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Herring Fishermen Petition U.S. Supreme Court to Reject Executive Power Grab

Loper Bright Enterprises v. Raimondo *challenges bureaucratic scheme to force fishermen to pay for monitors without congressional authority.*

Paul Clement leads case that provides an opportunity to overrule Chevron.

Facts: For the past 30 years, the Magnuson-Stevens Act has given the National Oceanic and Atmospheric Administration (NOAA) discretionary authority to require monitors on commercial fishing boats. But when the agency ran out of money to pay for additional monitoring in Atlantic herring fisheries, NOAA decided to shift the cost to small businesses—the fishermen themselves—without any authorization from Congress.

The federal government now demands that most herring fishermen effectively pay the salaries of third-party contractors, estimated at over $700 per day, to ride their boats and watch them fish. That's more than some boat captains will make on the same trip.

This is the maritime equivalent of being forced to carry a state trooper in your car—and pay his salary.

If the story sounds familiar, that's because the Academy Award Best Picture, *CODA,* talked about a regulation just like this. An industry already beleaguered by overlapping state and federal regulations plus ever-decreasing fishing quotas now must take on this additional cost. As a result, family-run fishing boats in Cape May, New Jersey face an existential threat to their way of life.

Case: Several fishermen, represented by Cause of Action Institute and former U.S. Solicitor General Paul Clement, are petitioning the Supreme Court to hear their case. Their lawsuit seeks to overturn the outrageous abuse of power that the federal government is using to inflict harm on the fishermen.

Nothing in the Magnuson-Stevens Act gives NOAA the authority to pass monitoring costs on to the herring fishing families. In fact, Congress went out of its way to only allow fee-shifting to industry in specific, limited circumstances—and not here. Regulators should have asked Congress for this authority if they wanted it, but instead they lawlessly bypassed the legislative branch and decided they knew better.

Appeals Court Ruling: The D.C. Circuit held that because the Magnuson-Stevens Act was silent on the issue of industry funding, it is "ambiguous" whether Congress intended to give regulators the authority to force the herring fishermen to pay for third-party at-sea monitors. Bluntly put, this means that because Congress never told an agency it can't do something, then it can do whatever it wants. The government argued and the courts agreed that *Chevron* deference, drawn from a 1984 Supreme Court opinion, justified this unprecedented arrogation of power. *Loper Bright* has followed a familiar blueprint: Congress gave regulators no authority; the agency acted anyway; the courts blessed it; and now fishermen are left paying the tab.

That blueprint, however, is starting to show cracks. In a strong dissent, Judge Justin Walker derided NOAA's attempt to circumvent elected lawmakers in this money grab: "I doubt that Congress meant to allow for free fisherman chauffeurs . . . Congress can make profitable fishing even harder by forcing fishermen to spend a fifth of their revenue on the wages of federal monitors embedded by regulation onto their ships. But until Congress does that, the Fisheries Service cannot." Judge Walker also pointed out that the Supreme Court has largely abandoned using *Chevron* in recent decisions.

Why It Matters: Courts are bound to follow *Chevron* unless the Supreme Court revisits and directly overturns it. The *Loper Bright* case shows that deference is more than an esoteric legal theory. It is bad law that permits unelected agency officials to grab power Congress never delegated to them at the expense of family-owned small businesses and workers. As long as *Chevron* stands, this judge-made law makes it so the government will always win no matter how unnecessary or ruinous its rules may be for everyday Americans. Fishermen feed America, but NOAA is attempting to feed off their grueling labor in a parasitic power grab without congressional oversight or approval.

What's Next? With the support of Cause of Action Institute and Paul Clement, the fishermen in *Loper Bright Enterprises* are petitioning the Supreme Court to hear their case and potentially overrule *Chevron*. Statutory context makes clear Congress knew how to delegate authority for industry-funded monitoring but decided not to for the herring fishery.

The Supreme Court should either overrule *Chevron* or clarify that unelected bureaucrats cannot compel fishermen to pay at-sea monitors without a clear authorization from Congress.

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