No. 22-90

In the Supreme Court of the United States

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

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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This case challenges an agency's ability to change course without addressing the precedent from which it departs. While FERC recognizes that unexplained decision-making is impermissible under the Administrative Procedure Act (APA), it ignores the way in which judicial deference facilitates exactly that offense. By purporting to follow precedent, an agency can bypass the requirement of an explanation. After all, following precedent is itself an explanation for agency action, and doing so is necessarily *not* a change of course. That is, if the agency is actually following its precedent. But when that issue is contested, courts are capable of—and responsible for—assessing whether or not the agency is adhering to precedent or using it as cover for unexplained decision-making. There is no reason courts should defer to the agency's say-so on that fundamentally judicial question.

In four short paragraphs, FERC blessed the Phillips Companies' three-part plan to monopolize a pipeline that should operate as a common carrier. App. 14–15 (¶ 12); 16–17 (¶ 15), 21–23 (¶¶ 20–21). It left most of NGL's arguments unaddressed, and its responses "might have profited from further elaboration," as the D.C. Circuit charitably put it. App. 7. When NGL sought judicial review, the Commission retreated to deference, insisting that its decision was entitled to deference as an interpretation of the agency's precedent. CADC Respondent's Br. at 15.

When the D.C. Circuit obliged, it abdicated its duty to scrutinize the Commission's actions as required by the APA and this Court's precedent. The result is a loophole that undermines the separation of powers and, as the Amici States point out, poses a threat to federalism.

I. Lower Courts Disagree Whether and to What Extent Deference Is Due to an Agency's Interpretation of Its Precedent.

No one disputes that agencies can change course. Pet. 13–14. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."). The issue is how agencies can satisfy their obligation to provide a reasoned explanation for such changes. Pet. 14 (citing *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

NGL explained (Pet. 13–18) and Amici confirmed (Amici Br. 7–11) that lower courts are divided on whether and to what extent to defer to an agency's interpretation of its own precedent. FERC denies that there exists a split of authority on the question presented, but its cited cases confirm the disparate approaches among lower courts. FERC Br. 12–15.

For instance, respondents cite the Fourth Circuit's decision in *Tinoco Acevedo* v. *Garland*, 44 F.4th 241, 250 (4th Cir. 2022), for the proposition that "[a]n agency's interpretation of its own precedents receives considerable deference." FERC Br. 13; Phillips Br. 26. It is true, as Amici note, that the Fourth Circuit paid lip service to *Cassell* deference (Amici Br. 7), but the Fourth Circuit

declined to defer and instead remanded the case "for the BIA to interpret its precedent and address [the petitioner's] argument . . . ." *Tinoco Acevedo*, 44 F.4th at 250; see also *id.* at 246 (remand was proper because agency failed to adequately address its precedent). In other words, the Fourth Circuit did what the D.C. Circuit failed to do here: it scrutinized the agency decision, recognized its failure to meaningfully engage with its precedent, and therefore remanded for the agency to engage in reasoned decision-making. Cf. App. 8–9 (assuming FERC "necessarily rejected" precedent-based arguments).

Likewise, FERC attempts to obscure the Third Circuit's approach. It cites *CBS Corp.* v. *FCC*, 663 F.3d 122, 143 (3d Cir. 2011), for the proposition that "an agency's interpretation of its own precedent is entitled to deference." FERC Br. 13. But in *CBS* the Third Circuit vacated the FCC's decision and held that deference was not appropriate because the agency "change[d] a well-established course of action without supplying notice of and a reasoned explanation for its policy departure." 663 F.3d at 138. That is consistent with the Third Circuit's longstanding approach articulated in *Stardyne, Inc.* v. *NLRB*, 41 F.3d 141 (3d Cir. 1994), a decision that features prominently in both NGL's Petition and Amici's brief yet is conspicuously absent from FERC's analysis. There, the Third Circuit afforded no deference to the NLRB's interpretation of its own precedent. Instead, after determining that the agency failed to distinguish controlling precedent, the Third Circuit held that "the Board's failure in this case to follow or repudiate its prior holding . . . was arbitrary and capricious." *Id.* at 153.

The First Circuit also applies arbitrary-and-capricious review without deference to an agency's interpretation of its own precedent. In *Shaw's Supermarkets, Inc.* v. *NLRB*, 884 F.2d 34, 36 (1st Cir. 1989), the First Circuit scrutinized a dozen prior Board decisions before determining that the Board failed to reconcile its prior precedent. Remanding the case for the agency to engage in reasoned decision-making, the First Circuit held that the law is "clear" that an agency cannot deviate from precedent without "explicitly recognizing that it is doing so and explaining why." *Id.* at 36–37 (citing *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 808–809 (1973)).

These cases belie the Phillips Companies' assertion that NGL fails to identify "any decision indicating another court would have reached a different result here." Phillips Br. 20. To the contrary, had the D.C. Circuit applied the analysis articulated by the First, Third, or Fourth Circuits in the above cases, this case would have been remanded for FERC to engage in reasoned decision-making.

To sidestep the issue of how different circuits view *Cassell* deference, respondents attempt to moot the issue with contradictory merits arguments. The Phillips Companies insist that FERC "did not depart from [its] precedent." Phillips Br. 21. Meanwhile FERC notes "confusion" about whether the agency followed precedent or instead "consider[ed] that precedent in a context involving a different set of facts." FERC Br. 15. This disagreement would not exist if the D.C. Circuit required of

FERC what the First, Third, and Fourth Circuits required in the cases above—*i.e.*, reasoned decision-making explaining whether the agency was "follow[ing] or repudiate[ing]" its precedent, *Stardyne*, 41 F.3d at 153. Had FERC provided the reasoned decision-making that *Cassell* deference bypasses, there would be no room for respondents to trip over each other's rationalizations. Instead, FERC cursorily declared certain precedent not "applicable" and thereby avoided meaningful review, which the D.C. Circuit endorsed by supplying its own analysis and citing *Cassell* deference. See App. 6, 23.

Even if there were no circuit split on the question presented, the Court "regularly grants certiorari even absent a circuit conflict where—as here—the case raises questions of fundamental importance regarding the limits of federal agency interpretive authority on matters of enormous economic and regulatory consequence." *Am. Hosp. Ass'n* v. *Becerra*, No. 20-1114, at 16 (U.S. June 15, 2022). That rationale applies with full force here, especially when coupled with the D.C. Circuit's outsized influence on administrative law. *See* Pet.18–19.

II. Deference to FERC's Interpretation of Its Precedent as a Substitute for Reasoned Decision-Making Permeates the Opinion Below.

Respondents offer three arguments for why deference was unimportant in this case. First, they maintain that the D.C. Circuit deferred to FERC's interpretation of precedent in permitting only one of the Phillips Companies' three mechanisms for monopolizing the Blue

Line. That assertion is mistaken, but even if true, it concedes that the issue of *Cassell* deference as a bypass for reasoned decision-making is before the Court. Second, respondents beg the question by declaring that the precedent FERC ignored was inapt. The issue is not whether NGL is correct about FERC's precedent but whether FERC's treatment of it was adequately explained *at the time*—either directly or through a valid form of deference. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). Third, both respondents attempt a waiver argument that their own briefs contradict. Ultimately, this case is an ideal vehicle for clarifying agencies' duty to face arguments about precedent and courts' role in reviewing those explanations.

1. FERC invoked deference to "the Commission's interpretation of its own precedent" for every issue NGL challenged before the D.C. Circuit. CADC Respondent's Br. at 15, 21. It did not segregate its demand for deference based on which of the Phillips Companies' contested actions was at issue, nor would there have been any reason for doing so.

And FERC got what it wanted. Throughout its opinion, the D.C. Circuit deferred to the Commission's interpretation of its own precedent. See Pet. 12, 22–26. It cited the same *Cassell* progeny that FERC cited with no indication that such deference would apply to one of the Phillips Companies' tactics but not the other two. App. 6 (citing *Mo. Pub. Serv. Comm'n* v. *FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015)).

The notion that the D.C. Circuit applied a different standard of review to each of the Phillips Companies' actions is nonsensical. The linchpin of respondents' argument is that the D.C. Circuit cited *Missouri Public Service Commission* in its analysis of the prorationing policy, from which respondents argue that the court must have applied a different standard elsewhere. Phillips Br. 11. The opinion tells a different story. Regarding jurisdiction over the Supply & Exchange Agreement, the court approved FERC's order because it "referenced precedent" and therefore "necessarily rejected" NGL's argument that "the Commission failed to respond meaningfully" to its cited cases. App. 8–9. The only way that "referenc[ing] precedent" is a "meaningful[]" response is if the court accepts that reference without demanding an explanation. In fact, finding a necessary implication that the agency rejected precedent-based arguments is possibly the purest form of deference.

Even if correct, however, respondents' argument does not weigh against this Court's review. Improper deference on one of three contested actions is sufficient for review in this Court. To avoid that outcome, FERC speculates that the D.C. Circuit was "was independently prepared to reach" the same conclusion without deference. FERC Br. 10; see also *id.* at 18 ("[T]he D.C. Circuit *appears to have believed* that the Commission had the better reading of its precedent even without deference." (emphasis added)). But the D.C. Circuit said none of that. Conjectural alternatives for a lower-court holding are not enough to escape this Court's oversight.

2. Respondents' efforts to backfill a rationale for its conclusion are unpersuasive and improper. The agency's rationale must be stated in its order. *Chenery*, 318 U.S. at 87. Thus, the Phillips Companies miss the mark by citing rationales that the Commission never mentioned. *E.g.*, Phillips Br. 9 (arguing alternatives to interconnection), 12 (discussing the *court's* analysis of precedent that FERC never mentioned). FERC's opposition brief repeats the fundamental problem with its original order: it simply declares that earlier FERC precedent "involved dissimilar facts." FERC Br. 10. But whether the FERC precedent cited by NGL is "similar" is the very question that FERC skipped by ignoring contrary precedent or "interpreting" it to match the desired outcome and then invoking deference. The Commission cannot avoid review by assuming the conclusion it did not explain at the time.

The interconnection pipe is illustrative. The Commission's order made no attempt to distinguish—and failed even to mention—its previous understanding of its statutory jurisdiction over "*all instrumentalities and facilities* of shipment and carriage" and "*all service* in connection with the *receipt*, delivery . . . transfer in transit, storage, and handling of property transported." 49 U.S.C. App. § 1(3) (1988) (emphasis added). With respect to the interconnection pipe, NGL appealed to the holding in *Lakehead Pipe Line Co., LP*, 71 FERC ¶ 61,338 (1995). That case recognized jurisdiction over any "integral part of the overall transmission function." *Ibid.*; see Pet. 23–24. The Commission never even cited that precedent. Its

appeal to a different case that addressed storage facilities—which no one believes characterizes the interconnection pipe—only underscores the problem. Pet. 24 (noting that the other interconnections identified by respondents have FERC-approved tariffs).

Maybe the Commission will ultimately succeed in distinguishing its prior precedents. But it must do so in contemporaneous, reasoned decision-making.

3. On the last page of its brief, the Commission makes a half-hearted argument for waiver. FERC Br. 18–19. It finds no support in the record. NGL has consistently insisted on a reasoned explanation for FERC's departure from its precedents. *E.g.*, CADC Petitioner's Br. at 15 ("In the few instances in which FERC actually addressed NGL's arguments, FERC misinterpreted its own precedents, rendering its explanations arbitrary and capricious."); CADC Reply at 23 (disputing FERC's argument "that its ruling that it lacks jurisdiction over the agreement deserves 'deference,'" and seeking remand for the Commission to respond to NGL's cited precedent). On the other hand, FERC expressly requested deference under *Missouri Public Service Commission*, a recent descent of *Cassell*. NGL has consistently pled for reasoned decision-making and opposed FERC's efforts to shield its unexplained order as an "interpretation" of precedent that is entitled to deference.

FERC's observation that NGL did not cite *Cassell* focuses too narrowly. Preservation "does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460,

469 (2000). In fact, just one page before attempting a waiver argument, the Commission correctly summarizes the issue: "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." FERC Br. at 17; see also Phillips Br. 1 ("departed from its prior precedent without a reasoned explanation . . . and that the court of appeals allowed this by simply deferring to FERC's interpretation of its precedent."). Well stated. With the issue properly framed—*i.e.*, as an APA challenge to the lack of an adequate explanation for FERC's departure from precedent, which the D.C. Circuit declined to review based on deference—there is no argument that NGL has not been pressing these claims all along.

III. FERC's Merits Argument Reveals the Impropriety of Courts Deferring to Agencies' Interpretation of Precedent.

The Commission offers a preview of its merits argument supporting judicial deference to agencies' interpretation of their own precedent. FERC Br. 15–17. The points are interesting but ultimately unpersuasive.

First, the Commission contends that *Cassell* deference is a corollary of arbitrary-and-capricious review under the APA. *Id.* at 15. In doing so, it treats an agency's conclusion about the meaning of its precedent as the decision under review. But the meaning of agency precedent is not itself the decision. Rather, it is an input to the agency's decision regarding, for example, whether pipes that carry propane are within its statutory jurisdiction.

And deference on any input—including the meaning of a statute, regulation, or precedent—is not automatic under the APA. That was exactly the question on which the Court granted certiorari in *Kisor*: "Kisor first attacks *Auer* as inconsistent with the judicial review provision of the Administrative Procedure Act." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2418 (2019) (plurality). While *Kisor* ultimately shed little light on that question because the Court unanimously agreed that the Department of Veterans Affairs had interpreted the regulation correctly, the point for current purposes is that the APA does not compel deference. And improper deference, like the examples listed in *Kisor*, violates the APA. *Id.* at 2417–2418; *Christopher* v. *Smithkline Beecham Corp.*, 567 U.S. 142, 155 (2012) ("convenient litigating position"); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170–171 (2007) ("unfair surprise").

Second, the Commission follows the Sixth Circuit in characterizing *Cassell* deference as derivative of *Auer* deference. FERC Br. 16; *Aburto-Rocha* v. *Mukasey*, 535 F.3d 500, 503 (2008). That may be true, but it is not a reason to validate *Cassell* deference. The Commission's assertion that, like construing regulations, interpreting precedent involves "policy judgment" (FERC Br. 16) relies on a concept that did not persuade a majority of this Court in *Kisor*. 139 S. Ct. at 2413 (plurality). Equally importantly, *Kisor*'s "markers" for the "context and character" analysis weigh against deference to agencies' interpretation of precedent. For example, courts should not defer to "convenient litigating positions" and "*post hoc* rationalizations," or "when an agency substitutes one

view of a rule for another." *Id.* at 2418–2417. This case illustrates how the context and character of *Cassell* deference necessarily tends to transgress each of those markers. Pet. 3, 21.

Third, and related, FERC argues institutional competence. FERC Br. 17. It acknowledges that "agencies may lack comparative expertise in interpreting judicial opinions," but asserts that "the same is not true of the agency's own decisions." *Ibid.* Unfortunately, that is the end of the paragraph. Interpreting precedent is precisely what courts do in a common-law system. As noted in the Petition, the only exception is deference to state courts' interpretation of state law under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), which is based on dual sovereignty, not competence. In fact, federal appellate courts do not defer to lower courts in interpreting state precedent—*i.e.*, where there is no concern for separate sovereignty, deference does not make sense for quintessentially judicial functions. *Salve Regina College* v. *Russell*, 499 U.S. 225, 231 (1991). Or as *Kisor* summarized it, "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." 139 S. Ct. at 2417.

The Commission's merits arguments underscore the importance of this issue. They implicate the separation of powers at the heart of the Constitution and indicate how lower courts and agencies are misperceiving this Court's precedent, especially *Kisor*. Pet. 3–4, 19–22. These are precisely the concerns that drove half a dozen Amici States to urge review of this pernicious form of

deference. The Court should grant the petition and confirm that agency "interpretations" of precedent are not a substitute for reasoned decision-making.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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