Cape May Fishermen at Center of High Stakes U.S. Supreme Court Case

Courtesy Cause of Action

Bill Bright, left, a Cape May fisherman, exits the U.S. Supreme Court Building in Washington Wednesday, Jan. 17. Right behind him is Wayne Reichle, the owner of another Cape May fishery. The two men's argument that they shouldn't have to pay the salary of federal monitors, who ride on board to enforce regulations, is at the center of a high-stakes Supreme Court case that could disrupt one of the most oft cited legal precedents.

By Shay Roddy

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Their Argument Over Who Should Pay for Onboard Monitors Could Disrupt a Long-standing Precedent

It was a battle of David vs. Goliath in front of the U.S. Supreme Court on Wednesday, Jan. 17. And in this case, David happened to reside in Cape May.

Three herring fishermen, who thought it unfair that they had to pay for a government monitor to accompany them on their expeditions, found themselves in front of the nation's highest court

and at the center of a high-stakes battle over regulatory power, backed by a conservative group that sees the case as much bigger than one about fishing.

The fishermen, all out of Cape May, had filed suit to challenge a requirement that they pay for and carry a federal monitor onboard with them. The monitors sail along to enforce regulations, gather data and prevent overfishing.

One of the fishermen, Stefan Axelsson, who was born and raised in Cape May, said paying the monitors could make his business unsustainable.

"Nobody in a family business wants to be the last one to do it, everyone wants to pass it along, and my fear is I may not be able to," he said in a statement.

But lower courts hearing the case ruled against the fishermen, relying on case law that has been cited in decisions more than 17,000 times, a number Justice Elena Kagan referenced during oral arguments Jan. 17. The 40-year-old Chevron case, in particular, has been relied on 70 times in Supreme Court decisions, Kagan added.

Chevron deference, as it's known, is a legal doctrine stemming from the 1984 Supreme Court ruling in Chevron USA v. Natural Resources Defense Council, a decision that established a precedent requiring courts to defer to a reasonable agency interpretation of laws passed by Congress when there is ambiguity in the way the law is written. The doctrine was used to defeat the argument of the fishermen in the lower courts.

But the Chevron ruling has long been a thorn in the side and a target of conservatives, eager to rein in what they see as government overreach.

The fishing case was adopted by influential conservatives to showcase the pitfalls of the Chevron ruling and demonstrate its detriments to small businesses, with the fishermen embodying the sympathetic, hardworking American on the verge of losing a livelihood their families have relied on for generations thanks to runaway regulatory power.

"This case well illustrates the real-world costs of Chevron, which do not fall exclusively on the Chevrons of the world but injure small businesses and individuals as well," Paul D. Clement, a

lawyer representing the Cape May fishermen, said during oral arguments.

According to a report in The New York Times (https://www.nytimes.com/2024/01/16/climate/koch-chevron-deference-supreme-court.html), the local fishermen's high-powered legal team, headed by Clement, the U.S. solicitor general under President George W. Bush, is funded by billionaire Charles Koch. The Cause of Action Institute, a conservative activist group, has also been instrumental in supporting the fishermen.

Clement played up the fact that, to his clients, the case is not about politics, but survival.

"None of us would be here if it weren't for our clients, who had the gumption to stand up to agency overreach," Clement, who has argued more than 100 cases before the Supreme Court, said during a press conference in Washington outside the Supreme Court building following arguments.

"When you're in the business of representing people in the Supreme Court, the clients are really the heroes, because they take this very seriously."

In Loper Bright Enterprises v. Raimondo, as the Cape May fishermen's case is captioned, the petitioners argue that the approximately $700 per day the monitors cost them eats away around 20% of their profits.

"This case has nothing to do with politics and everything to do with protecting the livelihoods of my family and crew," Bill Bright, one of the fishermen, said in a statement. "Monitors are paid regardless of the catch, and under this rule they would make more than me and my crew on many trips, which isn't financially feasible or fair."

Bright is a first-generation fisherman who has fished out of Cape May for 40 years, first as a deckhand, then working in the engine room, and eventually in a vessel's wheelhouse. He purchased his own old, leaky wooden ship more than 35 years ago, which he named the "F/V Defiance," aimed at the doubters he was determined to prove wrong.

His successful commercial fishing business supplies, among others, a no-frills dockside Wildwood restaurant, Hooked Up Seafood (https://hookedupseafood.com/), which is run by his wife and two

Supporters of local fishermen hold signs outside of the U.S. Supreme Court building in Washington, D.C., on Wednesday, Jan. 17. *Courtesy Cause of Action*

daughters.

Clement's third client, Wayne Reichle, the owner and president of Lund's Fisheries, headquartered in Cape May, said he is not opposed to the monitors riding along, but he has a problem with being asked to foot the bill for it.

"We've carried monitors aboard our vessels for decades, and we're happy to do so to ensure every catch is responsibly harvested. No one has more at stake than we do in the long-term health of these waters, but we don't believe we should be responsible for covering the monitors' salaries," Reichle said in a statement.

In an interview with the Herald, Jonathan R. Siegel, a professor of law at George Washington University, said he could only speculate as to why the court chose the Cape May fisheries case as a vehicle to reexamine the oft-cited Chevron precedent, but timing and personnel changes on the court likely had a lot to do with it.

"This happens to be the moment when the court is ready to reconsider Chevron," Siegel said. "This is a case where the challengers to Chevron are very sympathetic. I think everyone can very readily understand that small business fisheries will face a substantial cost as a result of the agency's decision here. It's easy to understand why they're upset, and you can sympathize with them."

In its arguments against overturning Chevron (https://www.supremecourt.gov/DocketPDF/22/22-1219/293527/20231215173114032_22-1219%20Relentless%20-%20merits%20-%20final.pdf), the Biden administration,

represented by Solicitor General Elizabeth B. Prelogar, pointed out that a 2020 rule requiring fisheries to pay for the monitors has had no real-world financial impact on them, since the program was suspended and regulated vessels were reimbursed for the costs they incurred as a result of it.

That argument was made in a brief that is part of a case almost identical to Loper Bright, also argued in front of the Supreme Court Jan. 17, but filed by fisheries out of Rhode Island. Arguments in the two cases lasted more than three and a half hours, something Clement said shows how seriously the court is taking them.

It isn't common for the Supreme Court to agree to hear two almost identical cases, but Justice Ketanji Brown Jackson recused herself from the Cape May fishermen's case, because she participated in it while she was a federal appeals court judge before joining the Supreme Court. She will weigh in on the case involving the Rhode Island fisheries.

"It is unusual," Siegel said of the court's granting a writ of certiorari for similar cases. "Probably, what they're thinking is, if we're going to make this important decision, if we're going to reconsider [Chevron], which has become one of the most important cases in all of administrative law, let's have nine justices. Let's not do this shorthanded."

During oral arguments, Prelogar said that disrupting Chevron could impact uniformity, with different rulings coming out of different courts around the country. She said that over the last 40 years, the precedent has become ingrained in lawmaking, and Congress has relied on agencies to fill in the gaps in legislation.

Prelogar argued Chevron deference should not be overruled because it gives weight to agency expertise, and judges are not experts in the complex factors that are often subject to litigation. Chevron keeps courts out of policy making, which is not the role of the judiciary, she argued.

The Chevron ruling, once hailed by Reagan-era conservatives, has kept power out of the hands of politically appointed federal judges. Now it has become a darling of liberals, who didn't control Congress during most of the Clinton, Obama and Biden years.

“When the executive branch is controlled by Democrats, [Chevron deference is] favorable to Democrats,” Siegel said. “When the executive branch is controlled by Republicans, Chevron is favorable to Republicans.

“So, it’s a little mysterious as to why the opposition to Chevron has coalesced among conservatives. I guess the explanation is that Chevron makes it easier to run the government. It makes it easier to run the executive branch. And conservatives are always saying they want less government.”

Justices seemed divided on the idea of overturning Chevron. Reading the tea leaves from the session didn’t reveal unanimity among justices, but did make it seem like Chevron might be in peril.

“It certainly looks like there’s going to be some cutting back on Chevron,” Siegel said. “I don’t know that [the court] will absolutely go so far as to say Chevron is overruled. But I think it’s very likely it will be cut back, at a minimum, and the court will limit the circumstances in which Chevron applies.”

While the program forcing fisheries to pay for the onboard monitors is currently suspended, if Chevron is overturned by the Supreme Court there are two possibilities for what could happen next, according to the professor.

“The Supreme Court could say, all right, we’re overruling Chevron, and now we’re going to send this case back for the lower courts to reconsider it, understanding that Chevron is no longer applicable,” he said.

“Other times they say, to illustrate how the new test works, we’re going to decide this case. Now that we know what the test is, here’s the answer to this particular case.”

A decision from the Supreme Court is expected in early summer.

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