No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S OPPOSITION TO MOTION OF RESPONDENTS MARKLE INTERESTS, LLC, ET AL., FOR DIVIDED ARGUMENT

RICHARD C. STANLEY
Stanley, Reuter, Ross, Thornton & Alford, LLC
909 Poydras Street, Suite 2500
New Orleans, LA 70112
(504) 523-1580

TIMOTHY S. BISHOP
Counsel of Record
CHAD M. CLAMAGE
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

JAMES R. JOHNSTON
ZACHARY R. HIATT
Weyerhaeuser Company
220 Occidental Ave. S.
Seattle, Washington 98104
(206) 539-4361

Counsel for Petitioner

OPPOSITION TO MOTION FOR DIVIDED ARGUMENT

Petitioner Weyerhaeuser Company respectfully opposes the motion for divided argument of Markle Interests, LLC, *et al.*, who are respondents in this case by operation of Rule 12.6. The Markle parties filed a separate certiorari petition from the judgment of the Fifth Circuit, No. 17-74, which this Court did not grant when it granted the writ in No. 17-71.

As recognized by the Markle respondents, "[d]ivided argument is not favored" (Rule 28.4), and it is rarely granted between private parties. There is no reason to grant it here, inviting the problems described by Justice Jackson that "[w]hen two lawyers undertake to share a single presentation, their two arguments at best will be somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing." Justice Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 802 (1951) (quoted in Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE 776-777 (10th ed. 2013)).

The Markle respondents do not assert that their interests or arguments in this litigation conflict with or are inconsistent with those of petitioner Weyerhaeuser. Instead, they point to one additional sub-argument that they made in their brief in support of Weyerhaeuser, but which Weyerhaeuser did not make in its opening brief, concerning the second question presented (a question that the Markle respondents did not present in their own certiorari petition in No. 17-74).

In that sub-argument concerning the reviewability of FWS's decision not to exclude Unit 1 from critical habitat designation on economic grounds, the Markle

respondents ask this Court to adopt as the law their reading of Justice Scalia's dissenting opinion in *Webster* v. *Doe*, 485 U.S. 592 (1988). The Markle respondents fully briefed that argument in their opening brief (at 41-44), the United States responded (at 49 n.12), and now Markle has the opportunity to address that argument again in a reply brief. See Rule 25.3. No more is necessary. See SUPREME COURT PRACTICE, *supra*, at 778 (observing that in *Lexecon, Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 521 U.S. 1150 (1997), this Court refused "to allow separate argument from co-defendants making overlapping but divergent points in their briefs").

Notably, Weyerhaeuser has strongly advocated (at 45-56) that the U.S. Fish and Wildlife Service's decision not to exclude Unit 1 from critical habitat designation is judicially reviewable, carefully distinguishing *Heckler* v. *Chaney*, 470 U.S. 821 (1985), on which the Fifth Circuit principally relied. And no fewer than twelve petitioner-side amicus briefs addressed the reviewability question, a number devoting their entire briefs to that issue. All reviewability arguments have been fully aired.

Otherwise, the Markle respondents point only to the fact that they have different ownership interests in Unit 1. But Weyerhaeuser owns part of Unit 1 outright, has a lease on all of the remaining land at issue through 2043, and actually operates the land on a day-to-day basis as a commercial forest.

There is therefore no reason to think that Weyerhaeuser's and the Markle respondents' interests in this litigation are in any way inconsistent—indeed,

respondents do not claim that they are. Nor, in an Administrative Procedure Act challenge based on an administrative record is there any reason to think that the Markle respondents could bring to oral argument any relevant factual nuance worth the disruption that is inevitably caused by dividing a 30 minute argument.

CONCLUSION

For the foregoing reasons, the Markle respondents' motion for divided argument should be denied.

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/S/ Timothy S. Bishop

TIMOTHY S. BISHOP
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel of Record for Petitioner Weyerhaeuser Company