No. 22-____

In the Supreme Court of the United States

NGL SUPPLY WHOLESALE, L.L.C.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

With the aid of a unique form of judicial deference, Phillips Pipeline LLC ("Phillips Pipeline") has transformed what should be a common-carriage pipeline into a monopoly that serves only its affiliate, Phillips 66 Company ("P66"). Previously, the Federal Energy Regulatory Commission ("FERC") had considered and rejected similar ploys to sidestep the statutory requirement that common carriers provide transportation to all customers upon reasonable request. Here, however, the Commission ignored those precedents and pivoted to a narrow reading of its jurisdiction that excludes even market-cornering behavior by an affiliated corporation. The D.C. Circuit affirmed this approach by "defer[ring] . . . to the Commission's interpretation of its own precedent." App. 6. This novel form of deference, embraced in the Sixth and D.C. Circuits, first arose in *Cassell* v. *FCC*, 154 F.3d 478 (D.C. Cir. 1998), decided the year after this Court decided *Auer* v. *Robbins*, 519 U.S. 452 (1997). The question presented is:

Did the D.C. Circuit err in deferring to FERC's "interpretation of its own precedent" in the absence of a reasoned explanation for departing from the standards embodied in those precedents?

PARTIES TO THE PROCEEDING

Petitioner is NGL Supply Wholesale, L.L.C.

Respondent is the Federal Energy Regulatory Commission.

Intervenors below were Phillips 66 Company and Phillips 66 Pipeline LLC.

CORPORATE DISCLOSURE STATEMENT

The following companies have a 10% or greater ownership interest in Petitioner NGL Supply Wholesale, L.L.C.:

NGL Energy Partners LP

NGL Energy Operating LLC

NGL Liquids, LLC

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

The Blue Line is a pipeline that connects propane terminals in Texas, Kansas, and Oklahoma to consumers in Missouri and Illinois. It belongs to Phillips Pipeline LLC, but the Interstate Commerce Act ("ICA") requires that the Blue Line be available to all shippers upon reasonable request. By imposing this requirement, the ICA addresses the fact that pipelines, like railroads, are natural monopolies. Because every shipper cannot build its own pipeline, the ICA assures non-owners that they can use interstate pipelines on terms approved by FERC—known as "tariffs."

Of course, pipeline owners have every incentive to favor their affiliates and exclude other shippers. The Phillips Companies have done just that through a trio of strategies. First, Phillips Pipeline allows its affiliate, P66, to control a small segment of pipe at the west end of the Blue Line that serves no purpose other than the transportation of propane and acts as the gateway to the Blue Line. The Phillips Companies deny FERC's jurisdiction over this interconnection pipe, despite tariffs in place for other interconnections on the Blue Line. Second, Phillips Pipeline adopted a policy of rewarding so-called "regular" shippers with 90% of the Blue Line's capacity. Rewarding regular shippers is commonplace, but Phillips Pipeline's policy ensures that the only regular shipper is P66. It accomplishes that by requiring shipments in 12 consecutive months, which includes the summer months when the Blue Line flows from east to west and P66 is the only

supplier of propane at the eastern terminus—thereby precluding anyone other than P66 from becoming a regular shipper. Third, Phillips Pipeline insisted that its shipping agreement with NGL is actually a commodity-exchange agreement and therefore beyond FERC's oversight. Taken together, these three actions have turned the Blue Line from what should be a common carrier into a proprietary resource serving the Phillips Companies alone.

NGL filed a complaint with FERC, asking it to review each of the Phillips Companies' actions. FERC declined in a brief order spending no more than two paragraphs on each stratagem and leaving many of NGL's arguments unaddressed. When NGL appealed to the D.C. Circuit, FERC turned to deference. Its brief invoked no fewer than three forms of deference, citing this Court's decisions in *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837 (1984), and *City of Arlington* v. *FCC*, 569 U.S. 290 (2013), as well as a novel form of deference that exists only in the D.C. Circuit: deference to an agency's interpretation of its precedent. Respondent's Br., *NGL Supply Wholesale L.L.C. v. FERC*, No. 20-1330, at 15, 21.

The latter form of deference arose in *Cassell* v. *FCC*, 154 F.3d 478 (D.C. Cir. 1998), and its foundation is shaky. The single case *Cassell* cites says nothing about deferring to agencies' interpretation of their own precedent, which makes sense because interpreting precedent is the quintessential judicial task in a common-law system. Outside of the DC Circuit, the only circumstance in which courts defer to another body's interpretation of precedent is when federal courts sitting in diversity jurisdiction defer to the

work of a State judiciary under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). That deference merely reflects America's system of dual sovereignty. *Cassell* deference, on the other hand, represents an abdication of the courts' duty to scrutinize agency action that does not implicate the agency's expertise vis-à-vis the courts. And, unlike *Erie*, reading agency precedent is within federal courts' expertise and authority. It is also their responsibility. The Administrative Procedure Act requires reasoned decision-making when agencies change regulatory course. *National Cable Telecom. Assn.* v. *Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005). Courts have responsibility for applying that rule to executive agencies. 5 U.S.C. § 706(2); 28 U.S.C. § 2342(5). Deferring to unexplained pivots simply because the agency purports to be interpreting its precedent undermines judicial review.

Cassell deference was questionable from the start, but after this Court's decision in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), it is indefensible. *Kisor* addressed precisely the Commission's approach in this case. It pulled back *Auer* deference "when an agency substitutes one view of a rule for another." *Kisor*, 139 S. Ct. at 2418. That is exactly the circumstance where *Cassell* and its progeny apply. Deference to an agency's interpretation of its own precedent allows the agency to substitute one view for another, attribute the change to an interpretation of precedent, and thereby obtain the deference that *Kisor* forbids.

Even before *Kisor*, the D.C. Circuit's approach was an outlier. This Court has never applied *Cassell* deference. Moreover, at least three circuits have read the

same precedent on which that decision relies to reject the kind of deference at issue in this case; only one circuit has adopted the D.C. Circuit's approach. And because the D.C. Circuit hears an outsized number of agency cases, its deference to agencies presents special cause for review.

In light of the D.C. Circuit's extension of deference to agency conduct criticized in *Kisor*, and the importance of reasoned decision-making, this Court should grant certiorari and close the loophole for agencies to change course by simply "interpreting" their own precedent to reach a desired outcome.

OPINIONS BELOW

The order from the U.S. Court of Appeals for the District of Columbia Circuit denying rehearing en banc appears at 2022 WL 980905. App. 31–32. The panel's opinion appears at 2022 WL 715081. App. 1–9. FERC's decision is available at 172 FERC ¶ 61,016 (2020). App. 10–30.

JURISDICTION

The D.C. Circuit denied rehearing en banc on March 28, 2022. App. 1. The Chief Justice granted Petitioner's motion to extend the time in which to file a writ of certiorari until July 26, 2022 on June 23, 2022. The lower court's jurisdiction rested on 28 U.S.C. §§ 2321, 2342–2343. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Interstate Commerce Act defines "transportation" subject to FERC's jurisdiction to include:

> all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

49 U.S.C. App. § 1(3).

The relevant section of the Administrative Procedure Act provides that:

> The reviewing court shall—
>
> hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the

> record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court

5 U.S.C. § 706(2).

STATEMENT OF THE CASE

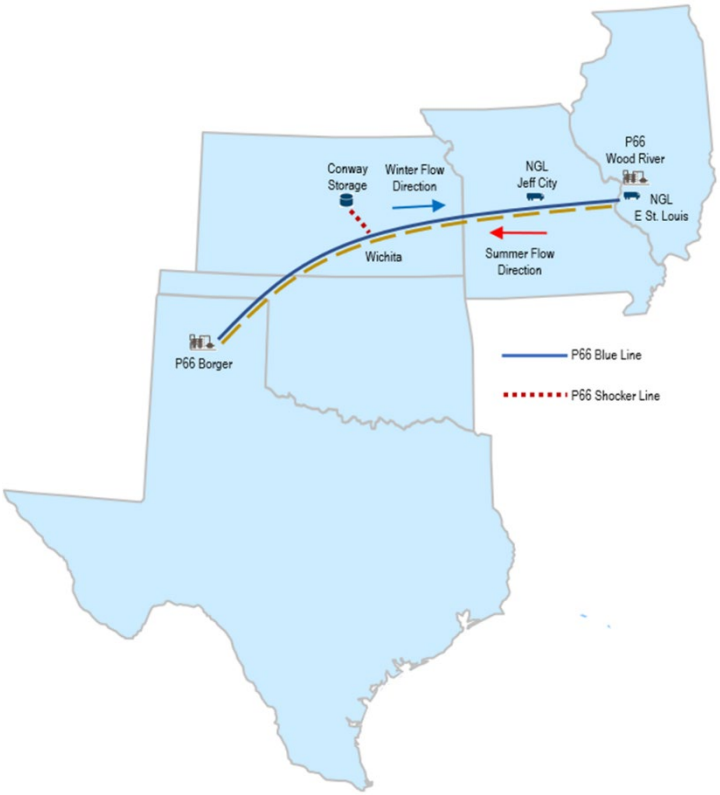
A. Statutory Background

In response to anticompetitive behavior by railroads, Congress adopted the Interstate Commerce Act in 1887. The Act was a direct response to this Court's holding in *The Wabash Case*, 118 U.S. 557 (1886), which recognized that individual States had limited ability to regulate interstate commerce. Congress took up the project of railroad oversight with the goal of preventing monopolistic behavior by the companies that operated railways across State lines. Soon enough, Congress recognized that railroads were just one of several means for conveying products from one part of the nation to another. It therefore amended the ICA in 1906 to include pipelines carrying oil and other hydrocarbons. 34 Stat. 584, Pub. L. 59-337.

The core provisions of the ICA require common carriage on reasonable terms and without discrimination. 49 U.S.C. App. § 1(3) ("It shall be unlawful for any common carrier . . . to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company . . . ."). Among the species of favoritism the ICA forbids is preferential treatment of corporate affiliates.

B. Factual & Procedural Background

1. The Blue Line. The Blue Line transports propane and butane across five States. In the six "winter" months, it flows from west to east, carrying fuel from Borger, TX, and Conway, KS, to consumers in Jefferson City, MO, and East St. Louis, IL. The Blue Line is the only propane pipeline serving these destinations. During the six "summer" months, the pipeline reverses flow and carries fuel from east to west.



A small set of origin and destination points allow shippers access to the Blue Line and the markets it serves. On the west end of the pipeline, Conway is the

most important hub. It is home to two terminals that sell and store propane. The larger belongs to the Williams Companies; the smaller to ONEOK Hydrocarbon, Inc. The Williams terminal serves a large number of buyers and sellers and represents a larger and more liquid market. The only connection between the Williams terminal and the Blue Line is the so-called "interconnection" that P66 owns and for which it has refused either to apply the Blue Line's tariff or to file its own tariff with FERC as a common carrier. Undermining its affiliate's argument, Phillips Pipeline includes its interconnection with the ONEOK terminal in its FERC-approved tariff. And the only other workaround from the Williams terminal—using Mid-America Pipeline's Central Line—is also subject to a FERC tariff. Only P66 provides the needed transportation without subjecting itself to FERC's jurisdiction.

At the east end of the Blue Line, P66 operates the Wood River refinery, which processes Canadian and domestic crude oil to produce a variety of products, including propane. P66 is the only seller of propane at the east end of the Blue Line.

2. Un-Common Carriage. Phillips Pipeline operates the Blue Line pursuant to a FERC-approved tariff. Its only current customer, however, is its affiliate, P66. The Phillips Companies accomplished this monopolization, in spite of the ICA, through three related artifices that squeezed out the only other shipper: NGL.

First, Phillips Pipeline permits P66 to own a small segment of pipe at the west end of the Blue Line. The so-called "interconnection" serves no purpose other than transporting propane. In fact, the Phillips

Companies described it as a "few feet" of pipe with metering equipment attached. As mentioned above, the ONEOK interconnection at Conway is covered by a FERC-approved tariff, as is the Mid-America Pipeline that could carry propane to the Blue Line. By refusing to file a tariff, P66 avoids the obligations of a common carrier—either on its own (like ONEOK and Mid-America) or as part of its sibling's Blue Line tariff.

Second, when demand for shipping on the Blue Line exceeds capacity, Phillips Pipeline applies a "prorationing policy" that guarantees at least 90% of capacity to P66. FERC has long approved—and this case does not challenge—the general use of prorationing policies that reward shippers for consistent patronage, even during times of low demand. This particular policy, however, leverages P66's monopoly at the east end of the Blue Line by requiring shipments in 12 consecutive months to qualify as a "regular" shipper. Because P66 is the only seller of propane at the east end of the Blue Line, it can and does refuse to sell propane to other shippers during the summer months, thus preventing them from qualifying under Phillips Pipeline's prorationing policy. The result is that P66 alone enjoys the minimum 90% capacity reserved for regular shippers.

Third, the Phillips Companies treat P66's Propane Supply and Exchange Agreement ("Agreement") with NGL as a commodity-sale agreement rather than encompassing transportation, which would bring it within FERC's jurisdiction. As a factual matter, the Agreement has governed transportation for years. It also includes terms that make no sense in the absence of transportation services. Among those are rates

based on the Blue Line tariff, requirements that NGL inform P66 of the amount of propane it intends to ship the day before P66 must nominate total shipping quantities to Phillips Pipeline, and a requirement for "line fill," which is exactly what its name suggests—an obligation on shippers to provide material to fill the pipeline so that it can transport propane. But because the Agreement was with P66 and the Phillips Companies argue that it is outside FERC's purview, it prevents non-affiliates from becoming regular shippers in two ways: (1) P66 can refuse to provide propane, and (2) NGL's shipments occur in the name of P66, preventing NGL from qualifying as a regular shipper. Of course, P66 can also charge prices that FERC does not review and approve, as it does for the tariff filed by Phillips Pipeline.

The Agreement was the successor to a contract mandated by the Federal Trade Commission in 2002 as part of approving a merger between Conoco and Phillips Petroleum. The FTC required the Phillips Companies to provide NGL physical propane and transportation services to East St. Louis, where there would otherwise be no competition following the merger. The Phillips Companies' interpretation of the Agreement, like its other actions, is an attempt to eliminate precisely the competition the FTC required when it approved the merger.

3. FERC Proceedings. Aggrieved by the Phillips Companies' monopolization of the Blue Line, NGL filed a detailed complaint with FERC. It explained how each of the three artifices discussed above led to discriminatory treatment of would-be shippers on the Blue Line and, especially when demand was high, led

to refusal to ship on reasonable terms—all in violation of the ICA. NGL proposed several possible remedies that FERC could consider, including requiring Phillips Pipeline to alter its prorationing policy to consider each season independently. FERC, however, rejected NGL's challenge in a short order declaring that it lacked jurisdiction over the interconnection and the Agreement, and it broke with its precedent by refusing to consider facts beyond the four corners of the prorationing policy (*e.g.*, P66's monopoly on the east end of the Blue Line) that make the policy discriminatory in violation of the ICA.

On most points, the order said nothing in response to NGL's arguments. It occasionally declared simply that FERC lacks jurisdiction over the sale of commodities, which no one contests, and ended its analysis there. App. 14–15 (¶ 12).

4. Judicial Review. On appeal, FERC did not hide its reliance on deference to dodge NGL's challenge. Because the rulings at issue were jurisdictional, FERC identified *City of Arlington* as a central case, despite the absence of any real dispute over statutory interpretation. Even more troubling, FERC relied on deference to "the Commission's interpretation of its own precedent" as the relevant standard of review. Respondent's Br., *NGL Supply Wholesale L.L.C. v. FERC*, No. 20-1330, at 15 (citing *Cassell* progeny *Int'l Transmission Co.* v. *FERC*, 988 F.3d 471, 481 (D.C. Cir. 2021) and *Mo. Pub. Serv. Comm'n* v. *FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015)). In fact, FERC invoked deference in its defense of each of the three artifices over which it had refused jurisdiction. *Id.* at 21 (interconnection), 29 (prorationing), 33 (Agreement).

A panel of the D.C. Circuit noted that FERC's order was "relatively terse and might have profited from further elaboration." App. 7. That was an understatement, but the court nevertheless accepted FERC's pleas for deference and affirmed its unreasoned decision. It followed FERC in citing *Missouri Public Service Commission* for the central question of whether the courts should defer to agencies' purported interpretations of precedent. App. 6. And it expressly justified its holding based on "our deferential standard of review." App. 8. The en banc court denied NGL's request for rehearing to reconsider *Cassell* deference. App. 1. Because deference to an agency's interpretation of precedent offends the separation of powers and undermines the protections in the Administrative Procedure Act, NGL now petitions this Court for certiorari.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's practice of deferring to an agency's interpretation of its own precedent is an outlier among circuit courts, creates a loophole for unexplained changes in position, and adds confusion that this Court's decision in *Kisor* aimed to dispel. This Court has routinely expressed an interest in reassessing the deference that courts afford administrative agencies. *Kisor*, 139 S. Ct. at 2409; *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2120–2121 (2018) (Kennedy, J., concurring). It has not yet passed on the form of deference at issue here. Yet deference of this sort has taken firm root in the circuit that hears most of the nation's administrative cases, and the Sixth Circuit has now expressly adopted it as well, reasoning that it is a natural extension of *Auer*. *Aburto-Rocha* v.

Mukasey, 535 F.3d 500 (6th Cir. 2008). The Court should take this occasion to confirm that courts are capable of reading and applying precedent and therefore owe no deference to agencies in this quintessentially judicial task.

I. The D.C. Circuit Has Created a Form of Deference Contrary to this Court's Precedent and Embraced by Just One Other Circuit.

Beginning with *Cassell*, the D.C. Circuit has deferred to an "agency's interpretation of its own precedents." 154 F.3d at 483. To support this innovation, *Cassell* cited a single earlier case from the D.C. Circuit that contained no such holding and instead applied this Court's long-standing rule that agencies must explain changes in regulatory approach. See *Atchison, Topeka Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (affirming an "agency's duty to explain its departure from prior norms"). The loophole created by deferring to an agency's interpretation of its own precedent is at odds with this Court's long-standing insistence on reasoned decision-making.

A. Three Circuits Read the Same Precedent from This Court to Require Reasonable Explanation for Changes in Regulatory Course; One Circuit Follows the Court Below.

The precedent on which *Cassell* and its progeny, including the decision below, rely does not support deference to agencies' interpretation of their own precedent. To the contrary, this Court has always required reasoned explanation for changes in approach and

withheld deference when an agency does not meet that requirement.

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016). At minimum, this requirement demands that the agency "display awareness that it is changing position" and forbids agencies from "depart[ing] from a prior policy *sub silentio*." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The consequences for breaking with earlier agency policy without reasoned explanation include ineligibility for deference. Thus, the Court in *Encino Motorcars* withheld *Chevron* deference because of "an unexplained inconsistency in agency policy." 136 S. Ct. at 2126 (quotation and modification omitted).

When the DC Circuit adopted the deference at issue in this case, it did so with minimal citation, and none to this Court's precedent. That paucity of authority reflects *Cassell*'s novelty. But tracing *Cassell*'s purported authority confirms that deference to agencies' interpretation of their precedents is a creation of the D.C. Circuit.

Cassell cited a single case in support of the deference that is the subject of this Petition: *Inland Lakes Management, Inc.* v. *NLRB*, 987 F.2d 799 (D.C. Cir. 1993). As an initial matter, the deference at issue in *Inland Lakes* was *Chevron*. *Id.* at 805. It therefore addressed agencies' interpretation of statutes rather than their own precedent. The closest *Inland Lakes* came to discussing *Cassell* deference is the unremarkable statement that "[a]n agency may of course 'find that, although [a] rule in general serves useful

purposes, peculiarities of the case before it suggest that the rule not be applied in that case.'" *Ibid.* (citing *Atchison*, 412 U.S. at 808).

As applied in at least three other circuits, *Atchison*'s allowance for case-specific departures from precedent contradicts *Cassell* in two ways. First, it concerns individual cases—"peculiarities of the case before it"—rather than reframing "prior norms" in the absence of something anomalous about the case at issue. Second, rather than sidestepping the requirements of reasoned decision-making, *Atchison* imposes an additional obligation on agencies to explain why the prior norms should not apply. As a result, other circuits have applied *Atchison* differently than *Cassell* and its progeny.

The First Circuit, for example, has applied *Atchison* to hold that "[t]he law that governs an agency's significant departure from its own prior precedent is clear. The agency cannot do so without explicitly recognizing that it is doing so and explaining why." *Shaw's Supermarkets, Inc.* v. *NLRB*, 884 F.2d 34, 36–37 (1st Cir. 1989). According to the First Circuit, the reason for requiring an explanation is to enable judicial review. "Whatever the ground for departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." *Id.* at 37. This approach, allegedly based on the same precedent as *Cassell*, requires the opposite of deference; it demands that agencies announce and explain changes of course so that courts can scrutinize the reasoning for themselves.

The Fifth Circuit likewise interprets this Court's precedent to require searching rather than deferential judicial review. *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157 (5th Cir. 1977). In *Sunnyland Packing*, the Fifth Circuit reviewed without deference whether an NLRB decision was consistent with a long line of earlier precedent. *Id.* at 1160. While recognizing that the Board had once departed from its earlier precedent in a decision that could not "be rationally reconciled" with the earlier line, it rejected an employer's request to apply the aberrant decision. *Id.* at 1160–61. The court stressed that an agency's "depart[ures] from prior norms . . . must set forth clearly the reasons for its new approach." *Id.* at 1160 (citing *Atchison* and *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653 (1954)). The Fifth Circuit therefore treated an unexplained and irreconcilable departure from earlier precedent as a nullity.

And the Third Circuit afforded no deference to an agency's efforts to reconcile what the court, without deference, considered irreconcilable precedent. *Stardyne, Inc.* v. *NLRB*, 41 F.3d 141, 152–54 (3d Cir. 1994) (Alito, J.). The *Stardyne* court noted and rejected the agency's attempt to distinguish its prior holding, which would have been impossible if it afforded deference as the D.C. Circuit does. *Id.* at 153. Citing *Atchison*, the Third Circuit held that "the Board's failure in this case to follow or repudiate its prior holding . . . was arbitrary and capricious." *Ibid.* That is precisely the choice—following prior precedent or repudiating it through reasoned decision-making—which the D.C. Circuit does not require of agencies appearing before it.

The other precedent identified in *Inland Lakes* is similarly antithetical to *Cassell* deference and only underscores the D.C. Circuit's departure from practice in other circuits. 987 F.2d at 805 (citing *NLRB* v. *Int'l Union of Operating Engineers, Loc. 925, AFL-CIO*, 460 F.2d 589 (5th Cir. 1972)). The Fifth Circuit in *Operating Engineers* reviewed an order in which the NLRB imposed personal liability on a union official in circumstances where it had previously refused to do so. *Ibid.* While noting that the agency offered several plausible explanations on appeal, the court held that "the Board may not depart *sub silentio*, from its usual rules of decision to reach a different, unexplained result in a single case." *Id.* at 604. In applying that rule, the Fifth Circuit noted this Court's instruction in *SEC* v. *Chenery Corp*, 318 U.S. 80 (1943), that "[e]xplanations proffered in briefs at the appellate level are not an adequate substitute for a reasoned explanation of the result reached in the decision itself." *Ibid.*

Four other circuits have cited *Operating Engineers*, none of them to adopt the D.C. Circuit's form of deference. *Shaw's Supermarkets*, 884, F.2d at 37; *NLRB* v. *Motor Convoy, Inc.*, 673 F.2d 734, 736 (4th Cir. 1982); *NLRB v. Silver Bay Loc. Union No. 962, Int'l Bhd. of Pulp, Sulphite & Paper Mill Workers, AFL-CIO*, 498 F.2d 26, 29 (9th Cir. 1974); *Powell* v. *United States*, 945 F.2d 374, 377 (11th Cir. 1991). To the contrary, theses opinions uniformly refrain from deferring to the agency's interpretation of its own precedent and insist on reasoned explanations for departures from an earlier approach.

On the other side of the split, only the Sixth Circuit has applied *Cassell* deference in an opinion that

illustrates the subtle creep of deference from *Auer* to other areas of agency action. *Aburto-Rocha*, 535 F.3d at 503 ("An agency's interpretation of its own precedents receives considerable deference" (citing *NSTAR Elec. Gas Corp.* v. *FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007)). That court, like the D.C. Circuit, nebulously derives its new form of deference from "[w]hat is generally true in administrative law," with citation to *Auer*. *Ibid.* The Sixth Circuit noted *Auer*'s "deference to an agency's interpretation of its own regulations" and declared that this deference "applies in equal measure to the BIA's interpretation of its precedents." *Ibid.*

Because this Court has never blessed the extension of *Auer* to agencies' interpretation of precedent, and at least three circuits have refrained from deferring to agencies in this way, certiorari is appropriate to resolve this division in the lower courts.

B. The D.C. Circuit's Special Role in Overseeing Agencies Justifies Review.

The D.C. Circuit hears an outsized number of cases involving administrative law. Many statutes, including the ICA, permit litigants to bring suit either in their home circuit or the D.C. Circuit. *E.g.*, 28 U.S.C. § 2343. As a result, while some cases are spread around the nation, many are concentrated in a single circuit. Developments in that court are therefore especially worthy of review.

As the Court recently explained, "[t]his Court regularly grants certiorari even absent a circuit conflict when-as here-the case raises questions of fundamental importance regarding the limits of federal agency

interpretive authority on matters of enormous economic and regulatory consequence." *Am. Hosp. Ass'n* v. *Becerra*, No. 20–1114, at 16 (U.S. June 15, 2022) (citing *FERC* v. *Electric Power Supply Ass'n*, 136 S. Ct. 760 (2016); *Michigan* v. *EPA*, 576 U.S. 743 (2015); *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302 (2014); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *MCI Telecommunications Corp.* v. *Am. Telephone & Telegraph Co.*, 512 U.S. 218 (1994)).

Like those precedents, this case raises an issue of administrative law that has taken hold in the D.C. Circuit. That court's disproportionate impact on administrative law weighs in favor of review.

C. Deference to Agencies' Interpretation of Their Own Precedents Is Contrary to This Court's Prior Decisions.

This Court has long read the APA to require reasoned decision-making. Deference doctrines have always existed in some tension with that requirement, so the Court has carefully circumscribed the use of deference, most recently in *Kisor*. Combined with the requirement of reasoned decision-making and the sole circumstance in which this Court has instructed federal courts to defer to another body's interpretation of precedent, the limitations on *Auer* and the requirement of reasoned decision-making foreclose the D.C. Circuit's *Cassell* deference.

In *Kisor*, the Court held that *Auer* deference is "cabined in scope." 139 S. Ct. at 2408. The reasoning behind that holding underscores the unsuitability of

deference to agency precedent. First, *Kisor* explained that deference requires a court to exhaust traditional tools of construction before finding a textual ambiguity and proceeding to deference. *Id.* at 2415. But reading statutes and regulations is a different exercise than reading precedent. The tools of construction that help eliminate ambiguity in the former do not apply to the latter. See, *e.g.*, *Lewis* v. *Zatecky*, 993 F.3d 994, 1005 (7th Cir. 2021) ("[J]udicial opinions are not statutes and should not be treated in such a rigid way."). As a result, it makes no sense to say that precedent, as opposed to a statute or regulation, contains a "genuine ambiguity." *Kisor*, 139 S. Ct. at 2415. Even if that statement were meaningful, neither the D.C. Circuit nor FERC found an ambiguity in the Commission's precedent.

Second, the Court noted its obligation to "make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2416. While noting that this "character and context" inquiry is amorphous, the Court offered some "markers" for lower courts' assessment of when deference is possible. *Id.* at 2416–2418. Among those is the requirement that "the agency's interpretation must in some way implicate its substantive expertise." *Id.* at 2417. On this point, *Kisor* noted that "[s]ome interpretive issues may fall more naturally into a judge's bailiwick." *Ibid.* It cited a number of cases for which no deference was afforded, including the interpretation of a "judicial review provision." *Ibid.* (citing *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649–650 (1990)). Thus, "[w]hen the agency has no comparative expertise in resolving a regulatory

ambiguity, Congress presumably would not grant it that authority." *Ibid.*

Here, the "character and context of the agency interpretation" is inherently judicial: reading precedent. FERC has "no comparative expertise" in applying earlier holdings to the facts of the current case, which are undisputed at this stage of the proceedings. Only in the *Erie* context has this Court directed federal courts to defer on the interpretation of precedent. And even that deference is not a reflection of competence but of respect for dual sovereignty. The D.C. Circuit's approach thus opens a new frontier in deference. *Kisor* indicates that this frontier should remain closed, but at a minimum, the Court should consider whether the interpretation of precedent is of a "character" that warrants deference.

Another "marker" focuses on whether the agency is offering a "fair and considered judgment" or merely a "'convenient litigating position' or '*post hoc* rationalizatio[n].'" *Id.* at 2417 (citation omitted; alteration original). In particular, *Kisor* rejected deference "when an agency substitutes one view of a rule for another." *Ibid.* This rule is consistent with the general requirement that agencies explain departures from earlier practice. *State Farm*, 463 U.S. at 42.

Interpretations of precedent, however, are especially susceptible to becoming convenient *post hoc* litigating positions. Other agency action for which the Court has allowed deference reflects conscious, pre-litigation policy choices. *State Farm*, for example, evaluated the rescission of a rule accomplished through formal rulemaking. *Id.* at 38. Even *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413 (1945), involved a

formal announcement of how the agency would interpret its rules. In contrast, an agency's interpretation of its own precedent in an adjudication—or worse, on appeal—bears no indicia of contemporaneous, considered judgment. No formal process is required, and no notice heralds the coming interpretation. Moreover, agencies can always assure a reviewing court that their interpretation is specific to the case at bar. The agency-precedent context is therefore especially dubious as "fair and considered judgment" rather than *post hoc* litigation strategy.

In sum, agency precedent differs in kind from other sources of law on which this Court has permitted deference. Precedent does not contain "genuine ambiguities" in the way statutes and regulations do. Thus courts cannot avoid excessive deference by first applying the ordinary tools of construction independently. *Kisor*, 139 S. Ct. at 2415. And the "character and context" of interpreting precedent confirms that agencies have "no comparative expertise" relative to courts. *Id.* at 2417. Indeed, the only context in which deference attaches to interpretation of precedent is based on sovereignty rather than competency. *Kisor*'s guidelines thus foreclose extending *Auer* to agency precedent as the Sixth and D.C. Circuits have done. This Court should grant certiorari to confirm what is implicit in *Kisor* and confine agency deference to its recognized forms.

II. This Case Is a Good Vehicle Because Deference Drove the Outcome Below.

FERC devoted no more than two paragraphs to each of its jurisdiction-limiting decisions. App. 14–15 (¶ 12); 16–17 (¶ 15), 21–22 (¶¶ 20–21).

Unsurprisingly, it failed to address numerous of NGL's arguments and said nothing about one of the primary precedents on which NGL based its claim for jurisdiction over the Phillips Companies' interconnection pipe. This lack of reasoning forced FERC's lawyers to invoke every form of deference on appeal, including deference to the Commission's interpretation of its own precedent. For its part, the D.C. Circuit charitably noted that FERC's order "might have profited from further elaboration" before citing *Cassell*'s progeny and leaning on the "deferential standard of review." App. 6–8. Neither the Commission nor the court below ever argued that FERC provided a reasoned explanation for repudiating its past decisions. The issue of deference is therefore front and center.

FERC's statutory jurisdiction extends to "*all* instrumentalities and facilities of shipment and carriage . . . and *all* service in connection with the receipt, delivery . . . transfer in transit, storage, and handling of property transported." 49 U.S.C. App. § 1(3) (1988) (emphasis added). Like any agency, FERC is not at liberty to narrow its jurisdiction beyond the scope of the statute. *Michigan* v. *EPA*, 576 U.S. 743 (2015).

Concerning the interconnection pipe, NGL pointed to FERC's longstanding rule that its jurisdiction reaches any facility that is an "integral part of the overall transmission function." *Lakehead Pipe Line Co., LP*, 71 FERC ¶ 61,338 (1995). NGL relied heavily on *Lakehead*'s conclusion that even storage tanks could come within FERC's jurisdiction if they were integral to transportation. In response, FERC simply declared—and the panel below accepted—that the interconnection pipe operates "before jurisdictional

transportation has commenced." App. 4, 17. But that is exactly the question: is the interconnection a transportation facility within the definition in the ICA?

More important for purposes of administrative law is that the Commission never even cited *Lakehead*. Nor did it address the fact that FERC approved a tariff covering Phillips Pipeline's interconnection with ONEOK's terminal (just as FERC has exercised jurisdiction over tariffs encompassing the interconnections between the Blue Line and NGL's terminals in East St. Louis and Jefferson City). Instead, the Commission retreated to deference and cited a different precedent, involving terminal facilities like those owned by the Williams Company, which are not the subject of NGL's complaint. App. 17 nn. 15, 18 (citing *TE Products Pipeline Co.*, 130 FERC ¶ 61,257, order on reh'g, 131 FERC ¶ 61,277, at P 12 (2010) ("*TEPPCO*")). In fact, TEPPCO drew the line between jurisdictional and non-jurisdictional facilities at the terminal itself: "jurisdictional transportation is completed when the product enters the terminal." *Ibid.* FERC's failure to address the main precedent cited in the petition or to explain its treatment of the ONEOK interconnection underscores the importance of its demand for deference to its treatment of its own precedent.

FERC's treatment of the other two artifices is similarly dependent on *Cassell* deference. The Commission had previously examined prorationing policies based on their "practical effect" and rejected those that presented "nearly impossible odds" or no "meaningful opportunity" for becoming a regular shipper. *Colonial Pipeline Co.*, 156 FERC ¶ 61,001, at P 19 (2016). Here, FERC simply declared *Colonial* not "applicable." App.

23. On appeal, the D.C. Circuit noted the theoretical possibility that NGL could become a regular shipper and stated that "'deference is due to the Commission's interpretation of its own precedent.'" App. 6 (quoting *Mo. Pub. Serv. Comm'n*, 783 F.3d at 316). Stripped of this novel form of deference, the Commission's actions are "intolerably mute" decisions that would not survive judicial review. *State Farm*, 463 U.S. at 43.

Likewise, the court below relied on its "deferential standard of review" to bless FERC's conclusion that it lacked jurisdiction over the Agreement. App. 8. It noted, in the vein of faint praise, that FERC had "referenced precedent" and excused its failure to respond to NGL's argument as "necessarily reject[ing]" them. App. 8–9. Of course, agency silence can always be characterized as "necessarily reject[ing]" unaddressed arguments. This Court has already foreclosed that "intolerably mute" approach, however. *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). Instead, FERC's silence in response to allegations that must be accepted as true at the dismissal stage is only possible with the D.C. Circuit's extreme deference.

On appeal, the Commission's lawyers worked to put flesh on the bones of its holding, but that does not suffice under *Chenery*. Some of those arguments drove the D.C. Circuit's opinion, despite NGL's objection. For example, the court below accepted FERC's appellate argument that the existence of alternative means for transporting propane to the Blue Line removes FERC jurisdiction over the contested interconnection pipe. App. 4–5. This reasoning—applying a so-called "necessary or integral" test—appeared nowhere in the

Commission's Order. See Reply Br., *NGL Supply Wholesale L.L.C.* v. *FERC*, No. 20-1330, at 3. Elsewhere, the D.C. Circuit accepted the new argument that FERC incorporated part of the Phillips Companies' answer by reference. App. 8. The desire to augment FERC's unreasoned order—and thereby obscure the deference necessary to uphold that order—is sympathetic, but impermissible as a matter of law. *Chenery*, 318 U.S. at 87; see also *Stardyne*, 41 F.3d at 153 (rejecting appellate counsel's attempts to reconcile agency precedent); *Operating Engineers*, 460 F.2d at 604 (same).

Without the benefit of deference to FERC's interpretation of its own precedent, the outcome below is impossible. This case therefore presents an ideal vehicle for passing on the permissibility of extending *Chevron* and *Auer* to require deference not only to agencies' construction of statutes and regulations but to precedent as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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