No. 22-90

# In the Supreme Court of the United States

NGL SUPPLY WHOLESALE, L.L.C., PETITIONER

*v.*

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION


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## QUESTION PRESENTED

Whether the court of appeals properly deferred to the Federal Energy Regulatory Commission's interpretation of a prior Commission decision in the course of reviewing petitioner's contention that the Commission wrongly sustained an oil pipeline's prorationing policy allocating pipeline capacity to particular shippers during periods of high demand.

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## OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1-9) is not published in the Federal Reporter but is available at 2022 WL 715081. The order of the Federal Energy Regulatory Commission (Pet. App. 10-30) is reported at 172 F.E.R.C. ¶ 61,016.

## JURISDICTION

The judgment of the court of appeals was entered on January 25, 2022. A petition for rehearing was denied on March 28, 2022 (Pet. App. 31-34). On June 23, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 26, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. In 1887, Congress enacted the Interstate Commerce Act (ICA), ch. 104, 24 Stat. 379, to regulate the rates charged by interstate railroads. The ICA mandates that all "charges made for any service rendered * * * in the transportation of * * * property" be "just and reasonable," 49 U.S.C. App. 1(5) (1988); Congress also created the Interstate Commerce Commission to administer the statute, 49 U.S.C. App. 11.[1] In 1906, Congress extended the ICA—and the jurisdiction of the Interstate Commerce Commission—to pipelines transporting oil, including petroleum products such as propane, in interstate commerce. Hepburn Act (Interstate Commerce), ch. 3591, 34 Stat. 584; 49 U.S.C. App. 1(1)(b), 3(a). Although Congress largely repealed the ICA in 1978, see Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b) and (c), 92 Stat. 1466-1470, it simultaneously transferred the Interstate Commerce Commission's authority to the newly created Federal Energy Regulatory Commission (Commission), which was vested with "the duties and powers related to the establishment of a rate or charge for the transportation of oil by pipeline or the valuation of that pipeline that were vested on October 1, 1977, in the Interstate Commerce Commission." 49 U.S.C. 60502; see *United Airlines, Inc.* v. *FERC*, 827 F.3d 122, 127-128 (D.C. Cir. 2016).

Section 1(4) of the ICA provides that "[i]t shall be the duty of every common carrier," including oil pipelines, "to provide and furnish transportation upon reasonable request therefor." 49 U.S.C. App. 1(4). In addition, operators of interstate oil pipelines within the

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[1] References to the ICA are to the 1977 version, which can be found in 49 U.S.C. 1 *et seq.* (1976), *reprinted in* 49 U.S.C. App. 1 *et seq.* (1988).

Commission's jurisdiction may not grant a shipper an undue or unreasonable preference or subject a shipper to undue or unreasonable prejudice or disadvantage. 49 U.S.C. App. 3(1). Accordingly, an oil pipeline operating in interstate commerce is required to accept any shipments tendered to it upon reasonable request. See *Belle Fourche Pipeline Co.*, 28 F.E.R.C. ¶ 61,150, at 61,281 (1984). But because a pipeline's capacity may be insufficient to transport all tendered shipments, pipelines may adopt reasonable rules to allocate capacity in times of excess demand. See *ibid.* (citing *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915)); see also *Colonial Pipeline Co.* (*Colonial Pipeline*), 156 F.E.R.C. ¶ 61,001 at ¶ 23 (2016) (explaining that "a shipper's inability 'to move volumes they wish to move' on a constrained pipeline, by itself, 'does not violate the common carrier obligation to provide service'" (quoting *Platte Pipe Line Co.*, 117 F.E.R.C. ¶ 61,296 at ¶ 46 (2006))).

Under Section 13(1) of the ICA, "[a]ny person * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to [the Commission] by petition," and "[i]f * * * there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of." 49 U.S.C. App. 13(1).

2. a. Respondent Phillips 66 Pipeline LLC (Phillips Pipeline) operates the 688-mile Blue Line, which carries propane between Borger, Texas and East St. Louis, Illinois. Pet. App. 2, 11. The northern part of the Blue Line (from Conway, Kansas to East St. Louis) is bidirectional, flowing west-to-east in the winter months and

east-to-west in the summer months. *Id.* at 2, 11-12. During the period at issue in this case, two shippers used the Blue Line: petitioner NGL Supply Wholesale, L.L.C., and respondent Phillips 66 Company (Phillips 66), an affiliate of Phillips Pipeline. *Id.* at 2.

In 2019, petitioner filed a complaint with the Commission alleging that Phillips Pipeline unreasonably denied petitioner access to the Blue Line in favor of Phillips 66. Pet. App. 2. As relevant here, petitioner advanced three arguments. First, it argued that Phillips Pipeline has refused to offer common-carrier service over a segment of Phillips 66-owned pipes that connect the Blue Line to a privately owned storage terminal in Conway. *Id.* at 2-3. Second, petitioner argued that Phillips Pipeline's "prorationing policy"—which allocates Blue Line capacity to "regular shippers" during periods of high demand—is unduly discriminatory, because becoming a regular shipper would require petitioner to ship amounts on the pipeline all twelve months of the year, even when the pipeline flows in a direction opposite to what would satisfy petitioner's needs. *Id.* at 3, 5-6. And third, petitioner argued that an exchange agreement between it and Phillips 66—which sets the terms on which Phillips 66 sells propane to petitioner by exchange—effectively enables that rival shipper to also set the terms and conditions of transportation service on the Blue Line, in violation of the ICA. *Id.* at 3.

b. The Commission rejected each of those arguments in a written order that largely denied petitioner's complaint. Pet. App. 10-30.[2] As to the first, the Commission determined that Phillips 66's interconnection,

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[2] The Commission determined that another one of petitioner's arguments was potentially meritorious and set the matter for an evidentiary hearing. Pet. App. 26-29.

which consists of metering facilities and a smaller pipeline segment connecting those facilities to the mainline, qualified as "terminal facilities" falling outside the Commission's jurisdiction over pipelines providing interstate transportation service. *Id.* at 15-17. With regard to the second, the Commission determined that Phillips Pipeline's prorationing policy was not discriminatory because it provides all shippers with a meaningful opportunity to achieve "regular shipper" status. *Id.* at 18-24. As to the third, the Commission determined that petitioner and Phillips 66's exchange agreement covered nonjurisdictional sales of propane, not FERC-jurisdictional transportation—so that dispute fell outside the Commission's authority, too. *Id.* at 13-15.

3. a. Petitioner filed a petition for review of the Commission's order challenging all three of those determinations. Pet. App. 3. Phillips Pipeline and Phillips 66 intervened in support of the Commission. *Id.* at 1.

In an unpublished judgment order, the court of appeals denied the petition for review. Pet. App. 1-9. The court began by noting that it would review the Commission's ICA order "under the arbitrary-and-capricious standard." *Id.* at 3; see *United Airlines*, 827 F.3d at 127 (citing 5 U.S.C. 706(2)(A)). It then separately analyzed each of petitioner's challenges.

First, the court of appeals affirmed the Commission's determination that the Phillips 66 interconnection in Conway fell outside its jurisdiction. Pet. App. 4-5. Petitioner argued that the Commission had ignored its decision in *Lakehead Pipe Line Co.*, 71 F.E.R.C. ¶ 61,338 (1995), which held that tank facilities located in the middle of a pipeline were subject to the Commission's jurisdiction because they were "necessary" to connect the pipeline's upstream and downstream sys-

tems and thus "an integral part of the [pipeline's] overall transmission function." *Id.* at 62,325 (citation omitted); see Pet. App. 4.

The court of appeals determined that the Commission had appropriately accounted for *Lakehead*, however, by relying on a more recent Commission decision, *TE Products Pipeline Co.* (*TEPPCO*), 131 F.E.R.C. ¶ 61,277 (2010), that had expressly applied *Lakehead* to a more analogous set of facts. Pet. App. 4. In *TEPPCO*, the court of appeals explained, the Commission had determined that terminal facilities that were not on the pipeline's mainline system were nonjurisdictional because they were "'not integral or necessary to the [pipeline's] transportation function.'" *Ibid.* (quoting *TEPPCO*, 131 F.E.R.C. ¶ 61,277 at ¶ 12) (brackets in original). The court found that the Commission had reasonably applied that same reasoning to the Phillips 66 interconnection, which was "'a few feet of pipeline and some metering facilities' * * * located before jurisdictional transportation commenced." *Ibid.* (quoting Pet. App. 16).[3] The court also emphasized the Commission's observation that shippers had other options besides the Phillips 66 interconnection to originate propane on the Blue Line at Conway, which "further rebutted [petitioner's] contention that the interconnection was a necessary or integral component of interstate propane transportation." *Id.* at 4-5. And the court rejected as meritless petitioner's additional attempts to distinguish *TEPPCO*. *Id.* at 5.

Second, the court of appeals found no error in the Commission's determination sustaining Phillips Pipeline's

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[3] This brief substitutes the court of appeals' citations to the Commission's order in the Joint Appendix (C.A.J.A. 1-13) with citations to the Appendix to the Petition (Pet. App. 10-30).

prorationing policy. Pet. App. 5-7. The court initially noted (citing the Commission's decision) that prorationing policies based on historical rates of shipment are "commonplace" and have been "repeatedly approved." *Id.* at 6 (quoting Pet. App. 20). Petitioner had nonetheless argued that the Commission "failed to account for" its prior decision in *Colonial Pipeline*, *supra*, an instance in which the Commission had found a prorationing policy unreasonable. *Ibid.*

The court of appeals disagreed. It observed that in *Colonial Pipeline*, the policy "allocated capacity via a lottery system under which new shippers faced 'nearly impossible odds of . . . obtaining sufficient capacity allocations' to become regular shippers." Pet. App. 6 (quoting Pet. App. 23, in turn quoting *Colonial Pipeline*, 156 F.E.R.C. ¶ 61,001 at ¶¶ 18-19); see *Colonial Pipeline*, 156 F.E.R.C. ¶ 61,001 at ¶ 19 (noting that the "practical effect" of that lottery was to "eliminate" a means of obtaining access to the system). "Here, by contrast," the court explained, the Commission had determined that "'nothing'" in Phillips Pipeline's prorationing policy prevented petitioner from becoming a regular shipper, so long as it shipped for 12 consecutive months. Pet. App. 6 (quoting Pet. App 23). The Commission's "inquiry into the prorationing policy's 'practical effect' on shippers' ability to achieve regular-shipper status * * * thus was consistent with *Colonial*." *Ibid.* (quoting Pet. App. 23). After that sentence and a corresponding citation to the Commission's order, the court included a citation to *Missouri Public Service Commission* v. *FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015), with a parenthetical quoting that decision for the proposition

that "deference is due to the Commission's interpretation of its own precedent." Pet. App. 6.[4]

Third, the court of appeals rejected petitioner's challenge to the Commission's determination that it lacked jurisdiction over petitioner's propane-exchange agreement with Phillips 66. Pet. App. 7-9. The court observed that "the Commission's treatment of this issue is relatively terse and might have profited from further elaboration." *Id.* at 7. But it found that the Commission's determination "passes muster under our deferential standard of review." *Id.* at 7-8. Noting that the Commission's jurisdiction "'does not extend to the sales of petroleum products,'" *id.* at 8 (quoting Pet. App. 14-15), the court agreed that the exchange agreement—under which "[petitioner] tendered propane to Phillips 66 at Conway in exchange for propane at [petitioner's] terminals elsewhere on the Blue Line"—"plainly" contemplates an "exchange of product." *Ibid.* The court also noted that the Commission had invoked precedent "determining that analogous exchange agreements were non-jurisdictional," including a decision with analogous facts, *Bridger Pipeline LLC*, 126 F.E.R.C. ¶ 61,182 (2009). Pet. App. 8. And while the court acknowledged that petitioner had attempted to distinguish those precedents before the Commission, the court concluded that "the Commission's discussion necessarily rejected" certain of those attempts, and the other arguments lacked merit. *Id.* at 8-9.

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[4] The court of appeals also determined that the Commission reasonably declined to require that the Blue Line be prorated by season rather than by year. Pet. App. 7 (noting that Commission policy grants pipelines considerable latitude to craft allocation policies to meet their specific operational circumstances).

b. Petitioner sought rehearing and rehearing en banc, which the court of appeals denied with no judge requesting a vote. Pet. App. 31-34.

**ARGUMENT**

The court of appeals' unpublished decision does not warrant this Court's review. Petitioner contends (Pet. 12-13) that this Court should grant review to decide whether the D.C. Circuit erred in deferring to the Commission's interpretation of Commission precedent in denying the petition for review. The form of deference that petitioner objects to, however, played no meaningful role in the D.C. Circuit's analysis. Moreover, there is no conflict among the courts of appeals; like this Court and other circuits, the D.C. Circuit requires a reasoned explanation for an agency's departure from precedent, an approach consistent with deference to an agency's reasonable interpretations of its prior decisions. No court of appeals has rejected the D.C. Circuit's approach in this regard, and many other circuits have adopted it. Nor does this approach—which is analogous to the deference accorded to agency interpretations of agency regulations—run afoul of the principles enunciated in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019). Finally, this case would be a poor vehicle for addressing the issue, because petitioner did not raise any challenge to such deference in the court of appeals and the court therefore did not discuss the issue. The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 12-15, 18-19) that this Court should grant review to evaluate the D.C. Circuit's reliance on the proposition, which petitioner attributes to *Cassell* v. *FCC*, 154 F.3d 478 (D.C. Cir. 1998), that "[a]n agency's interpretation of its own precedent is entitled to deference," *id.* at 483. Petitioner asserts that

the court employed this particular form of deference to reject each of petitioner's challenges to the Commission's order in this case. See Pet. 24.

Petitioner's understanding of the opinion below is incorrect. It is true that the D.C. Circuit has long "accord[ed] deference to an agency's reasonable interpretation of its own precedents." *Global Crossing Telecomms., Inc.* v. *FCC*, 259 F.3d 740, 746 (2001); see, *e.g.*, *Pacific Coast Supply, LLC* v. *NLRB*, 801 F.3d 321, 333 (D.C. Cir. 2015). But the court of appeals referred to such deference only once in its opinion in this case, and only in the course of resolving petitioner's challenge to the prorationing policy issue. See Pet. App. 6. Even then, the court's reference to what petitioner has labeled "*Cassell* deference" was fleeting and ambiguous; the court noted the point only via a secondary citation, see *ibid.* (citing, *inter alia*, *Missouri Pub. Serv. Comm'n* v. *FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015)), without explaining how it affected the court's analysis.

Every indication, moreover, is that the court of appeals noted the deference principle only to bolster a conclusion it was independently prepared to reach. The court first observed that the Commission precedent at issue, *Colonial Pipeline Co.* (*Colonial Pipeline*), 156 F.E.R.C. ¶ 61,001 (2016), involved dissimilar facts: a lottery system, established by the pipeline itself, that presented shippers with "nearly impossible odds" of obtaining sufficient capacity allocations to become regular shippers. Pet. App. 6 (citation omitted); see *Colonial Pipeline*, 156 F.E.R.C. ¶ 61,001 at ¶ 19. The court then drew a "contrast" with Phillips Pipeline's policy, which, the Commission determined, contained "'nothing'" that prevented petitioner from nominating the amounts necessary to become a regular shipper. Pet. App. 6

(quoting Pet. App. 23). On that basis, the court concluded that the Commission's analysis "was consistent with *Colonial*." *Ibid.* And following the court's parenthetical reference to deference, it restated that same basis for distinguishing *Colonial Pipeline* in straightforward terms: "*As the policy at issue here in no way prevented [petitioner] from nominating the requisite volumes*, the Commission permissibly determined that the concerns underlying its order in *Colonial* were inapplicable in this case." *Id.* at 6-7 (emphasis added).

With respect to the other two issues under review—the Commission's determinations that the Phillips 66 interconnection and the propane exchange agreement fell outside its jurisdiction—the court of appeals did not purport to rely on (indeed, did not refer to) deference to the Commission's reading of Commission precedent at all. See Pet. App. 4-5, 7-9. Petitioner does not demonstrate otherwise. It points (Pet. 12, 23, 25) to the court's reference to "our deferential standard of review" in rejecting petitioner's third challenge, Pet. App. 7-8. But read in context, it is evident the court was referring to the arbitrary and capricious standard of review that the court stated was applicable to the Commission's order as a whole. See *id.* at 3.[5] Petitioner does not challenge

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[5] Petitioner asserts that the court of appeals "noted that FERC's order 'might have profited from further elaboration' before citing *Cassell*'s progeny and leaning on the 'deferential standard of review.'" Pet. 23 (quoting Pet. App. 7); see *id.* at 12 (similar). But the court's remark was referring to the Commission's analysis of the third "issue"—not the Commission's analysis as a whole. Pet. App. 7. And the court's citation to *Missouri Public Service Commission* came earlier in the opinion, when the Commission was discussing petitioner's prorationing policy challenge. See *id.* at 6.

that standard or its application here.[6] While petitioner also claims that upholding the Commission's determinations would have been "impossible" without deference, Pet. 26, there is nothing in the court's opinion supporting that view. Rather, petitioner appears to take issue with how the court addressed or applied various Commission precedents discussed in the opinion. See, *e.g.*, Pet. 23-25. But such narrow, case-specific, and fact-bound disagreements do not justify this Court's intervention. Far from "dr[iving] the outcome below," Pet. 22 (capitalization altered and emphasis omitted), the court of appeals' citation to the *Missouri Public Service Commission* decision concerning deference to an agency's interpretation of its precedent played at most a secondary role in only one of petitioner's three challenges to the Commission's order.

2. Petitioner additionally contends (Pet. 13-18) that this Court's review is necessary to resolve "division in the lower courts" over whether courts should defer to agency interpretations of agency precedent. That is mistaken as well.

Petitioner asserts that the D.C. Circuit's practice of deferring to reasonable agency interpretations of earlier agency decisions renders it "an outlier among circuit courts." Pet. 12. But petitioner cites no decisions holding that courts must review agency precedent de

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[6] Petitioner also argues (Pet. 25-26) that the court of appeals' analysis rejecting petitioner's first challenge ran afoul of *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). But that distinct claim of error is not encompassed in the question presented. In any event, the availability of other options for accessing the pipeline, to which the court referred, Pet. App. 4-5, was referred to in the Commission's order as well, see *id.* at 16-17, n.18 (noting private respondents' argument that petitioner had other means of transporting propane from Conway to the Blue Line).

novo, with no deference to the agency's understanding of its own prior decisions. To the contrary, petitioner acknowledges that the Sixth Circuit has adopted the same approach. Pet. 17-18; see *Aburto-Rocha* v. *Mukasey*, 535 F.3d 500, 503 (6th Cir. 2008) ("What is generally true in administrative law remains true here: An agency's interpretation of its own precedents receives considerable deference.").

Nor do the D.C. and Sixth Circuits stand alone. Decisions from the First, Second, Third, Fourth, Fifth, and Seventh Circuits, as well as an unpublished decision from the Eleventh Circuit, reflect the same view. See *Commonwealth of Mass., Dep't of Educ.* v. *United States Dep't of Educ.*, 837 F.2d 536, 545 (1st Cir. 1988) ("[A]n administrative agency must be given wide latitude in deciphering its own opinions."); *Zheng* v. *United States Dep't of Justice*, 416 F.3d 129, 131 (2d Cir. 2005) (per curiam) (granting "deference" to agency's "reasonable interpretation" of prior decision, citing D.C. Circuit precedent); *CBS Corp.* v. *FCC*, 663 F.3d 122, 143 (3d Cir. 2011), cert. denied, 567 U.S. 953 (2012) (noting that "an agency's interpretation of its own precedent is entitled to deference" (quoting *Cassell*, 154 F.3d at 483)); *Tinoco Acevedo* v. *Garland*, 44 F.4th 241, 250 (4th Cir. 2022) ("An agency's interpretation of its own precedents receives considerable deference." (citation omitted)); *Louisiana Land & Exploration Co.* v. *FERC*, 788 F.2d 1132, 1136 n.18 (5th Cir. 1986) (explaining that "[t]he Commission's construction of its own order is entitled to great weight and commensurate deference on judicial review"); *Central States Enterprises, Inc.* v. *ICC*, 780 F.2d 664, 678 (7th Cir. 1985) (deeming it "axiomatic that a reviewing court must afford a considerable deference to a federal agency's interpretation of

its own precedent"); *Outokumpo Stainless USA, LLC* v. *NLRB*, 773 Fed. Appx. 531, 533-534 (11th Cir. 2019) (noting that an agency's "interpretation of its own precedent is entitled to deference" (quoting *Ceridian Corp.* v. *NLRB*, 435 F.3d 352, 355 (D.C. Cir. 2006))).

Rather than pointing to any conflict regarding that issue, which is the subject of the question presented, petitioner invokes decisions of other courts of appeals holding that agencies must acknowledge and provide a reasoned explanation for changes in agency policy, including departures from past agency precedent. Pet. 15-17; see, *e.g.*, *Shaw's Supermarkets, Inc.* v. *NLRB*, 884 F.2d 34, 36-37 (1st Cir. 1989) (an agency must "explicitly recogniz[e]" that it is departing from past precedent and "explain[] why"); see also *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 221 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").

But the D.C. Circuit also adheres to this well-settled rule. See, *e.g.*, *New Fortress Energy Inc.* v. *FERC*, 36 F.4th 1172, 1176 (2022). Indeed, the D.C. Circuit noted this rule in the *Missouri Public Service Commission* decision. 783 F.3d at 316 ("The court * * * must reverse a [Commission] decision that departs from established precedent without a reasoned explanation." (citation and internal quotation marks omitted)). And the two practices are entirely consistent: while the D.C. Circuit (and other courts) will accept, within the bounds of reasonable interpretation, an agency's understanding of its past decisions, the court will not allow an agency to depart from past practice without any explanation or by way of an *un*reasonable interpretation. See *Global Crossing*, 259 F.3d at 746 ("reasonable interpretation[s]" receive deference); *Ceridian Corp.*, 435

F.3d at 355. Thus, the D.C. Circuit's approach in no way "creates a loophole for unexplained changes in position." Pet. 12.[7]

Petitioner's confusion on this point may stem from a belief that the Commission abandoned *Colonial Pipeline*, rather than considering that precedent in a context involving a different set of facts. See Pet. i, 16, 23. But the court of appeals disagreed with that characterization. Pet. App. 6-7. Again, this Court's review is not warranted to resolve that narrow disagreement, which would at most amount to a misapplication of settled law.

3. a. In addition, the lower courts' practice of granting deference to reasonable interpretations of agency precedent finds support in well-established principles of administrative law.

First, this practice accords with the familiar arbitrary and capricious standard applicable to judicial review of agency determinations. See 5 U.S.C. 706(2)(A); see also *Boch Imports, Inc.* v. *NLRB*, 826 F.3d 558, 568-569 (1st Cir. 2016) (suggesting that deference to agency interpretations of precedent derives from arbitrary and capricious review). Under that standard, a court "may not substitute [its] own judgment for that of the Commission." *FERC* v. *Electric Power Supply Ass'n*, 577 U.S. 260, 292 (2016). Instead, the court must uphold

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[7] Amici appear to share the same misunderstanding of the D.C. Circuit's case law. They suggest that the D.C. Circuit's approach conflicts with the Third Circuit's because the latter will not defer when an agency's interpretation of precedent is "capricious," Okla. et al. Amici Br. 7-8 (quoting *CBS*, 663 F.3d at 143), and they argue that the D.C. Circuit will accept "any reason" for distinguishing precedent, *id.* at 6. To the contrary, the D.C. Circuit requires an interpretation to be reasonable before the court will defer. See *Global Crossing*, 259 F.3d at 746; see also *United States Telecom Ass'n* v. *FCC*, 295 F.3d 1326, 1332 (D.C. Cir. 2002).

agency action if the agency has "'articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Ibid.* (quoting *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)) (brackets in original). Reasonable agency judgments about how a past precedent should be understood and applied is the kind of "policy judgment" to which courts defer generally. *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021); see *ibid.* (calling judicial review under the arbitrary and capricious standard "deferential").

Second, the approach is justified as a logical corollary to the deference afforded to an agency's reasonable interpretations of its own regulations in appropriate circumstances. *Aburto-Rocha*, 535 F.3d at 503; *Zheng*, 416 F.3d at 131; see *Auer* v. *Robbins*, 519 U.S. 452 (1997); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *Auer* deference is rooted in a "presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities." *Kisor*, 139 S. Ct. at 2412 (plurality opinion). That presumption is no less salient when the agency implements a regulatory scheme through adjudication; resolving questions about whether or how a determination enunciated in an agency decision should apply to a new set of facts likewise "enables the agency to fill out the regulatory scheme Congress has placed under its supervision." *Id.* at 2418. In addition, the agency that decided the earlier case may be "in the better position to reconstruct its original meaning." *Id.* at 2412 (plurality opinion) (brackets, citation, and internal quotation marks omitted).

b. Petitioner's objections to this practice are not persuasive. As discussed above, petitioner primarily argues (Pet. 13-18) that the D.C. Circuit does not require agencies to acknowledge and provide a reasoned explanation for changes in position. As explained, that is incorrect. See pp. 14-15, *supra*.

Petitioner also argues (Pet. 19-22) that the form of deference here contravenes the "the limitations on *Auer* [deference]" enunciated in *Kisor*. That too is mistaken. An agency's application of its decisions to the facts at hand undoubtedly "implicate[s] its substantive expertise"; the agency must draw upon its "[a]dministrative knowledge and experience," and the interpretive question may benefit from the agency's "'nuanced understanding'" of the regulatory area. *Kisor*, 139 S. Ct. at 2417 (citation omitted). While agencies may lack comparative expertise in interpreting *judicial* opinions, cf. Pet. 21; see *Northeast Beverage Corp.* v. *NLRB*, 554 F.3d 133, 138-139 n.* (D.C. Cir. 2009) (noting that the court is "not obligated to defer to an agency's interpretation of Supreme Court precedent" (citation omitted)), the same is not true of the agency's own decisions.

Nor are agency interpretations of prior decisions likely to reflect "convenient *post hoc* litigating positions." Pet. 21; see *Kisor*, 139 S. Ct. at 2417. An agency's application of prior precedent will often occur in the course of adjudication (here, by the full Commission). In that context, there is no reason to presume that the agency's analysis does not reflect its "fair and considered judgment." *Kisor*, 139 S. Ct. at 2417 (citation omitted).

Petitioner also points (Pet. 20) to *Kisor*'s instruction that courts should "exhaust all the traditional tools of construction" before concluding that a regulation is

ambiguous and thus eligible for *Auer* deference. 139 S. Ct. at 2415 (citation and internal quotation marks omitted). But that instruction is of limited use here, because "opinions are not statutes, from which we squeeze all we can out of every last word." *In re Plavix Mktg., Sales Practices & Prods. Liab. Litig. (No. II)*, 974 F.3d 228, 235 (3d Cir. 2020). Rather, in analyzing its past decisions, an agency necessarily assesses their reasoning and exercises its judgment in addressing the implications of that reasoning for the case before it, which may arise in a different context presenting new facts and considerations. In any event, this case does not squarely present the question whether a court must identify an ambiguity in an agency decision before deferring to the agency's subsequent consideration of that decision—because here, the D.C. Circuit appears to have believed that the Commission had the better reading of its precedent even without deference. See pp. 10-11, *supra*.

4. Finally, even if the question presented otherwise merited review, this case—involving an unpublished judgment order of the court of appeals—would be a poor vehicle for addressing it. For one thing, as discussed above, the court of appeals did not purport to defer to the Commission's interpretation of its precedent with respect to two of the holdings petitioner challenges, and the extent to which deference played a role with respect to the third is at most unclear. See pp. 10-12, *supra*.

In addition, this Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see, *e.g.*, *Zobrest* v. *Catalina Foothills*

*Sch. Dist.*, 509 U.S. 1, 8 (1993); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). That is the case here. As petitioner notes (Pet. 2, 11), the Commission's brief before the court of appeals invoked, in stating the standard of review, the principle that courts "defer[] to the Commission's interpretation of its own precedent." Gov't C.A. Br. 15 (citing *International Transmission Co.* v. *FERC*, 988 F.3d 471, 481 (D.C. Cir. 2021)). Petitioner's reply brief did not provide an argument against such deference or for why it should not be applied in the circumstances of this case. As a result, the D.C. Circuit had no occasion to consider whether such deference would be inappropriate here, including after *Kisor*. The Court should decline to do so in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (This Court is "a court of review, not of first view.").

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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