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Chevron Doctrine Supporters Flock To High Court In Key Case

By **Juan-Carlos Rodriguez**

Law360 (September 22, 2023, 5:52 PM EDT) -- Health groups, scientists, a labor union, small businesses and environmentalists are urging the U.S. Supreme Court not to strike down a nearly 40-year-old precedent that allows judges to defer to federal agencies' interpretations of law in rulemaking disputes, arguing it's a valuable and reliable tool in administrative law cases.

As anticipation about the high court's October term builds, one of the most closely watched cases is Loper Bright Enterprises v. Raimondo, in which New Jersey herring fishers are challenging a National Marine Fisheries Service rule that requires them to partially subsidize federal compliance observers who accompany them on their voyages.

The fishers have taken **direct aim** at lower courts' reliance on the Supreme Court's legal test articulated in 1984's Chevron v. Natural Resources Defense Council to uphold the NMFS rule. Chevron gives judges a two-part analysis designed to ease the pathway for deference to "reasonable" legal interpretations espoused by federal agencies in support of their rulemakings.

On Thursday and Friday, several groups weighed in with amicus briefs supporting the federal government, which **has urged** the justices to affirm Chevron deference.

Although it's an environmental law case, the American Cancer Society, Muscular Dystrophy Association and many other health advocacy groups also say the high court must not upset the Chevron doctrine, which they argue has supported a multitude of different types of federal rules, including ones facilitating the administration of federal programs like Medicare, Medicaid and the Children's Health Insurance Program.

"The competent and stable administration of these programs depends on the deep expertise of the agencies to which Congress has assigned the responsibility of promulgating rules and rendering interpretive decisions in connection with the implementation of these complex statutes, which serve nearly half the U.S. population, in every geographic region, of every income level, and with every kind of medical and care need," the **health groups' brief** reads.

According to the fishers challenging the NMFS rule, Chevron methodology inappropriately transferred power to the executive branch that rightfully belongs to Congress and the judiciary.

But in a **separate brief**, the American Federation of Labor and Congress of Industrial Organizations, or AFL-CIO, says Chevron deference is actually required by the Constitution.

"Congress may and often must legislate in broad terms and designate an agency to elaborate those terms in order to effectively exercise its authority under Article I," the union federation argues. "Congress' instruction that an agency has discretion to elaborate the broad terms of a statute is part of what 'the law is,' and thus part of what the judicial branch has a duty to articulate and apply."

And a group of administrative law scholars say judicial deference to agency interpretations of law has been "a pillar" of the American legal system for more than a century, and that Chevron merely formalized one version of the principle. They say the fishers are off base in suggesting that courts should be deciding all questions of law with a blank slate.

"Just as a court might 'decide' a question of law starting from a blank slate, a court equally fulfills

that duty by looking to an agency's interpretation of the law and adopting it if it deems it reasonable," the **scholars said**. "This is not a matter of semantics — it is a matter of an ambiguous statutory provision that three generations of judges and justices have construed as permitting just such an approach."

The American Association for the Advancement of Science and other science groups also filed **their own brief**, arguing that agencies with scientific and technical expertise are better suited to keep up with the "rapidly changing nature of science and technology" and consider the input of parties with very different analyses, backgrounds and agendas.

"It is precisely because scientific information is both essential to much decisionmaking (by agencies and courts) and ever-evolving as a field of knowledge that a certain amount of judicial, as well as scientific, humility is prudent," their brief says.

Meanwhile, small business groups the Main Street Alliance, American Sustainable Business Council, South Carolina Small Business Chamber of Commerce and Businesses for Conservation and Climate Action **told the justices** that less than half of new small businesses survive to the five-year mark, and that anything that reduces risk and increases stability and predictability helps.

"By creating a stable framework for courts to use when evaluating the validity of regulations, Chevron results in a more uniform and predictable interpretation of regulations," the groups say. "Chevron has also been shown to play a critical role in constraining the judiciary, ensuring that the judiciary's policy preferences do not drive regulatory policy."

Finally, revisiting its role in the original case, the NRDC also filed **an amicus brief** on Friday. The group says that although it lost in Chevron v. NRDC and also the following year in a case where the Chevron test was applied, it respects "the principles of deference on which the court based its decisions" and urges the court to "exercise caution before abandoning them."

The NRDC is asking for Chevron to be affirmed even though it and other groups like it may win more cases if the doctrine is overruled, per the brief.

"If lower court judges were instructed to determine what they believe to be the best interpretation of a statute, it might invite those judges to resume resolving interpretive disputes based on their personal policy preferences," the green group said. "Judicial outcomes would tend to become less uniform and less predictable, even within a single circuit."

Representatives for the U.S. Department of Justice and for the fishers weren't immediately available for comment late Friday.

The health groups are represented by Scott P. Lewis, Michael J. Pineault, Austin P. Anderson and Paul M. Kominers of Anderson & Krieger LLP, Mary Rouvelas of the American Cancer Society Cancer Action Network and Jane Perkins and Sarah Somers of the National Health Law Program.

The AFL-CIO is represented by its own Harold C. Becker, Matthew Ginsburg and Andrew Lyubarsky.

The administrative law scholars are represented by Elizabeth B. Wydra, Brianne J. Gorod and Miriam Becker-Cohen of the Constitutional Accountability Center.

The science groups are represented by D. Alicia Hickok of Faegre Drinker Biddle & Reath LLP.

The small business groups are represented by Jeffrey B. Dubner, Kaitlyn Golden, Kristen P. Miller and Skye L. Perryman of the Democracy Forward Foundation.

The NRDC is represented by its own Ian Fein and David Doniger.

The herring fishers 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, Edwin S. Kneedler, Matthew

Guarnieri, 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.

--Editing by Alanna Weissman.
