The Supreme Court agreed yesterday to hear a case about whether environmental impact statements need to address climate change. To read the arguments made about the case, you'd think that this was a common law area where courts establish the rules. But as I discuss in a forthcoming article, recent amendments have put a lot of flesh on the previously barebones law. The. bottom line: The Supreme Court shouldn't give advocates of narrowing NEPA a victory that they were unable to get through the legislative process.

Prior to 2023, NEPA contained only one short subsection about environmental impact statements. That left a lot of room for the rules to be shaped by the courts and the Council on Environmental Quality, which oversees the executive branch's implementation of NEPA. But a sleeper provision of the 2023 debt ceiling law added pages of detail about environmental impact statements. As a result, there's much less running room for courts and agencies to be creative.

Paying no regard to the 2023 amendments, the cert. petition and the government response focus on the 2004 *Public Citizen* decision by the Supreme Court. There, the Court said that "NEPA requires a 'reasonable close causal connection' akin to the proximate cause in tort law." This language, according to conservatives, limits agencies to considering only the direct impact of an agency action on its immediate surroundings.

Conservatives have then argued that climate change, which has delayed but global effects involving complex atmospheric science, doesn't count. Justice Thomas wrote the opinion, and maybe that is what he had in mind. But judicial opinions are only interpretations of the statute. It is the statute itself that is binding.

Based on its interpretation of the *Public Citizen* case, the Trump-era CEQ regulations adopted a definition of environmental impacts. It said that "effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain." Reinforcing the geographic specificity presumption, it also stated that "significance would usually depend only upon the effects in the local area." Also, CEQ said, analysis of cumulative effects would not be required. All of which would make it difficult to cover climate impacts in an impact statement.

When the House sought to amend NEPA in 2023, it didn't include the Trump CEQ's language about area-specific and near-term effects in the proposed legislation, even though the bill generally drew on those regulations for inspiration. The House bill did pick up the language about a "reasonably close causal connection" from the *Public Citizen* case.

By the time the final language of the bill emerged from negotiations between the House and

President Biden, however, the “close connection” language was gone. The only requirement was that effects be “reasonably foreseeable.” In other words, Congress rejected language intended to put artificial restrictions on what counts as an environmental impact in favor of a broad, flexible foreseeability test. Rather than following the 2020 Trump regulation, the statute followed the 2022 Biden regulation.

Drawing conclusions from Congress’s failure to incorporate additional requirements can be tricky. There are alternative interpretations, including the possibilities that the language was considered redundant or that Congress wished to leave open whether adoption of the requirements was allowed. In this case, the redundancy explanation is not compelling, given that the 2023 amendments contain many other redundant or overlapping provisions. But it is still conceivable that omission of the additional requirements was meant to leave the issue open.

Nevertheless, the presumption against considering events remote in space or time in the 2020 CEQ regulation seems inconsistent with Congress’s 2023 choice of foreseeability as the criterion. Tort law has always been seen as an analogy for the causation issue in NEPA. As every law student learns from the *Palsgraf* case, there have been two opposing approaches to causation in torts: one based on foreseeability and the other based on directness and proximity in time and space. Congress appears to have opted for the foreseeability approach, not the directness approach.

Moreover, Congress’s deliberate omission of the language regarding a “close causal connection” tracks the Biden CEQ. The Biden CEQ’s rationale was that the phrase was superfluous and misleading “because an agency’s ability to exclude effects too attenuated from its actions is adequately addressed by the longstanding principle of reasonable foreseeability that has guided NEPA analysis for decades.”

The House would probably have preferred a narrow interpretation of environmental impacts. But the bill that came out of the White House negotiations didn’t use the same language as the House bill, and the House bill itself didn’t contain the same language as the Trump CEQ regulations.

Why haven’t the 2023 Amendments to NEPA played more of a role in this case? Part of the reason is the assumption that the next statute applies only to environmental reviews begun after it was passed, That may not be right: new statutes generally apply to all pending cases, and the statute itself did not have a delayed effectiveness date.

Even if the new statute doesn’t directly apply, it seems pointless for the Supreme Court to

ignore it, because otherwise its ruling will be obsolete as soon as the older cases have moved through the courts. Given that the statute, like the. Biden regulation, was meant to clarify the meaning of the statute, it makes sense for the Court to take it into account.

The larger point is that NEPA is no longer an open-ended law that left CEQ and the courts free to fill in details as they liked. Analysis of NEPA issues, as in all cases of statutory interpretation, must begin with the text of the statute. In this case, that text supports advocates of broad NEPA coverage.