No. 16-1498

In The
Supreme Court of the United States

WASHINGTON STATE
DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,
a Yakama Nation Corporation,

Respondent.

On Petition For Writ Of Certiorari
To The Washington Supreme Court

SUPPLEMENTAL BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

SUPPLEMENTAL BRIEF FOR RESPONDENT COUGAR DEN

In its brief, the Solicitor General endorses the Ninth Circuit's interpretation and application of the 1855 Treaty with the Yakama Nation, yet follows with a lukewarm recommendation that this Court grant review of the Washington Supreme Court's ruling. The Solicitor General's brief only highlights the reasons that this Court should deny the petition. To support its statement that the decision to recommend review is even a "close question," the Solicitor General avers that (i) the Washington Supreme Court erred in characterizing the Washington tax statute at issue and (ii) this alleged error creates "tension" with the Ninth Circuit. These arguments in support of review are fundamentally flawed.

I. The Solicitor General's Disagreement with the Washington Supreme Court's Interpretation of the Washington Fuel Tax Does Not Merit Certiorari

a. The Solicitor General first argues that the Washington Supreme Court committed error in its characterization of the state tax statute at issue. This Court typically does not sit to correct error. *See* SUP. CT. R. 10.

The Solicitor General does not assert that there is a dispute involving any federal question. *See* Br. at 19 ("both parties accept the Ninth Circuit's federal-law framework for evaluating whether a state law runs afoul of Article III of the Treaty"). Given the lack of

uncertainty in the proper treaty construction, the Solicitor General's claim that the Washington Supreme Court incorrectly construed a Washington statute supplies no reason to grant review.

b. Review for error correction is especially inappropriate where the purported error in question has to do with a state supreme court's construction of a state statute. The Washington Supreme Court engaged in statutory interpretation of a Washington state statute and held that the Washington statute taxes importation. Only after the court held that the statute taxed Respondent's importation of fuel into the State and to the Yakama Reservation did the court hold that the state statute, so construed, impermissibly burdened the right to travel guaranteed by the Treaty.

c. Moreover, the Washington Supreme Court committed no error—it correctly construed the Washington statute as a tax on Cougar Den's importation of fuel through the State and onto the Yakama Reservation, burdening the Right to Travel preserved by the 1855 Treaty.

The Solicitor General asserts that the state law's import provision should be read in some broader context. Br. at 12. Notably absent from the Solicitor General's assertion of error by the Washington Supreme Court—and indeed by every judicial officer in Washington to review this state statute—is any discussion or understanding of Washington statutory construction, tax law, or the state constitutional mandate that all fuel tax revenue must be used for the maintenance and

improvement of highways. Instead, the Solicitor General wholly adopts the two justice dissent below, without additional analysis or authority.

Seven justices of the Washington Supreme Court addressed and rejected the argument that the import taxes assessed under Former Revised Code of Washington sections 82.36.020(2) and 82.38.030(7) are anything other than a tax on "bringing goods to market." Washington imposes a point-of-sale tax on fuel when fuel is removed from the terminal rack and an import tax when fuel is "imported" into the state. *See* Former Wash. Rev. Code. §§ 82.36.020(2) & 82.38.030(7). Here, as the Washington Supreme Court explained below, "Cougar Den is being taxed for importing fuel" through Washington to its destination on the Yakama Reservation. Pet. App. 1a. Accordingly, the Washington Supreme Court considered the nature of Washington's tax on that activity.

Washington's fuel tax is plainly not a tax on the possession of fuel itself: a tax is assessed on (a) the ***transfer*** of fuel from the terminal rack to a distributor or (b) the ***importation*** of fuel into the state.[1] Former

[1] The Solicitor General does not support its statement that the triggering event is irrelevant to the character or nature of the tax and Washington law rejects that argument. It is well established that the nature of a tax is revealed by examining the subject matter of the tax, the manner in which it is assessed, and the measure of the tax. *Harbour Village Apartments v. City of Mukilteo*, 139 Wash. 2d 604, 989 P.2d 542 (1999). Washington follows basic hornbooks in repeatedly and emphatically rejecting claims that taxes on transactions or on the right to use or transfer things are taxes on the property themselves. *See, e.g.*, *Black v. State*, 67 Wash. 2d 97, 99-100, 406 P.2d 761 (1965).

Wash. Rev. Code §§ 82.36.020(2) ("the tax . . . is imposed ***when any of the following occurs***") (emphasis added) & 82.38.030(7). The fuel tax statutes define "import" as "to bring . . . fuel into [the] state," other than through a "pipeline or vessel" and subject to other exemptions. Former Wash. Rev. Code §§ 82.36.010(10) & 82.38.020(12). Several categories of possessed fuel, such as fuel located in "the fuel supply tank of a motor vehicle" and wholesale fuel passing through Washington to another out-of-state market are exempt. *Id.* Read with fidelity to the text as a whole and in context, in accordance with Washington's canons of statutory construction, the Washington Supreme Court properly concluded that the tax burdened activity rather than possession.

Moreover, the Solicitor General's interpretation of the Washington statute is irreconcilable with its prior interpretation of the Kansas tax upheld in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), which Petitioner and the Solicitor General represent to operate in the same manner.[2] *See* Br. at 11 ("Washington tax thus operates in the same way as the tax upheld by this Court in *Wagnon*"). There, the Solicitor General relied upon the triggering events to conclude that the tax was "by definition an excise or sales tax

[2] Respondent does not concede that the taxes are identical or that Washington's 2007 Amendments successfully moved the incidence off of tribal retailers. The Washington Supreme Court expressly has not addressed that question. *See Automotive United Trade Organization v. Washington*, 183 Wash. 2d 842, 856, 357 P.3d 615 (2015).

that is expressly levied on the use, sale, or delivery of fuel," whereas here the Solicitor General ignores the operative verbs and triggering events to conclude that the same tax is assessed on possession, regardless of the triggering event. *Compare* Amicus Brief of United States at 13-14, Case 04-631 (filed July 14, 2005), *with* Br. at 12-13.

Regardless, the Solicitor General's position that this Court might have construed the state statute differently in the first instance is irrelevant. It is axiomatic that "a State's highest court is the final judicial arbiter of the meaning of state statutes." *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975).

II. The Solicitor General Manufactures "Tension" by Assuming that the Washington Supreme Court Interpreted Its Statute Erroneously

a. The Solicitor General next suggests that the decision below "is in tension with" decisions from the Ninth Circuit. The Solicitor General does not allege a conflict, which of course is this Court's criterion for granting review. The Solicitor General's choice and supporting analysis undermines the Petition for Review, which rests on the premise that "[t]he Washington Supreme Court majority's view of the treaty is diametrically opposed to the Ninth Circuit's." Pet. at 20.

b. The Solicitor General refrains from alleging a conflict for good reason. First, the tension only exists if this Court rejects the state supreme court's construction of the Washington tax statute. Second, and even

with that predicate assumption, the tension alleged is with only one case, *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), which rests on an entirely different set of facts.

In determining whether the Treaty is an express federal law exempting the Yakama Nation from a nondiscriminatory state law, the Ninth Circuit (i) considers the nature or character of the restriction or condition imposed by the state law and (ii) the meaning of the "Right to Travel" provision in the Treaty. *See Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996) ("*Cree I*") (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1979)). As the Government recognizes, this framework is not contested and courts applying this framework have uniformly defined the meaning of the "Right to Travel" provision: the provision preempts state laws that restrict or place conditions on (a) travel, including encumbrances on Yakamas "bringing goods to market," but not (b) encumbrances on the sale of goods. Br. at 14, 19; *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) ("*Cree II*"); *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007); *King Mountain Tobacco*, 768 F.3d 989.

The Solicitor General discusses these three Ninth Circuit cases and it does not allege any tension between the state court ruling and *Cree II* and *Smiskin*. The only alleged "tension" is with *King Mountain Tobacco*, which, as thoroughly addressed in Respondent's Brief in Opposition, considered an escrow statute imposing a mandatory flat-fee payment assessed on every unit of

tobacco sold. 768 F.3d at 997-98. To manufacture this "tension," the Solicitor General adopts the position advanced by the dissenting opinion below that would have interpreted Washington's import tax as a tax on ownership rather than importation. Br. at 19 (citing Pet. App. 26a (Fairhurst, C.J., dissenting)).

The state supreme court's analysis of the Washington fuel tax scheme cannot be revised to manufacture a conflict. Because the Washington Supreme Court's construction of the local statute rests on purely state law, that construction is conclusive. The only question remaining is "whether the statute so construed and applied" is preempted by the Treaty. *See Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 483 (1942). The Solicitor General acknowledges that any state burden on the Yakama's right to transport goods to market over public highways would be preempted. If this Court recognizes the Washington Supreme Court's holding that Washington's fuel tax burdens the transportation of fuel, then a holding that the Treaty Right to Travel preempts the state tax is inescapable.

III. The Solicitor General's Unsubstantiated Claims of Harm Do Not Merit Certiorari

a. As a final effort to support its tepid recommendation for certiorari, the Solicitor General speculates that this ruling construing Washington law could be applied to other treaties and other goods in different states with different laws.

The Solicitor General raises the specter that the decision below might be applied beyond its specific facts. Br. at 21. Yet the Solicitor General, like the Petitioner, fails to identify any other Washington law that might be preempted by the Treaty Right to Travel when a Yakama Nation member travels.

As for concerns about other states, the Solicitor General effectively asks this Court to identify and interpret unspecified state taxes—other than the Washington fuel tax—that might burden travel and therefore be preempted. And again, because there is no dispute over the meaning of the treaty right, any such analysis would turn on the character and nature of the challenged state tax. In any event, this would be a matter to be determined if and when such a preemption challenge was entertained.

Further, the Solicitor General's speculative concerns about the future and far flung implications of the decision below fail to consider the limited extent of that holding. The Washington Supreme Court adopted the factual findings in *Yakama Indian Nation v. Flores*, which found that the Treaty protected the right to travel within Washington but did not define the full geographic scope of that right. 955 F. Supp. 1229, 1261-67 (E.D. Wash. 1997). This limitation makes for a poor vehicle to address the Solicitor General's hypotheticals: any court considering the potential preemptive effects of the Treaty of 1855 in another state, such as Kansas, would have to engage in factfinding in order to construe the Treaty according to the understanding of the Indians at the time. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) ("treaties with the

Indians must be interpreted as they would have understood them"). Specifically, that future court would inquire into the Yakama Nation's expectations and the scope of the rights they thought they were reserving.

b. The Solicitor General strangely opines that it would be difficult for the Washington State Legislature to structure its fuel tax in a manner that circumvents the Yakama Nation's treaty rights. Br. at 20 ("it is unclear whether the Washington Legislature could rewrite the law * * * to reach a different conclusion about preemption."). Washington does not have a right to evade treaty obligations. The law does not permit the state to abrogate the Yakama Nation's rights merely so that it might "pursu[e] the most efficient remedy" to enforce fuel taxes on Washington drivers. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991). As both Petitioner and the Solicitor General point out, Washington has shifted its fuel tax before in response to court cases enforcing Tribal rights. The current regime reflects the deliberate choice of the Washington legislature.

Moreover, the Solicitor General's speculative concerns may soon become moot, as Washington contemplates abandoning its fuel tax altogether in favor of a Road Usage Charge. Washington's Constitution mandates that fuel taxes be exclusively used to maintain public highways and roads.[3] WASH. CONST. art. II § 40.

[3] Section 40 of the Washington Constitution further reinforces the state supreme court's ruling. Because the Washington Constitution requires that fuel taxes such as those at issue can only be spent on maintaining roads, it is even clearer that this

Recognizing that motor vehicles are increasingly fuel efficient and that tens of thousands of electric vehicles do not pay for the privilege of using the public highways, Washington's legislature has authorized research on driving taxes that would be paid per mile.[4]

The naked concerns about potential revenue loss are speculative and unquantified. Even the Solicitor General frankly allows that it may be preferable to let "other state courts * * * interpret the relevant treaty language before this Court intervenes." Br. at 21.

CONCLUSION

The Washington Supreme Court's determination rests on a reasonable construction of the state statute and should be treated as conclusive. The proper construction of Washington state's fuel tax statute does not merit certiorari. This Court should deny the petition.

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fuel tax as applied to Cougar Den was an impermissible tax on its use of public highways. *Cree II*, 157 F.3d at 769 ("the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use.").

[4] 2015 Wash. Sess. Laws 1720, 1726 § 205(1); Gutman, "Washington state to test pay-by-the-mile as a way to fund highways," Seattle Times (Sept. 15, 2017), found at: https://www.seattletimes.com/seattle-news/transportation/washington-state-to-test-pay-by-the-mile-as-a-way-to-fund-highways/

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Respectfully submitted,

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