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.,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS PHILLIPS 66 COMPANY AND PHILLIPS 66 PIPELINE LLC

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QUESTION PRESENTED

Whether the court of appeals correctly applied the arbitrary-and-capricious standard in upholding the Federal Energy Regulatory Commission's (FERC) interpretation of prior agency precedent and denying the petition for review, where the court analyzed FERC's reasoning and treatment of the precedent and found the present order in line with it.

PARTIES TO THE PROCEEDINGS

Petitioner in this Court, NGL Supply Wholesale, L.L.C., was petitioner in the court below and was the complainant in the underlying agency proceeding.

Respondent Federal Energy Regulatory Commission (FERC) was respondent in the court below and ruled against Petitioner in the underlying agency proceeding.

Respondents Phillips 66 Company (Phillips 66) and Phillips 66 Pipeline LLC (Phillips Pipeline) (collectively, the Phillips entities) were intervenors in the court below and were the prevailing respondents in the underlying agency proceeding initiated by Petitioner.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondents Phillips 66 Company and Phillips 66 Pipeline LLC state as follows:

> Respondent Phillips 66 Pipeline LLC, a Delaware limited liability company, is a wholly owned subsidiary of Respondent Phillip 66 Company. Respondent Phillips 66 Company, a Delaware corporation, is a wholly owned subsidiary of Phillips 66, a publicly traded Delaware corporation. At this time, The Vanguard Group is the only shareholder owning 10% or more of Phillips 66.

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INTRODUCTION

Petitioner seeks review of this fact-bound dispute by claiming that FERC departed from its prior precedent without a reasoned explanation in the underlying agency order, and that the court of appeals allowed this by simply deferring to FERC's interpretation of its precedent. But none of that is true. Indeed, one can hardly recognize the proceedings and resulting orders in this case from Petitioner's arguments.

Petitioner filed a complaint under the Interstate Commerce Act (ICA) at FERC against the Phillips entities, alleging three distinct, fact-specific arguments. The Phillips entities responded. FERC addressed each argument separately, explaining why FERC precedent supported rejection of each aspect of Petitioner's complaint and distinguishing certain precedent. Petitioner contested that order under the arbitrary-and-capricious standard, a deferential one in which courts ask whether the agency acted within a zone of reasonableness. See, *e.g.*, *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The court of appeals upheld the order, specifically analyzing FERC precedent and explaining why the order was consistent with it. The court cited the principle of deferring to FERC's interpretation of its own precedent for only one issue—and even then, as an afterthought "see" cite while analyzing the precedent, finding FERC's analysis "consistent" with one, and holding FERC "reasonably" rejected Petitioner's reliance on another. This case was resolved consistent with FERC precedent after analysis of that precedent by FERC and the court below.

Yet Petitioner (and its amici) incorrectly describe these orders in seeking review. They fail to mention the key parts of the decision below actually analyzing, and finding FERC's underlying order consistent with, prior FERC precedent, while overstating the lone cite to the so-called "*Cassell* deference" principle on one issue, all to mistakenly claim this principle somehow drove the entire outcome below. And they are wrong to portray FERC's order as unexplained or contrary to agency precedent; for example, on the issue for which the court cited the contested deference principle, FERC devoted four paragraphs and thirteen footnotes to discussing the issue and precedent.

These mischaracterizations, along with other misstatements in the Petition (detailed below), preclude review of the sole issue advanced. FERC did not depart from agency precedent, and the court below did not simply defer to FERC's interpretation of precedent. Petitioner's real complaint is not about deference, but about the fact-specific outcome here that was dictated by the ICA and principles embodied in FERC's precedent. Petitioner's question presented and arguments for review, like amici's contentions, thus bear no relationship to this case and are neither fairly presented by the decision below nor outcome-determinative here. The Petition should thus be denied.

Importantly, too, the deference issue on which review is sought was not pressed by Petitioner or meaningfully passed on below. This also warrants denial.

Regardless, the court of appeals' *per curiam*, unpublished decision does not conflict with any decision of another circuit or this Court. Petitioner and amici are wrong to claim a circuit split, as all the cited cases

apply the same settled legal principles and diverge in their outcomes only because of different facts. The decision below is fully consistent with this Court's precedent, including *Atchison Topeka Santa Fe Railway Co.* v. *Wichita*, 412 U.S. 800, 807-09 (1973), because the court actually analyzed the FERC precedent to ensure FERC's treatment of that precedent was consistent and reasonable. The court simply found no departure from precedent. Petitioner's and amici's undertheorized reliance on *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), as controlling the deference a court conducting arbitrary-and-capricious review should afford an agency's exercise of its expertise when interpreting and applying *agency* precedent, is both novel and misguided. Petitioner's "no deference" position invites an unprecedented and unsupported carveout from the Administrative Procedure Act's (APA) arbitrary-and-capricious standard. There is no conflict warranting review.

In the end, contrary to Petitioner's and amici's exaggerated claims that the case presents weighty questions about administrative law and federalism, this case involved application of settled law to these facts. There were no agency departures from precedent or undue deference afforded. Petitioner simply does not like the outcome here, but FERC's order and the decision below were correct. There are no compelling reasons for review.

STATEMENT OF THE CASE

A. Regulatory Background

The ICA gives FERC jurisdiction over pipelines transporting oil in interstate commerce. 49 App. U.S.C. §§ 1(1) and 3(a) (1988). "A service is subject to the [ICA] and [FERC's] jurisdiction only if it is 'integral' or 'necessary' to the pipeline transportation function." *TE Prod. Pipeline Co., LLC*, 130 FERC ¶ 61,257 P 13 (2010), *reh'g denied*, 131 FERC ¶ 61,277 (2010) (*TEPPCO*) (quoting *Lakehead Pipe Line Co., L.P.*, 71 FERC ¶ 61,338, at 62,325 (1995), *order on reh'g*, 75 FERC ¶ 61,181, at 61,601 (1996) (*Lakehead*)). FERC's jurisdiction under the ICA is limited to the transportation of oil and does not include the purchase and sale of commodities. See, *e.g.*, *W. Refin. Pipeline Co.*, 122 FERC ¶ 61,210 at P 12 (2008), *reh'g denied*, 123 FERC ¶ 61,271 (2008).

The ICA requires common carriers on jurisdictional pipelines to "provide and furnish transportation upon reasonable request therefor," 49 App. U.S.C. § 1(4), meaning they must accept any shipment tendered upon reasonable request, *Belle Fourche Pipeline Co.*, 28 FERC ¶ 61,150 at 61,281 (1984). Because a pipeline's capacity may not be sufficient to do so in periods of high demand, it may adopt reasonable rules—"prorationing policies"—to allocate capacity. *Penn. R Co.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 133 (1915). FERC does not prescribe a uniform prorationing methodology, instead requiring only that any policy comply with the ICA's mandate that pipelines not grant a shipper an undue or unreasonable preference or subject a shipper to undue or unreasonable prejudice. *Suncor Energy Mktg. Inc. & Suncor Energy*

(U.S.A.) Inc., 132 FERC ¶ 61,242, PP 24,97 (2010) (*Suncor*); 49 App. U.S.C. § 1(4). One approved method is to allocate capacity based on shipper loyalty, a "historically-based" prorationing policy. *Id.* at P 25.

B. Factual Background

Phillips Pipeline operates the Blue Line, a 688-mile propane and butane pipeline going from Borger, Texas to East St. Louis, Illinois. App.2. The eastern segment of the Blue Line flows bi-directionally by season: eastward from Conway, Kansas to East St. Louis in September-March, and westward from East St. Louis to Conway in April-August. App.2, 11. Conway is a commercial hub for propane, butane, and other natural gas liquids sales, and parties may store product at private facilities owned by the Williams Companies, Inc. and ONEOK Hydrocarbon, L.P. (the "Williams and ONEOK Terminals"). App.12; Intervenors.C.A.Br.2-3.

Like many FERC-regulated pipelines, the Blue Line tariff contains a prorationing policy that governs allocation of capacity on the Blue Line in times of high shipping demand. See App.3. The Blue Line's prorationing policy allocates capacity to all shippers during such times but prioritizes those qualifying as regular shippers, meaning those shipping on the Blue Line for a continuous twelve-month period. App.5-6, 18 n.19.

Phillips 66 is globally engaged in refining, processing, transporting, and marketing crude oil, natural gas liquids, refined petroleum products, and petrochemicals. App.12. As relevant to this matter, Phillips 66 operates and partly owns refineries in Illinois and Texas. App.12. Phillips 66 is also a shipper on

the Blue Line. App.2. In or around May 2019, construction was completed on a project, which Phillips 66 paid for, that allowed Phillips 66 to tender propane from the Williams Terminal into the Blue Line (the "Williams-Phillips 66 Interconnection"). Intervenors.C.A.Br.14-15. Prior to that, Phillips 66 tendered propane from the Williams and ONEOK Terminals through alternative interconnecting facilities that remain available to Petitioner, as well as Phillips 66 and others. App.16-17 & n.18; Intervenors.C.A.Br.14-15. Petitioner owns terminals along the Blue Line in Jefferson City, Missouri and East St. Louis. App.11; Intervenors.C.A.Br.3. Contrary to Petitioner's claim that the Blue Line serves only Phillips 66, Pet.i, 1, 8, Petitioner is a shipper on the Blue Line. App.2.

Federal Trade Commission directives arising from a 2002 merger required Phillips 66 to enter into an exchange agreement to supply Petitioner with propane. App.11. An exchange involves trading a commodity at one point for the commodity at another point, with title transfer at each point. See, *e.g.*, *ConocoPhillips Co.*, 134 FERC ¶ 61,174 at P 54 (2011); *W. Refin.*, 122 FERC ¶ 61,210 at P 15 n.6. Petitioner subsequently entered into materially identical exchange agreements under which Petitioner would give Phillips 66 propane at Conway and receive propane at Petitioner's terminals, where title transferred. App.11, 14; Intervenors.C.A.Br.3.

C. Proceedings Below

1. Petitioner filed a complaint at FERC against the Phillips entities alleging, as relevant, three ICA

violations.[1] Petitioner argued that the Williams-Phillips 66 Interconnection was subject to FERC jurisdiction and the ICA's common-carriage requirement, such that Phillips 66 must allow Petitioner to use it. Pet.8-9; App.12. Petitioner also claimed Phillips Pipeline's prorationing policy was not just and reasonable because it did not provide Petitioner a reasonable opportunity to become a regular shipper. Pet.9; App.12. Petitioner further complained that the exchange agreement violated the ICA because it provided for transportation of propane. Pet.9-10; App.12. The Phillips entities responded, providing affidavits and other evidence rebutting Petitioner's factual arguments, and Petitioner filed a further brief and evidence in reply. App.13.

FERC denied each claim. FERC determined it lacked jurisdiction over the Williams-Phillips 66 Interconnection, which is located before the commencement of transportation activities. App.16-17. FERC found Phillips Pipeline's historical prorationing policy was permissible, that Petitioner's failure to obtain regular-shipper status was the result of Petitioner's own business decisions, and that precedent did not require different seasonal prorationing policies. App.19-24. And FERC concluded the exchange agreement was a non-jurisdictional agreement concerning the sale of propane rather than a transportation agreement. App.14-15.

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[1] Petitioner's complaint included a fourth allegation that is not at issue.

2. Petitioner sought review in the D.C. Circuit. First, Petitioner contended FERC ignored its arguments as to the Williams-Phillips 66 Interconnection by not discussing the *Lakehead* decision, 71 FERC ¶ 61,338, argued the interconnection is "necessary or integral" to interstate transportation, and claimed FERC misapplied *TEPPCO*, 131 FERC ¶ 61,277. Pet.C.A.Br.20-29. Second, Petitioner challenged FERC's decision to sustain Phillips Pipeline's prorationing policy, asserting FERC failed to account for *Colonial Pipeline Co.*, 156 FERC ¶ 61,001 (2016) (*Colonial*) and *Suncor*, 132 FERC ¶ 61,242. Pet.C.A.Br.29-36. Third, Petitioner faulted FERC's decision on the exchange agreement, claiming FERC failed to address arguments that it constitutes transportation. Pet.C.A.Br.37-43.

The Phillips entities intervened in support of FERC, and both they and FERC rebutted each of Petitioner's contentions. FERC's brief cited the principle that courts defer to FERC's interpretation of its precedent, Resp.C.A.Br.14-15, 29, which Petitioner did not contest.

3. The court unanimously denied the petition for review in an unpublished order. App.3.

First, on the interconnection issue, the court examined the relevant FERC precedent (*TEPPCO* and *Lakehead*), concluded the interconnection is not subject to FERC jurisdiction because it is used to tender product to the pipeline before interstate transportation begins, and confirmed that FERC adequately explained this. App.4-5. The court also held the inter-

connection is not "necessary or integral" to jurisdictional transportation because shippers have other options to originate product on the Blue Line. *Id.*

Second, the court affirmed FERC's determination to sustain the prorationing policy, explaining how FERC's analysis was "consistent" with *Colonial* because unlike the prorationing policy in that case, the policy here "in no way prevented [Petitioner] from nominating the requisite volumes" to become a regular shipper. App.5-7. The court then observed that deference is due FERC's interpretation of its own precedent. App.6. The court also held FERC "reasonably" rejected Petitioner's argument that *Suncor* mandated separate prorationing policies by season, distinguishing *Suncor* on the facts. App.7.

Third, the court agreed that FERC lacked jurisdiction over the exchange agreement because that agreement was for exchange of propane, not for transportation under the ICA. App.7. The court discussed why FERC's handling of this issue—incorporating and discussing FERC precedent establishing that analogous exchange agreements were non-jurisdictional—was adequate. App.7-9. The court held that, having reasonably rejected Petitioner's position that the exchange agreement was jurisdictional, FERC correctly declined to address Petitioner's additional arguments premised on that position. App.8-9.

4. Petitioner requested rehearing and rehearing en banc and, for the first time, opposed deference to FERC's interpretation of its precedent. See Pet.C.A. Pet. for Reh'g & Reh'g En Banc 11-12. The court unanimously denied both petitions without addressing this new argument. App.31-34.

REASONS FOR DENYING THE PETITION

I. The Petition Mischaracterizes The Decision Below, Which Does Not Fairly Or Dispositively Raise The Question Presented.

The entire asserted basis for review here is that the court of appeals deferred to FERC's interpretation of its precedent and that FERC's interpretation departed from its precedent without explanation. But Petitioner (like its amici) misdescribes the orders below, to the extent it impacts what would properly be before the Court. See S. Ct. R. 15.2. Under any fair reading of the orders below, the narrow question Petitioner urges for review is not actually presented, and certainly not outcome-determinative, here.

A. The decision below analyzed prior FERC precedent, rather than simply deferring to FERC's interpretation of it.

1. Review is requested here premised on the notion that the court just deferred to FERC's interpretation of its precedent throughout. See, *e.g.*, Pet.i, 2, 12, 22-26; Amici.Br.11. Petitioner references other forms of deference separately cited by the court but seeks review only on the so-called "*Cassell* deference" principle. See Pet.i. On that principle, Petitioner claims FERC's actions could not have been sustained without such deference. *E.g.*, Pet.24-25. Petitioner concludes: "Without the benefit of deference to FERC's interpretation of its own precedent, the outcome below is impossible." Pet.26; *accord* Amici.Br.11 (discussing only the exchange-agreement part of the decision, then concluding: "FERC prevailed by being conclusory in

its analysis and leaving the D.C. Circuit to do the real work under *Cassell* deference.").

2. Contrary to all this, the court *at most* relied on this deference principle on one issue—and even then, only after analyzing the FERC precedent and approving FERC's treatment of it.

First, Petitioner and amici create the misimpression that the court applied "*Cassell* deference" throughout, but the court cited this principle *only* for the prorationing-policy issue. App.6. The court did not cite it in discussing the interconnection or exchange-agreement issues. App.4-5, 7-9. That was consistent with FERC's briefing below: FERC cited deference principles in a standard-of-review section, but, in arguing the three issues, urged deference to its interpretation of its precedent *only* on the prorationing-policy issue, relying on distinct deference principles on other issues. See, *e.g.*, Resp.C.A.Br.21, 29, 33. Petitioner is thus wrong to suggest "*Cassell* deference" impacted the interconnection and exchange-agreement issues, Pet.23-26, and amici err in focusing on the exchange-agreement part of the decision, Amici.Br.11. Only the prorationing-policy issue could be relevant to the narrow question presented.[2]

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[2] Petitioner notes the court generically referenced its "deferential standard of review" in discussing the exchange agreement. App.8. But there is no reason to presume from this general reference that "*Cassell* deference" specifically was relied upon, much less drove the outcome, on this issue, particularly because the court did not cite that principle for this issue and the general reference came in applying the deferential arbitrary-and-

Second, the court did not just defer to FERC but instead analyzed the precedent and FERC's handling of it. That is especially true on the prorationing-policy issue, for which Petitioner stressed *Colonial* and *Suncor*. The court summarized *Colonial* and FERC's explanation of it, concluding FERC's analysis here "was consistent with *Colonial*." App.6. Only then did the court cite a case on deferring to an agency's interpretation of its precedent. *Id.* The court concluded that because the policy here "in no way prevented [Petitioner] from nominating the requisite volumes," FERC "permissibly determined that the concerns underlying its order in *Colonial* were inapplicable in this case." App.6-7. As to *Suncor*, the court held FERC "reasonably rejected [Petitioner's] analogy to it" and explained *why* FERC "permissibly determined" *Suncor* did not apply. App.7. Petitioner and amici ignore all this to paint a misimpression of total deference.

Likewise, on the interconnection issue, the court analyzed the *Lakehead* and *TEPPCO* cases. The court found FERC accounted for them by discussing *TEPPCO* (which was based on *Lakehead*), explained why FERC lacked jurisdiction under that authority, and rejected on the merits Petitioner's contentions regarding *TEPPCO*. App.4-5. On the exchange agreement, the court's summary of FERC's rationale approvingly noted FERC cited precedent supporting its position, and rejected Petitioner's chief contention that FERC had not adequately addressed its arguments. App.7-8. These parts of the decision further

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capricious standard and another deference principle—the scope of FERC's jurisdiction. App.3, 7-9; see Resp.C.A.Br.33.

show the court engaged in its own analysis of precedent, rather than simply deferring.

Third, given that the court analyzed and approved FERC's treatment of precedent, the court arguably did not even defer to FERC as a standalone rule. The court cited this deference principle only when discussing the prorationing policy, and then only as an add-on while independently analyzing FERC's treatment of precedent. App.4-9. And the court found FERC's determinations regarding those prior cases were "reasonabl[e]" or "permissibl[e]," App.6-7, consistent with the basic arbitrary-and-capricious standard, see, *e.g.*, *Prometheus*, 141 S. Ct. at 1158. See also *infra* Part II.B. This lone citation is far too thin a reed to bear the enormous weight Petitioner and amici must give it in seeking review. Properly read, the decision below does not involve meaningful reliance on so-called "*Cassell* deference."

B. As the court below held, FERC's order is in line with, rather than an unexplained departure from, FERC precedent.

A second premise underlying the request for review is that FERC's interpretation of its precedent, to which the court supposedly deferred, effected a departure from that precedent. See, *e.g.*, Pet.i, 2, 11, 22-26; Amici.Br.1, 6, 11. That, too, is wrong on each issue.

1. FERC's no-jurisdiction determination regarding the interconnection between the Blue Line and the Williams Terminal is, as the court recognized, consistent with FERC precedent. App.4-5, 16-17. The parties agree FERC has jurisdiction over the Blue Line but not the storage terminal, so the question was

where jurisdictional interstate transportation begins, and FERC properly relied on *TEPPCO*, plus other cases, to answer it. App.16-17. The cited precedent all involved fact-specific applications of the same principle: FERC exercises jurisdiction over facilities related to pipeline service only if they "are necessary or integral to transportation" on the pipeline. *TEPPCO*, 131 FERC ¶ 61,277 at P 11 (citing *Lakehead*, 71 FERC ¶ 61,338 at *19); *Tesoro Refin. & Mktg. Co.,* 135 FERC ¶ 61,116 at P 17 (2011); see App.16-17. This requires FERC to make factual findings and apply its technical expertise to determine which facilities are "necessary or integral" to transportation.

TEPPCO affirmed that FERC analyzes the functional necessity of supplemental and incidental services when determining if a facility is jurisdictional. *TEPPCO* was not limited to storage facilities, as Petitioner says. Pet.24. FERC explained that "transportation services are completed at the time the petroleum product enters the terminal *or other facilities*"; facilities such as "smaller pipes and metering facilities" are non-jurisdictional because they occur before or after jurisdictional transport begins or ends and "are not integral or necessary to the transportation function." 131 FERC ¶ 61,277 at PP 11, 12 (emphasis added). The court below discussed these facts and agreed that FERC's similar analysis in this matter is consistent with its precedent. App.5.

Petitioner relies on *Lakehead*, but the court correctly held FERC relied on and explained why the interconnection is factually similar to *TEPPCO*, which discussed and applied *Lakehead*, thus fully engaging with the substance of Petitioner's *Lakehead* point.

App.4; see *Verso Corp.* v. *FERC*, 898 F.3d 1, 12 (D.C. Cir. 2018). And the facts of *Lakehead* are inapposite. The liquids transported on Lakehead's system were broken out using facilities that "are an integral part of the overall transmission function," such that "[i]n essence and effect, the…facilities are…in lieu of a pipe connecting Lakehead's upstream and downstream systems and are an integrated part of its system of common carriage." 71 FERC ¶ 61,338 at *19. In contrast, the interconnection here is not necessary to fill any gap in the Blue Line's service and is plainly not "integrated" with the Blue Line. As FERC found based on the record evidence, the interconnection is only one of several methods shippers can use to move product from the Williams and ONEOK Terminals to the Blue Line. App.4-5.

FERC's decision is consistent with *Lakehead* and *TEPPCO*. There was no departure from precedent.

2. FERC's prorationing-policy approval is also consistent with precedent. FERC properly applied the principle from *Colonial* to examine the policy's practical effect, and correctly distinguished *Colonial* and *Suncor*. A reasoned distinction of precedent is not a departure from precedent. *Ceridian Corp.* v. *NLRB*, 435 F.3d 352, 356 (D.C. Cir. 2006).

Petitioner does not dispute that under precedent, including *Colonial*, twelve-month historical prorationing policies are acceptable if they allow all parties a reasonable opportunity to become a regular shipper. App.19-23. Under the *Colonial* policy, FERC found, "new shippers making consistent nominations for service had 'nearly impossible odds of…obtaining suffi-

cient capacity allocations'" to become regular shippers. App.23 (quoting *Colonial*, 156 FERC ¶ 61,6001 at P 19). That policy was unjust because the policy itself—not some external factor—"has the effect of locking new shippers into new shipper status indefinitely." 156 FERC ¶ 61,6001 at P 23. Yet, FERC explained, where an entity's failure to achieve regular-shipper status results from its own business decisions, a facially neutral policy is permissible. App.21 & n.28 (listing cases denying challenges to facially neutral policies when shippers' business decisions led to diminished capacity entitlement). FERC examined this record and determined as a factual matter Petitioner's failure to become a regular shipper was the result of Petitioner's business decisions—specifically, its decision not to ship product on the Blue Line during all twelve months. App.21-22 & n.32. Contrary to Petitioner's factual argument that Phillips 66 has a "monopoly," Pet.9, 11, FERC reasonably found NGL could have obtained "alternate propane supplies" that would allow it to ship propane from east to west when the pipeline flowed in that direction. App.22.

Further, FERC did not depart from precedent by correctly distinguishing *Suncor*. App.23-34. As FERC explained, *Suncor* is factually inapposite because it concerned two separate physical segments of a pipeline that had different capacities, not a single pipeline with seasonal changes in flow direction. App.24; *Suncor*, 132 FERC ¶ 61,242 at P 4. Petitioner provided no support for its assertion that a single and continuous bi-directional pipeline with uniform capacity, such as the Blue Line, should be viewed as having multiple segments. See *Columbia Gas Transmission Corp.* v.

FERC, 477 F.3d 739, 743 (D.C. Cir. 2007) (no reason to find FERC departed from precedent where petitioner did not undercut distinctions FERC identified).

FERC also distinguished *Suncor* legally. App.24. In *Suncor*, the pipeline's existing prorationing policy was not just and reasonable, so the shippers and the pipeline both submitted proposed revisions. 132 FERC ¶ 61,242 at P 1. The shippers' proposal applied the historical allocation methodology separately to each segment. *Id.* at P 140. FERC found the pipeline's proposal would not be just and reasonable for reasons not relevant here, whereas the shippers' proposal would, and directed the pipeline to adopt the shippers' proposal. *Id.* at P 136. FERC thus did not mandate separate prorationing policies based on different physical segments as a rule; it merely held, of the two proposed policies *in that circumstance*, the pipeline had to adopt that option. *Id.* at P 97.

As the court below held, FERC correctly analyzed and applied *Colonial* and *Suncor*. App.7. There was no inconsistency or departure from precedent.

3. FERC's no-jurisdiction determination regarding the exchange agreement is also consistent with its precedent. FERC undisputedly lacks jurisdiction over the sale of commodities. The exchange agreement here requires Phillips 66 to tender propane to Petitioner at Petitioner's terminals in exchange for a contemporaneous delivery of propane to Phillips 66 at Conway; as in *Western Refining Pipeline Co.*, upon which FERC relied, "there is no need to involve the pipeline at all, for there is nothing for the pipeline to do to make an exchange happen." 122 FERC ¶ 61,210 at P 16, *reh'g denied*, 123 FERC ¶ 61,271 (cited at

App.15); see Intervenors.C.A.Br.11-12. Phillips 66 may supply propane to Petitioner from propane it has already shipped, but it also may—and does—provide propane obtained from other origins. And while the exchange agreement addresses certain elements that are also commonly addressed in transportation agreements, FERC's determination that "the fact that 'an oil pipeline engages in certain activities or provides certain services, and even may include rates for such services in its tariff as a convenience to shippers, does not make the activities or services jurisdictional,'" is squarely in line with precedent. App.15 & n.9 (quoting *ConocoPhillips*, 134 FERC ¶ 61,174 at P 54).

FERC's decision is thus consistent with precedent. App.14-15 & nn.8-10. As the court found after discussing precedent distinguishing transportation agreements from exchange agreements, FERC's analysis is sound. App.8. No departure from precedent occurred.

C. The Petition's question presented and arguments for review are thus not fairly presented by the decision below or determinative of the outcome of this case.

Because the premises underlying the Petition are untrue, the sole basis advanced for review falls apart.

1. Properly read, the decision below does not fairly present the Petition's question presented or supporting arguments. The question presented narrowly asks if there was error below from FERC "departing from the standards embodied in" its "precedent[]" and the court below affirming that by "deferring to FERC's 'interpretation of its own precedent.'" Pet.i. Petitioner (like its amici) repeatedly states-as-fact both notions,

but they are false. See *supra* Parts I.A & I.B; see also S. Ct. R. 15.2.

As a result, this case provides no occasion to decide if a court errs in deferring to an agency's unexplained departure from its precedent through interpretation because, here, there were no unexplained agency departures or meaningful deference given by the court. So even if there were a relevant conflict in authority—there is not, as explained in Part II—this case offers no opportunity to resolve it. The Petition's question is wholly untethered to this case, so opining on it would constitute an abstract, advisory opinion. Review is thus precluded or unwarranted.

2. At minimum, review is unwarranted here because resolving the question presented and supporting arguments would not affect the ultimate outcome.

As explained above, the court analyzed FERC's precedent and found FERC's present order in line with it, even as to the one issue for which the court cited the contested deference principle. See *supra* Part I.A. A ruling by this Court that no deference is due to FERC's interpretation of its precedent thus would not change the result. Any such ruling would at most be relevant to one of three issues, and on that issue especially—but also on the others—the court already analyzed and approved of FERC's treatment of the precedent. The decision below simply did not turn on the question presented and is correct regardless of how that question is resolved.

Similarly, FERC's interpretations of its precedent did not involve any departures. See *supra* Part I.B. The ruling Petitioner seeks would thus have no impact

in this case or on the correctness of the decision below. The question presented is irrelevant to and could not change the outcome here.

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For these reasons, the issue urged for review is not fairly, much less dispositively, presented in this case.

II. The Decision Below Does Not Implicate Any Circuit Split Or Conflict With This Court's Precedent.

Even if one assumes the court below gave FERC some meaningful deference, its decision does not conflict with any decision of another circuit or this Court.

A. The decision below is consistent with uniform circuit precedent and does not conflict with Petitioner's cited rulings.

Petitioner chiefly seeks review by claiming the circuits are divided over whether courts should defer to an agency's interpretation of its own precedent. See Pet.13-18. Petitioner sometimes asserts that this conflict includes courts granting such deference *instead of* requiring reasoned explanations for departures from the precedent. See, *e.g.*, Pet.i, 13, 17. Petitioner's mixing of the principles is confused; indeed, *no* cited case deferred to an agency to allow an unexplained departure from precedent. That did not happen here, either. See *supra* Part I. Petitioner does not identify any two courts deciding the same legal issue in opposite ways or any decision indicating another court would have reached a different result here; instead,

Petitioner simply highlights cases with divergent outcomes based on different facts. Petitioner is wrong to claim there is any relevant conflict among the circuits.

1. For starters, *all* circuits faithfully adhere to this Court's precedent requiring agencies to give reasoned explanations when deviating from prior positions. The cases Petitioner and amici cite merely illustrate application of this principle to different facts; they do not remotely support the claims of a conflict. See Pet.15-18; Amici.Br.7-11. None of those cases address the standard a court should apply when considering whether agency precedent is controlling, let alone hold that courts must review agency precedent *de novo*. In each, the court applied the rule that an agency must provide a reasoned explanation for departing from precedent, considered whether the agency had done so in that case, and, if not, remanded. That is the same rule the D.C. Circuit follows, but it was not at issue here because FERC did not depart from precedent. In short, the differing outcomes cited by Petitioner and amici are attributable to the distinct facts of each case, not a split between the circuits.

Petitioner cites *Shaw's Supermarkets, Inc.* v. *NLRB*, 884 F.2d 34 (1st Cir. 1989), *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157 (5th Cir. 1977), and *Stardyne, Inc.* v. *NLRB*, 41 F.3d 141 (3d Cir. 1994) to argue that three circuits conflict with the D.C. Circuit's approach. See Pet.15-16. That is incorrect.

In *Shaw's Supermarkets*, the First Circuit reviewed an order by the National Labor Relations Board (NLRB) without specifying the applicable standard of review, found the order deviated "signifi-

cantly" from "a relatively clear line" of NLRB precedent without explaining the reasons for the deviation, and remanded for further explanation. 884 F.2d at 41. In so doing, the court emphasized: "In finding the Board's decision in this case inconsistent with its precedents, we do not intend to impose upon the Board the time-consuming obligation of microscopically examining prior cases; nor to encourage counsel to examine past precedent with an eye towards raising hosts of legalistic arguments and distinctions." *Id.* But when the agency "wishes to deviate from well-established precedent as significantly as it has done here, it must, at least, explain the reasons for its deviation." *Id.* at 35. *Shaw's Supermarkets* cited *Atchison* in support of this rule. *Id.* at 36-37. That rule applied on the distinct facts based on the precedent at issue there, but it is inapplicable here because there was no such deviation.

NLRB v. *Sunnyland Packing* similarly does not support Petitioner's position. The Fifth Circuit there *affirmed* the agency action at issue after agreeing with the agency's interpretation of its own precedent—again, without specifying the standard of review. The court found: "The basis for the NLRB action is clear, intelligible, and founded on the frequently reaffirmed [agency precedent]. No departure from prior norms has occurred. Thus there is no need for explication of the basis for the agency's action to enable the court to judge the consistency of that action with the agency's mandate." 557 F.2d at 1160-61. That is what FERC did here: it issued an order based on precedent, did not depart from prior norms, and was therefore not required to provide a more detailed "explication of the

basis" for its action. See also *Atchison*, 412 U.S. at 807 (agency "may articulate the basis of its order by reference to other decisions") (citation omitted). The court below reviewed and properly approved that action.

Stardyne v. *NLRB* also does not conflict with the D.C. Circuit's approach. There, the Third Circuit reviewed an NLRB order and concluded the agency's "failure to follow or repudiate its prior holding…was arbitrary and capricious and a violation of the [APA]." 41 F.3d at 153. As in *Shaw's Supermarket*, the court found that the NLRB order was irreconcilable with precedent. *Id.* at 152-53. Petitioner's argument that *Stardyne* conflicts with the outcome here assumes FERC departed from its precedent, which is untrue; like Petitioner's other cases, the result in *Stardyne* was driven by the particular facts of that case. See *supra* Part I.B. And while the Petition suggests the outcome in *Stardyne* "would have been impossible" if the court reviewed deferentially the agency's interpretation of precedent, Pet.16, that ignores that courts can and do remand agency action that falls outside the "zone of reasonableness." *Prometheus*, 141 S. Ct at 1158; see *infra* Part II.B.2. These cases differ in their result due to distinct facts, not a split of authority.

Amici cite a Ninth Circuit case, *California Trucking Ass'n* v. *ICC*, 900 F.2d 208 (9th Cir. 1990), for the notion that "the typical APA review also leads courts to affirm agency adjudications without needing any *Cassell* deference." Amici.Br.10. This argument rests on amici's unfounded assertion that so-called "*Cassell* deference" is an "added layer of deference" beyond arbitrary-and-capricious review. Amici.Br.3-4. *Califor-*

nia Trucking does not support amici's argument; if anything, the court in *California Trucking* was *more* deferential to the agency than the court below here. The court considered a petitioner's argument that the ICC had deviated from precedent, found it unclear "whether this order was indeed a departure from controlling precedent," applied a deferential standard, and affirmed. 900 F.2d at 213. Regardless, that case—like the rulings Petitioner cited—is readily distinguishable on its facts from, and in no way conflicts with, the decision below.

Citing *Aburto-Rocha* v. *Mukasey*, Petitioner mistakenly asserts the Sixth Circuit is "on the other side of the split" from the First, Third, and Fifth Circuits. Pet.17 (citing 535 F.3d 500 (6th Cir. 2008)). In *Aburto-Rocha*, the Sixth Circuit denied a petition for review of a Board of Immigration Appeals order denying an application for cancellation of removal. 535 F.3d at 501. The court disagreed with the applicant's argument that the BIA had ignored its own precedent in considering whether the alien's removal would result in "hardship," reasoning "[a]n agency's interpretation of its own precedents receives considerable deference" and finding "the BIA did not unreasonably apply its own precedent in rejecting his application." *Id.* at 501, 503. Similar to the courts in the other circuit cases discussed above, and like the D.C. Circuit here, the court reviewed the applicable precedent to determine whether the agency "fairly applied its precedent." *Id.* at 504. The Sixth Circuit's application of a deferential standard when considering whether the agency reasonably interpreted its own precedent is not inconsistent with the other courts, including because none

of those courts disagreed with that standard. There is no conflict between these cases warranting review.

2. Beyond these distinctions between the decision below and the cases Petitioner and amici cite, the fact remains that Petitioner identifies no case where a court permitted an agency to depart from precedent without a reasoned explanation or refused to consider whether an agency had done so. Instead, all circuits agree an agency may not depart from precedent without a reasoned explanation, while the APA also requires all circuits to set aside agency actions only if those actions are "found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

Further, in applying these principles—and contrary to Petitioner's and amici's contentions—the circuits that have specifically addressed the standard of review for an agency's interpretation of its precedent have uniformly held a court *should* apply deference—including the three circuits Petitioner claims have rejected this standard. For example, the First Circuit held an agency "possesses…a not inconsiderable realm of reasonable discretion…to determine how to apply its own past precedents." *Boch Imps., Inc.* v. *NLRB*, 826 F.3d 558, 568–69 (1st Cir. 2016). Similarly, as amici acknowledge, the Third Circuit has explicitly adopted the D.C. Circuit's *Cassell* opinion. *CBS Corp.* v. *FCC*, 663 F.3d 122, 143 (3d Cir. 2011);

see *Cassell* v. *FCC*, 154 F.3d 478 (D.C. Cir. 1998).[3] And the Fifth Circuit applied the principle of deferring to agency interpretation of its own precedent as early as 1979—19 years before *Cassell*. *Seaboard Coast Line R. Co.* v. *United States*, 599 F.2d 650, 652 (5th Cir. 1979). *Accord Li Yong Zheng* v. *DOJ*, 416 F.3d 129, 131 (2d Cir. 2005); *Tinoco Acevedo* v. *Garland*, 44 F.4th 241, 246 (4th Cir. 2022); *Cent. States Enters., Inc.* v. *ICC*, 780 F.2d 664, 678 n.18 (7th Cir. 1985); *Cal. Trucking*, 900 F.2d at 213; *Outokumpo Stainless USA, LLC* v. *NLRB*, 773 F. App'x 531, 533–34 (11th Cir. 2019). This further defeats any claimed conflict: the circuits Petitioner and amici rely on do not differ from the D.C. Circuit on this specific issue, and no circuit has expressed disagreement.

B. The decision below is fully consistent with this Court's precedent.

The specific attacks on the decision below based on this Court's precedent, even if appropriate for review, see S. Ct. R. 10, are likewise misguided.

1. The court's review of FERC's action was entirely consistent with the plurality opinion in *Atchison*, which Petitioner cites for the rule that an agency must "explain its departure from prior norms." Pet.13 (quoting 412 U.S. at 808). As described above,

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[3] Amici claim the Third Circuit's version of *Cassell* deference differs from the D.C. Circuit's because the Third Circuit remanded, Amici.Br.7-8, but that was simply driven by the specific facts of that case.

there was no such departure here, as both FERC and the court below explained. See *supra* Part I.

The *Atchison* plurality also observed: "A further complication [in considering an agency's treatment of prior orders] arises when…the agency distinguishes earlier cases in which it invoked the rule. An initial step…is to specify factual differences between the cases." 412 U.S. at 808. Here, FERC determined which of its precedents applied more closely to these facts and which were distinguishable, and explained its decisions. Some of these decisions required factual determinations squarely within the agency's area of expertise. The court below reviewed FERC's analysis of that precedent and explanations distinguishing certain precedent, and, finding FERC's decisions reasonable, affirmed. No more was required.

2. In this respect, the decision below adheres to the APA and this Court's related precedent.

The APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness" and "permits…the setting aside of agency action that is arbitrary or capricious." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Prometheus*, 141 S. Ct at 1158. The ques-

tion is simply whether "the agency's path may reasonably be discerned." *Fox Television*, 556 U.S. at 513-14. For cases involving agency adjudications of disputes, like this case, the reviewing court considers whether the agency's fact-findings are "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E).

Petitioner sought review under, and the court below applied, the APA arbitrary-and-capricious standard. App.3. Crediting an agency's reasonable interpretation and application of its precedent is consistent with that standard. It is not, as amici assert, an added layer of deference on top of arbitrary-and-capricious review. Amici.Br.4. Nor does it sanction agency departures; agency action is still arbitrary and capricious if it "departs from established precedent without a reasoned explanation." *Mo. Pub. Serv. Comm'n* v. *FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015); *accord Fox Television*, 556 U.S. at 514-16. Departing from precedent means "treating similar situations differently." *W. Deptford Energy, LLC* v. *FERC*, 766 F.3d 10, 21 (D.C. Cir. 2014) (citation omitted); *ANR Pipeline Co.* v. *FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995). Distinguishing precedent—as occurred here—is not the same as departing from it. *Ceridian Corp.*, 435 F.3d at 356.

Further, contrary to amici's position, applying such a standard does not mean "the agency wins every time." Amici.Br.6. Indeed, even the courts citing so-called "*Cassell* deference" still require the agency to engage in reasoned decision-making. See, *e.g.*, *Int'l Transmission Co.* v. *FERC*, 988 F.3d 471, 481 (D.C. Cir. 2021) (affirming FERC "based on a plain reading of" FERC precedent, "*and bolstered by* the deference

that we owe FERC in the interpretation of its own precedent") (citing *Mo. Pub. Serv. Comm'n*, 783 F.3d at 316) (emphasis added); *W. Deptford Energy*, 766 F.3d at 20 (remanding despite deference to agency interpretation of precedent).

This Court has never held that, where an agency relies on its own precedent in an adjudication, a reviewing court must disregard the agency's view and conduct a *de novo* review of that precedent. Neither Petitioner nor amici cite any authority accepting this novel position. It would constitute an unprecedented and unsupported carve-out from the APA and is irreconcilable with the Court's precedent that requires a reviewing court to ensure only "that the agency has acted within a zone of reasonableness." *Prometheus*, 141 S. Ct. at 1158.

3. In urging greater scrutiny of agency application of agency precedent than ever before, Petitioner and amici rely heavily on *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), which clarified the limits of agency deference in the context of construing agency regulations. At the same time, Petitioner concedes "reading statutes and regulations is a different exercise than reading precedent." Pet.20. Yet Petitioner then conflates application of *judicial* precedent with application of *agency* precedent. Pet.21. While courts ought not defer to agencies on legal questions not within the agency's area of expertise, see, *e.g., Kisor*, 139 S. Ct. at 2417, that is not applicable when it comes to an agency's interpretation of *its own* precedent. See, *e.g.*, *Atchison*, 412 U.S. at 808-09 (distinguishing between reviews of judicial application of precedent and agency application of agency precedent).

Case-by-case interpretation and application of agency precedent inherently involves consideration of fact issues falling within the agency's area of technical expertise. This case illustrates the point; for example, Petitioner argued below that agency precedent compelled FERC to require Phillips Pipeline to apply separate prorationing policies to each direction of its bidirectional pipeline, yet Phillips Pipeline, citing competing precedent, argued such a result was not required and that it could prioritize shippers who shipped all twelve months in both directions. App.19. Resolving these contentions required FERC to consider the competing interests of shippers jockeying for access to the pipeline and the pipeline's interest in rewarding its loyal customers, apply the balance struck in its prior orders to new facts, and address Petitioner's factual contention that it could not ship year-round. App.19-22. Such issues are within FERC's statutory expertise. See *Williams Pipe Line Co.* v. *Empire Gas Corp.*, 76 F.3d 1491, 1497 (10th Cir. 1996); see also *Shaw's Supermarkets,* 884 F.2d at 35. And of course, the APA requires deference to agency fact-findings if they are supported by substantial evidence. 5 U.S.C. § 706(2)(E).

To the extent the court here did defer to FERC's interpretation of its own precedent, that was consistent with *Kisor*, the APA, and other law.

III. This Is Not An Adequate Vehicle For Deciding The Question Presented.

Even if the deference principle at issue were worthy of review, this case offers no—or a poor—vehicle for addressing it. The question is not presented and

certainly is not dispositive here, see *supra* Part I, and other reasons also counsel strongly against review.

A. Petitioner did not press the issue below.

This Court's "traditional rule…precludes 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). Petitioner failed to timely argue below against deference to FERC's interpretation of precedent.

As described above, Petitioner raised three issues on petition for review. FERC's response cited distinct deference principles on each issue. FERC claimed its ICA jurisdictional determination regarding the interconnection was entitled to deference under *Chevron* and *City of Arlington* v. *FCC*, 569 U.S. 290, 297 (2013). Resp.C.A.Br.21. FERC claimed its interpretation of its precedent on the prorationing policy was due deference under *International Transmission Co.* v. *FERC*, 988 F.3d 471, 481 (D.C. Cir. 2021).[4] Resp.C.A.Br.28-29. And FERC argued its jurisdictional determination regarding the exchange agreement was due deference based on its experience administering the ICA under *City of Arlington* and *OXY USA Inc.* v. *FERC*, 64 F.3d 679, 700 (D.C. Cir. 1995). Resp.C.A.Br.33.

In reply, Petitioner challenged the assertions of deference under *Chevron* and for jurisdictional rulings. See Pet.C.A.Reply 9, 23. But Petitioner did *not*

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[4] In a general Standard of Review, FERC also cited more cases for this notion. See Resp.C.A.Br.15.

contest the principle to which it now objects—deference to an agency's interpretation of its precedent. Nor had Petitioner addressed this in its opening brief. In fact, neither the concept nor the term Petitioner coins, "*Cassell* deference," appears anywhere in its merits briefing below. Because Petitioner pressed no opposition to this principle, the court had no notice Petitioner contested it. The argument was waived.

Moreover, Petitioner's raising of this argument on rehearing was not sufficient to preserve it. See, *e.g.*, *Baltimore & O.R. Co.* v. *United States*, 298 U.S. 349, 388–89 (1936) (arguments first raised on rehearing "not seasonably presented unless…specifically passed upon" in denial). Petitioner could have pressed its argument in reply, after FERC's brief raised the principle, yet Petitioner did not. And the court did not pass on the issue in denying rehearing. App.31-34. The issue is not presented for review.

B. The question is not presented by, and at least was not sufficiently passed upon in, the non-precedential ruling below.

Also critical is that the court below "passed upon" the question presented. *Williams*, 504 U.S. at 41.

As explained above, the question posed—whether the court erred in deferring to FERC's interpretation of precedent that constituted an unexplained departure from that precedent—is not presented here. See *supra* Part I. The court below certainly did not pass on *that* question, because the court did not simply defer but rather analyzed the precedent and agreed with

FERC, FERC did not depart from precedent, and indeed it is not clear the court deferred at all beyond applying the arbitrary-and-capricious standard.

Further, it cannot credibly be said the court meaningfully passed on the issue of deferring to an agency's interpretation of its precedent. All the court did was cite this principle on one issue to bolster its own analysis of relevant precedent. App.6; see *supra* Part I.A. And for a court to meaningfully pass on an issue, the court must be aware it is contested—which was not true here, see *supra* Part III.A.

Because Petitioner did not litigate below the issue sought for review, and the court did not sufficiently pass on it, it is not properly before this Court. Nor is there any reason to depart from the well-settled rule that this is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

C. At minimum, the question is not cleanly presented and requires resolution of threshold issues.

The Court at least should deny review because the issue is not presented clearly or cleanly here.

As described above, the question presented assumes-as-fact that the court deferred to FERC and FERC's interpretation of precedent departed from the precedent. Both notions are wrong, rendering the question presented an academic one untethered to and not determinative of this case. But at best for Petitioner, both predicates would be debated in this Court if review were granted, and the Court would have to decide these fact-bound predicates before addressing fully or meaningfully the question presented.

The mere existence of such threshold questions counsels strongly against review here. That is especially so because those issues are intensely fact-bound, within the agency's expertise, unlikely to affect other cases, and not worthy of this Court's attention. Given the threshold issues and other vehicle problems, the question is not presented with sufficient clarity from the record or decision below to warrant review here.

IV. The Decision Below Is Correct, And Petitioner's Secondary Challenges To That Ruling Do Not Warrant Review.

On the issue sought for review, the court ruled correctly across-the-board. See *supra* Parts I–II. The court properly applied the arbitrary-and-capricious standard, analyzed key FERC precedent, and found the present order in line with that precedent. Any deference given to FERC's interpretation of precedent was consistent with this Court's decisions, other circuit decisions, and the APA and other law. There is no error to correct. See also S. Ct. R. 10 (certiorari inappropriate for fact-bound claims of error).

Sprinkled throughout the Petition are secondary challenges to the decision below. See, *e.g.*, Pet.2, 11-12, 23-26. For example, Petitioner invokes *Chenery* and argues the court went beyond the bases in FERC's order. Petitioner also asserts other arbitrary-and-capricious attacks, such as to the sufficiency of the explanation by the court and FERC. And Petitioner refers to other deference principles, including *Chevron* and deference to agencies' jurisdictional rulings.

None of these secondary issues are fairly included within the question presented, which narrowly seeks

review *only* on the principle of deferring to an agency's interpretation of its precedent. Pet.i. Further, there was no error below in relation to these issues, they are controlled by settled law on which there is no dispute, and none of the fact-bound issues is worthy of review. See also S. Ct. R. 10.

V. At Minimum, Further Percolation Of The Deference Issue Is Warranted.

Even if the "*Cassell* deference" issue were worthy of attention at some point, denial of review is proper because the Court would benefit from further development of the issue in the lower courts. Petitioner and amici cite relatively few cases citing the principle over the course of 24 years. See Pet.15-18; Amici.Br.6. Apparently no circuit decisions meaningfully analyze it. Indeed, Petitioner apparently invented the moniker "*Cassell* deference." This alone is reason to deny review and allow percolation, especially given the recency of *Kisor* and other agency-deference decisions. The Court should *at least* wait to address this issue in a case where it is preserved and debated below, meaningfully passed on by the court below, and dispositive on or material to the outcome.

VI. Amici States' Arguments Are Misplaced.

Like Petitioner, Amici States inaccurately describe the orders below and advance exaggerated arguments for review that bear no relationship to this case. See, *e.g.*, Amici.Br.1-3, 6, 11-12. For example, amici's arguments turn on the same two unfounded premises as Petitioner's request for review.

Amici also overstate dramatically the interests at stake. They claim various hypothetical harms to federalism, Amici.Br.15-20, all of which has nothing to do with this case, bears no relationship to the orders below, and ignores existing safeguards for states' rights. For example, agencies are required—in the adjudication context—to provide reasoned explanations when departing from prior positions. See *supra* Part II. The APA requires reasoned decision-making, foreclosing the exaggerated harms of which amici warn. And amici disregard that states can intervene in adjudications. See, *e.g.*, 5 U.S.C. § 554(c). Amici's federalism-based contentions are misguided.[5]

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[5] Similarly, Petitioner vastly overstates the importance here by comparing this case to those in which the Court addressed issues of fundamental significance about the interpretive authority of federal agencies on matters of substantial economic and regulatory impacts. Pet.18-19. This case is not remotely comparable to those, either in the deference principle at issue or its specific application on these facts.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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