

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE)
DEPARTMENT OF LICENSING,)
Petitioner,)
v.) No. 16-1498
COUGAR DEN, INC.,)
Respondent.)

Pages: 1 through 78

Place: Washington, D.C.

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5 Petitioner,)

6 v.) No. 16-1498

7 COUGAR DEN, INC.,)

8 Respondent.)

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10 Washington, D.C.

11 Tuesday, October 30, 2018

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:04 a.m.

16

17 APPEARANCES:

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19 Olympia, Washington; on behalf of the Petitioner.

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22 the United States, as amicus curiae, supporting
23 the Petitioner.

24 ADAM G. UNIKOWSKY, ESQ., Washington, D.C.; on behalf
25 of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 16-1498,
5 Washington State Department of Licensing versus
6 Cougar Den.

7 Mr. Purcell.

8 ORAL ARGUMENT OF NOAH PURCELL

9 ON BEHALF OF THE PETITIONER

10 MR. PURCELL: Mr. Chief Justice, and
11 may it please the Court:

12 Washington's fuel tax taxes fuel, not
13 highway travel. The tax is non-discriminatory
14 and its incidence is off-reservation, so it
15 applies to Cougar Den unless preempted by
16 express federal law. Nothing in the Yakama
17 treaty preempts this tax. The treaty
18 guarantees the tribe the right in common with
19 others to travel by public highway, but it says
20 nothing that would preempt a generally
21 applicable tax on goods like this one.

22 The contract --

23 JUSTICE SOTOMAYOR: I'm sorry.

24 MR. PURCELL: I'm sorry, Your Honor.

25 JUSTICE SOTOMAYOR: Could you tell me

1 could you tax the tribe's buying of the fuel in
2 another state?

3 MR. PURCELL: Well, the treaty --

4 JUSTICE SOTOMAYOR: They take the
5 truck, they leave your state, they go to
6 another state, they buy the fuel. Can you tax
7 them in the buying of that fuel?

8 MR. PURCELL: The other state could
9 certainly tax them on that, Your Honor.
10 They've conceded that. Whether we could tax
11 them as a matter of state law, I don't think
12 so, but -- but --

13 JUSTICE SOTOMAYOR: All right.

14 MR. PURCELL: -- but not -- certainly
15 not under the treaty.

16 JUSTICE SOTOMAYOR: So the question
17 is, in my mind, whether the travel rights to
18 freely use the highways permit you to tax them
19 for an incidence carrying the fuel from another
20 state on a highway through your state, correct?
21 Now the court below called this an importation
22 tax.

23 MR. PURCELL: Right.

24 JUSTICE SOTOMAYOR: You've been
25 resisting that, and you call it a use tax.

1 MR. PURCELL: Right.

2 JUSTICE SOTOMAYOR: But, if it's an
3 importation tax, it's not equally applied.
4 There are wholesalers of all kind who can
5 import without paying the tax, correct?

6 MR. PURCELL: Not if they lack a
7 license like Cougar Den, Your Honor. An
8 unlicensed entity owes the tax when they bring
9 the fuel into the state regardless of how they
10 do so, and licensed entities that buy fuel in
11 the state pay the tax immediately within the
12 state. So this tax applies to fuel purchased
13 in Washington or outside of Washington --

14 JUSTICE SOTOMAYOR: What is the -- the
15 license? Is it a way to get them not to pay?
16 Who pays for the fuel then once you're
17 licensed? You're a wholesaler, you bring it
18 in, I'm assuming by vessel or by pipeline.

19 MR. PURCELL: Well, then -- sorry.
20 Sorry, Your Honor.

21 JUSTICE SOTOMAYOR: Then the person
22 who buys the fuel uses it, correct?

23 MR. PURCELL: Well, if you're bringing
24 it into a terminal or a refinery, then -- then
25 the tax is due when it's picked up at a

1 terminal or a refinery. Who actually pays the
2 tax is a complicated question depending on
3 whether the entity that owns the fuel in the
4 tank is a supplier or not.

5 But that's when the tax is due.

6 JUSTICE SOTOMAYOR: If we accept that
7 the travel provision entitled this tribe to
8 travel with goods back and forth to a market
9 without a tax, without a license, just like in
10 the fishing rights case, then what gives you
11 the right to charge them within the state?
12 Meaning they're traveling free of tax, free of
13 license, they go to the reservation, you can't
14 tax them on the reservation.

15 MR. PURCELL: Right.

16 JUSTICE SOTOMAYOR: So I'm not quite
17 sure what permits you to tax them at all.

18 MR. PURCELL: Well, there's two
19 crucial --

20 JUSTICE SOTOMAYOR: If you can't tax
21 them when they picked up the fuel.

22 MR. PURCELL: There's two crucial
23 points about that, Your Honor. First of all,
24 Cougar Den concedes that we could tax a
25 purchase or sale that a Yakama member makes

1 outside of the reservation, even though that
2 would not have been taxed in 1855. What's
3 doing the work --

4 JUSTICE SOTOMAYOR: At the market.

5 MR. PURCELL: At the market, yes, but
6 -- but --

7 JUSTICE SOTOMAYOR: But you've just
8 admitted that at the market where they pick
9 this up, you couldn't tax them.

10 MR. PURCELL: Well, the point is, Your
11 Honor, the treaty did not preserve everything
12 exactly as it was in 1855. The key point here
13 is that this Court has adopted a clear rule
14 that as to off-reservation taxes,
15 off-reservation state taxes can be applied to
16 tribes if -- if they're non-discriminatory and
17 -- and if the incidence is off-reservation.
18 And, here, that's the case, so --

19 JUSTICE KAGAN: Mr. Purcell --

20 JUSTICE SOTOMAYOR: Well, that --

21 JUSTICE KAGAN: -- there are a lot of
22 issues in this case, but just to make it easier
23 for me, could I ask you to assume a couple of
24 them and then could -- we could focus on one?

25 MR. PURCELL: Sure.

1 JUSTICE KAGAN: So you know one issue
2 is does the right to travel include the right
3 to travel with goods, and I'm going to ask you
4 to just assume that it does.

5 MR. PURCELL: Okay.

6 JUSTICE KAGAN: And then another
7 question is, does this treaty preempt generally
8 applicable taxes? And I'm -- that's -- you've
9 been talking a lot about that. And I'm just
10 going to ask you to assume that it does.

11 MR. PURCELL: Okay.

12 JUSTICE KAGAN: In other words, you
13 know, if -- if -- if you have a toll on a road,
14 for example, the fact that it's generally
15 applicable, you still can't apply it to members
16 of the Yakama Nation. I'm just going to ask
17 you --

18 MR. PURCELL: Okay.

19 JUSTICE KAGAN: -- to assume that,
20 okay?

21 MR. PURCELL: Uh-huh.

22 JUSTICE KAGAN: So, if both of those
23 things are true, then it seems to me we come --
24 to me, the hardest issue, which is how do we
25 look at this tax? Do we look at it as a tax

1 that is preventing the Yakama from doing
2 exactly what they bargained for in this treaty;
3 in other words, it -- you know, it's not
4 preventing but burdening the Yakama from
5 traveling on roads with goods, or you keep on
6 saying, well, no, because it's not targeted at
7 that. It's not directed at that. It's a more
8 broad tax on the possession of fuel.

9 And I guess what I want to ask you is
10 why that matters. I mean, it -- it does seem
11 to me that from the Yakama's point of view, and
12 they're, after all, the people who entered into
13 the treaty, from the Yakama's point of view,
14 this tax is burdening exactly what they
15 bargained to get, which is the ability to
16 transport their goods without any burdens,
17 without a tax.

18 MR. PURCELL: No, Your Honor. This
19 tax applies to the fuel itself regardless of
20 whether or how it's transported.

21 JUSTICE KAGAN: I know -- maybe I'm
22 not making myself clear. You're sort of
23 saying, well, the tax applies in other
24 circumstances to people who aren't transporting
25 fuel. But I'm saying, from the Yakama's point

1 of view, they're transporting goods on the
2 road, exactly as the treaty says they can, and
3 why do they care if you apply your tax in other
4 circumstances as well? Why should they care?
5 Why does it matter what the full scope of the
6 tax is if, from the Yakama's point of view, the
7 tax burdens exactly what they got as a result
8 of its treaty?

9 MR. PURCELL: Because, Your Honor,
10 this Court has never said that a person or a
11 company can make an activity exempt from state
12 law, an activity like fuel possession, by
13 engaging in that activity while also engaged in
14 a treaty-protected activity like travel.

15 If that's the rule, then a Yakama
16 member could possess illegal firearms or
17 illegal drugs or diseased apples in their car,
18 to just gave a range of examples, and bring
19 them into the state and say your laws against
20 these things violate my right to travel by
21 public highway. And that cannot possibly be
22 the right approach, or else it would preempt
23 any sort of state --

24 JUSTICE SOTOMAYOR: But even in the
25 fishing rights case, which you don't see as --

1 as comparable, but others might argue it is,
2 the state can regulate for public interest
3 conservation points.

4 The Indian tribe has conceded that you
5 can regulate for public interest on a highway.
6 That wasn't superseded by the treaty. But what
7 they bargained for was to -- to carry goods
8 back and forth from the market without a
9 burden. That was their bargain. Just as,
10 under the fishing rights treaty, they can go
11 and collect fish without paying a tax or
12 getting a license for that fish.

13 MR. PURCELL: Your Honor, in Tulee,
14 this Court said that the -- the state could not
15 tax the very right at issue, the right to fish.
16 But, here, that is not at all what's happening.

17 JUSTICE SOTOMAYOR: Or impose a toll
18 to do it.

19 MR. PURCELL: Well, and the Court has
20 never said that the state can generally
21 regulate a fishing right in the public
22 interest. It's only said that the state can
23 regulate for the conservation of fish. So --

24 JUSTICE SOTOMAYOR: Well, that's the
25 public interest.

1 MR. PURCELL: Well, but -- but -- but
2 Cougar Den is seeking to expand that to say the
3 State can do anything that would protect public
4 safety. And this Court has never said that
5 about the fishing right. So that's sort of a
6 convenient addition that they've conceded, but
7 it's not found anywhere in the treaty text.
8 And so they're -- they're essentially asking
9 this Court to -- to find kind of reasonable
10 regulations that are okay without any basis in
11 the treaty.

12 JUSTICE GORSUCH: Well, counsel, is
13 that so? I mean, I thought the interpretation
14 of the phrase "in common with" by the district
15 court in Yakama Indian Nation was that it
16 allowed the state to impose certain regulations
17 that facilitate both native and non-native
18 travel along the same highways. So --

19 MR. PURCELL: That's --

20 JUSTICE GORSUCH: -- safety
21 regulations, speed limits, would facilitate
22 travel in common.

23 MR. PURCELL: That's what the district
24 court held in Yakama Indian Nation.

25 JUSTICE GORSUCH: Right.

1 MR. PURCELL: Of course, that wouldn't
2 cover something like, for example, regulating
3 firearm possession or diseased apple
4 transportation.

5 JUSTICE GORSUCH: But it does regulate
6 the questions that we've been talking about in
7 terms of it does provide some safety
8 regulations, for example, right?

9 MR. PURCELL: Well, presumably, that
10 would allow, for example, a speed limit but not
11 any other sort of regulation on the goods
12 themselves, which is what the state's trying to
13 do here.

14 I mean, what's odd under Cougar Den's
15 theory is that the state --

16 JUSTICE GORSUCH: That's all, under
17 the Yakama Indian Nation holding, that's all
18 that the treaty would allow you to do.

19 And I guess I'm wondering in the first
20 instance why -- why you're not estopped from
21 arguing a different position today?

22 MR. PURCELL: For a number of reasons,
23 Your Honor. First of all, this Court has
24 always treated treaty interpretation as a
25 question of law for this Court to decide de

1 novo, and that's how this Court has always
2 approached treaty interpretation.

3 It has never considered itself bound
4 by legal conclusions reached by a lower court
5 even in the same case.

6 JUSTICE GORSUCH: Well, I -- I don't
7 feel bound. I wonder if you are, though.

8 (Laughter.)

9 MR. PURCELL: No, Your Honor. We
10 explained in our reply brief as a matter of
11 state law the argument is just completely wrong
12 that we're bound by any of those statements in
13 the ALJ's ruling or the superior court ruling.

14 But, more importantly, this Court has
15 never considered itself bound by what are
16 really legal conclusions in a district court
17 opinion.

18 And Yakama Indian Nation dealt with a
19 very narrow issue of a fee as a precondition to
20 use the highway. That is not what we have
21 here.

22 Cougar Den and the Yakama Nation are
23 free to use the highway and not pay this tax.
24 What they can't do is possess fuel and bring it
25 into the state or purchase it in the state

1 without paying the tax.

2 JUSTICE KAVANAUGH: But they were told
3 at the time of the treaty that you could go on
4 the roads to take your things to market, as if
5 you would be treated off-reservation, as if you
6 were still on the reservation.

7 MR. PURCELL: The first part they were
8 told, Your Honor. The second part they were
9 not. That is a misquote that the other side is
10 using from the -- the -- the --

11 JUSTICE KAVANAUGH: But the effect --
12 the effect was that, in taking your goods to
13 market, which was the promise, in exchange for
14 a huge area of land, an area of land the size
15 of the State of Maryland that was given up by
16 the tribe, that you could take your goods to
17 market.

18 And this burdens, as Justice Kagan
19 said, this burdens substantially their ability
20 to take goods to market.

21 MR. PURCELL: Your Honor, the Yakama
22 remain entirely free to take goods to market.
23 And Cougar Den has conceded that the state can
24 tax their -- their trading of goods
25 off-reservation, as they must. So the idea

1 that the treaty preserved things exactly as
2 they were in 1855, and the Yakama trading
3 practices, is just impractical.

4 JUSTICE KAGAN: But what the treaty
5 seems to present -- prevent is the state from
6 taxing either travel or, as Justice Kavanaugh
7 says, travel with goods.

8 Isn't that exactly what they got in
9 exchange for their land?

10 MR. PURCELL: No, Your Honor, the best
11 reading of the treaty is that it does not
12 preempt non-discriminatory taxes that apply
13 equally to everyone. The treaty says it
14 guarantees a right in common with others to
15 travel by public highway.

16 And none of the reasons the Court
17 deviated from that ordinary meaning in the
18 fishing cases apply here.

19 But even if the Court decided that it
20 guaranteed the Yakama some right beyond what it
21 guaranteed others in terms of traveling without
22 paying a fee for traveling, what we have here
23 is not a fee for traveling. The -- the -- this
24 fee does not turn, this tax does not turn in
25 any way on use of the highway.

1 It's paid on fuel purchased in state,
2 fuel purchased out of state. If Cougar Den
3 brought this fuel into Washington and
4 immediately put it into a tank on the other
5 side of the state line, they would still owe
6 the tax even if they never traveled any
7 farther.

8 JUSTICE KAGAN: Well, the -- the tax
9 legislation taxes a wide range of activities.
10 One is it taxes fuel that's removed in the
11 state from a refinery, but the one that's being
12 applied here is that it taxes motor vehicle
13 fuel entering into this state.

14 So entering into, this is a pretty
15 standard importation tax, which is to say that
16 it's taxing the travel of goods into the state,
17 which, again, seems to be what the Yakama got
18 as a result of this treaty: the ability to
19 take goods to market and to take goods from
20 market, regardless where that market is.

21 MR. PURCELL: But, again, Your Honor,
22 the -- the fuel -- the tax applies to fuel
23 purchased inside Washington and outside of
24 Washington and brought into Washington by any
25 means. It would apply if they were bringing it

1 in by private toll road. It is not a tax on
2 using public highways.

3 And -- and the happenstance of where
4 the state line is was not certainly a factor in
5 the 1855 treaty negotiations.

6 What -- what Cougar Den is essentially
7 arguing --

8 JUSTICE KAGAN: Do you -- do you
9 contest -- I mean, if you said what is Cougar
10 Den doing, how would you describe what Cougar
11 Den is doing, what its activity is? Because
12 the way I would describe Cougar Den's activity
13 is that it's bringing goods from market.

14 MR. PURCELL: Well, two things about
15 that, Your Honor. First of all, the treaty
16 does not --

17 JUSTICE KAGAN: I just really asked
18 how would you describe Cougar Den's activity.

19 MR. PURCELL: Sorry. I would describe
20 it as possessing fuel in Washington, Your
21 Honor. That is why they paid a tax.

22 Keep in mind, Cougar Den is not even
23 doing the transferring here.

24 JUSTICE KAGAN: You would describe it
25 as possessing fuel as opposed to transporting

1 fuel?

2 MR. PURCELL: They owe the tax because
3 they possess fuel. They are not transporting
4 the fuel in light of the facts of this case.

5 JUSTICE KAGAN: So if Jack says I'm
6 taking my pigs to market, and somebody says,
7 what are you doing, Jack? He says, well, I'm
8 taking my pigs to market. No, I think you're
9 possessing your pigs, Jack.

10 MR. PURCELL: Well, if the state had a
11 rule that diseased pigs could not leave a
12 certain area, under the -- under Crudenser, the
13 state could not apply that rule.

14 And -- and so this is a regulation of
15 the goods, a tax to the goods, not a tax on the
16 travel. That's the crucial point here.

17 That's -- that's one of the crucial
18 points. The other crucial point is, under the
19 best reading of the treaty, this is a
20 non-discriminatory tax that applies to
21 everyone. And so it would not be preempted
22 even if it were.

23 JUSTICE KAVANAUGH: That -- that
24 reading of "in common with" was rejected by the
25 Court in the fishing cases.

1 MR. PURCELL: It was, Your Honor, but
2 none of the reasons the Court gave in those
3 cases apply here. So the Court really gave
4 three cases.

5 And in the Tulee case, the Court said
6 it was despite the phrase "in common with
7 others" that it was going to read the fishing
8 right as creating a greater right for the
9 tribes than for non-Indians. And there were
10 sort of historical, textual, and practical
11 reasons.

12 And the practical reason, first and
13 foremost, was an equal right would have left no
14 fish for the Indians to take because they're so
15 vastly outnumbered by non-Indians.

16 And that's just not the case here.
17 Allowing equal access to the highway --

18 JUSTICE GORSUCH: Well, we -- counsel,
19 we normally read a -- a -- a phrase to bear the
20 same meaning in all of its applications. And
21 we wouldn't normally read the term "in common
22 with" to mean one thing when it's fishing and
23 another thing when it's highways, would we?
24 That would be kind of an extraordinary --

25 MR. PURCELL: Fair --

1 JUSTICE GORSUCH: -- reading of a
2 statutory term.

3 MR. PURCELL: Fair enough, Your Honor,
4 but in Tulee, this Court said it was sort of
5 deviating from the normal meaning.

6 JUSTICE GORSUCH: What -- what -- what
7 do you think about that, though?

8 MR. PURCELL: I think you had good
9 reasons for deviating from the normal meaning
10 in Tulee that do not apply here. And so I
11 think the Court should give the phrase its
12 normal meaning.

13 JUSTICE GORSUCH: But having adopted
14 one reading of it, why wouldn't we be
15 consistent?

16 MR. PURCELL: Because none of the
17 reasons you gave in those cases apply here --

18 JUSTICE GORSUCH: Okay.

19 MR. PURCELL: -- the textual reasons
20 and practical.

21 JUSTICE GORSUCH: The next -- next
22 concern would be then what do we do about the
23 fact that this is also how the district court
24 concluded it after very careful reading in
25 Yakama Indian Nation about the history of the

1 treaty --

2 MR. PURCELL: Well, it's the --

3 JUSTICE GORSUCH: -- and looking at
4 the original understanding of both parties and
5 its original meaning at that time, and that the
6 Indians understood it not to mean a common
7 regulation applicable to everybody, but, again,
8 that they would be able to do the same things
9 that they've always done just with non-native
10 persons present?

11 MR. PURCELL: The meaning of the
12 treaty, of course, is a question of law for
13 this Court to decide de novo. And if the Court
14 doesn't want to reach that issue, of course,
15 you can simply say that whatever the treaty
16 means about travel, this is a tax on goods.

17 I'd like to reserve the remainder of
18 my time for rebuttal if I may.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. Not -- not so fast.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: I did that
23 once too.

24 Ms. O'Connell.

25

1 ORAL ARGUMENT OF ANN O'CONNELL,
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONER
4 MS. O'CONNELL: Mr. Chief Justice, and
5 may it please the Court:

6 Article III of the Yakama treaty does
7 not exempt tribal members from paying
8 Washington's motor fuel tax.

9 The treaty protects the right in
10 common with others to travel upon the public
11 highways. It does not give tribal members
12 immunity from excise taxes on goods that
13 they're carrying inside their trucks inside --
14 that they're brought outside of the reservation
15 or obtained outside of the reservation for
16 trade or for any other purpose.

17 Respondent acknowledges that tribal
18 members are not exempt from the economic
19 framework for trading goods that has developed
20 outside of the reservation.

21 If Respondent had obtained this fuel
22 from a refinery in Washington, it could be
23 taxed for that transaction.

24 If Oregon had charged a tax on this
25 transaction, the Respondent would have to pay

1 it. Washington's tax is an -- is an economic
2 burden on the fuel that's being carried in the
3 truck. It's not a restriction on their ability
4 to use the highway in common with others.

5 JUSTICE BREYER: Assume I think you're
6 mostly right, but what about the fact that it's
7 gasoline? I mean, can -- can the state impose
8 tolls on -- on the highway? Say they really
9 want people to use mass transit. We're going
10 to have a \$1,000 toll.

11 MS. O'CONNELL: I don't --

12 JUSTICE BREYER: Can they do that?

13 MS. O'CONNELL: The state -- well, the
14 state could impose a \$1,000 toll if it was
15 doing that for everybody. I think that --

16 JUSTICE BREYER: Yes, doing it for
17 everybody. Now, by the way, nobody, or hardly
18 anyone, can use the highways, including the
19 tribe.

20 MS. O'CONNELL: I think that -- that
21 hypothetical is quite unlikely simply because
22 the --

23 JUSTICE BREYER: I believe that they
24 are unlikely to impose it. That's why it's a
25 hypothetical.

1 MS. O'CONNELL: There's -- there's an
2 antidiscrimination rule built into --

3 JUSTICE BREYER: No, no, everyone has
4 to pay the thousand.

5 MS. O'CONNELL: Right. So I guess --

6 JUSTICE BREYER: Including the tribe.
7 And then, if you were going to say they can do
8 that, I really do find it difficult to
9 distinguish this issue.

10 MS. O'CONNELL: There -- there could
11 be some restrictions, Justice Breyer, like --

12 JUSTICE BREYER: There could?

13 MS. O'CONNELL: -- if you imposed a,
14 you know, a million dollar tax on everybody's
15 use --

16 JUSTICE BREYER: No, no, it's \$1,000,
17 and, of course, as soon as you agree to that,
18 I'm going to say it's only 50, and then I'm
19 going to say it's 10.

20 MS. O'CONNELL: Right.

21 JUSTICE BREYER: And then, when I'm
22 driving up, I would have thought they can't do
23 that, but if they can't do that, this is
24 gasoline. And maybe all those Oregon and --
25 and California and other places and everybody

1 pays it, that's true, but if you pay a high
2 gasoline tax, it's pretty hard to travel.

3 And they're supposed to be able to
4 travel on the highway, just as if you get all
5 the salmon out of the river, it's pretty hard
6 to fish.

7 MS. O'CONNELL: I suppose there could
8 be circumstances where the restriction that's
9 placed on travel on the highway are so severe
10 that it undermines --

11 JUSTICE BREYER: In Oregon, you say
12 that they have -- they cannot take steps to
13 remove significant numbers of salmon from the
14 steam -- stream, and they cannot take steps
15 sufficient to significantly limit the right to
16 travel on the highway. Why these people? Do
17 what you want for the other citizens.

18 MS. O'CONNELL: So I think there's a
19 couple of distinctions that we need to -- to
20 draw between what you're hypothesizing and what
21 is happening here. The first is that, yes,
22 there could be circumstances in which the
23 restriction that's imposed is so severe that it
24 burdens the actual ability or right to travel
25 on the highway. But there's --

1 JUSTICE BREYER: How much is the tax?

2 MS. O'CONNELL: Excuse me?

3 JUSTICE BREYER: How much is the tax?

4 MS. O'CONNELL: Well, we don't think
5 that -- I mean, I -- I --

6 JUSTICE BREYER: I know you don't
7 think it's relevant, but if I happen to think
8 it was relevant and asked the question how much
9 is the tax, what would the answer be?

10 MS. O'CONNELL: I -- I don't have a --

11 JUSTICE BREYER: You don't know?

12 MS. O'CONNELL: -- a number to give
13 you. I think the, you know, district court
14 could determine what -- what was too burdensome
15 and actually --

16 JUSTICE BREYER: But they didn't make
17 any of these arguments.

18 MS. O'CONNELL: No, that's correct.
19 And I think the other thing is, even if you
20 thought that the treaty preempted things like
21 fees to use the highway, such as a toll or a
22 licensing fee that was issue -- at issue in
23 Cree, so you adopted the Ninth Circuit's rule
24 of what kinds of things are preempted, it still
25 wouldn't preempt this tax, which isn't a fee to

1 use the highway; it's a tax, an economic burden
2 on the goods that are being carried in the
3 truck.

4 The -- the text of Article III secures
5 to the -- the Yakamas only the right in common
6 with others to travel upon the public highways.
7 And that right, by its plain terms, doesn't
8 protect activities other than highway travel.
9 There's nothing in the negotiating history
10 either that indicates --

11 JUSTICE SOTOMAYOR: Well, there's one
12 central part, which is they traveled the
13 highways for free. They weren't burdened by
14 economic -- by economic manner in traveling the
15 highway.

16 So we go back to Justice Breyer's
17 question, which is whether it's 50 cents or a
18 million dollars, you're saying if it's 50 cents
19 or 5 or 10, presumably, it's okay, you can
20 burden them with that. You just can't burden
21 them -- and I presume you would say every other
22 citizen -- by imposing a million dollars? Is
23 that your point?

24 MS. O'CONNELL: Well, I don't -- I
25 don't think the state is ever going to impose a

1 tax that is so burdensome that nobody can
2 travel on the highways, but our -- yes, we
3 believe that --

4 JUSTICE SOTOMAYOR: So you're going
5 back to the point that Justice Gorsuch ended
6 with, which is that you're reading "in common
7 with all others" differently in this context
8 than in the fishing rights context?

9 MS. O'CONNELL: Yes. And I think the
10 reason that it's different in this context than
11 in the fishing context is because of the right
12 at issue. I think there are textual
13 differences and historical differences between
14 those two clauses of the treaty.

15 JUSTICE SOTOMAYOR: Well, the one
16 difference that you can't get around is they
17 didn't sign a treaty and give away that much
18 real estate to get nothing in return, to be
19 treated exactly like every other citizen in
20 traveling the highway.

21 MS. O'CONNELL: No, I think one -- one
22 thing that is really -- really important about
23 this right to travel provision, the right to
24 use the public highways, is that the -- the
25 tribe was receiving an assurance from Governor

1 Stevens that if they gave up the rest of the
2 land in exchange for the reservation, they
3 would still be able to leave the reservation,
4 they would still be able to travel throughout
5 the area, and that they would be able to do so
6 without discrimination against them, without
7 taxes imposed or without rules imposed that
8 were unique to Indians.

9 JUSTICE SOTOMAYOR: You just said it:
10 without taxes imposed.

11 MS. O'CONNELL: Without taxes imposed
12 that were not applied to everybody else.

13 JUSTICE GORSUCH: What kind of --

14 JUSTICE KAVANAUGH: It doesn't say
15 that.

16 JUSTICE GORSUCH: -- what kind of
17 promise is that? Given the constitutional
18 rights to travel and equal protection, is that
19 a -- is that a -- is that an illusory promise,
20 the promise you've just described?

21 MS. O'CONNELL: No. I mean, I think
22 at the time it was -- it was just a reassurance
23 to the tribe that Governor Stevens was giving.
24 There are examples cited on page 38 of the
25 Petitioner's brief where, at the time, in the

1 mid-1800s, there were restrictions on tribal
2 members leaving reservations. There are
3 instances where people would report back to
4 Congress that the -- the Indian agent on the
5 reservation would issue a pass and tell the
6 tribal members how long they could be gone from
7 the reservation and for what purposes.

8 JUSTICE GORSUCH: Do you think any of
9 that would hold up today?

10 MS. O'CONNELL: No.

11 JUSTICE GORSUCH: Okay.

12 MS. O'CONNELL: Certainly not. But,
13 at the time, it was a reassurance from Governor
14 Stevens that the tribe member --

15 JUSTICE KAVANAUGH: The -- the purpose
16 wasn't -- the purpose wasn't just to leave the
17 reservation, though. The purpose, as I
18 understand it, was to leave for the -- for
19 trade. And if you so burden the trade, that
20 seems inconsistent with the purpose.

21 MS. O'CONNELL: I -- I don't think,
22 Justice Kavanaugh, that -- that Respondent is
23 even arguing that the trade can't be burdened
24 once they leave the reservation. They
25 acknowledge that the transaction, if they

1 purchased the fuel in Washington, could be
2 taxed, that it could be taxed if -- if Oregon
3 were to impose a tax here. So it's not that
4 they're exempt from the economic framework for
5 trade that's going on outside the reservation.

6 If we could go back to the fishing
7 cases for just a moment --

8 JUSTICE KAGAN: But I think what is at
9 issue is the transport of goods to and from the
10 market, which is what it seems the Yakama is
11 engaging in here.

12 MS. O'CONNELL: That's true. I mean,
13 they are transporting goods from market and
14 they are -- when they come back from Oregon
15 with the fuel, but that's not -- the treaty
16 just protects the right in common with others
17 to use the public highways.

18 JUSTICE KAGAN: But if -- if I
19 disagree with you on that -- and I hadn't
20 understood that you were taking that position
21 in your brief -- but if I disagree with you on
22 that and I use -- and I understand "in common
23 with" the way Tulee understood "in common
24 with," then it seems, well, there they are,
25 they're doing what this treaty says that the --

1 that this -- they're doing exactly what this
2 treaty protects, which is transporting goods to
3 and from market.

4 MS. O'CONNELL: I think that, under
5 that view, Justice Kagan, the -- the most you
6 could get is to the Ninth Circuit's line where
7 they've said that the state can't impose a fee
8 like a licensing fee or a toll or something
9 like that to use the highway, even if it's
10 being imposed across the board.

11 What's happening here is a different
12 type of restriction. It's an economic burden
13 on the goods that are being transported to and
14 from market that the Respondent concedes it
15 could be taxed for at the -- at the purchase
16 point.

17 JUSTICE KAGAN: But not because of the
18 -- but not at the movement point, not -- not
19 when it -- the -- the goods go from one state
20 to another on the highway.

21 MS. O'CONNELL: Right. But the -- the
22 distinction between those things, I think, is
23 pretty thin. Oregon could have -- could have
24 taxed this transaction. It doesn't because
25 Oregon, like Washington, doesn't place a tax on

1 fuel that's headed out of the state. They
2 assume that it will be taxed once it gets to
3 the next state.

4 JUSTICE KAGAN: Well, it might be
5 thin, but shouldn't we say that the state has
6 to do things the right way, which is to say the
7 state has to do things without violating the
8 treaty. And if the state has another way to do
9 it, go for it.

10 MS. O'CONNELL: I think the -- the
11 state has tried many different ways to impose
12 this tax that have been struck down by various
13 courts. What the state has done here is
14 basically followed this Court's advice in
15 Wagoner, which is to move the incidence of the
16 tax up the supply chain to off the reservation.
17 Now --

18 JUSTICE KAGAN: But what the state has
19 done is to tax exactly the activity that's
20 protected under the treaty, which is the --
21 which is the transportation of goods to and
22 from market.

23 MS. O'CONNELL: I -- I don't think so.
24 There's -- I think there's a distinction
25 between -- if you think that -- that the -- the

1 tribe wouldn't be subject to a uniform tax if
2 it taxed the very thing that they were trying
3 to preserve, which was the ability to use the
4 public highways, then that would just -- it
5 would just mean that you couldn't charge them a
6 fee to use the highway or something like that,
7 not that you couldn't tax the goods that are in
8 the truck. I think one -- thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Unikowsky.

12 ORAL ARGUMENT OF ADAM G. UNIKOWSKY
13 ON BEHALF OF THE RESPONDENT

14 MR. UNIKOWSKY: Mr. Chief Justice, and
15 may it please the Court:

16 The Yakama treaty preempts the
17 application of the fuel tax to Respondent for
18 two reasons. The first reason is that, when
19 Respondent transports fuel, it exercises the
20 right to travel secured by the Yakama treaty.
21 As such, it has right -- the right to do that
22 without incurring a tax obligation, regardless
23 of whether this tax is styled as one on
24 possession or transportation.

25 Second, even if this case turned on

1 what the tax is on, this really is a tax on
2 transportation because that's what the statute
3 says and that's how the state court construed
4 it as a matter of state law.

5 CHIEF JUSTICE ROBERTS: So if -- if
6 this -- these were apples coming into the State
7 of Washington and there was a fee to -- but
8 they inspected the apples to make sure they
9 weren't diseased and the people who owned the
10 apples had to pay that fee, is that problematic
11 if it wasn't motor fuel, oil, but just apples,
12 a fee to inspect the apples, prevent disease
13 from spreading to other Washington apples?

14 MR. UNIKOWSKY: Your Honor, we
15 wouldn't object to the inspection at all. We
16 -- we might object to the fee. But the
17 inspection is appropriate.

18 CHIEF JUSTICE ROBERTS: Well, that's
19 kind of the -- well, in other words, everybody
20 else bringing apples in has to pay the fee to
21 inspect the apples, but the tribe doesn't, even
22 though -- or the -- the fee can't be assessed
23 if the tribe is transporting the apples?

24 MR. UNIKOWSKY: Yeah, I think that if
25 all the tribe is doing is transporting the

1 apples, we absolutely agree the -- the apples
2 can be inspected. We agree that, for
3 regulatory purposes, that's fine.

4 CHIEF JUSTICE ROBERTS: But -- but --
5 but no fee can be assessed if the tribe is
6 transporting the apples?

7 MR. UNIKOWSKY: Yeah, I think that a
8 fee that goes into the -- you know, the general
9 treasury of the state cannot -- cannot be
10 assessed on the tribe when they're exercising
11 the treaty right. But --

12 CHIEF JUSTICE ROBERTS: Even if the
13 apples don't belong to the tribe? They're
14 bringing them to somebody -- you know, they're
15 just bringing them down the road?

16 MR. UNIKOWSKY: Well, it would depend
17 on who has to pay the tax. So they're -- in
18 this particular tax, if you just appoint an
19 agent to transport it for you, you, the
20 importer who appoints the agent, pays the tax.
21 So I think that if the tax was levied on the
22 person who -- so if the taxpayer was the person
23 who owned the apples and they just hired an
24 Indian and a truck to bring it --

25 CHIEF JUSTICE ROBERTS: Yeah.

1 MR. UNIKOWSKY: -- but the state --
2 yeah, then I think that the --

3 CHIEF JUSTICE ROBERTS: Isn't that
4 what's going on here? I thought --

5 MR. UNIKOWSKY: No.

6 CHIEF JUSTICE ROBERTS: -- it was the
7 owner -- I thought it was the owner of the fuel
8 that is taxed, not the --

9 MR. UNIKOWSKY: Yes, that's Cougar
10 Den.

11 CHIEF JUSTICE ROBERTS: -- not the
12 transporter?

13 MR. UNIKOWSKY: Yes, that's Cougar
14 Den, Your Honor. That's Respondent. The
15 Indian owns the fuel.

16 CHIEF JUSTICE ROBERTS: So it's not
17 who owns -- it -- it's not a -- a separation
18 between the goods and the transport, right?

19 MR. UNIKOWSKY: No, Your Honor, what
20 the statute does is it says it's the
21 transportation that's taxed, but the tax is
22 imposed on the owner.

23 So, if you hire someone in a truck to
24 transport something for you, it makes perfect
25 sense that the state wouldn't want the trucker

1 to have to pay this tax which will probably
2 exceed the fee he's getting for transporting
3 it.

4 So the state -- the statute imputes
5 the act of transportation to the owner of the
6 fuel. That's in the definition of motor
7 vehicle fuel importer.

8 And so, in this case, Cougar Den
9 transports the fuel both via an agent, which is
10 a contractor, and also it uses its own trucks.
11 There's a declaration in the record that says
12 that sometimes it uses its own trucks,
13 sometimes it hires a contractor, but Cougar Den
14 --

15 CHIEF JUSTICE ROBERTS: So -- so, if
16 it's the owner, why do you -- why does it
17 interfere with a right to travel?

18 MR. UNIKOWSKY: Well, it's -- it's the
19 -- it's the owner's transportation either
20 itself or via an agent. The states never
21 distinguish, by the way, the transportation via
22 Cougar Den's own trucks and via its agent.
23 That's just the argument the state did not make
24 in its brief.

25 And, you know, so, ultimately, it's

1 the owner that pays the tax. And the idea is,
2 if you hire a trucker, that's not different
3 from just using the trucks that you own.

4 The point is the sine qua non of
5 taxation under the statute is the
6 transportation of goods to market. And whether
7 you do it with your own truck or you hire
8 someone else and a truck, it doesn't change the
9 fact that you need to pay the tax.

10 CHIEF JUSTICE ROBERTS: Does it make a
11 difference -- I think this is the argument on
12 the other side -- that it's assessed per
13 gallon, in other words, that suggests as
14 opposed to per mile that you're carrying it?

15 MR. UNIKOWSKY: No.

16 CHIEF JUSTICE ROBERTS: It suggests
17 that it's -- it's based on possession if it's
18 based on right there at that moment how much do
19 you have. They don't care where it's going.
20 They don't care if you use it all up right at
21 the border or -- or whatever. It has nothing
22 to do with -- with travel. It's purely on the
23 good itself.

24 MR. UNIKOWSKY: Well, I don't agree --
25 I don't think that you can just say a tax is on

1 a good. I think this Court has always required
2 an analysis of the precise activity engaged in
3 by the taxpayer.

4 So the Wagnon case, the argument that
5 the tribe made in that case was that really
6 this is a tax on the fuel that's sold at
7 retail.

8 And the test this Court adopted was
9 you've got to have this focused analysis of
10 what is the taxpayer doing that triggers the
11 application of the tax.

12 And in this case, the thing that the
13 taxpayer is doing is importing the fuel. By
14 its terms, the statute says that the taxable
15 event is the entry of fuel into the state, so
16 the traveling with the fuel.

17 And the taxpayer under the statute is
18 defined as the importer. And so I think that
19 just has to be a tax on importation.

20 And, incidentally, it's not even just
21 that it's the importer that pays the tax. The
22 tax actually distinguishes for licensed
23 importers between people who use highways and
24 people who don't use highways. And --

25 JUSTICE ALITO: I'm sorry. What if

1 the -- I mean, what if the statute said the
2 first entity to possess the fuel in the state
3 must pay the tax?

4 MR. UNIKOWSKY: So we would still say
5 that's preempted, although our legal analysis
6 might differ a little bit.

7 JUSTICE ALITO: Why would that be
8 preempted?

9 MR. UNIKOWSKY: Well, first of all, I
10 think that, as applied to fuel that comes in
11 from out of state, really, first possession
12 just is inherently importation.

13 In other words, you can't be the first
14 possessor of fuel, at least that originates out
15 of state, unless you're the one hauling it into
16 the state.

17 So, in that context, I just think
18 first possession kind of means it.

19 JUSTICE ALITO: Well, I thought you
20 just said we have to focus on what the statute
21 says is being taxed, so if the statute says
22 expressly possession is being taxed, that
23 doesn't matter.

24 MR. UNIKOWSKY: Okay. So we have two
25 arguments in our brief, a broader argument and

1 a narrower argument. The broader argument
2 actually doesn't depend on what the statute
3 says. It depends on what the tribal member is
4 doing.

5 So, if the tribal member can show that
6 the only thing that they're doing is exercising
7 a treaty right, which is to say transporting
8 goods to market, then they don't pay the tax,
9 no matter how the statute is styled.

10 JUSTICE ALITO: Well, then that's very
11 artificial and you get into this metaphysical
12 question of what they're doing. They're doing
13 many things. When they're -- you know, when
14 the farmer is bringing his pigs to market, he's
15 doing many things. He's traveling with the
16 pigs. He's possessing the pigs. He's
17 breathing. He may be doing all kinds of other
18 things.

19 MR. UNIKOWSKY: Well, yeah, but I
20 think that things that are inherent in
21 transportation, like breathing while you're
22 transporting it, I think would be sort of
23 wrapped up in transportation.

24 I mean, on the facts of this case,
25 what we have here is an Indian distributor

1 transporting fuel to an Indian reservation to
2 be sold to an Indian retailer on the
3 reservation and potentially to Indian
4 customers.

5 Really, the only connection that
6 Cougar Den has off-reservation is that it's
7 hauling this fuel.

8 JUSTICE BREYER: The -- the thing I
9 don't understand is that many states have laws
10 against bringing in diseased apples, all kinds
11 of things. All right? So, if they don't bring
12 it in, you can't transport it at all.

13 So, if your point is that they have a
14 right to transport things, I would have thought
15 you would have said a ban was worse because --
16 but you don't. You say a ban is okay, but a
17 tax isn't. That's your argument?

18 MR. UNIKOWSKY: Yes, that is our
19 argument, Your Honor.

20 JUSTICE BREYER: Okay. Now, if you
21 tax what they do in this state, is they have a
22 tax that says if you buy goods to use in your
23 house somewhere else, you have to -- you have
24 to pay a use tax when you bring it into our
25 state.

1 And then another state says we're
2 going to legalize marijuana, but we tax it
3 pretty high, and another state says we have --
4 you know, I can go on and on and on. And
5 you're saying, well, this tribe, it doesn't
6 have to pay the tax on marijuana. It doesn't
7 have to pay the ordinary sales tax, which take
8 the form of a use tax in the state. And I
9 could probably think of 10 other examples.

10 And, my goodness, I say why -- why
11 not? Is that your position, what I said?

12 MR. UNIKOWSKY: No, it is not our
13 position. I'm not saying that at all.

14 JUSTICE BREYER: Good. Now, fine.
15 I'm glad it isn't because my own position I had
16 a good argument against.

17 (Laughter.)

18 JUSTICE BREYER: But I'd like -- I'd
19 like -- like to -- I'd like to know what your
20 position is then.

21 MR. UNIKOWSKY: We are not claiming
22 exemption from sales taxes. We draw a
23 distinction between the acquisition of
24 something, which is not travel, and the
25 transportation of something that is.

1 So if you --

2 JUSTICE BREYER: So especially for
3 gas?

4 MR. UNIKOWSKY: Yeah, so if you buy --

5 JUSTICE BREYER: I didn't see that in
6 your brief. I put the argument to them and I
7 just didn't see that in your brief that you
8 were saying but a tax on gas interferes with
9 transportation.

10 MR. UNIKOWSKY: That-- that's not our
11 position.

12 JUSTICE BREYER: That's not your
13 argument either.

14 MR. UNIKOWSKY: Our position is not
15 based on the fact that it's --

16 JUSTICE BREYER: Okay. What is your
17 argument?

18 MR. UNIKOWSKY: Our argument is that
19 if you buy fuel and the state imposes a sales
20 tax, as Your Honor referred to, then the
21 acquisition of a good -- it could be fuel, it
22 could be apples, it could be anything -- that
23 could be taxed. That's not travel. But, here,
24 that's happening out of state.

25 I don't think there would be a treaty

1 problem with the taxation of that, but the
2 state hasn't tried to tax that purchase in
3 Oregon, and so that's -- that's out of the
4 case.

5 And so the only thing that the state
6 is taxing in the State of Washington is the
7 transportation. So it's actually --

8 JUSTICE BREYER: What do you mean the
9 transportation? Does it say it taxes the
10 transportation?

11 MR. UNIKOWSKY: I think it does. I
12 mean, it talks about --

13 JUSTICE BREYER: It does?

14 MR. UNIKOWSKY: -- taxable --

15 JUSTICE BREYER: You know the statute
16 better than I. Does the statute say we impose
17 a tax on the transportation of gasoline?

18 MR. UNIKOWSKY: Your Honor, I'll tell
19 you the words of the statute and then what the
20 state court said.

21 JUSTICE BREYER: What's the answer,
22 yes or no?

23 MR. UNIKOWSKY: It doesn't use the
24 word transport, but the state court said it
25 taxes transportation, and the state court

1 authoritatively construes state statutes.

2 JUSTICE KAGAN: Well, it uses the word
3 enter.

4 JUSTICE BREYER: What is the word?

5 JUSTICE KAGAN: Enter is a --

6 MR. UNIKOWSKY: Yeah, it uses enter.
7 It says entry of fuel.

8 JUSTICE KAGAN: It's a movement.

9 MR. UNIKOWSKY: The taxpayer is "the
10 importer," and the state court --

11 JUSTICE BREYER: No, what is the word
12 of the statute?

13 JUSTICE KAGAN: Enter.

14 MR. UNIKOWSKY: That is the taxable
15 entry into the state.

16 JUSTICE BREYER: You get a tax. A tax
17 is imposed when a good enters.

18 MR. UNIKOWSKY: Yes.

19 JUSTICE BREYER: A tax is imposed of
20 90 percent when marijuana enters this state,
21 and you just told me that would be okay.

22 MR. UNIKOWSKY: The taxpayer is
23 defined as the importer and the state court
24 construed the statute as a tax on
25 transportation.

1 JUSTICE BREYER: An importer of
2 marijuana must pay a tax of 90 percent.

3 MR. UNIKOWSKY: Yes. I think that --

4 JUSTICE BREYER: You say that is legal
5 or illegal?

6 MR. UNIKOWSKY: I think if it was a
7 tax on marijuana --

8 JUSTICE BREYER: I just -- what I just
9 said.

10 MR. UNIKOWSKY: I don't see a
11 different between marijuana --

12 JUSTICE BREYER: Is it legal or
13 illegal?

14 MR. UNIKOWSKY: If it was just a tax,
15 it probably would be illegal, Your Honor.

16 JUSTICE BREYER: You heard what I
17 said. A tax -- the statute says a tax on
18 marijuana is imposed. Now what were the words
19 you used -- I wanted to use the same ones --
20 upon entry of the marijuana into the state.
21 That's all. I'm just trying to --

22 MR. UNIKOWSKY: Yes. Our position
23 does not depend on the good that's being
24 imported. If it's a tax on fuel or a tax on
25 marijuana, it would be the same thing.

1 JUSTICE BREYER: All right. So now
2 what you're claiming is that -- and this is
3 what's bothering me and I'm trying to get to
4 it -- you're saying that the tribe, unlike
5 anyone else in the state, can refuse to pay
6 taxes that really have nothing to do with
7 transportation but have to do with drug
8 regulation, which have to do with keeping
9 certain bad things out, which have to do with
10 raising money for other reasons.

11 Now that -- you see what I'm saying?
12 I'm saying the common sense of it is why would
13 this treaty give a tribe the right not to pay
14 taxes that have really nothing to do with
15 transportation, that's just the way, et cetera.

16 MR. UNIKOWSKY: All right. Let me
17 answer that in two ways.

18 JUSTICE BREYER: Yes.

19 MR. UNIKOWSKY: The first answer is if
20 it's truly a regulatory fine, if it's like you
21 can't possess marijuana and we are punishing
22 you, then we don't view that as a tax. We view
23 that as a regulation.

24 JUSTICE BREYER: All right.

25 MR. UNIKOWSKY: I think that, you

1 know, the distinction between taxes and fines
2 might in some cases be difficult to identify.
3 Not in this case. This is definitely a -- a
4 tax.

5 JUSTICE ALITO: So where do you get
6 the difference between a regulation and a --
7 and -- and a tax under the words of the treaty?

8 MR. UNIKOWSKY: So I -- so we're
9 following this Court's decision in Tulee and
10 Yakama Indian Nation. I'm not trying to evade
11 your question.

12 The words of the treaty, I think it's
13 the in common with language that opens the door
14 to certain types of regulatory rules, I think
15 that, by implication, the fact that the Yakama
16 ceded rights in all of this land probably opens
17 the door to the state to protect public safety
18 in that land. Right?

19 So, if a person's carrying a firearm
20 or diseased apples, which is going to cause
21 other people to die, then there's a similar
22 justification for permitting those laws as
23 permitting speed limits.

24 JUSTICE ALITO: Where does that come
25 from? There's -- you -- you -- you prohibit

1 certain things. You tax certain things. Where
2 does that come from?

3 MR. UNIKOWSKY: Well, so this is the
4 line the Court drew in the Tulee case with
5 respect to the fishing clause and in the
6 Puyallup case. There's like explicit language
7 saying we distinguish between the two.

8 So we're following the Court's lead on
9 this issue. And the Court has essentially said
10 that a tax isn't necessary in the relevant
11 sense. And so you don't need the tax to ensure
12 that non-Indians can use the resource in common
13 with Indians.

14 And, similarly, I don't think you --
15 you need a tax to ensure, you know, public
16 safety in the relevant sense, whereas I think
17 that you really need to prevent, you know,
18 diseased apples or firearms in order to protect
19 public safety.

20 JUSTICE KAVANAUGH: If an
21 off-reservation sales tax is okay, as you say
22 it is, why is an off-reservation possession tax
23 not okay?

24 MR. UNIKOWSKY: Well, I don't think
25 this is a possession tax, Your Honor. I think

1 it's a -- it's a transportation tax.

2 JUSTICE KAVANAUGH: Suppose it is a
3 possession tax. Is that then okay?

4 MR. UNIKOWSKY: So we -- we have a
5 broader argument --

6 JUSTICE KAVANAUGH: An off-reservation
7 possession tax?

8 MR. UNIKOWSKY: So we have a broader
9 argument in our brief and a narrower one. So
10 the broader one it's not, and the narrower one
11 it is. So the broader argument in our brief is
12 you've got to look at what the tribal member is
13 doing. And because he can't -- it's like a tax
14 on breathing, right? You can't transport
15 something without possessing it, just like you
16 can't transport it without breathing it.

17 JUSTICE KAVANAUGH: That seems to be
18 an argument that it's a sham, that it's really
19 getting to transportation. "Sham" might be too
20 strong a word, but it's not -- it's really
21 about transportation, not possession. What if
22 it's really about possession?

23 MR. UNIKOWSKY: So I think, under the
24 broadest possible version of our argument, we
25 probably -- but I'm not going to push this very

1 hard -- I think it would be preempted, but I'm
2 not going to push it very hard because I think
3 that this really is a transportation tax.

4 I think it's actually quite helpful to
5 look at why the statute is written the way it
6 is, to understand why we really think this is a
7 transportation tax. So I get that the overall
8 goal of the state is to ensure that all fuel
9 sold at retail is subject to a tax.

10 But the natural way to do that is just
11 to tax the retail sale, but this Court has held
12 in the Chickasaw Nation case that those types
13 of taxes are preempted. And, in fact, some
14 Washington taxes were preempted.

15 And so what the state decided to do
16 is, as my colleague states, move the incidence
17 outside the reservation. But the thing is, for
18 tax -- for fuel like this, when you have an
19 Indian distributor hauling it from out of state
20 to the Indian reservation, to sale to an Indian
21 retailer, the only connection between this fuel
22 and off-reservation activity is that you're
23 hauling it across this stretch of land. That's
24 it.

25 CHIEF JUSTICE ROBERTS: Well, what if

1 you have the -- the tank where the fuel is
2 going to go in is -- is right by the border and
3 it's a tax on fuel that goes into the tank?
4 They don't care what you do with it; you can
5 transport it, you can -- whatever you want to
6 do with it. And it's owned by Cougar Den, the
7 -- the -- the tank, and they then use it,
8 transport it in their trucks.

9 In other words, the state doesn't care
10 about transportation. It just wants -- as soon
11 as it comes into the border, with no
12 involvement by Cougar Den, it comes into --
13 it's taxed in their tank, and then that's it.
14 End of story as far as the state's concerned.

15 MR. UNIKOWSKY: I understand that
16 overall the state just wants the money in some
17 sense. But the reason it's structured this tax
18 this way is because it knows --

19 CHIEF JUSTICE ROBERTS: No, I'm
20 talking about my hypothetical tax, okay? It --
21 as soon as it goes into a tank, not one of the
22 tanker trucks, then it's taxed on that. As
23 soon as you -- it enters into a tank at the
24 border and it's taxed, is that okay? Nothing
25 to do about transportation at all.

1 MR. UNIKOWSKY: Well, if you're
2 referring to like taking the -- the fuel from
3 the truck and putting it into a big tank off
4 the reservation at the border, if that's the
5 hypothetical --

6 CHIEF JUSTICE ROBERTS: A non- --
7 non-Indian truck.

8 MR. UNIKOWSKY: Yeah, that -- if
9 that's the hypothetical, then that wouldn't be
10 transportation. That would be delivery to some
11 retailer, to some other tank, or something like
12 that. So I think that we draw a -- you have to
13 look at the taxable event. If the event is the
14 transportation, there's one result. If it's
15 the delivery to a big tank, outside the
16 reservation --

17 JUSTICE BREYER: It doesn't say
18 transportation.

19 MR. UNIKOWSKY: -- it's a different
20 one.

21 JUSTICE BREYER: It says bulk entry or
22 something like that, non-bulk entry. And what
23 I'm actually bothered about is people are going
24 to buy millions of things online. And so a
25 state says the following: We just want our

1 sales tax. And so they pass a statute that
2 looks like this. When something you've bought
3 online enters into the state, a tax is due.
4 You know, that's pretty close to this statute.

5 And what I'm having trouble is seeing
6 how your argument -- that's why I have this
7 other argument, where it's just fuel. But you
8 don't accept that. Okay.

9 How your argument would permit the
10 state to -- it would deny the state the right
11 to tax the Indian tribe when they've done what
12 everybody else has done, just bought things
13 online, and they haven't yet paid the use tax
14 or haven't yet paid the comparable sales tax.

15 Now that's what's really bothering me.
16 And -- and if you can give me a minute or so on
17 that, I would be helped.

18 MR. UNIKOWSKY: Yeah, I'm happy to.
19 So on -- on the hypothetical of buying things
20 online, I think it would depend on how the
21 statute defined the taxable event. So, of
22 course, there's -- there's some recent
23 developments in the law, in the Wayfair case
24 involving out-of-state taxation.

25 So, if the state is capable of taxing

1 the sale, in other words, the taxable event is
2 the transaction itself, that wouldn't be a
3 treaty issue. There might be other issues,
4 dormant Commerce Clause, whatever. That
5 wouldn't be a treaty issue. So if that -- that
6 is the incidence, in some sense, of the tax,
7 that's the thing that's being taxed, then that
8 wouldn't necessarily be a treaty problem. So
9 if --

10 JUSTICE GINSBURG: Incidence is --
11 you're -- you're shipping -- shipping something
12 into the state from out of state. That's what
13 it was in the -- in the sales and compensating
14 use tax case.

15 MR. UNIKOWSKY: Yes, Your Honor. So
16 if -- in other words, it depends on what's
17 being taxed. So, if it's the shipment on the
18 highway and it's an Indian who's paying the
19 tax, then I think that that would -- that would
20 restrict the right to travel because --

21 JUSTICE GINSBURG: But it's a shipment
22 of goods into our state. You're selling
23 something to a state resident, you have to pay
24 the tax on the goods that are sold to an
25 in-state resident.

1 MR. UNIKOWSKY: I think that, again,
2 this Court has really drawn a -- has not really
3 talked about in terms of a tax on goods. The
4 Court has analyzed it in terms of a tax on the
5 relevant activity. So there's a tax on the
6 sale or a tax on the transportation, but you've
7 got to look at what the taxpayer is -- is
8 specifically doing.

9 I think that's what the Wagon -- so I
10 don't mean to evade your hypothetical. I just
11 -- I -- it just really depends on exactly how
12 the statute is structured.

13 JUSTICE ALITO: Suppose the --

14 JUSTICE KAGAN: Mr. Unikowsky --

15 JUSTICE ALITO: -- suppose the fuel
16 arrives by tanker and it is taxed when it
17 reaches the -- the port of Seattle, but
18 everybody knows that, at that point, it's going
19 to be transferred to trucks owned by Cougar
20 Den. Would that be -- what would your position
21 be?

22 MR. UNIKOWSKY: That would not be
23 preempted. First of all, it would probably be
24 a non-Indian taxpayer who pays the tax because
25 -- assuming the tanker truck is owned by

1 someone who isn't an Indian.

2 JUSTICE ALITO: Well, suppose it's
3 somebody in the tribe.

4 MR. UNIKOWSKY: Even so, I don't think
5 so. I think that -- the Wagnon case really, I
6 think --

7 JUSTICE ALITO: Why -- why would it
8 not be?

9 MR. UNIKOWSKY: Because the taxable
10 transaction isn't the transportation of the
11 fuel. We don't read this treaty, as the state
12 claims, to have -- to just have this broad
13 umbrella protection of any trade that's in any
14 way facilitated by highway travel. What we say
15 is that you've got to have a very focused look
16 at what precisely is being taxed.

17 JUSTICE ALITO: Why does it matter
18 whether it arrives by sea or across the border
19 from Oregon?

20 MR. UNIKOWSKY: Well, if the -- if the
21 relevant taxable event is the entry into a port
22 by a --

23 JUSTICE ALITO: If the relevant
24 taxable event is the possession, the first
25 possession within the border of Washington?

1 MR. UNIKOWSKY: Well, it depends -- in
2 that scenario where it arrives by a tanker
3 truck, the first possessor is someone who's
4 using a big boat and is not traveling on public
5 highways. So that possessor is not exercising
6 any right under the treaty.

7 Now I understand there might be
8 downstream economic consequences on Cougar Den,
9 but I think that we're just trying to follow
10 the analysis in the Wagnon case, which has
11 required this specific analysis of what's being
12 taxed. I think the Wagnon --

13 JUSTICE KAGAN: Mr. Unikowsky --

14 MR. UNIKOWSKY: Yes.

15 JUSTICE KAGAN: -- it seems to me you
16 can look at this in one of two ways, and which
17 way you look at it, in part, you know, suggests
18 who should win.

19 The first is you -- you could say:
20 What is the taxpayer here doing? Is what the
21 taxpayer here doing within the terms of the
22 treaty? And there, it just seems to me that
23 you win because what the taxpayer is doing is
24 transporting goods to and from market. You can
25 say he's possessing the goods. You can say

1 he's breathing while he's transporting the
2 goods. But what he's doing is transporting
3 goods to and from market. So -- so that
4 suggests that you should win, where the focus
5 is on the activity taxed.

6 But what I hear the state and the SG
7 in its brief saying is you shouldn't focus on
8 the thing that the taxpayer is doing, you
9 should instead sort of look to the purpose of
10 the state. You should look to what is the full
11 scope of activities that the state is trying to
12 tax and why they have this tax. And according
13 to them, they have this tax because they want
14 to get to every single taxpayer who possesses
15 fuel in the state. And this is what's
16 necessary to get to Yakama taxpayers.

17 So what should we focus on: the
18 activity that's -- the taxpayer is doing or the
19 purpose of the state legislation?

20 MR. UNIKOWSKY: So, of course, I think
21 it's the activity. And I think that your
22 question is really what this case boils down
23 to.

24 And I think there's a lot of reasons
25 why the former answer is correct and the latter

1 is not. First of all, I just think that the
2 treaty right focuses on the Indian's right. It
3 says the Indian has the right to trade and --
4 to travel, excuse me. I don't see a focus on
5 sort of the holistic intent of the state and
6 why it's enacting a particular tax.

7 Also, I think in the Wagnon case, the
8 whole argument by the tribe in that case is
9 that what the state was really trying to do was
10 burden things on the reservation. The Court
11 said we don't look at these broad assessments
12 of purpose. We -- we look at this formal
13 analysis of the thing that's being taxed. And
14 that's really just the analysis that we're
15 asking the Court to do here.

16 And, actually, in the right to fish
17 cases, the Court has done the same thing. The
18 Court has understood the right to fish as
19 essentially providing an easement on private
20 property to fish that preempts any state laws
21 that would prevent you to going on the
22 property. Those laws were the ultimate
23 generally applicable laws. They applied to
24 Indians and non-Indians. They applied
25 regardless of whether you're going on the

1 property to fish or to do something else.

2 They had absolutely nothing whatsoever
3 to do with fishing, but they were still held to
4 be preempted because you looked at what the
5 Indian was trying to do, which is fish, and the
6 Court held that the treaty gave the Indian the
7 right to do that.

8 I think that's also true, by the way,
9 with like the on-reservation tax versus
10 off-reservation tax distinction. Like in
11 Chickasaw Nation, this Court held that a tax on
12 -- on on-reservation activity was preempted.
13 The tax at issue had -- was not targeting
14 Indian reservations. It was a generally
15 applicable tax that applied to everybody, but
16 as applied to protected activity, in that case
17 on-reservation activity, the tax was preempted.

18 JUSTICE KAVANAUGH: Counsel, do you --

19 JUSTICE GINSBURG: But these retailers
20 -- these are off-reservation, the retailers of
21 the fuel, they are off-reservation or
22 on-reservation?

23 MR. UNIKOWSKY: The retailers are
24 exclusively on the reservation. That's why the
25 state doesn't -- isn't able to tax the sale,

1 because it's an Indian retailer. All of the
2 retailers that Cougar Den sells to are Yakama
3 retailers on the reservation.

4 JUSTICE GINSBURG: And they sell to
5 not people, not exclusively people on the
6 reservation, right?

7 MR. UNIKOWSKY: That's true. But we
8 haven't disputed that the state can collect --
9 order the retailer to collect the tax from
10 non-Indian consumers.

11 So, if the state is concerned about
12 collecting that tax, we haven't disputed that's
13 the way to do it. And this is what the Court
14 said in Chickasaw Nation. It says if the state
15 wants to make sure this tax is collected from
16 non-Indian consumers, it could just amend its
17 laws to -- to provide that. And we haven't
18 disputed --

19 JUSTICE BREYER: I'm not talking about
20 non-Indians. I'm talking about the Indian
21 consumers.

22 I've now read the statute again, and
23 it seems there are four relevant words. The
24 tax on fuel applies when the fuel enters into
25 this state.

1 And now all I have to do is substitute
2 for the word "fuel" things bought online, which
3 could be anything at all, and then we can have
4 diseased things or I don't know what,
5 marijuana, and you are saying -- and I think
6 you are saying this -- that this statute, which
7 had to do with travel on the roads, applies to
8 all those things as long as they use the words
9 "the tax applies when it enters into this
10 state."

11 Now I hope I'm wrong -- or maybe I'm
12 right -- I don't know. I want to hear your
13 answer.

14 MR. UNIKOWSKY: That's not exactly our
15 position because there was a few other things
16 that have to be true.

17 So, first of all, the tax --

18 JUSTICE BREYER: Yes, it also, by the
19 way, has to be the case that it goes by FedEx
20 or it goes by UPS or it goes by a truck or
21 something like that. It can't just go by an
22 airplane and be delivered by a drone. I've got
23 that. Now what else?

24 MR. UNIKOWSKY: So, again, we have a
25 broader argument and a narrower argument. We

1 do have one specific argument in our brief
2 which focuses on the fact that this -- this
3 traveled through the ceded area.

4 Now I think that it would still be
5 preempted even if it was outside the ceded
6 area, but sort of the narrowest argument in our
7 brief goes like this, right? To look at what
8 the Indians secured, you have to look at what
9 they had. And they had something special on
10 this particular stretch of land, which is a tax
11 immunity, and, therefore, if you want to look
12 at what they kept, it's an immunity that
13 applies specifically when the truck is going
14 across that land.

15 Now I will say that for off -- for --
16 for travel off the ceded area, I probably still
17 would be arguing preemption given that the
18 treaty by its terms applies to all public
19 highways.

20 But the narrowest version of our
21 argument in our brief really only applies to
22 this particular travel because of the special
23 rights that the tribe enjoyed on that stretch
24 of land at the time of the treaty.

25 JUSTICE KAVANAUGH: The language of

1 the treaty does not distinguish, though --

2 MR. UNIKOWSKY: That's correct.

3 JUSTICE KAVANAUGH: -- between the
4 ceded area and the other areas.

5 MR. UNIKOWSKY: So the textual hook
6 for that would be the word "secured," which
7 this Court has construed as requiring looking
8 at what they already possessed.

9 JUSTICE KAVANAUGH: And another
10 question, which is your -- your position
11 depends on disaggregating possession and
12 transportation, but you could possess something
13 without transporting. You can obviously
14 transport without possessing fuel.

15 So the tax -- why -- why can't we
16 disaggregate possession of transportation?

17 MR. UNIKOWSKY: Well, first of all, I
18 think that in many ways these are state law
19 questions. Like there's this fundamental
20 dispute in this case about whether this is just
21 like one statute on first possession or a whole
22 bunch of different subsections that are taxing
23 different types of things, one of which is
24 transportation.

25 And it's kind of like a philosophical

1 question. But I think that ultimately that's a
2 state law question, not a federal question. It
3 seems to me if the state court is construing
4 authority to --

5 JUSTICE KAVANAUGH: So, if a state
6 court construed it differently from this state
7 court, you would have a different position?

8 MR. UNIKOWSKY: I mean, I think I'd
9 probably still try to argue preemption, but I
10 think it would be much harder than the argument
11 I'm currently making to you today, because the
12 Court has held that the incidence of the tax is
13 a question of state law.

14 It just seems to me that if -- if the
15 state court is saying that this is a
16 transportation tax, and transportation is
17 treaty-protected activity, it just kind of
18 follows like almost, like, inevitably that
19 there's -- there's preemption because, you
20 know, you're taxing treaty-protected activity
21 based on the statute as it's authoritatively
22 construed by the state court.

23 I just would like to say one thing
24 about why I think that, you know, this -- what
25 the state is doing here is quite inconsistent

1 with what I think the expectation of the tribe
2 would have been in 1855, because the tribe was
3 actually specifically concerned about
4 transporting fuel along this route, right? And
5 so Governor Stephens promised in the treaty
6 minutes, you can take your goods to market to
7 the river, which is a reference to the Columbia
8 River. And this actually used to be their
9 land.

10 So sort of as consideration for giving
11 up this stretch of land, which at the time was
12 their land, that they agreed that they would
13 continue to -- to travel across it. They'd
14 have the right to travel.

15 And so I think it is a little bit of a
16 bait and switch to the Yakamas to say, well,
17 now we're going to basically exploit the fact
18 that you have to travel across this stretch of
19 land to impose this tax that we wouldn't
20 otherwise be able to impose, and, by the way,
21 the effect of the tax is to mimic in a tax on
22 the reservation -- on on-reservation retailers.

23 And I think that, you know, I haven't
24 talked about the treaty canon so far because I
25 think neutral principles are more than

1 sufficient to resolve this case for Respondent,
2 but at least under the -- the generous
3 interpretation principles for Indians, I don't
4 think that's what the Indians thought they were
5 getting, that this exploitation of the travel
6 on the very land they gave up, securing for
7 themselves the right to travel across it.

8 I think that it's very natural and
9 consistent with what I think the expectation of
10 the Yakamas would have been, that they could
11 continue traveling across that land with their
12 goods as they were already doing it at the
13 time, and -- and that means -- that means
14 transporting without paying a fee or owing an
15 obligation to the states.

16 JUSTICE SOTOMAYOR: Does it mean
17 anything that this tax is literally on
18 traveling the route, importing by a highway?
19 There is no similar tax on importation by
20 licensed people. They don't pay the tax. Only
21 the user who buys it pays the tax, correct?

22 MR. UNIKOWSKY: Yes. I think that's
23 actually a very important point in this case,
24 because the state cast this as a first
25 possession tax, but, honestly, that's just the

1 state's gloss on it. That's not what it says.
2 And, in fact, that's not even how it operates,
3 because if you're the first possessor via
4 highway, you pay the tax. But, if you're a
5 licensed importer and you're a first possessor
6 via a boat, you don't.

7 CHIEF JUSTICE ROBERTS: Well, you want
8 to characterize it as a transport tax, and the
9 statute doesn't say that either.

10 MR. UNIKOWSKY: Well, I think that the
11 state court is responsible for construing state
12 law. It says import, which is the importer
13 pays the tax. On page 121 of the Joint
14 Appendix, the taxpayer is defined as the
15 importer. And the state court said, which I
16 think is intuitive, that importation is a
17 species of transportation.

18 And so there is an authoritative
19 decision that this statute taxes
20 transportation. So --

21 JUSTICE SOTOMAYOR: The problem is
22 it's not consistent. You're right, the
23 wholesalers, licensed wholesalers are the
24 importers, but they don't pay the tax.

25 MR. UNIKOWSKY: Yeah. So this is not

1 a tax on first possession. It just doesn't
2 work that way. And -- and the state is just
3 adding this gloss that this is just one big tax
4 on first possession, even though, obviously,
5 when you just look at the words of the statute,
6 it isn't one. And that's why I think the Court
7 should just use the words of the statute which
8 talk about importation and entry and the
9 construction of that by the state court, rather
10 than determining preemption, essentially by the
11 gloss placed on the state's attorneys based on
12 words that are not in the statute, nor did the
13 state court think those things to be true.

14 JUSTICE KAVANAUGH: To state the
15 obvious, the value, current value of the land
16 the tribe gave up is enormous, right?

17 MR. UNIKOWSKY: It's a third of the
18 State of Washington, I believe, Your Honor.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Four minutes, Mr. Purcell.

23 REBUTTAL ARGUMENT OF NOAH PURCELL

24 ON BEHALF OF THE PETITIONER

25 MR. PURCELL: Thank you, Mr. Chief

1 Justice.

2 I'd like to point out two crucial
3 facts about what will happen if you accept
4 Cougar Den's position.

5 First to Justice Breyer's point, if
6 you accept their position, Yakama members can
7 transport goods nationwide without taxation or
8 regulation. That's why you see such a broad
9 coalition of states joining an amicus brief on
10 our side.

11 JUSTICE SOTOMAYOR: They don't have a
12 treaty with everybody.

13 MR. PURCELL: They have a treaty with
14 the United States, Your Honor. And as counsel
15 just said, the right to travel says on all
16 public highways. It makes no sense to limit it
17 to the ceded area.

18 Even historically, it wouldn't make
19 any sense because the Yakama traveled beyond
20 the ceded area. And -- and, also, Cougar Den
21 is trying to use the history when it helps them
22 by trying to limit the geography, but then not
23 when it hurts them, like, you know, what goods
24 can be transported or how it can be
25 transported. Of course, the fuel and the

1 highway, and these roads, did not exist at the
2 time.

3 The second crucial point --

4 JUSTICE KAGAN: But on -- on that one,
5 didn't Mr. Unikowsky say, consistent with our
6 case law, that there's a difference between
7 taxation and regulation?

8 MR. PURCELL: And -- and that's just a
9 misrepresentation of the case law. The fishing
10 cases have have said the state can regulate
11 fishing to conserve the fish, the very thing
12 that's the subject of the treaty. There's no
13 similar -- there's no similar rationale here.

14 The Court has never said that we can
15 regulate fishing more generally than that.
16 There's no distinction in this Court's cases in
17 treaty cases between taxing and regulation.
18 More broadly, Mescalero actually rejected
19 exactly that argument.

20 The second point is that, under their
21 theory, we could completely ban the
22 transportation of fuel by highway if we did it
23 for a regulatory reason, like we decided it's
24 not safe. We could just ban it outright and --
25 and that would be fine. But we can't impose a

1 generally applicable tax on goods like fuel
2 because it happens to apply when Cougar Den
3 travels on the highway. That makes absolutely
4 no sense.

5 There's no plausible way to read the
6 treaty that would lead to that result. This is
7 a tax on fuel possession. It is not a tax on
8 highway travel. The state court explicitly
9 said it would apply regardless of whether
10 Cougar Den uses the highway.

11 It is not a tax on transportation. It
12 is a tax on the fuel itself.

13 So -- so even if you accept much of
14 Cougar Den's position here, it does not lead to
15 a ruling in their favor.

16 And you can tell, as Justice Kavanaugh
17 pointed out, that you can disaggregate
18 transportation from possession here because the
19 statute does and, in fact, on the facts of this
20 case they are disaggregated. Cougar Den is
21 paying the tax even though they were not
22 transporting fuel. They have possessed the
23 fuel. They owned the fuel. So, for all the
24 reasons -

25 JUSTICE GORSUCH: Has Washington

1 considered taxing non-tribal members for their
2 purchases on tribal lands?

3 MR. PURCELL: Your Honor, that is the
4 system that we had before we adopted this
5 system. And it was struck down by a federal
6 court in Washington. And then we adopted this
7 tax, modeled on what this Court said was okay
8 in Wagnon.

9 I'd also like to address Wagnon just
10 does not address the issue in this case.
11 Wagnon was about who the tax applies to and
12 where the incidence of the tax is.

13 In this case those things are
14 undisputed. Cougar Den owes the tax and it's
15 off reservation. So the rule is that the tax
16 can apply unless preempted by express federal
17 law.

18 And here there's nothing in the Yakama
19 treaty that preempts this tax. There is just
20 no plausible way to read the right to travel by
21 public highway in common with others to preempt
22 a tax on goods.

23 So -- so, you know, Wagnon just does
24 not do what they're asking it to do. Wagnon
25 described the tax that the City of Washington

1 modeled its tax on.

2 And -- and I just think it's crucial
3 also to understand that even their limited
4 ceded area argument does not work.

5 It does not work. It's -- it's
6 contrary to the treaty text which says a right
7 to travel on all public highways, and it's --
8 and it's also refuted by the history that had
9 the Yakama traveling beyond the ceded
10 territory.

11 So if there is no further questions we
12 would ask the Court to reverse the state --
13 state supreme court and hold that the tax
14 applies to Cougar Den. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 11:05 a.m., the case
18 was submitted.)

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Official - Subject to Review

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