# SUPREME COURT OF THE UNITED STATES

No. 16–1498

WASHINGTON STATE DEPARTMENT OF LICENSING, PETITIONER *v.* COUGAR DEN, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[March 19, 2019]

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE KAVANAUGH join, dissenting.

In the 1855 treaty in which the Yakamas surrendered most of their lands to the United States, the Tribe sought to protect its way of life by reserving, among other rights, "the right, in common with citizens of the United States, to travel upon all public highways." Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953. Cougar Den, a Yakama corporation that uses public highways to truck gas into Washington, contends that the treaty exempts it from Washington's fuel tax, which the State assesses upon the importation of fuel into the State. The plurality agrees, concluding that Washington cannot impose the tax on Cougar Den because doing so would "have the practical effect of burdening" Cougar Den's exercise of its right to travel on the highways. *Ante*, at 9. The concurrence reaches the same result, reasoning that, because the Yakamas' right to travel includes the right to travel with goods, the State cannot tax or regulate the Yakamas' goods on the highways. *Ante*, at 7–8 (GORSUCH, J., concurring in judgment).

But the mere fact that a state law has an effect on the Yakamas *while* they are exercising a treaty right does not establish that the law impermissibly burdens the right

itself. And the right to travel with goods is just an application of the Yakamas' right to travel. It ensures that the Yakamas enjoy the same privileges when they travel with goods as when they travel without them. It is not an additional right to possess whatever goods they wish on the highway, immune from regulation and taxation. Under our precedents, a state law violates a treaty right only if the law imposes liability upon the Yakamas "for exercising the very right their ancestors intended to reserve." *Tulee* v. *Washington*, 315 U. S. 681, 685 (1942). Because Washington is taxing Cougar Den for possessing fuel, not for traveling on the highways, the State's method of administering its fuel tax is consistent with the treaty. I respectfully dissent from the contrary conclusion of the plurality and concurrence.[1]

We have held on three prior occasions that a nondiscriminatory state law violated a right the Yakamas reserved in the 1855 treaty. All three cases involved the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Art. III, 12 Stat. 953. In *United States* v. *Winans*, 198 U. S. 371 (1905), and later again in *Seufert Brothers Co.* v. *United States*, 249 U. S. 194 (1919), we held that state trespass law could not be used to prevent tribe members from reaching a historic fishing site. And in *Tulee* v. *Washington*, we held that Washington could not punish a Yakama member for fishing without a license. We concluded that the license law was preempted because the required fee "act[ed] upon the Indians as a charge for exercising the very right their ancestors intended to reserve"—the right to fish. 315

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[1] There is something of an optical illusion in this case that may subtly distort analysis. It comes from the fact that the tax here happens to be on motor fuel. There is no claim, however, that the tax inhibits the treaty right to travel because of the link between motor fuel and highway travel. The question presented must be analyzed as if the tax were imposed on goods of any sort.

U. S., at 685.

These three cases found a violation of the treaty when the challenged action—application of trespass law and enforcement of a license requirement—actually blocked the Yakamas from fishing at traditional locations. Applying the reasoning of those decisions to the Yakamas' right to travel, it follows that a State could not bar Yakama members from traveling on a public highway, or charge them a toll to do so.

Nothing of the sort is at issue here. The tax before us does not resemble a blockade or a toll. It is a tax on a product imported into the State, not a tax on highway travel. The statute says as much: "There is hereby levied and imposed . . . a tax . . . *on each gallon of motor vehicle fuel*." Wash. Rev. Code §82.36.020(1) (2012) (emphasis added). It is difficult to imagine how the legislature could more clearly identify the object of the tax. The tax is calculated per gallon of fuel; not, like a toll, per vehicle or distance traveled. It is imposed on the owner of the fuel, not the driver or owner of the vehicle—separate entities in this case. And it is imposed at the same rate on fuel that enters the State by methods other than a public highway—whether private road, rail, barge, or pipeline. §§82.36.010(4), 020(1), (2). Had Cougar Den filled up its trucks at a refinery or pipeline terminal in Washington, rather than trucking fuel in from Oregon, there would be no dispute that it was subject to the exact same tax. See §§82.36.020(2)(a), (b)(ii). Washington is taxing the fuel that Cougar Den imports, not Cougar Den's travel on the highway; it is not charging the Yakamas "for exercising the very right their ancestors intended to reserve." *Tulee*, 315 U. S., at 685.

It makes no difference that Washington happens to impose that charge when Cougar Den's drivers cross into Washington on a public highway. The time and place of the imposition of the tax does not change what is taxed,

and thus what activity—possession of goods or travel—is burdened. Say Washington imposes a tax on certain luxury goods, assessed upon first possession of the goods by a retail customer. A Yakama member who buys a mink coat at an off-reservation store in Washington will pay the tax. Yet, as the plurality acknowledges, under its view a tribal member who buys the same coat right over the state line in Portland and then drives back to the reservation will owe no tax—all because of a reserved right to travel on the public highways. *Ante*, at 15. That makes no sense. The tax charges individuals for possessing expensive furs. It in no way burdens highway travel.

The plurality devotes five pages to planting trees in hopes of obscuring the forest: to delving into irrelevancies about how the tax is assessed or collected, instead of the substance of what is taxed. However assessed or collected, the tax on 10,000 gallons of fuel is the same whether the tanker carrying it travels three miles in Washington or three hundred. The tax varies only with the amount of fuel. Why? Because the tax is on fuel, not travel. If two tankers travel 200 miles together from the same starting point to the same destination—one empty, one full of fuel—the full tanker will pay the fuel tax, the empty tanker will pay nothing. Their travel has been identical, but only the full one pays tax. Why? Because the tax is on fuel, not travel. The tax is on the owner of the fuel, not the owner of the vehicle. Why? You get the point.

The plurality responds that, even though the tax is calculated per gallon of fuel, it remains a tax on travel because it taxes a "feature" of travel. *Ante*, at 15. It is of course true that tanker trucks can be seen from time to time on the highways, but that hardly makes them a regular "feature" of travel, like the plurality's examples of axels or passengers. And we know that Washington is not taxing the gas insofar as it is a feature of Cougar Den's travel, because Washington imposes the exact same tax on

gas that is not in transit on the highways.

Rather than grappling with the substance of the tax, the plurality fixates on variations in the time and place of its assessment. The plurality thinks it significant that Washington does not impose the tax at the moment of entry on fuel that enters the State by pipeline or by a barge bound for a refinery, but instead when a tanker truck withdraws the fuel from the refinery or pipeline terminal. This may demonstrate that the tax is not on *first* possession of fuel in the State, as the plurality stresses, but it hardly demonstrates that the tax is not on possession of fuel *at all*. Regardless of how fuel enters the State, someone will eventually pay a per-gallon charge for possessing it. Washington simply assesses the fuel tax in each case upon the wholesaler. See 188 Wash. 2d 55, 60, 392 P. 3d 1014, 1016 (2017). This variation does not indicate, as the plurality suggests, that the fuel tax is somehow *targeted* at highway travel.

The plurality also says that it is bound by the Washington Supreme Court's references to the tax as an "importation tax" and tax on "the importation of fuel," *ante*, at 7 (quoting 188 Wash. 2d, at 67, 69, 392 P. 3d, at 1019, 1020), but these two references to the point at which the tax is *assessed* are not authoritative constructions of the *object* of the tax. The state court did not reject Washington's argument that this is a tax on fuel; instead, like the plurality today, it ignored that argument and concluded that the tax was invalid simply because Washington imposed it while Cougar Den was traveling on the highway. In any event, the state court more often referred to the tax as a "tax on fuels" or "fuel tax[ ]." *Id.*, at 58–61, 392 P. 3d, at 1015–1016.

After the five pages arguing that a tax expressly labeled as on "motor vehicle fuel" is actually a tax on something else, the plurality concludes . . . it doesn't matter. As the plurality puts it at page nine of its opinion, "even if" the

tax is on fuel and not travel, it is preempted because it has "the practical effect of burdening" the Yakamas' right to travel on the highways. The plurality's rule—that States may not enforce general legislation that has an effect on the Yakamas while they are traveling—has no basis in our precedents, which invalidated laws that punished or charged the Yakamas simply for exercising their reserved rights. The plurality is, of course, correct that the trespass law in *Winans* did not target fishing, but it effectively made illegal the very act of fishing at a traditional location. Here, it is the possession of commercial quantities of fuel that exposes the Yakamas to liability, not travel itself or any integral feature of travel.

The concurrence reaches the same result as the plurality, but on different grounds. Rather than holding that the treaty preempts any law that burdens the Yakamas while traveling on the highways, the concurrence reasons that the fuel tax is preempted because it regulates the possession of goods, and the Yakamas' right to travel includes the right to travel with goods. *Ante*, at 7–8. But the right to travel with goods is just an application of the right to travel. It means the Yakamas enjoy the same privileges whether they travel with goods or without. It does not provide the Yakamas with an additional right to carry any and all goods on the highways, tax free, in any manner they wish.[2] The concurrence purports to find this additional right in the record of the treaty negotiations, but

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[2]The plurality simply assumes that the right to travel with goods is an additional, substantive right when it reasons that the fuel tax is preempted because it taxes an "integral feature" of travel with goods. *Ante*, at 16. The concurrence makes the same assumption when it compares the fuel tax to a tax on " 'possession' of fish" *Ante*, at 8. That tax would be preempted because "taking possession of fish" is just another way of describing the act of fishing. But possession of a tanker full of fuel is not an integral feature of travel, which is the relevant activity protected by the treaty.

the record shows only that the Yakamas wanted to ensure they could continue to travel to the places where they traded. They did not, and did not intend to, insulate the goods they carried from all regulation and taxation.

Nothing in the text of the treaty, the historical record, or our precedents supports the conclusion that the right "to travel upon all public highways" transforms the Yakamas' vehicles into mobile reservations, immunizing their contents from any state interference. Before it reaches the reservation, the fuel in Cougar Den's tanker trucks is always susceptible to state regulation—it does not pass in and out of state authority with every exit off or entry onto the road.

Recognizing the potentially broad sweep of its new rule, the plurality cautions that it does not intend to deprive the State of the power to regulate when necessary "to prevent danger to health or safety occasioned by a tribe member's exercise of treaty rights." *Ante*, at 17. This escape hatch ensures, the plurality suggests, that the treaty will not preempt essential regulations that burden highway travel. *Ante*, at 9–10. I am not so confident.

First, by its own terms, the plurality's health and safety exception is limited to laws that regulate dangers "occasioned by" a Yakama's travel. That would seem to allow speed limits and other rules of the road. But a law against possession of drugs or illegal firearms—the dangers of which have nothing to do with travel—does not address a health or safety risk "occasioned by" highway driving. I do not see how, under the plurality's rule or the concurrence's, a Washington police officer could burden a Yakama's travel by pulling him over on suspicion of carrying such contraband on the highway.

But the more fundamental problem is that this Court has never recognized a health and safety exception to reserved treaty rights, and the plurality today mentions the exception only in passing. Importantly, our prece-

dents—all of which concern hunting and fishing rights—acknowledge the authority of the States to regulate Indians' exercise of their reserved rights only in the interest of *conservation*. See *Tulee*, 315 U. S., at 684 ("[T]he treaty leaves the state with power to impose on Indians, equally with others, such restrictions . . . as are necessary for the conservation of fish . . . ."); see also *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 205 (1999) ("We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation."); *Confederated Tribes of Colville Reservation* v. *Anderson*, 903 F. Supp. 2d 1187, 1197 (ED Wash. 2011) ("Notably absent from the binding Supreme Court and Ninth Circuit cases dealing with state regulation of 'in common' usufructuary rights is any reference to a state's exercise of its public-safety police power."). Indeed, this Court had previously assured the Yakamas that "treaty fishermen are *immune from all regulation save that required for conservation*." *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 682 (1979) (emphasis added). Adapted to the travel right, the conservation exception would presumably protect regulations that preserve the subject of the Yakamas' right by maintaining safe and orderly travel on the highways. But many regulations that burden highway travel (such as emissions standards, noise restrictions, or the plurality's hypothetical ban on the importation of plutonium) do not fit that description.

The need for the health and safety exception, of course, follows from the overly expansive interpretation of the treaty right adopted by the plurality and concurrence. Today's decision digs such a deep hole that the future promises a lot of backing and filling. Perhaps there are good reasons to revisit our long-held understanding of reserved treaty rights as the plurality does, and adopt a

broad health and safety exception to deal with the inevitable fallout. Hard to say, because no party or *amicus* has addressed the question.

The plurality's response to this important issue is the following, portentous sentence: "The record of the treaty negotiations may not support the contention that the Yakamas expected to use the roads entirely unconstrained by laws related to health or safety." *Ante*, at 17. A lot of weight on two words, "may not." The plurality cites assurances from the territorial Governor of Washington that the United States would make laws to prevent "bad white men" from harming the Yakamas, and that the United States expected the Yakamas to exercise similar restraint in return. *Ante*, at 18. What this has to do with health and safety regulations affecting the highways (or fishing or hunting) is not clear.

In the meantime, do not assume today's decision is good news for tribal members across the country. Application of state safety regulations, for example, could prevent Indians from hunting and fishing in their traditional or preferred manner, or in particular "usual and accustomed places." I fear that, by creating the need for this untested exception, the unwarranted expansion of the Yakamas' right to travel may undermine rights that the Yakamas and other tribes really did reserve.

The concurrence does not mention the plurality's possible health and safety exception, but observes that the Yakamas expected to follow laws that "facilitate the safe use of the roads by Indians and non-Indians alike." *Ante*, at 11. The State is therefore wrong, the concurrence says, to contend that a decision exempting Cougar Den's fuel from taxation would call into question speed limits and reckless driving laws. But that is not the State's principal argument. The State acknowledges that laws facilitating safe travel on the highways would fall within the long-recognized conservation exception. See Tr. of Oral Arg.

12–13. The problem is that today's ruling for Cougar Den preempts the enforcement of any regulation of *goods* on the highway that does not concern *travel* safety—such as a prohibition on the possession of potentially contaminated apples taken from a quarantined area (a matter of vital concern in Washington). See *id.*, at 13; Brief for Petitioner 44.

The concurrence says not to worry, the apples could be regulated and inspected where they are grown, or when they arrive at a market. Or, if the Yakamas are taking the apples back to the reservation, perhaps the Federal Government or the Tribe itself could address the problem there. *Ante*, at 10. What the concurrence does not say is that the State could regulate the contraband apples on the highway. And there is no reason offered why other contraband should be treated any differently.

Surely the concurrence does not mean to suggest that the parties to the 1855 treaty intended to confer on the Tribe the right to travel with illegal goods, free of any regulation. But if that is not the logical consequence of the decision today, the plurality and the concurrence should explain why. It is the least they should do.

I respectfully dissent.