Fishers' Livelihood Concerns Could Bring SCOTUS Sea Change for Environmental Law

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The Supreme Court has agreed to hear a group of New Jersey herring fishers' challenge to a long-standing key administrative law doctrine—the "*Chevron* doctrine." It could be the next term's most consequential case. The *Chevron* doctrine requires federal courts to defer to administrative agencies' interpretations of their governing statutes where the text of those statutes is ambiguous. As one of the most-cited Supreme Court cases, *Chevron* has been instrumental in administrative law practice over the past forty years. It has also become a primary target for several of the Court's conservative justices.

In the case now before the Court, *Loper Bright Enterprises v. Raimondo*, Case No. 22-451, herring fisher appellants assert that the lower courts improperly applied the *Chevron* doctrine when they upheld a National Marine Fisheries Service (NMFS) regulation requiring them to pay a portion of the salary of a third-party compliance monitor onboard their boats. While no party questions NMFS's authority to require that fishing vessels "carry" a federal or third-party observer onboard, the fishers challenge the agency's power to force them to pay those observers up to approximately 20 percent of a vessel's annual returns.

The fishers petitioned the Supreme Court to determine whether NMFS is implicitly authorized under the Magnuson-Stevens Act (MSA)[1] to pass these enforcement costs onto industry and separately to either clarify that silence does not create "ambiguity" in a statute for purposes of triggering *Chevron* deference, or to discard *Chevron* doctrine altogether. The Court granted certiorari on only the second question, and the consequences for federal environmental law could be vast. Until recently, federal agencies have routinely relied upon the *Chevron* doctrine when defending their regulations.

Background of *Chevron* Deference

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court created a two-part legal test for determining whether a federal court should defer to a government agency's interpretation of a statute which it administers.[2] In what has come to be called *Chevron* Step One, the court must ask whether Congress has spoken unambiguously to the precise issue at question—if it has, the court must follow the text. However, if the court finds that the statutory text at issue is ambiguous, then it moves to *Chevron* Step Two and will defer to the agency's interpretation of the statute if it is "based on a permissible construction of the statute," even if the court does not find that to be the best reading of the statute.

"*Chevron* deference" has since become a core doctrine of administrative law, with federal courts citing to and applying the case thousands of times over the past four decades. Proponents of *Chevron*'s approach argue that it is a necessary tool for the government to solve modern problems. *Chevron* deference allows Congress to dictate broad principles of law while technocratic expert agencies fill in the technical gaps through regulation. The decision, it is argued, also enables agencies to be more responsive to changing needs and issues over time. And though the environmental litigants themselves lost in the original *Chevron* case, federal courts have frequently applied the doctrine to uphold significant rulemakings by the Environmental Protection Agency and other agencies that environmentalists have favored.

But the doctrine has many opponents, including among the conservative justices of the Supreme Court. Prior to his nomination to the Court, then-Judge Neil Gorsuch authored both the majority opinion and a separate concurring opinion in *Gutierrez-Brizuela v. Lynch*, and in that separate opinion made clear that he finds *Chevron* constitutionally untenable.[3] *Chevron* is "no less than a judge-made doctrine for the abdication of the judicial duty," Gorsuch wrote, and is "a problem for the people whose liberties may now be impaired not by an independent decisionmaker seeking to declare the law's meaning as fairly as possible—the decisionmaker promised to them by law—but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day."[4]

Justice Clarence Thomas has similarly written that the *Chevron* decision "wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over to the Executive."[5]

And looking to *Chevron* in practice, Justice Kavanaugh has explained that the doctrine's "fundamental problem . . . is that different judges have wildly different conceptions of whether a particular statute is clear or ambiguous."[6]

The late Justice Scalia, however, was a key supporter of *Chevron* and frequently cited and applied the doctrine in his opinions. He explained both the history and justification for the *Chevron* doctrine in a 1989 speech at Duke Law School, including that deference to agency interpretations aligns with Congress's intent in enacting broadly written statutes: "If Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegee be able to suit its actions to the times, and that continuing political accountability be assured, through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight."[7] The *Chevron* doctrine, he wrote, "more accurately reflects the reality of government, and thus more adequately serves its needs," than would a lack of deference to agencies' statutory interpretations.[8]

Perhaps unsurprisingly, the Supreme Court has avoided applying—or even referencing—*Chevron* in recent years. Nevertheless, the doctrine has long been the standard, and lower courts continue to apply it. The D.C. District Court and D.C. Circuit applied *Chevron* as a central component of their rulings in *Loper Bright Enterprises*. The Supreme Court has now agreed to consider the herring fishers' petition, which asks the Court to rethink the doctrine in its entirety.

Fishers Fight *Chevron*

The herring fishers' petition arises out of their challenge to a potentially costly regulation they claim is grounded in statutory silence. NMFS, also known as NOAA Fisheries, oversees U.S. federal fisheries under the MSA. NMFS promulgates fishery management plans for each federal fishery. All such plans are required to "contain the conservation and management *measures*, applicable to foreign fishing and fishing by vessels of the United States, which are *necessary and appropriate for the conservation and management of the fishery*."[9] A fishery management plan may also "*require that one or more observers be carried on board a vessel* of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the

fishery."[10] In three narrow circumstances, the MSA explicitly authorizes charging fishers for the costs of the monitors assigned to their boats.

Those three instances are not at issue in this case.[11] The MSA does not address whether fishing vessels must also pay such observers in other circumstances. The fishers do not contest NMFS's statutory authority to require them to carry observers on board but challenge the agency's ability to require them to pay those observers outside the narrow circumstances explicitly authorized in the MSA.

The New England Fishery Management Council manages the Gulf of Maine herring fishery. In February 2020, NMFS promulgated a final rule that required "industry-funded monitoring" by third-party observers across all New England fisheries. Specifically for the Atlantic herring fishery, the rule requires that fishers with certain permits notify NMFS "prior to any trip declared into the herring fishery." Half of all such trips carry a federally funded "observer" or, where not provided, a privately funded third-party "monitor." NMFS prohibits a vessel that refuses to pay for a private monitor from fishing for herring. The agency estimates that third-party monitors would cost fishers $710 per day, or an annual reduction of "approximately 20 percent" of financial returns-to-owner.

In *Loper Bright Enterprises*, the New Jersey herring fishers contest NMFS's authority to require them to pay for the third-party compliance monitors they must carry on board. They argue that the MSA does not authorize such a requirement, but both the D.C. District Court and D.C. Circuit upheld the 2020 NMFS regulation, applying the principles of *Chevron* deference. The district court held that the MSA unambiguously authorizes (*Chevron* Step One) industry-funded monitoring in the herring fishery because such funding is "necessary and appropriate" to the fishery's conservation and management.[12] On appeal, the D.C. Circuit disagreed, finding that the MSA was "not . . . wholly unambiguous" and leaves NMFS's authority to require industry-funded monitoring "unresolved."[13] Nevertheless, the D.C. Circuit held that NMFS's interpretation of the MSA's "silence on the issue of cost of at-sea monitoring" was "reasonable" in light of its "broad 'necessary and appropriate' provision," and so upheld the requirement under *Chevron* Step Two.[14]

By contrast, the fishers argue that the MSA's silence unambiguously does *not* authorize NMFS's industry-funding requirement (*Chevron* Step One). They also argue that it is not permissible to read such authority into the statute's "necessary and appropriate" provision where Congress explicitly provided for industry-funded monitoring in three unique and inapplicable situations but failed to do so for any other situation, including for the Atlantic herring fishery (*Chevron* Step Two).

The herring fishers petitioned the Supreme Court for certiorari on two questions: (1) whether the MSA implicitly authorizes NMFS to require industry-funded monitoring of the herring fishery, and (2) whether the Court should "overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[15] The Solicitor General opposed certiorari, arguing that it would make "an unsuitable vehicle for reconsidering *Chevron*" because the district court had found that the statute clearly authorized the agency rule. Nevertheless, after numerous conferences considering the case, the Court granted certiorari, limited to the second question. While the Court did not grant cert on the petition's first question, a clarification or rejection of *Chevron* could result in the D.C. Circuit reconsidering its August ruling.

Will the Court Put *Chevron* Out to Sea?

The Supreme Court does not have to overturn *Chevron* to decide this case. A majority of justices could take up the herring fishers' more limited request to "clarify" that statutory silence is not "ambiguity" sufficient to support deference to an agency's "plausible" statutory interpretation when the asserted power

is expressly granted elsewhere in the statute to a different situation. This would be an important clarification of administrative law but not a sea change.

However, given the Court's six-member conservative majority, that Justices Gorsuch, Thomas, and Kavanaugh have expressed clear antipathy toward *Chevron*, and that Justice Jackson has recused herself (probably because she heard oral argument on the case while she was on the D.C. Circuit), the Supreme Court may take this opportunity to overrule the doctrine in its entirety. Such a decision could have dramatic effect, particularly in the lower courts that rely on the doctrine more frequently. Without *Chevron*, courts would probably revert to a case-by-case decision-making, which could limit or call into question federal regulations affecting every sector of the national economy, environmental regulations not least among them, where statutory language is less than clear. And as Justice Scalia pointed out in his dissent in *United States v. Mead Corp.*, the resolution of statutory ambiguities by federal judges could produce "ossification of large portions of our statutory law."[16]

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[1]16 U.S.C. § 1801 et seq.

[2]467 U.S. 837 (1984).

[3]834 F.3d 1142 (10th Cir. 2016).

[4]*Id.* at 1152–53 (Gorsuch, J., concurring).

[5]*Michigan v. E.P.A.*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring).

[6]Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016).

[7]Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 518 (1989).

[8] *Id.* at 521.

[9]16 U.S.C. § 1853(a)(1)(A).

[10]16 U.S.C. § 1853(b)(8).

[11]These circumstances include (1) where the North Pacific Council (whose jurisdiction includes Alaska, Washington, and Oregon) requires fishing vessels to carry an observer; (2) where a fisher is limited to harvest a specific quantity of the total allowable catch for a certain fishery; and (3) where foreign vessels fish within the U.S. exclusive economic zone. In the first two instances, compliance observer fees are limited to two or three percent of the ex-vessel value of the vessel's catch. None of these three circumstances apply to the U.S.-national, Atlantic herring fishers in this case.

[12]*Loper Bright Enterprises, Inc. v. Raimondo*, 544 F. Supp. 3d 82, 104 (D.D.C. 2021).

[13]*Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 366 (D.C. Cir. 2022).

[14]*Id.* at 369–70.

[15]Petition for Certiorari at i–ii.

[16]533 U.S. 218, 247 (2001) (Scalia, J., dissenting).

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