Jimmy Carter's solar panels on the White House were dismantled by Reagan, but another important legacy has survived. PURPA – the Public Utility Regulatory Policies Act of 1978 – is a law designed to boost renewable energy. Last week, the D.C. Circuit ruled on an important PURPA issue, handing solar producers a win. The ruling will give a boost to solar energy in states that disfavor renewables and independent power producers. Importantly, the ruling also shows that a post-*Chevron* world is a mixed blessing for conservatives.

PURPA gives small renewable energy producers the right to sell into the grid at a fair price, local utility regulators notwithstanding. To qualify, a facility must have the capacity to produce no more than 80 MW of power. The facility in question had solar panels that could produce more than that amount of direct current, but its inverters would allow it to put only 80 MW of alternating current into the grid. Excess production from the solar panels would be stored in batteries, which would be discharged through the inverters to sell power when the panels weren't producing as much power. One benefit is that the grid may have too much power during peak solar periods, which could force the solar generator to shut down without the ability to store the excess. FERC ruled that the facility's power production (measured at the grid interconnection) was 80 MW, whereas opponents argued that the peak production from solar panels (which was well over 80 MW) should count. This technical legal issue would determine whether the facility was covered by PURPA.

In the first round of the litigation, the D.C. Circuit ruled that FERC's interpretation of the statute was reasonable and entitled to *Chevron* deference. When the Supreme Court overruled *Chevron* in the *Loper Bright* case, it sent the solar case back to the D.C. Circuit for reconsideration. In a 2-1 decision last Tuesday, the court ruled the facility did qualify under PURPA.

The composition of the panel is worth noting. The majority opinion was written by an Obama appointee (Pillard) but joined by a Trump appointee (Katsas). The dissent was written by another Trump appointee (Walker). Thus, conservative judges are not necessarily a monolithic block even when applying the new *Loper Bright* approach.

The majority's reasoning was also significant. The majority did more than just consult a dictionary. In the court's view, the most natural reading of PURPA's language is that a facility's coverage is governed by the actual amount of power that it can deliver to the grid. In this case, that was determined by the capacity of the inverters. The panel considered "the statutory purpose to prompt development of alternative sources of usable energy" and found that the argument for this interpretation was bolstered by its long-time use by FERC.

It would have been nice to be given more discussion of how to apply *Loper Bright*. But it's

possible that Pillard and Katsas were not ready to commit to a clear statement of post-*Chevron* methodology or that they didn't agree with each other. The opinion is nonetheless reassuring that courts will not simply engage in wooden literalism but will also consider statutory context and the views of expert agencies.

Finally, while the Trump Administration has tried to portray the *Loper Bright* decision as a big win, this case illustrates that it can be quite the opposite. The original D.C. Circuit opinion said that the statute was ambiguous and therefore subject to interpretation (and reinterpretation) by the agency. That left open the option for a more conservative future FERC to change its mind. But *Loper Bright* says that the court must make its own determination of the best interpretation of the statute. Having lost on that issue, FERC no longer has the option of later adopting a contrary view.

Will the Supreme Court review this case? That seems unlikely. The issue in the case is significant but hardly frontpage news, and the legal issue involves a technical point in a complex law. Conceivably, the Court could use the case as a vehicle to give clearer instructions to lower courts about how to apply *Loper Bright*, But there are dozens of other cases that would serve equally well or better, including the big tariff case that the Court has already agreed to hear. Thus, the odds seem slim of Supreme Court review. Thus, this win for renewable energy is likely to stick.