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Pro-Business Interests Press Justices To End Chevron

By **Peter McGuire**

Law360 (July 24, 2023, 8:15 PM EDT) -- Dozens of conservative think tanks, pro-business groups and U.S. lawmakers have sided with New Jersey's herring industry in a U.S. Supreme Court case that could roll back the deference courts grant to executive agencies to interpret unclear federal laws.

In almost 40 briefs filed on Friday and Monday, parties including the U.S. House of Representatives urged the justices to overrule or significantly narrow the so-called Chevron deference in a decision over whether the U.S. National Marine Fisheries Service overstepped its authority by mandating fishing businesses including Loper Bright Enterprises pay for third-party onboard inspectors.

The sweep of interests pressing the justices to **reshape a landmark ruling** in 1984's **Chevron v. Natural Resources Defense Council** points to how a decision could affect the regulatory landscape. The U.S. Chamber of Commerce, major agriculture and meat trade groups, conservative-led states, the firearms industry and even e-cigarette manufacturers told the justices how the decision allowed unpredictable, harmful federal regulation run rampant.

The Republican-controlled House, in its Monday brief, said the court should hold that executive agencies are not entitled to a court's deference when the statute is silent on specific regulatory power. The nearly 40-year-old decision found that courts should yield to agency's interpretation of ambiguous laws, but has been increasingly under fire including **from Justice Neal Gorsuch**.

In the **Loper Bright case**, a district court and the D.C. Circuit ruled that the NMFS had the authority to make vessels use paid monitors under the Magnuson-Stevens Act, deferring to the agency's interpretation that the **law permitted the requirement**.

But Congress never expressly gave fisheries regulators the power they claimed to wield, the House said. Letting agencies find new authority "lurking" in the absence of clear Congressional intent aggrandizes executive power, lets regulators expand their footprint, and undermines government checks and balances, the House added.

The justices should hold that a statute is not ambiguous and does not trigger the Chevron deference when it is silent on whether agencies have regulatory power, according to the brief.

"When a statute fails to address whether an agency possesses a claimed regulatory authority, the agency lacks that power," the House said.

The arguments from Chevron opponents followed in the same vein and went further. Eight powerful trade groups, including the American Farm Bureau Federation, North American Meat Institute and National Association of Home Builders, told the justices that Chevron should be overruled entirely.

Constraining courts' ability to really interpret statutes by forcing them to defer to agency interpretations creates regulatory uncertainty, a bias in favor of agency actions and an incentive to find statutes ambiguous, according to their brief.

"It is time to correct the Chevron error and give clear guidance to lower courts, regulators and the regulated that such deference is unwarranted," the trade groups said.

A West Virginia-led alliance of 27 states urged the justices to recognize Chevron's threat to the

nation. Since the ruling almost four decades ago, a growing "fourth branch" of federal government has put out boundless and unaccountable rules, including by hijacking Congressional taxation authority to make fishing vessels fund a federal inspection program, the states said.

"This sort of regulatory abuse happens too often, so the amici states implore the court to set things right," they said. "The only way to recover from Chevron is to scrap Chevron — all of it."

Meanwhile, trade groups and industry sectors told the court how executive agencies leaned on Chevron to cover regulatory turmoil and overreach.

The National Shooting Sports Foundation, which represents America's gun industry, said Chevron provides cover for the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives "whipsawing rules." Trade groups and small business representing the e-cigarette industry similarly argued the U.S. Food and Drug Administration used courts' deference to agency expertise to institute a de facto ban on any non-tobacco e-cigarette flavors.

Trade groups including the International Foodservice Distributors Association, National Retail Federation and Associated Builders and Contractors told the court to consider how the U.S. National Labor Relations Board uses Chevron to excuse its ever-changing interpretation of the National Labor Relations Act.

The U.S. Chamber of Commerce, in its own brief, said that the Chevron ruling may have been a way to promote stability and consistency by keeping policymaking out of the hands of unelected judges. The precedent has since evolved to permit unaccountable regulatory power, the chamber added.

"Businesses cannot plan and invest for the future when agencies are free to unilaterally change the basic rules that govern them at any time," the Chamber said in an email to Law360 on Monday. "If Chevron is to be salvaged at all, the only path to doing so is by adhering faithfully to the separation of powers, which supports predictability, stability and accountability in the law."

Groups including the Cato Institute, Mountain States Legal Foundation, Christian Employers Alliance, National Federation of Independent Businesses, Liberty Justice Center and Gun Owners of America and politicians including Georgia Gov. Brian Kemp, a Republican, and a group of U.S. lawmakers led by Sen. Ted Cruz, R-Texas, chimed in with similar critiques of the Chevron doctrine.

Ryan Mulvey, co-counsel for the herring fishing companies in the case, said his clients represented countless mom-and-pop businesses and everyday Americans touched by federal regulation.

"This case provides an opportunity to restore the proper roles of the federal courts and Congress to hold government accountable and ensure that all Americans can have their day in court," Mulvey told Law360 in an email. "The number of amicus filings reflects broad interest in overruling Chevron and ending unchecked power in the hands of government bureaucrats."

The National Marine Fisheries Service declined to comment Monday.

The case centers on arguments from Loper Bright Enterprises Inc. and the other fishing companies that say the D.C. Circuit got it wrong in August when it issued a split opinion upholding a 2020 National Marine Fisheries Service rule that imposed an industry-funded monitoring program on herring fishers.

The companies questioned whether the fisheries service can force domestic fishing vessels to pay up to 20% of the salaries of the monitors they're forced to host. While the Magnuson-Stevens Act requires vessel owners to make room onboard for federal observers who check for compliance with regulations, it doesn't explicitly state owners must pay for the observers, the fishers told the Supreme Court in their petition for writ of certiorari.

In response, the fisheries service argued the fishers have not shown they are burdened by monitoring services and noted that other National Marine Fisheries Service regulations require fishing vessels to pay for third-party services such as electronic catch reporting, specific equipment and safety checks.

Far from being "silent" on charging industry for monitoring, the Magnuson-Stevens Act has clear language that authorizes the program, the government has said.

The House of Representatives is represented by Matthew B. Berry, Todd B. Tatelman, Brooks M. Hanner, Sarah E. Clouse and Bradley Craigmyle of the U.S. House of Representatives Office of General Counsel.

The National Taxpayers Union Foundation is represented in-house by Joseph D. Henschman and Tyler Martinez.

The agriculture trade groups are represented by Timothy S. Bishop and Brett E. Legner of Mayer Brown LLP and Ellen Steen and Travis Cushman of the American Farm Bureau Federation.

The NFIB is represented by Elizabeth Milito and Rob Smith of the NFIB Small Business Legal Center and David C. Tryon of The Buckeye Institute.

The Coalition for a Democratic Workplace and allied trade groups are represented by Elbert Lin, Kurt G. Larkin, Reilly C. Moore, David N. Goldman and Michael Dingman Hunton Andrews of Kurth LLP.

The Competitive Enterprise Institute is represented in-house Devin Watkins and Dan Greenberg.

The National Right to Work Legal Defense Foundation is represented in-house by W. James Young.

The e-cigarette groups are represented by Eric P. Gotting and Azim Chowdhury of Keller & Heckman LLP and J. Gregory Troutman.

Advancing American Freedom is represented in-house by J. Marc Wheat.

Cruz and other lawmakers are represented by Jennifer L. Mascott and R. Trent McCotter of the George Mason University's Antonin Scalia Law School.

The U.S. Chamber is represented in-house by Daryl L. Joseffer and Andrew R. Varcoe and Helgi C. Walker, Russell B. Balikian, Jessica L. Wagner and Edward B. Ferguson of Gibson Dunn & Crutcher LLP.

The National Shooting Sports Foundation is represented by H. Christopher Bartolomucci, Brian J. Field and Kenneth A. Klukowski of Schaerr Jaffe LLP.

The New Civil Liberties Alliance is represented in-house by John J. Vecchione, Philip Hamburger, Mark Chenoweth and Kara Rollins.

The Mountain States Legal Foundation is represented in-house by Ivan L. London and David C. McDonald.

West Virginia and allied states are represented by Patrick Morrissey, Lindsay S. See, Michael R. Williams and Grant A. Newman of the Office of the West Virginia Attorney General.

The Ohio Chamber of Commerce is represented in-house by Tony Long and by Larry J. Obhof Jr. of Shumaker Loop & Kendrick LLP.

The Independent Women's Law Center is represented in-house by Jennifer C. Braceras, by Cory L. Andrews and John W. Masslon II of the Washington Legal Foundation and Kathryn E. Tarbert, Gene C. Schaerr and Annika Boone Barkdull of Schaerr Jaffe LLP.

The Liberty Justice Center is represented in-house by Loren A. Seehase and Reilly Stephens.

The Landmark Legal Foundation is represented in-house by Michael J. O'Neill, Matthew C. Forys and Richard P. Hutchison.

The Cato Institute is represented in-house by Anastasia P. Boden, Thomas A. Berry and Isaiah McKinney and Curt A. Levey of The Committee for Justice.

Thomas W. Merrill is represented by James B. Septa and Joseph D. Kearney.

The Foundation for Government Accountability is represented in-house by Stewart L. Whitson, David Craig, Sofia DeVito, Caroline M.B. Miller and Ryan Young.

David Goethel and John Haran are represented by Andrew M. Grossman and Benjamin Janacek of BakerHostetler.

The fishing companies are represented by Paul D. Clement, Andrew C. Lawrence and Chadwick J. Harper of Clement & Murphy PLLC, and Ryan P. Mulvey, Eric R. Bolinder and R. James Valvo III of the Cause of Action Institute.

The government is represented by Elizabeth Prelogar, Todd Kim, Rachel Heron, Daniel Halainen and Dina B. Mishra of the U.S. Department of Justice.

The case is *Loper Bright Enterprises et al. v. Gina Raimondo et al.*, number 22-451, in the Supreme Court of the United States.

-Additional reporting by Madeline Lyskawa and Juan Carlos Rodriguez. Editing by Michael Watanabe.

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