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]

JUSTICE GORSUCH, with whom JUSTICE GINSBURG joins, concurring in the judgment.

The Yakamas have lived in the Pacific Northwest for centuries. In 1855, the United States sought and won a treaty in which the Tribe agreed to surrender 10 million acres, land that today makes up nearly a quarter of the State of Washington. In return, the Yakamas received a reservation and various promises, including a guarantee that they would enjoy "the right, in common with citizens of the United States, to travel upon all public highways." Today, the parties offer dueling interpretations of this language. The State argues that it merely allows the Yakamas to travel on public highways like everyone else. And because everyone else importing gasoline from out of State by highway must pay a tax on that good, so must tribal members. Meanwhile, the Tribe submits that the treaty guarantees tribal members the right to move their goods to and from market freely. So that tribal members may bring goods, including gasoline, from an out-of-state market to sell on the reservation without incurring taxes along the way.

Our job here is a modest one. We are charged with adopting the interpretation most consistent with the treaty's original meaning. *Eastern Airlines, Inc.* v. *Floyd*, 499 U. S. 530, 534–535 (1991). When we're dealing with a

tribal treaty, too, we must "give effect to the terms as the Indians themselves would have understood them." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 196 (1999). After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen. Nor is there any question that the government employed that power to its advantage in this case. During the negotiations "English words were translated into Chinook jargon . . . although that was not the primary language" of the Tribe. *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1243 (ED Wash. 1997). After the parties reached agreement, the U. S. negotiators wrote the treaty in English—a language that the Yakamas couldn't read or write. And like many such treaties, this one was by all accounts more nearly imposed on the Tribe than a product of its free choice.

When it comes to the Yakamas' understanding of the treaty's terms in 1855, we have the benefit of a set of unchallenged factual findings. The findings come from a separate case involving the Yakamas' challenge to certain restrictions on their logging operations. *Id.*, at 1231. The state Superior Court relied on these factual findings in this case and held Washington collaterally estopped from challenging them. Because the State did not challenge the Superior Court's estoppel ruling either in the Washington Supreme Court or here, these findings are binding on us as well.

They also tell us all we need to know to resolve this case. To some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else. *Post*, at 1–2 (KAVANAUGH, J., dissenting). But that is not how the Yakamas understood the treaty's terms. To the Yakamas, the phrase "'in common with' . . . implie[d] that the Indian and non-Indian use [would] be joint but [did]

not imply that the Indian use [would] be in any way restricted." *Yakama Indian Nation*, 955 F. Supp., at 1265. In fact, "[i]n the Yakama language, the term 'in common with' . . . suggest[ed] public use or general use without restriction." *Ibid.* So "[t]he most the Indians would have understood . . . of the term[s] 'in common with' and 'public' was that they would share the use of the road with whites." *Ibid.* Significantly, there is "no evidence [to] sugges[t] that the term 'in common with' placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." *Id.*, at 1247. Instead, the evidence suggests that the Yakamas understood the right-to-travel provision to provide them "with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods." *Id.*, at 1262.

Applying these factual findings to our case requires a ruling for the Yakamas. As the Washington Supreme Court recognized, the treaty's terms permit regulations that allow the Yakamas and non-Indians to share the road in common and travel along it safely together. But they do not permit encumbrances on the ability of tribal members to bring their goods to and from market. And by everyone's admission, the state tax at issue here isn't about facilitating peaceful coexistence of tribal members and non-Indians on the public highways. It is about taxing a good as it passes to and from market—exactly what the treaty forbids.

A wealth of historical evidence confirms this understanding. The *Yakama Indian Nation* decision supplies an admirably rich account of the history, but it is enough to recount just some of the most salient details. "Prior to and at the time the treaty was negotiated," the Yakamas "engaged in a system of trade and exchange with other plateau tribes" and tribes "of the Northwest coast and

plains of Montana and Wyoming." *Ibid.* This system came with no restrictions; the Yakamas enjoyed "free and open access to trade networks in order to maintain their system of trade and exchange." *Id.*, at 1263. They traveled to Oregon and maybe even to California to trade "fir trees, lava rocks, horses, and various species of salmon." *Id.*, at 1262–1263. This extensive travel "was necessary to obtain goods that were otherwise unavailable to [the Yakamas] but important for sustenance and religious purposes." *Id.*, at 1262. Indeed, "far-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture." *Id.*, at 1238. Travel for purposes of trade was so important to the "Yakamas' way of life that they could not have performed and functioned as a distinct culture . . . without extensive travel." *Ibid.* (internal quotation marks omitted).

Everyone understood that the treaty would protect the Yakamas' preexisting right to take goods to and from market freely throughout their traditional trading area. "At the treaty negotiations, a primary concern of the Indians was that they have freedom to move about to . . . trade." *Id.*, at 1264. Isaac Stevens, the Governor of the Washington Territory, specifically promised the Yakamas that they would "'be allowed to go on the roads to take [their] things to market.'" *Id.*, at 1244 (emphasis deleted). Governor Stevens called this the "'same libert[y]'" to travel with goods free of restriction "'outside the reservation'" that the Tribe would enjoy within the new reservation's boundaries. *Ibid.* Indeed, the U. S. representatives' "statements regarding the Yakama's use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors." *Id.*, at 1265. Before the treaty, then, the Yakamas traveled extensively without paying taxes to bring goods to and from market, and the record suggests that the Yaka-

mas would have understood the treaty to preserve that liberty.

None of this can come as much of a surprise. As the State reads the treaty, it promises tribal members only the right to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation. In fact, the millions of acres the Tribe ceded were a prize the United States desperately wanted. U. S. treaty negotiators were "under tremendous pressure to quickly negotiate treaties with eastern Washington tribes, because lands occupied by those tribes were important in settling the Washington territory." *Id.*, at 1240. Settlers were flooding into the Pacific Northwest and building homesteads without any assurance of lawful title. The government needed "to obtain title to Indian lands" to place these settlements on a more lawful footing. *Ibid.* The government itself also wanted to build "wagon and military roads through Yakama lands to provide access to the settlements on the west side of the Cascades." *Ibid.* So "obtaining Indian lands east of the Cascades became a central objective" for the government's own needs. *Id.*, at 1241. The Yakamas knew all this and could see the writing on the wall: One way or another, their land would be taken. If they managed to extract from the negotiations the simple right to take their goods freely to and from market on the public highways, it was a price the United States was more than willing to pay. By any fair measure, it was a bargain-basement deal.

Our cases interpreting the treaty's neighboring and parallel right-to-fish provision further confirm this understanding. The treaty "secure[s] . . . the right of taking fish at all usual and accustomed places, *in common with* citizens of the Territory." Treaty Between the United States

and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953 (emphasis added). Initially, some suggested this guaranteed tribal members only the right to fish according to the same regulations and subject to the same fees as non-Indians. But long ago this Court refused to impose such an "impotent" construction on the treaty. *United States* v. *Winans*, 198 U. S. 371, 380 (1905). Instead, the Court held that the treaty language prohibited state officials from imposing many nondiscriminatory fees and regulations on tribal members. While such laws "may be both convenient and, in [their] general impact, fair," this Court observed, they act "upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Tulee* v. *Washington*, 315 U. S. 681, 685 (1942). Interpreting the same treaty right in *Winans,* we held that, despite arguments otherwise, "the phrase '*in common with* citizens of the Territory'" confers "upon the Yak[a]mas continuing rights, *beyond those which other citizens may enjoy*, to fish at their 'usual and accustomed places.'" *Tulee*, 315 U. S., at 684 (citing *Winans*, 198 U. S., at 371; emphasis added). Today, we simply recognize that the same language should yield the same result.

With its primary argument now having failed, the State encourages us to labor through a series of backups. It begins by pointing out that the treaty speaks of allowing the Tribe "free access" from local roads to the public highways, but indicates that tribal members are to use those highways "in common with" non-Indians. On the State's account, these different linguistic formulations must be given different meanings. And the difference the State proposes? No surprise: It encourages us to read the former language as allowing goods to be moved tax-free along local roads to the highways but the latter language as authorizing taxes on the Yakamas' goods once they arrive there. See also *post*, at 3 (KAVANAUGH, J., dissenting).

The trouble is that nothing in the record supports this interpretation. Uncontested factual findings reflect the Yakamas' understanding that the treaty would allow them to use the highways to bring goods to and from market freely. These findings bind us under the doctrine of collateral estoppel, and no one has proposed any lawful basis for ignoring them. Nor, for that matter, has anyone even tried to offer a reason why the Tribe might have bargained for the right to move its goods freely only part of the way to market. Our job in this case is to interpret the treaty as the Yakamas originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact.

If that alternative won't work, the State offers another. It admits that the Yakamas personally may have a right to travel the highways free of most restrictions on their movement. See also *post*, at 3 (ROBERTS, C. J., dissenting) (acknowledging that the treaty prohibits the State from "charg[ing] . . . a toll" on Yakamas traveling on the highway). But, the State continues, the law at issue here doesn't offend that right. It doesn't, we are told, because the "object" of the State's tax isn't *travel* but the *possession* of fuel; the fact that the State happens to assess its tax when fuel is possessed on a public highway rather than someplace else is neither here nor there. And just look, we are told, at the anomalies that might arise if we ruled otherwise. A tribal member who buys a "mink coat" in a Washington store would have to pay the State's sales tax, but a tribal member who purchases the same coat at market in Oregon could not be taxed for possessing it on the highway when reentering Washington. See *post*, at 2–7.

This argument suffers from much the same problem as its predecessors. Now, at least, the State may acknowledge that the Yakamas personally have a right to travel free of most restrictions. But the State still fails to

give full effect to the treaty's terms and the Yakamas' original understanding of them. After all and as we've seen, the treaty doesn't just guarantee tribal members the right to *travel* on the highways free of most restrictions on their movement; it also guarantees tribal members the right to *move goods* freely to and from market using those highways. And it's impossible to *transport* goods without *possessing* them. So a tax that falls on the Yakamas' possession of goods as they travel to and from market on the highway violates the treaty just as much as a tax on travel alone would.

Consider the alternative. If the State could save the tax here simply by labeling it a fee on the "possession" of a good, the State might just as easily revive the fishing license fee *Tulee* struck down simply by calling it a fee on the "possession" of fish. That, of course, would be ridiculous. The Yakamas' right to fish includes the right to *possess* the fish they catch—just like their right to *move* goods on the highways embraces the right to *possess* them there. Nor does the State's reply solve the problem. It accepts, as it must, that possessing fish is "integral" to the right to fish. *Post*, at 6, n. 2 (ROBERTS, C. J., dissenting). But it stands pat on its assertion that the treaty protects nothing more than a personal right to travel, ignoring all of the facts and binding findings before us establishing that the treaty *also* guarantees a right to move (and so possess) goods freely as they travel to and from market. *Ibid.*

What about the supposed "mink coat" anomaly? Under the terms of the treaty before us, it's true that a Yakama who buys a mink coat (or perhaps some more likely item) at an off-reservation store in Washington will have to pay sales tax because the treaty is silent there. And it is also true that a Yakama who buys the same coat right over the state line, pays any taxes due at market there, and then drives back to the reservation using the public highways is

entitled to move that good tax-free from market back to the reservation. But that is hardly anomalous—*that* is the treaty right the Yakamas reserved. And it's easy to see why. Imagine the Yakama Reservation reached the Washington/Oregon state line (as it did before the 1855 Treaty). In that case, Washington would have no basis to tax the Yakamas' transportation of goods from Oregon (whether they might be fuel, mink coats, or anything else), as all of the Yakamas' conduct would take place outside of the State or on the reservation. The only question here is whether the result changes because the Tribe must now use Washington's highways to make the trek home. And the answer is no. The Tribe bargained for a right to travel with goods off reservation just as it could on reservation and just as it had for centuries. If the State and federal governments do not like that result, they are free to bargain for more, but they do not get to rewrite the existing bargain in this Court.

Alternatively yet, the State warns us about the dire consequences of a ruling against it. Highway speed limits, reckless driving laws, and much more, the State tells us, will be at risk if we rule for the Tribe. See also *post*, at 7–10 (ROBERTS, C. J., dissenting). But notice. Once you acknowledge (as the State and primary dissent just have) that the Yakamas *themselves* enjoy a right to travel free of at least some nondiscriminatory state regulations, this "problem" inevitably arises. It inevitably arises, too, once you concede that the Yakamas enjoy a right to travel freely at least on local roads. See *post*, at 3 (KAVANAUGH, J., dissenting). Whether you read the treaty to afford the Yakamas the further right to bring goods to and from market is beside the point.

It turns out, too, that the State's parade of horribles isn't really all that horrible. While the treaty supplies the Yakamas with special rights to travel with goods to and from market, we have seen already that its "in common

with" language *also* indicates that tribal members knew they would have to "share the use of the road with whites" and accept regulations designed to allow the two groups' safe coexistence. *Yakama Indian Nation*, 955 F. Supp., at 1265. Indeed, the Yakamas *expected* laws designed to "protec[t]" their ability to travel safely alongside non-Indians on the highways. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as *Amicus Curiae* 21a, 31a. Maybe, too, that expectation goes some way toward explaining why the State's hypothetical parade of horribles has yet to take its first step in the real world. No one before us has identified a single challenge to a state highway speed limit, reckless driving law, or other critical highway safety regulation in the entire life of the Yakama treaty.

Retreating now, the State suggests that the real problem isn't so much about the Yakamas themselves traveling freely as it is with their goods doing so. We are told we should worry, for example, about limiting Washington's ability to regulate the transportation of diseased apples from Oregon. See also *post*, at 10 (ROBERTS, C. J., dissenting). But if bad apples prove to be a public menace, Oregon and its localities may regulate them when they are grown or picked at the orchard. Oregon, its localities, and maybe even the federal government may regulate the bad apples when they arrive at market for sale in Oregon. The Tribe and again, perhaps, the federal government may regulate the bad apples when they arrive on the reservation. And if the bad apples somehow pose a threat to safe travel on the highways, even Washington may regulate them as they make their way from Oregon to the reservation—just as the State may require tribal members to abide nondiscriminatory regulations governing the safe transportation of flammable cargo as they drive their gas trucks from Oregon to the reservation along public highways. The only thing that Washington may not do is

reverse the promise the United States made to the Yakamas in 1855 by imposing a tax or toll on tribal members or their goods as they pass to and from market.

Finally, some worry that, if we recognize the potential permissibility of state highway safety laws, we might wind up impairing the interests of "tribal members across the country." See *post*, at 10 (ROBERTS, C. J., dissenting). But our decision today is based on unchallenged factual findings about how the Yakamas themselves understood this treaty in light of the negotiations that produced it. And the Tribe itself has expressly acknowledged that its treaty, while extending real and valuable rights to tribal members, does not preclude laws that merely facilitate the safe use of the roads by Indians and non-Indians alike. Nor does anything we say here necessarily apply to other tribes and other treaties; each must be taken on its own terms. In the end, then, the only true threat to tribal interests today would come from replacing the meaningful right the Yakamas thought they had reserved with the trivial promise the State suggests.

Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.