 1542 (2015), in which a business owned by an enrolled member of the Tribe claimed an exemption based on Article III of the 1855 Treaty from a Washington statute that required the business to place money into escrow to reimburse the State for health care costs related to

the use of tobacco products. Pet. App. 12a-13a. In *King Mountain*, the Ninth Circuit concluded that the business was not exempt from making the escrow payments because the Treaty reserved to the Tribe the right "to travel upon all public highways," not the "right to trade." 768 F.3d 997-998. According to the Washington Supreme Court, *King Mountain* stands for the proposition that "[w]here trade does not involve travel on public highways, the right to travel provision in the treaty is not implicated." Pet. App. 13a. But here, the court concluded, "travel on public highways is directly at issue because the tax was an importation tax," and it "was impossible for [respondent] to import fuel without using the highway." *Id.* at 13a-14a; see *id.* at 16a.

b. Chief Justice Fairhurst dissented. Pet. App. 17a-29a. She explained that the Tribe's "right to travel" protected by the treaty "is not a right to trade," and the motor-fuel tax could therefore be applied to members of the Tribe because the tax "burdens trade[,] * * * not fuel transport." *Id.* at 17a. In her view, the Legislature's clear intent was "to levy an excise tax on the first instance of *wholesale possession* of fuel not distributed through a refinery or importation terminal within the state," and that "[w]hether that fuel is then brought to market within Washington is not necessary or relevant for purposes of assessing tax due." *Id.* at 18a-19a.

Chief Justice Fairhurst further concluded that the treaty right "applies to trade only if inextricably linked to travel," which is not true of the Washington fuel tax. Pet. App. 25a; see *id.* at 23a. She explained that in *King Mountain*, the escrow payments required by state law "had nothing to do with travel, other than to impose a financial burden on the products King Mountain sought

to bring to market in Washington." *Id.* at 26a. "Similarly," she continued, "Washington's fuel excise tax on importers, imposed on the first incidence of wholesale possession of fuel within Washington, has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington." *Ibid.* She acknowledged that in *King Mountain* and in this case, "travel is necessary for trade" and that "[w]ithout travel, most goods have no market." *Ibid.* But she concluded that "necessity of transport, without an inextricable link between travel and trade, is not sufficient for preemption." *Ibid.*

DISCUSSION

The Washington Supreme Court erred in concluding that Article III of the 1855 Treaty exempted respondent from paying Washington's motor-fuel tax. The "right, in common with citizens of the United States, to travel upon all public highways" protected by the 1855 Treaty, 12 Stat. 952-953, is not violated by the tax at issue here, which taxes the introduction of a good into the state stream of commerce, no matter where the good originates or how it enters the State. The Washington Supreme Court's decision is also in tension with decisions of the Ninth Circuit interpreting the same treaty provision.

The Washington Supreme Court's decision will cause a significant loss of tax revenue for the State, and it is not immediately clear under that court's interpretation that the Washington Legislature could revise the statute in a way that would enable the State to collect an excise tax on motor fuel imported into Washington from another State before it arrives at the Tribe's reservation. And in light of long-running disputes about the scope of Article III of the 1855 Treaty, review by this

Court could also serve to bring needed clarity to the meaning of Article III. This Court's review is therefore warranted to correct the state court's error.

A. Article III Of The 1855 Treaty Does Not Exempt Respondent From Paying Washington's Motor-Fuel Tax

1. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973). The legal incidence of Washington's motor-fuel tax occurs when wholesale fuel is brought into the stream of commerce in Washington, which occurs outside of the Tribe's reservation. See *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005). Accordingly, respondent is subject to the tax unless Article III of the 1855 Treaty exempts members of the Tribe from complying with the state law.

In determining the scope of an Indian treaty right, courts must construe the treaty "as the Indians would naturally have understood it at the time of the treaty," *United States* v. *Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007), looking "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)); see *Tulee* v. *Washington*, 315 U.S. 681, 684-685 (1942); *United States* v. *Winans*, 198 U.S. 371, 380-381 (1905). "[D]oubtful or ambiguous expressions" are to be "resolved in the Indians' favor." *Smiskin*, 487 F.3d at 1264; see *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 630-631 (1970). Courts may not, however, ignore "clear * * * limit[s]"

appearing in the treaty. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 466 (1995).

2. Under these principles, respondent is not exempt from paying Washington's motor-fuel tax. The tax is not properly viewed as a violation of respondent's "right, in common with citizens of the United States, to travel upon all public highways." 1855 Treaty, art. III, 12 Stat. 952-953. The incidence of the tax is not on the use of public highways, and imposition of the tax does not depend upon a taxpayer's use of the highways. To the contrary, fuel licensees must pay the tax regardless of whether they remove the fuel from an in-state terminal or refinery or import fuel into the State—and, if they import, regardless of what means of transport they use. Wash. Rev. Code Ann. §§ 82.36.020(2)(a)-(c) (West 2012), 82.38.030(7) (West 2008).[3] The tax is assessed per gallon of fuel, at a set rate, without regard to how the fuel enters the stream of commerce. *Id.* §§ 82.36.020(1), 82.36.025 (West 2012), 82.38.030 (West 2008). The tax is thus appropriately viewed as an excise tax on "the first instance of wholesale possession of fuel within Washington," Pet. App. 17a (Fairhurst, C.J., dissenting) (emphasis omitted), not as a tax on the use of a public highway within the meaning of Article III of the 1855 Treaty. Article III does not exempt goods from taxation outside the Tribe's reservation simply because they are, or could be, transported by highway.

The history of Washington's motor-fuel tax further demonstrates that it is designed as an excise tax on the

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[3] The tax does not apply to fuel imported into the State by pipeline or vessel operated by a "licensee" and bound for a "terminal" or "refinery." Pet. App. 18a (Fairhurst, C.J., dissenting) (citing Wash. Rev. Code Ann. §§ 82.36.010(3), (4), (10), and 82.36.020(2)(c) (West 2012); *id.* §§ 82.38.020(4), (5), (12), and 82.38.030(7)(c) (West 2008)).

fuel itself, not as a tax on highway travel. As explained above (pp. 3-4, *supra*), before the Washington Legislature enacted the current version of the fuel tax, a federal court had concluded that a previous iteration of the tax had placed the incidence of the tax on fuel retailers, which posed a problem with respect to on-reservation Indian retailers due to the established rule that States generally may not tax Indian activities in Indian country. *Squaxin Island Tribe* v. *Stephens*, 400 F. Supp. 2d 1250, 1262 (W.D. Wash. 2005); see Pet. 5; Pet. App. 20a-22a.

In *Oklahoma Tax Commission* v. *Chickasaw Nation*, *supra*, this Court held that although a state cannot impose a tax on fuel sold by a tribe in Indian country, "the State generally is free to amend its law to shift the tax's legal incidence." 515 U.S. at 460. Following that guidance, the Washington Legislature amended the previous version of the motor-fuel tax by shifting its legal incidence up the supply chain to entities that supply fuel to retailers before the fuel arrives on an Indian reservation. *Ibid.*; Pet. 5-6. The Washington tax thus operates in the same way as the tax upheld by this Court in *Wagnon*, 546 U.S. at 99-100 (upholding Kansas tax imposed on fuel distributors upon "their initial receipt of motor fuel," where the distributors were permitted but not required to pass the tax down the distribution chain to retailers). That the State now taxes fuel when it is first possessed by a distributor in the State—whether when removed from a refinery or terminal rack at a bulk storage facility in the State, or brought in from out of State—thus reflects the State's effort to ensure that the incidence of the tax is not on Indian retailers operating on Indian reservations. It likewise does not

reflect an effort to impose any conditions or restrictions on using public highways.

3. The Washington Supreme Court concluded that the State motor-fuel tax is a tax on use of the highways because it "taxes the importation of fuel, which is the transportation of fuel." Pet. App. 16a. In reaching that conclusion, the court focused on the fact that, in respondent's case, the tax was triggered when respondent moved fuel across the state line inside a truck's tank. See *id.* at 13a-14a. The court recognized that the tax would be assessed "regardless of whether [respondent] uses the highway." *Ibid.* But the court considered that feature "immaterial" because "in this case, it was impossible for [respondent] to import fuel without using the highway." *Id.* at 14a. That analysis of the state fuel tax for purposes of Article III of the 1855 Treaty does not withstand scrutiny.

Characterizing a tax based on only one of the types of events that trigger it improperly severs that trigger from the larger statutory context. Cf. *Utility Air Reg. Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) ("[R]easonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'") (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Read as a whole, Washington's motor-fuel tax does not depend upon use of the highways, even if respondent happens to be using a highway at the time application of the tax to respondent is triggered. The regime as a whole seeks to tax the first wholesale possession of fuel in the State, regardless of how or where that possession occurs. Wash. Rev. Code Ann. §§ 82.36.020(2)(a)-(c) (West 2012), 82.38.030(7) (West 2008). As the statute itself states, the Legislature's purpose was to impose

the motor-fuel tax "at the time and place of the first taxable event and upon the first taxable person within th[e] state." *Id.* §§ 82.36.022 (West 2012), 82.38.031 (West 2008). And the Washington Supreme Court did not appear to dispute that the Treaty would not bar application of the tax to respondent if it obtained the motor fuel from a refinery or terminal rack within the State, even if the fuel was withdrawn from the refinery or terminal rack into a tanker truck and respondent then used the truck to transport the fuel over public highways to the Tribe's reservation. There is no reason for a different result if respondent obtains the fuel from a refinery or terminal rack outside the State and brings it by truck into the State.

Thus, the fact that first possession for some regulated parties will occur on a highway does not convert an excise tax into a tax on the use of the highway—or a burden on the "right, in common with citizens of the United States, to travel upon all public highways," 12 Stat. 952-953—any more than a state law banning the possession of a certain product would be a ban on highway travel simply because the ban encompasses the situation in which the person has brought the product in from out of state via a highway. In both the hypothetical and the present case, the highway is only relevant because someone has chosen it as the setting for undertaking an act (here, possession of wholesale fuel) that is subject to a general encumbrance, wherever the act takes place. The Washington Supreme Court therefore erred in concluding that Article III of the 1855 Treaty exempts respondent from paying the state motor-fuel tax.

B. The Decision Below Is In Significant Tension With Decisions Of The Ninth Circuit Interpreting Article III Of The 1855 Treaty

1. The Washington Supreme Court's decision in this case is in significant tension with decisions of the Ninth Circuit—the federal circuit that encompasses the Tribe's reservation and ceded lands. The Ninth Circuit has held that Article III of the 1855 Treaty exempts members of the Tribe from complying with state laws that apply to and burden their right to use the public highways to bring goods to market, but does not secure any broader right.

a. In *Cree* v. *Flores*, 157 F.3d 762 (1998), the Ninth Circuit considered whether members of the Tribe were exempt from Washington laws that required registration and licensing of logging trucks along with payment of fees according to gross weight, as well as log-tolerance permits and an associated fee for overweight trucks. *Id.* at 765. The Tribe and some of its members brought a suit for declaratory and injunctive relief after state officials issued traffic citations to drivers employed by tribal logging businesses that had refused to obtain the necessary licenses or permits. *Ibid.* The Tribe contended that Article III of the 1855 Treaty protected the right of its members to haul timber from the reservation to off-reservation markets without restriction and that the State therefore could not impose licensing fees or permit requirements on logging trucks owned by the Tribe or its members. *Ibid.*

To determine how Article III would have been understood by the Indians when the Treaty was adopted, the district court conducted an extensive factual inquiry into the Treaty's history. *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1236-1246 (E.D. Wash. 1997),

aff'd *sub nom. Cree* v. *Flores*, *supra*. The court determined that at the time of the Treaty, the tribal members traveled extensively for the purpose of trade and played a central role in a trade network stretching from the Pacific Northwest to the Great Plains. *Id.* at 1238. Based on the language of the Treaty, the importance of travel to the Tribe, and representations made by federal negotiators, the court held that tribal members would have understood Article III to secure a right to use public highways without limitations such as fees. *Id.* at 1246-1249. The district court held, however, that the Tribe and its members must comply with state registration requirements for purposes of identification, to the extent the requirements did not impose a fee or surcharge on the treaty right. *Id.* at 1260.

The Ninth Circuit affirmed, holding that the 1855 Treaty exempted tribal logging companies from compliance with state licensing and permitting requirements, and payment of associated fees, for trucks hauling logs on public highways. *Cree*, 157 F.3d at 769. The court determined that the 1855 Treaty, read as the Tribe would have understood it, secured for the Tribe "the right to transport goods to market over public highways without payment of fees for that use." *Ibid.*

b. The Ninth Circuit again considered the scope of Article III of the 1855 Treaty in *United States* v. *Smiskin*, *supra*. In *Smiskin*, the United States charged two Yakama members with violating the federal Contraband Cigarette Trafficking Act, 18 U.S.C. 2342(a), which makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes," and incorporates state law to define what is contraband. See 487 F.3d at 1263. The basis for the prosecution was that the defendants

had failed to comply with a Washington state law that required persons other than licensed wholesalers to give notice to state officials before transporting "unstamped" cigarettes—*i.e.*, cigarettes without either a "tax paid" or "tax exempt" stamp affixed to the packaging —within the State. *Ibid.* The federal Bureau of Alcohol, Tobacco and Firearms (ATF) had seized 4205 cartons of unstamped cigarettes from one of the defendant's residences because ATF agents suspected the defendants were transporting unstamped cigarettes from smoke shops on an Idaho Indian reservation to smoke shops on various Indian reservations in Washington. *Ibid.* The Ninth Circuit held that the defendants' violation of Washington's pre-notification requirement could not provide a valid basis for a federal prosecution under Section 2342(a) because applying the requirement to tribal members violated Article III of the 1855 Treaty. *Id.* at 1264.

The Ninth Circuit again took as its interpretive baseline this Court's rule that "[t]he text of a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians' favor." *Smiskin*, 487 F.3d at 1264 (citing *Mille Lacs*, 526 U.S. at 196, 200). Based on the history of the Treaty described in *Yakama Indian Nation*, *supra*, the court of appeals concluded that the pre-notification requirement was a restriction and condition on the right to travel that violated Article III of the 1855 Treaty. *Smiskin*, 487 F.3d at 1266.

The United States continues to believe that *Smiskin* was wrongly decided.[4] But in any event, the Ninth Circuit clarified the limits of its *Smiskin* decision in *King Mountain Tobacco Co.* v. *McKenna*, 768 F.3d 989 (2014), cert. denied, 135 S. Ct. 1542 (2015).

c. In *King Mountain*, the court of appeals held that Article III of the 1855 Treaty did not exempt members of the Tribe from complying with a state law that required cigarette companies to place money into an escrow account for every qualifying unit of tobacco sold subject to the State's cigarette tax, in order to reimburse the State for public-health expenses related to the use of tobacco products. 768 F.3d at 990-992. The court rejected the Tribe's argument that Article III of the 1855 Treaty "prohibit[s] imposition of economic restrictions or preconditions on the Yakama people's Treaty right to engage in the trade of tobacco products." *Id.* at 997. The court explained that while the treaty secures for the Tribe a "right to *travel* * * * for the purpose of transporting goods to market" without state interference, it does not secure any right to *trade* beyond the right to transport

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[4] The purpose of Washington's pre-notification requirement was to enforce the collection of the State's tax on cigarettes. Such a tax may be validly applied to on-reservation sales of cigarettes to non-Indians, even by a tribe or its members, where the incidence of the tax is on the non-Indian purchaser. See, *e.g.*, *Washington* v. *Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154-157 (1980). The pre-notification requirement under Washington law was not directed to the use of public highways as such; it imposed only a modest regulatory requirement as part of a comprehensive cigarette-tax regime. And because the Tribe and its members were not exempt from enforcement of the State's overall cigarette-tax regime, there is no reason to conclude that Article III of the 1855 Treaty exempted the Tribe from this one feature incidental to transportation.

goods on the highways. *Id.* at 998 (emphasis added). Unlike the state laws at issue in *Cree* and *Smiskin*, the court reasoned, the escrow requirement did not apply to the transport of particular goods, but rather required cigarette companies to place money in escrow for each unit of tobacco sold. *Id.* at 991-992. Therefore, the court held that Article III did not exempt Yakama members from complying with the escrow law. *Id.* at 998.

2. The Washington Supreme Court's decision is in considerable tension with those Ninth Circuit cases evaluating the preemption of state laws.[5] The state laws in *Cree* and *Smiskin* required the Tribe to comply with certain requirements in connection with use of the public highways to transport its goods for trade. Tribal members were required to obtain licenses and permits and to pay fees as a precondition to operating logging trucks on the highways, see *Cree*, 157 F.3d at 765, or to pre-notify state officials when transporting unstamped cigarettes, see *Smiskin*, 487 F.3d at 1262. Washington's motor-fuel tax, by contrast, is levied on each gallon of fuel withdrawn from a refinery or terminal rack in the State or brought into the State, regardless of how the import occurs. Wash. Rev. Code Ann. § 82.36.020(1) (West 2012).

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[5] The Ninth Circuit applies a different framework to determine whether Article III of the 1855 Treaty creates an exemption from *federal* taxes. See *Ramsey* v. *United States*, 302 F.3d 1074 (2002), cert. denied, 540 U.S. 812 (2003). The court stated in *Ramsey* that the "applicability of a federal tax to Indians depends on whether express exemptive language exists within the text of the statute or treaty." *Id.* at 1078. The court concluded that Article III did not exempt a tribal member who hauled logs on public highways using diesel trucks from paying federal highway-use and diesel-fuel excise taxes. *Id.* at 1076.

That the tax is imposed by reference to the moment when motor fuel enters the State does not transform the tax into an impermissible burden on the use of the highways. To the contrary, for fuel that is imported, the tax is imposed when the fuel enters the state because the Legislature wanted to make clear that the tax was being imposed at the first moment of wholesale possession of motor fuel in Washington, *i.e.*, "at the time and place of the first taxable event and upon the first taxable person within th[e] state." Wash. Rev. Code Ann. §§ 82.36.022 (West 2012), 82.38.031 (West 2008). The motor-fuel tax is a general encumbrance of the same type as the escrow requirement in *King Mountain*, which was imposed on each unit of tobacco sold. The motor-fuel tax "has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington." Pet. App. 26a (Fairhurst, C.J., dissenting).

C. This Court's Review Is Warranted To Correct The Washington Supreme Court's Determination That The 1855 Treaty Exempts Respondent From Paying Washington's Motor-Fuel Tax

Whether this Court's review is warranted to correct the Washington Supreme Court's erroneous decision is a close question. On the one hand, both parties accept the Ninth Circuit's federal-law framework for evaluating whether a state law runs afoul of Article III of the 1855 Treaty; they simply disagree about where this particular Washington state tax falls within that framework. Moreover, as respondent points out (Br. in Opp. 32-34), the Washington Supreme Court's decision could be viewed as an erroneous characterization of a state law by the State's highest court, which could be left to

the State's political branches to correct and would not necessarily warrant intervention by this Court.

On the other hand, the Washington Supreme Court analyzed whether the state tax was a tax on the use of the highways for the sole purpose of determining whether the tax was preempted by a federal treaty, and the court's holding rests squarely on the federal question whether Article III of the 1855 Treaty exempts respondent from paying the state tax. Pet. App. 13a-14a; cf. *Oregon* v. *Guzek*, 546 U.S. 517 (2006) (vacating decision of the Oregon Supreme Court which had held that a state limitation on the introduction of evidence in capital proceedings violated the federal Constitution). And although respondent and the Tribe contend (Br. in Opp. 35; Tribe's Amicus Br. 10) that the state legislature is free to amend its law in response to the Washington Supreme Court's decision, it is not immediately apparent that the Legislature could amend its law in a manner that would satisfy the Washington Supreme Court that the State is taxing the possession—and not the transportation—of motor fuel. The Legislature already made clear that it was moving the incidence of the tax up the supply chain and imposing the tax either when fuel is removed from an in-state source or when it is brought over the border. Wash. Rev. Code Ann. §§ 82.36.022 (West 2012), 82.38.031 (West 2008). If respondent's possession of fuel that it imports into the State will always be in a truck on a highway, then it is unclear whether the Washington Legislature could rewrite the law in a way that would cause the Washington Supreme Court to reach a different conclusion about preemption. And there could be a period of considerable uncertainty if it sought to do so. In light of the long-running disputes concerning invocation of Article III by

the Tribe and its members to claim exemptions from various Washington statutes governing cigarettes and motor fuels, review by this Court could serve to bring clarity to these issues.

Furthermore, although the Washington Supreme Court's decision involves the applicability of a single state tax to one tribally owned business, its reasoning could extend to any tax on the possession of a good that is imported into Washington by a member of the Tribe. Moreover, petitioner states (Pet. 29-30) that respondent has obtained or is seeking fuel exporter licenses in a number of other States, and the Washington Supreme Court's decision could lead to a refusal by respondent to pay a similar fuel-import tax in States into which it transported fuel by highway.

Petitioner and its amici further point out (Pet. 30-31; States' Amicus Br. 18-19) that the United States entered into treaties with tribes in Idaho and Montana that contain identically worded right-to-travel provisions. See Treaty of June 11, 1855, between the United States and the Nez Percé Indians, art. III, 12 Stat. 958; Treaty of July 16, 1855, between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, art. III, 12 Stat. 976. The existence of those other treaties could counsel in favor of allowing other state courts to interpret the relevant treaty language before this Court intervenes. In the meantime, however, Washington would be unable to collect what it contends would be a significant amount of tax revenue. Pet. 29-31.

On balance, the United States recommends that the Court grant review of the Washington Supreme Court's erroneous interpretation and application of Article III of the 1855 Treaty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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