

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-269

STATE OF WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT MOTION OF RESPONDENTS
FOR DIVIDED ARGUMENT

Pursuant to Rules 21 and 28 of the Rules of this Court, the United States and the tribal respondents respectfully move for divided argument in this case. The case is scheduled for argument on April 18, 2018. The division of argument time would offer the Court distinct perspectives on the important issues presented in this case. The United States and the tribal respondents propose to divide respondents' time equally, with 15 minutes allotted for each. Granting this motion therefore would not require the Court to enlarge the overall time for argument.

1. This case will address the propriety of relief granted to vindicate the "right of taking fish, at all usual and

accustomed grounds and stations," reserved by the Tribes in what is now the State of Washington in the Stevens Treaties, e.g., Treaty of Medicine Creek, U.S.-Nisqually, art. III, Dec. 26, 1854, 10 Stat. 1133. The district court determined that the Stevens Treaties impose a duty on the State to refrain from building or maintaining culverts that directly block passage of a large number of anadromous fish to and from those grounds and that significantly diminish fish populations available for tribal harvest. The court issued an injunction requiring the State to provide fish passage by addressing its barrier culverts on a reasonable schedule designed to remedy the violation of tribal treaty rights. The court of appeals affirmed. In this Court, the State argues that the courts below misconstrued the scope of the Tribes' treaty rights, that equitable defenses asserted by the State preclude the grant of relief to the Tribes, and that the scope of relief ordered by the district court was improper.

2. The tribal respondents initiated these proceedings by seeking relief in the district court in the case concerning the Tribes' fishing rights that this Court addressed in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) (Fishing Vessel). The tribal respondents continued to be separately represented after the United States intervened. The tribal respondents filed a separate brief in

the court of appeals in this case and were separately represented at the oral argument before that court. They have filed a merits brief before this Court, arguing in favor of affirming the rulings below, that exhaustively discusses the relevant factual, legal, historical, and practical issues implicated by this case. The Tribes' brief provides the unique perspective of sovereigns whose treaty rights are at stake in this case.

3. The United States has also filed a brief urging affirmance. The United States' brief argues that the courts below correctly interpreted the scope of the Tribes' rights under the Stevens Treaties, including because those interpretations are consistent with the intentions and understanding of the United States when it entered into the treaties. The United States is also uniquely positioned to address the State's equitable defenses, which are based on alleged actions or inactions by the federal government that, the State argues, would render the relief in this case unavailable.

4. This Court has repeatedly allowed the United States and the Tribes affected by a case to divide oral argument time, including several times this Term. See, e.g., Upper Skagit Indian Tribe v. Lundgren, No. 17-387; Patchak v. Zinke, 138 S. Ct. 897 (2018); Dollar General Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 2159 (2016). And both the United

States and affected Tribes were allotted oral argument time in Fishing Vessel, in which the Court construed and enforced the Tribes' fishing rights under the Stevens Treaties. The Court has thus recognized that Tribes and the United States offer distinct and complementary views even when both support the same ultimate outcome.

Respectfully submitted.

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APRIL 2018