Are WOTUS Concerns Water Under the Bridge Post-*Sackett?*

As noted in our cover story on Supreme Court wins, this year the NFIB Small Business Legal Center helped secure victories for property owners in cases involving the notoriously hard-to-define "waters of the United States," commonly referred to as "WOTUS."

Congress enacted the Clean Water Act (CWA) to prevent and manage water pollution, granting the Environmental Protection Agency (EPA) and Army Corps of Engineers jurisdiction over the waters of the United States. However, Congress did not define the phrase "waters of the United States." The Trump administration read it narrowly, but the Biden administration has defined it broadly in a rule that went into effect this past March.

According to Biden's EPA, if a "significant nexus" exists between a wetland—even a geographically isolated one—and traditionally navigable waters such as streams, rivers, and lakes, that wetland is part of the waters of the United States and is subject to the CWA. The vague term "significant nexus" finds its roots in *Rapanos v. United States*, a 2006 Supreme Court decision. This court decision, coupled with the back-and-forth between presidential administrations, has been confusing for property owners, many of whom are small businesses.

We filed an amicus brief at the U.S. Supreme Court in *Sackett v. EPA*, arguing against the significant nexus test established in *Rapanos*. The Court held—with all nine justices at least concurring in the judgment—that the test is dead in the water.

Thanks in part to SBLC's advocacy, *Sackett* provided a clear standard that will keep a great deal of private property, including business property, outside the scope of the CWA. The Court held that a wetland falls under the CWA only when it has a "continuous surface connection" with a "relatively permanent body of water connected to traditional interstate navigable waters." This new standard renders the significant nexus test void and the CWA considerably less ambiguous.

However, the Court did not address the EPA's January 2023 CWA rule re-defining waters of the United States, which relies on the significant nexus test.

SBLC supported a challenge to this EPA rule in federal court, filing amicus briefs in two cases: *Kentucky v. EPA,* and *Kentucky Chamber v. EPA.* In both cases, the court issued an injunction against the EPA, effectively stopping the rule in its tracks until the court reaches a decision. Given the Supreme Court's complete rejection of the significant nexus test, the Sixth Circuit will likely apply this reasoning to EPA's January 2023 rule.

It's safe to say that the tide has turned against all-encompassing readings of "waters of the United States." Though the CWA has proven to be a problem for property owners—NFIB members among them—our efforts this year will ensure that the law is significantly easier to navigate.

NFIB SMALL BUSINESS LEGAL CENTER | **Media Mentions**

12/20/2022

Small Business Trends mentions NFIB's amicus brief filed in *Tesla, Inc. v. National Labor Relations Board* concerning employers' rights to require uniforms in the workplace. The article quotes Legal Center Executive Director Beth Milito: "Small business owners want and deserve the freedom to require uniforms at work in order to guarantee uniformity and professionalism for their staff."
https://smallbiztrends.com/2023/03/nfib-argues-employers-can-require-employee-uniforms.html

02/06/2023

The Washington Post mentions the Supreme Court's upholding of Proposition 12 in *National Pork Producers Council v. Ross.* The decision permits California to enforce its pork rules nationwide, which Beth Milito noted "will have a staggering impact on pork farmers, consumers, and interstate commerce as a whole."
https://www.washingtonpost.com/politics/2023/05/11/california-pork-rule-supreme-court/

02/06/2023

Small Business Trends references the Legal Center's amicus brief filed in *Corner Post Inc. v. Board of Governors of the Federal Reserve System.* Beth Milito is quoted: "Card fees are a significant financial burden for small businesses. These fees often represent one of the largest operating costs for small businesses."
https://smallbiztrends.com/2023/05/small-businesses-rally-against-debit-card-interchange-fees.html

02/23/2023

The *Financial Regulation News* discusses *Sackett v. EPA* and quotes Beth Milito: "The ever-changing standard and definition of 'waters of the United States' has disproportionately impacted small businesses, including farmers, ranchers, home builders, and contractors."
https://financialregnews.com/national-federation-of-independent-business-supports-supreme-court-ruling-on-u-s-waters/

The NFIB Small Business Legal Center, a 501(c)(3) public interest law firm, protects the rights of America's small business owners by serving as the voice of small business in the courts and the legal resource for small business owners nationwide. It is not a legal defense fund for small business, but a legal tool to affect precedent-setting legal decisions that will influence small business' bottom line.

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NFIB SMALL BUSINESS LEGAL CENTER

The Brief

SUMMER 2023

NFIB Legal Center Supreme Court 2022-2023 Activity

The NFIB Small Business Legal Center has been extremely active at the U.S. Supreme Court this term—filing 11 amicus briefs. As always, our advocacy has focused on protecting the rights and interests of small businesses. Here is a summary of the Legal Center's Supreme Court docket.

Sackett v. EPA (WIN)
When is a wetland a "water of the United States" under the Clean Water Act? NFIB's amicus urged the Supreme Court to adopt the "relatively permanent" standard, a stricter test that narrows EPA jurisdiction. The Court did so, while unanimously rejecting the "significant nexus" standard that courts and agencies have relied on to broaden EPA's regulatory authority.

Glacier Northwest, Inc. v. International Brotherhood of Teamsters (WIN)
Does federal labor law prevent state tort claims against unions for intentionally destroying an employer's property during a labor strike? We argued no. The Supreme Court agreed, meaning employers have a remedy to recover for property damage by bad actors during labor strikes.

Tyler v. Hennepin County (WIN)
After the government seizes private property to collect back taxes, can it profit off a sale by keeping the excess beyond what was owed? NFIB's brief claimed that governments doing so violate the Constitution. The Supreme Court unanimously agreed.

Wilkins v. United States (WIN)
Is the Quiet Title Act's 12-year statute of limitations jurisdictional? We said it was not, and the Supreme Court determined the same, meaning property owners may have their day in court when challenging the government, even if it is after 12 years.

Coinbase, Inc. v. Bielski (WIN)
Does appealing a denial of a motion to arbitrate automatically halt judicial proceedings in the lower court? Our brief argued that it does. The Supreme Court agreed, saving business owners litigating arbitration disputes time and money.

Bittner v. United States (WIN)
Are violations of the Bank Secrecy Act on a per-report or per-account basis? NFIB's brief advocated for the more lenient interpretation that violations are on a per-report basis and the Supreme Court agreed.

National Pork Producers Council v. Ross (LOSS)
We argued that California may not impose pork production requirements on the entire country. In a highly splintered opinion, the Supreme Court disagreed. This decision means that states may constitutionally impose their policy preferences on out-of-state businesses.

The NFIB Legal Center looks forward to continuing the success of small businesses when the Supreme Court begins its 2023-2024 term this Fall.

Keep up with our work at:
NFIB.com/legal

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Supreme Court to Rule in Case that Could

Rein in Federal Agencies

By Elizabeth Milito, Executive Director, NFIB Small Business Legal Center

Almost 40 years ago, the Supreme Court held in *Chevron U.S.A v. Natural Resources Defense Council* that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." This *Chevron* doctrine "directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers."

Unfortunately, many statutes are ambiguous. Courts now routinely let agencies decide what the law means. As such, the *Chevron* doctrine allows bureaucrats to do the job of judges. As chief justice John Marshall said in 1803: "It is emphatically the province and duty of the judicial department to say what the law is." In short, we pay judges, not bureaucrats, to determine what the law means.

Now the Supreme Court, in *Loper Bright Enterprises v. Raimondo*, has agreed to address whether the *Chevron* doctrine should be overruled.

The NFIB Legal Center has filed an amicus brief arguing that the Court should eliminate *Chevron* deference to ensure that federal agencies do not engage in regulatory activity that violates the separation of powers.

The *Loper Bright* case involves the Magnuson-Stevens Act (the Act), which is administered by the National Marine Fisheries Service (NMFS). The plaintiffs own small fishing boats and are challenging a small-business-crippling NMFS regulation that requires boat owners to hire and pay at-sea "monitors." These monitors act as government agents to enforce federal fishing rules, yet the Act says nothing about making boat owners pay for monitoring. NMFS interprets the Act as allowing it and argues that its interpretation is entitled to *Chevron* deference.

The *Loper* case is yet another example of a federal agency having their cake and eating it too–they get to write the law, and then they get to interpret it. This kind of unfettered deference means that federal bureaucrats can easily change their interpretations of regulations and create uncertainty for small business.

This case presents an opportunity for the Court to relieve some of that regulatory hardship on small businesses by overturning *Chevron*.

Under the principle of separation of powers, no single part of the government should have power to both make and enforce the law. With *Chevron* eliminated, federal agencies would no longer be able to make up the law under the pretense of interpreting ambiguous statutes and could only enforce it consistent with judicial interpretations. Courts would once again serve as a check on the power of federal agencies, helping to preserve our freedom. All Americans, including small business owners, would benefit from eliminating *Chevron* deference.

I am grateful for the continued support of charter NFIB Small Business Legal Center members like you who make it possible for NFIB to participate in important cases like *Loper*. The Legal Center will continue the fight to challenge government agency overreach and work to level the regulatory "playing field" for small business.

Elizabeth Milito

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Legal Center Works to Reduce Costly and Unnecessary Federal Rules

In 1980, Congress passed the Regulatory Flexibility Act (RFA) with the intention of addressing the disproportionate impact of federal regulations on small businesses. The RFA requires federal agencies to consider the impacts of each new proposed and final rule on small businesses. These impacts include the number of small businesses that would be affected by a new rule and the costs associated with recordkeeping, reporting, and overall compliance.

The intent of the RFA was clear – when promulgating regulations, federal agencies must consider and minimize the impact of rules on small business. However, in the 40-plus years since the RFA became law, agencies have found ways to disregard or bypass many of its requirements. In fact, the NFIB Legal Center recently analyzed the Small Business Administration Office of Advocacy's comment letters to federal agencies from January 2021 to January 2023 and found significant noncompliance with the RFA.

This analysis was compiled by Legal Center attorney Rob Smith and published in a new white paper, which is aimed at serving three main purposes:

- Bring attention to the RFA and its mandate that agencies consider the effects of any proposed or final rule on small businesses;
- Highlight the recent lack of compliance with the RFA by administrative agencies; and
- Offer legislative recommendations to ensure agency compliance with the RFA, and protect small businesses from disproportionately bearing the burden of one-size-fits-all rulemaking.

Forty years ago, Congress viewed the increase of one-size-fits-all regulations as a growing problem and danger to national interest. The RFA, as a result, imposed various obligations onto federal agencies that they must conduct front-end and back-end analyses before enacting a new rule. These analyses require agencies to assess the potential economic impact of the proposed rule, and then ultimately explore alternatives to minimize the rules' economic impact.

The white paper offers legislative recommendations to ensure that federal agencies comply with the RFA including:

- Require agencies to consider both the direct and the indirect economic impact of new rules;
- Require agencies to publicly disclose the regulatory alternatives the agency examined to reduce any significant economic impact on small businesses; and
- Require federal agencies to convene small business review panels with business owners to increase opportunities for small businesses to provide feedback on burdensome regulations.

Overall, small businesses should not be disproportionately burdened by one-size-fits-all regulations, and the RFA should be strengthened to ensure that federal agencies consider the impact of their rules on small businesses.

[1]Rob Smith, The Regulatory Flexibility Act: Turning a Paper Tiger Into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking. National Federation of Independent Business Small Business Legal Center, May 2023, https://strgnfibcom.blob.core.windows.net/nfibcom/NFIB-RFA-White-paper.pdf

Check out Episode 10 of NFIB's Small Business Rundown, where NFIB member David Henrich joins expert NFIB staff to discuss the Regulatory Flexibility Act (RFA). Rob Smith joins the episode to discuss how federal agencies often fail to abide by it and what it means for small businesses. The RFA is meant to address the disproportionate impact of federal regulations on small businesses by requiring the agencies to consider the needs and resources of small business when making procedures.

Listen to the Podcast!