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NCLA Amicus Brief Challenges Supreme Court to Deep-Six *Chevron* Deference and at-Sea Monitor Rule

Loper Bright Enterprises, et al. v. Gina Raimondo, in her official capacity as Secretary of Commerce, et al.

Washington, DC (July 24, 2023) – Today, the New Civil Liberties Alliance filed an *amicus curiae* brief calling on the U.S. Supreme Court to overturn its destructive *Chevron* precedent in *Loper Bright Enterprises, et al. v. Gina Raimondo*, *et al.* The brief also asks the Court to set aside a rule promulgated by the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NOAA Fisheries).

The agencies' Final Rule requires fishing companies to pay for government monitoring of their herring catch, but no statute authorizes the agencies to obtain funding from regulated parties. Nevertheless, in August 2022, the U.S. Court of Appeals for the D.C. Circuit invoked the *Chevron* precedent in *Loper Bright v. Raimondo*, ruling that NOAA Fisheries' Final Rule was allowable under an expansive reading of the Magnuson-Stevens Act. *Chevron* requires federal judges to defer to federal agencies' reasonable interpretations of ambiguous statutes.

NCLA's *amicus* brief—co-authored by founder Philip Hamburger—makes important arguments against *Chevron* deference that the Court has never evaluated. First, it points out that deference requires judges to abandon their duty of independent judgment. This ancient duty is inherent in the office of being a judge and carefully protected in the Constitution by life tenure, a rule against salary diminishment, and other protections. Yet *Chevron* tells judges they must defer instead in their legal rulings to members of the Executive Branch who lack independence.

Second, the brief argues that *Chevron* deference denies due process of law by requiring judicial bias in favor of one party to a case—the powerful government, no less—and against the other party in court. This systematic bias would not be tolerated in any other context, but it has been polluting *Chevron* cases for nearly four decades. The brief also explains why certain excuses for *Chevron* bias fail, why *stare decisis* cannot justify retaining deference, and why the Court needs to repudiate *Chevron* deference altogether, rather than try to shore it up at the margins.

Last month, NCLA filed a petition for a *writ of certiorari* with the Supreme Court challenging the same Final Rule and *Chevron* in *Relentless v. Dept. of Commerce*. In that case, NCLA asks the Court to resolve a split between the U.S. First and Fifth Circuit Courts of Appeals. The First Circuit relied on *Chevron* to uphold the Final Rule. The Fifth Circuit instead eschewed *Chevron* and set aside a different NOAA Fisheries rule requiring constant GPS tracking of recreational charter fishing vessels in *Mexican Gulf Fishing Company v. U.S. Dept. of Commerce*.

Loper Bright v. Raimondo and *Relentless v. Dept. of Commerce* give the Supreme Court every opportunity to correct its *Chevron* error, restoring judicial independence and due process. The Court should take full advantage.

NCLA released the following statements:

"The combination of judicial power in the courts and judicial duty in each judge is profoundly important, even if often forgotten. The breadth of the institutional power is tempered by the narrow duty of the individuals who

oversee it, centrally the duty of independent judgment. The tight personal duty limits the danger from the breadth of institutional power. Article III makes no allowance for judges to abandon their duty of independent judgment, let alone to defer to decisions of persons who are not independent judges."
—Prof. Philip Hamburger, Founder and CEO, NCLA

"The willingness of the Court to take this case raises the hope that a doctrine that empowers regulators and disempowers citizens will finally hear its death knell."
—John Vecchione, Senior Litigation Counsel, NCLA

"The fishermen in *Loper Bright* and *Relentless* suffer under the same unlawful NOAA Fisheries rule featured in the Oscar-winning best picture, *CODA*. The Court needs to deep-six *Chevron*, before the next small business must take on a federal agency in a court proceeding infected with systematic judicial bias. Absent *Chevron* deference, no judge would read the Magnuson-Stevens Act to authorize forcing these fishermen to pay for at-sea monitors."
—Mark Chenoweth, President and General Counsel, NCLA

For more information visit the *amicus* page here.

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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