No. 10-890

MAR 1 1 2010

In The Supreme Court of the United States

MIDLAND CENTRAL APPRAISAL DISTRICT,

Petitioner,

v.

BP AMERICA PRODUCTION CO., AMERADA HESS TRADING COMPANY, CHEVRON USA, INC., CHEVRONTEXACO PRODUCTS COMPANY, CHEVRONTEXACO GLOBAL SUPPLY AND TRADING COMPANY, TEPPCO CRUDE OIL LLC AND TEPPCO CRUDE P/L LLC,

Respondents.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Eleventh Appellate District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a state intermediate appellate court's decision applying the Commerce Clause analysis established by *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) on a state tax assessed on oil moving in an interstate pipeline on its way to out-of-state refineries?

LIST OF PARTIES

The caption of the case lists the parties to the proceeding.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent BP America Production Company

BP America Production Company's parent company is BP Company North America, Inc. No other publicly held company owns 10% or more of BP America Production Company's stock.

Respondent Amerada Hess Trading Company

Amerada Hess Trading Company's parent company was Amerada Hess Corporation. Amerada Hess Corporation has changed its name to Hess Corporation. No other publicly held company owns 10% or more of Amerada Hess Trading Company's stock.

Respondent Chevron USA, Inc.

Chevron USA, Inc.'s parent company is Chevron Corporation. No other publicly held company owns 10% or more of Chevron USA, Inc.

Respondent ChevronTexaco Products Company

ChevronTexaco Products Company was an unincorporated division of Chevron USA, Inc. ChevronTexaco Products Company has changed its name to Chevron Products Company. As an unincorporated division of

RULE 29.6 CORPORATE DISCLOSURE STATEMENT – Continued

Chevron USA, Inc., there is no separate ownership of Chevron Products Company. Chevron USA, Inc.'s parent company is Chevron Corporation. No other publicly held company owns 10% or more of Chevron USA, Inc.

Respondent ChevronTexaco Global Supply and Trading Company

ChevronTexaco Global Supply and Trading Company was an unincorporated division of Chevron USA, Inc. ChevronTexaco Global Supply and Trading Company's activities have been transferred to Chevron Products Company. As an unincorporated division of Chevron USA, Inc., there is no separate ownership of Chevron Products Company. Chevron USA, Inc.'s parent company is Chevron Corporation. No other publicly held company owns 10% or more of Chevron USA, Inc.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Midland Central Appraisal District ("appraisal district") seeks a writ of certiorari to resolve a purported conflict between a Texas intermediate appellate court and the Oklahoma Supreme Court. The issue in *In re Assessment of Personal Prop. Taxes Against Mo. Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S. Ct. 1685 (2010) (*Missouri Gas*), was whether the Commerce Clause prohibited a tax on petroleum products removed from a pipeline and placed in a storage facility for several months. At issue in this case, in contrast, is a tax on oil moving quickly in an interstate pipeline system through Texas on its way to out-of-state refineries. Storage was a key factor in *Missouri Gas*. Tariffs in this case prohibited storing oil at the transportation facility. The two cases resulted in different outcomes only because they involved different facts. Thus, there is no conflict for this Court to resolve.

In addition, the Texas intermediate appellate court properly applied the controlling Commerce Clause analysis in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) to evaluate whether the appraisal district's efforts to tax the oil were proper. The appraisal district does not argue that a different legal test should govern. It instead claims that the intermediate court improperly applied the *Complete Auto* test to the facts at issue here. Asking the Court to supervise and

review particular facts is the kind of error correction in which this Court does not engage.

RESPONSE TO STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review the judgment of the state intermediate appellate court. As detailed below, the intermediate appellate court based its judgment on independent state law grounds. "[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). The Texas Supreme Court denied review of the court of appeals' opinion. Also, there is no conflict on an important federal question. The petition raises error with the application of the facts to a well-established legal principle.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. art. I, § 8, cl. 3: Regulation of Commerce

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

TEX. TAX CODE § 11.01 Real and Tangible Personal Property

> (a) All real and tangible personal property that this state has jurisdiction to tax is taxable unless exempt by law.
>
> (b) This state has jurisdiction to tax real property if located in this state.
>
> (c) This state has jurisdiction to tax tangible personal property if the property is:
>
> > (1) located in this state for longer than a *temporary period*;
> >
> > (2) temporarily located outside this state and the owner resides in this state; or
> >
> > (3) used continually, whether regularly or irregularly, in this state.
>
> (d) Tangible personal property that is *operated or located exclusively outside this state* during the year preceding the tax year and on January 1 of the tax year is not taxable in this state.

TEX. TAX CODE § 11.12 Federal Exemptions

> Property exempt from ad valorem taxation by federal law is exempt from taxation.

TEX. TAX CODE § 21.02 Tangible Personal Property Generally

> (a) Except as provided by Subsections (b) and (e) and by Sections 21.021, 21.04, and

21.05, tangible personal property is taxable by a taxing unit if:

> (1) it is located in the unit on January 1 for more than a temporary period;
>
> (2) it normally is located in the unit, even though it is outside the unit on January 1, if it is outside the unit only temporarily;
>
> (3) it normally is returned to the unit between uses elsewhere and is not located in any one place for more than a temporary period; or
>
> (4) the owner resides (for property not used for business purposes) or maintains the owner's principal place of business in this state (for property used for business purposes) in the unit and the property is taxable in this state but does not have a taxable situs pursuant to Subdivisions (1) through (3) of this subsection.

. . .

STATEMENT OF THE CASE

This case involves an ad valorem tax assessed on oil moving through a tank farm facility in Midland, Texas as part of its interstate journey to out-of-state refineries. The Respondents prevailed at trial and on appeal in arguing that the oil was not taxable for several independent reasons, including the application of

state law. The appraisal district failed to convince the Texas Supreme Court of the importance of the issues or of any alleged errors, and the Texas Supreme Court denied review. The appraisal district seeks a writ of certiorari from the state intermediate court of appeals' decision.

Because the appraisal district misstates several key facts, the Respondents BP America Production Company, Amerada Hess Trading Company, Chevron USA, Inc., ChevronTexaco Products Company and ChevronTexaco Global Supply and Trading Company (collectively "Oil Companies"), submit the following factual background based on the trial court's findings of fact.[1] SUP. CT. R. 15.2.

A. Factual background

The Oil Companies and their businesses. The Oil Companies are among the many shippers who move oil through an interstate, FERC-regulated pipeline system that originates in West Texas on its way primarily to out-of-state refineries. Pet. App. 26-27 (FF 2, 3, 6, 12). Once the Oil Companies inject oil

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[1] The trial court's findings of fact and conclusions of law are in the Clerk's Record 348-54 and are in Petitioner's Appendix 25-35. The Clerk's Record contains documents filed in the trial court and is referenced "CR." The Reporter's Record contains the transcription of the trial testimony and trial exhibits and is referenced "RR" with reference to a volume and page number. Exhibits are referenced "Px" or "Dx." Findings of fact and conclusions of law are referenced "FF" and "CL."

into the pipeline system, the oil becomes part of a common stream and moves under the sole control and custody of pipeline companies who operate the pipeline system. *Id.* (FF 8, 10).

The Oil Companies do not own massive quantities of oil in the Midland Tank Farm. Contrary to the appraisal district's statement, none of the Oil Companies (also known as "shippers") can determine the location of their oil in the pipeline system, much less the tank farm. *Id.* 32 (FF 48, 49, 50). In fact, it is impossible for anyone to identify the location on the pipeline system or ownership of any specific barrel. *Id.* Once a shipper inputs oil into the pipeline system, it has the right to withdraw an equivalent number of barrels. *Id.* 27 (FF 11).

Contrary to the appraisal district's characterization, the oil is not brought to Midland, Texas to sell. Pet. 4-5, 23. The oil is traded throughout the entire pipeline system, and trading does not interrupt the oil's continued movement. Pet. App. 31-32 (FF 43-52). Further, neither the Oil Companies nor the pipeline companies have any business purpose in keeping the oil in Midland, the county that assessed the tax on the oil. RR 2:105; RR 3:112; RR 5:97-98; RR 6:14; RR 7:67, 82. Midland is not a destination for the oil nor are there end-users or refineries in Midland. RR 3:69, 74; RR 5:109. In fact, Texas is not the oil's final destination. Ninety percent of the oil in the Midland Tank Farm leaves Texas for refineries located out of state. Pet. App. 27, 30 (FF 12, 39).

The tanks in the tank farm further transportation; they do not store oil. During its journey to out-of-state refineries, the oil moves through the Midland Tank Farm where it remains for only six to 72 hours. *Id.* 28 (FF 24). The oil travels across Texas in no more than two and a half weeks. *Id.* 31 (FF 42). The tank farm is a part of the pipeline system. *Id.* 28 (FF 19). It is undisputed that the oil was not removed from the pipeline, was not stored in the tank farm, and instead remained in transit through the tank farm. *Id.* 27-30 (FF 14-21, 30-37).

Contrary to the appraisal district's characterization, blending or batching oil in the tank farm does not facilitate marketing. The oil does not travel to the tank farm to be blended as the appraisal district suggests. Pet. 4. Blending and batching are operational functions necessary to facilitate the transmission of the oil and do not interrupt continuity of transit. Pet. App. 29 (FF 25). Only a small portion of oil was blended. RR 5:38; RR 6:12-14; 2:93; 7:24.

Contrary to the appraisal district's repeated theme, the tanks in the Midland Tank Farm cannot store oil; they are solely used to facilitate transportation to out-of-state refineries. Pet. 12-15; Pet. App. 27-30 (FF 12, 19, 21, 30, 31 36, 37, 39). The Midland Tank Farm is not a "depot," "entrepot," "holding tank," or place where the oil is brought to be sold. Pet. 21-22; DCAD amicus Br. 8; Pet. App. 27-30 (FF 12-21, 31-37). Tariffs governing the Midland Tank Farm expressly prohibit storage. 2nd Supp. RR Px 19 (Item 10 p. 6); Dx 22 (Item 11 p. 13); Dx 57 (Item 125 p. 9).

Constant presence of oil. The appraisal district also mischaracterizes the "constant presence" of oil in Midland County. Oil constantly moves through the pipeline and tank farm. RR 3:46-47, 117-18; RR 5:59; RR 7:46; RR 8:27-28; RR 9:127-28. Contrary to the appraisal district's assertion, the pipeline system, which includes the tanks, must have oil in it to operate. Pet. App. 27-30, 32 (FF 15, 17, 24, 30, 39 & 53); RR 3:45-47; RR 5:59-60; RR 6:41-42, 91-92; RR 7:46; RR 8:27-28. The oil in the tank farm, however, is not the same oil from one day to the next. Any accumulation of oil in the tanks is solely to maintain a minimum tank volume incidental to the oil's transmission and is not for storage. Pet. App. 27-30 (FF 14-22, 30-36).

Taxes are paid by the entities receiving governmental services. The Oil Companies are not, as the appraisal district claims, "exempted from taxation." Pet. 8, 10. The pipeline companies, which own and operate the tank farms, pay taxes on the tank farm's pipelines, tanks, and equipment, which is the property that receives governmental services from the Midland County taxing entities. Pet. App. 33 (FF 57). Likewise, the oil is not "exempted." Property taxes are paid on oil in the ground as reserves. TEX. TAX CODE § 23.175 ("TAX CODE"). Production taxes are paid on oil produced in Texas. *Id.* § 202.051; Pet. App. 6, n.3.[2] Further, oil is taxed once it reaches a refinery. Pet. App. 33 (FF 58).

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[2] The footnote is numbered "3" in Petitioner's Appendix. The footnote is number "1" in the court's opinion.

B. Proceedings below

Before 2003, the appraisal district did not attempt to tax oil in the tank farm or the pipeline system. Pet. App. 26 (FF 4). In 2003, in an effort to increase tax revenue, the appraisal district concluded for the first time that the oil in the Midland Tank Farm was taxable and appraised the oil. The only oil the appraisal district seeks to tax in this lawsuit is the oil moving through the Midland Tank Farm on January 1 of tax years 2003 and 2004.

After exhausting their administrative remedies, the Oil Companies filed the underlying lawsuits challenging the appraisal district's actions.

In the trial court, the Oil Companies challenged taxation on the following bases: (1) the state has no jurisdiction under state law to tax the oil, (2) if taxable under state law, the Commerce Clause of the United States Constitution bars taxation of the oil, (3) if taxable and not exempt, the oil does not have situs under state law to be taxed in Midland County, (4) the appraisal district impermissibly taxed an intangible contract right in violation of state law, and finally, (5) the appraisal district used an illegal method to allocate portions of the oil's value to the Oil Companies, also in violation of state law. CR 70-89; 90-104; 105-23.

Following a bench trial, the trial court concluded that the state lacked jurisdiction to tax the oil under Texas Tax Code § 11.01 and ordered the appraisal district to remove the oil from its appraisal roll.

Resp. App. 1-3. In its findings of findings of fact and conclusions of law, the trial court found for the Oil Companies on three alternative grounds that the oil was not taxable and also found the allocation method was unlawful. Pet. App. 34-35 (CL 1-6).

In affirming the trial court's judgment, the Court of Appeals for the Eleventh District of Texas (Eastland Court of Appeals) discussed two of the three bases for the court's determination that the oil was not taxable. First, the court ruled that the oil had entered the stream of interstate commerce and remained in continuous transit. Pet. App. 10-15. In so holding, the court rejected the appraisal district's argument that the oil was taxable because it was not in the stream of interstate commerce. *Id.* 10-11.

Next, the court addressed the validity of the tax under the Commerce Clause. The court applied the *Complete Auto Transit* factors and concluded that the oil did not have substantial nexus to the state and therefore the tax violated the Commerce Clause. *Id.* 15-18. Alternatively, the appellate court held the tax was improper because the oil remained in Midland County only temporarily and thus did not have situs under state law to allow taxation. *Id.* 18-19. The court did not expressly address whether the state had jurisdiction to tax the oil or reach the validity of the allocation method (which would require remand to the court of appeals).

The appraisal district petitioned for review with the Supreme Court of Texas. The Texas Supreme

Court denied the petition without comment and denied the appraisal district's motion for rehearing. *Id.* 23-24.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Court should deny the appraisal district's petition for writ of certiorari for several independent reasons. First, there are two jurisdictional bars to this Court's review. Second, in reaching its decision, the intermediate state appellate court decision applied long-standing precedent from this Court. Any purported conflict between the decision under review and the Oklahoma Supreme Court is based on factual distinctions. Finally, the suggested reasons for granting certiorari are contrary to existing Commerce Clause jurisprudence. The substantial nexus element in *Complete Auto Transit* is based on many factors. No factor alone controls the nexus analysis.

I. There is no basis for U.S. Supreme Court jurisdiction.

A. Two adequate and independent state law grounds support the judgment.

The appellate court held that the oil was not taxable based on an adequate and independent state law ground (situs) separate from the federal issue raised in the case. The trial court ruled for the Oil Companies on another state law ground (jurisdiction).

Resp. App. 1-3. In its opinion, the court of appeals addressed situs in detail. Although it did not address jurisdiction except for mentioning the underlying statute, the appellate court affirmed the trial court's judgment that there is no jurisdiction under state law to tax the oil. Resp. App. 4. Accordingly, an opinion from this Court on the federal law issue would be purely advisory and beyond its authority. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

1. State law controls state tax issues.

The appraisal district and TASB amici contend that Texas's jurisdiction to tax is "co-extensive" with the federal constitution to support their argument that the state law grounds are not independent. Pet. 30; TASB amici Br. 18-19.

State law, not federal law, is the source of the state's authority to tax property moving in interstate commerce. *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 108 (1994) (states have broad discretion to configure their systems of taxation). The Commerce Clause does not expand the scope of a state's authority to tax property. Under principles of federalism, federal law sets the minimum protections with which all states must comply. *Id.* State law, on the other hand, establishes the ceiling. *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986). Thus, even if federal law is not a barrier to a state tax, state law may be a barrier. State law, in other words, cannot "subtract from those rights guaranteed by the United States Constitution," but

nothing prohibits a state from providing additional protections to its citizens. *Sax v. Votteler*, 648 S.W.2d 661, 664 (1983).

Under the Texas ad valorem tax system, the appraisal district must overcome three hurdles to assess an ad valorem tax. First, the state must have jurisdiction to tax the property. Second, the property must not qualify for an exemption. And, finally, if there is jurisdiction and no applicable exemption, then situs (location) must be established in a particular Texas county.

In its argument that there is no independent state law ground, the appraisal district blends these concepts when they are in fact separate and distinct. Pet. 31; TAX CODE §§ 11.01(c)(1); 11.12 & 21.02(a)(1).

The first inquiry in determining taxability of property in Texas is whether the state has jurisdiction. TAX CODE § 11.01(c)(1-3) (establishing state's jurisdiction to tax personal property.) Generally, there is jurisdiction to tax personal property that is located in the state for "longer than a temporary period." *Id.* at § 11.01(c)(1). "More than a temporary period" means more than a limited time based on the owner's intent and type of property. *See Patterson-UTI Drilling Co. v. Webb County Appraisal Dist.*, 182 S.W.3d 14, 16, 18 (Tex. App. – San Antonio 2005, no pet.) (interpreting "temporary period" in the situs statute). If there is no jurisdiction, the inquiry ends and the property is not taxable and no other arguments are reached. This is exactly what the trial court concluded in its judgment. Resp. App. 1-3. Contrary to the

appraisal district's assertion, the court of appeals cited § 11.01, but did not expressly address the issue. Pet. App. 9-10. The court of appeals' judgment, however, affirmed "in all things" the trial court's judgment. Resp. App. 4.

If the state has jurisdiction to tax the property, the next inquiry is whether the property qualifies for an exemption. *See* TAX CODE §§ 11.11-.33. As applicable here, Texas law incorporates federal law. Property exempted under the Commerce Clause is also exempt under state law. *Id.* § 11.12. The court of appeals addressed this issue and, applying *Complete Auto*, concluded that the tax violated the Commerce Clause because no substantial nexus existed. The case cited by the appraisal district recognizes the distinction between jurisdiction and exemptions. *Dallas County Appraisal Dist. v. L.D. Brinkman & Co. (Texas), Inc.*, 701 S.W.2d 20, 22 (Tex. App. – Dallas 1985, writ ref'd n.r.e.).

Finally, if the state has jurisdiction to tax property and it is not exempt, then the last inquiry is where the property is located for tax purposes (situs). TAX CODE § 21.02(a). A property has situs if it is located in a Texas county on January 1 for "more than a temporary period." *Id.* at § 21.02(a)(1). "More than a temporary period" means more than a limited time based on the owner's intent and type of property. *See Patterson-UTI Drilling*, 182 S.W.3d at 16, 18. The court of appeals held that the oil was not taxable because there was no situs under § 21.02(a)(1). Pet. App. 18-19.

2. State law grounds are different than federal law.

The appraisal district suggests that the analysis of the Commerce Clause and situs issues is the same. But they address different matters and are governed by different standards. The state law ground judges the situs of *property* for purposes of state taxation. The Commerce Clause judges the appropriateness of a *tax*.

As it relates to taxing property moving in interstate commerce, jurisdiction and situs under Texas law have a different standard than federal law. Under Texas law, property is not taxable if it is in the state or in a particular county only temporarily, without further inquiry. TAX CODE § 11.01(c)(1); § 21.02(a)(1). Under *Complete Auto*, in contrast, a state tax is analyzed under four factors. Unlike the state law, federal law analyzes more than time in a state and considers additional connections to the state. *Compare* TAX CODE §§ 11.01(c)(1) & 21.02(a)(1) *with Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 279.

The appraisal district contends that if there is nexus under the Commerce Clause, then there is situs under Tax Code § 21.02. Unlike the appraisal district's contention, "nexus" from the Commerce Clause does not overlay onto the "temporary period" in § 21.02(a)(1) and in § 11.01(c)(1). Instead, the state statutes are based solely on time. Further, there is no need for § 11.01(c)(1) (jurisdiction) or § 21.02(a)(1) (situs) to rely on federal law. The state law exemption

provision applicable to property moving in interstate commerce expressly incorporates federal law. TAX CODE § 11.12 ("Property exempt from ad valorem taxation by federal law is exempt from taxation.").

3. The court of appeals treated the Commerce Clause issue separate from the state law situs issue.

Recognizing these principles, the court of appeals reached two separate holdings – one on the Commerce Clause and one on situs. *See Michigan v. Long*, 463 U.S. at 1040-41. Unlike the appraisal district's and TASB amici brief arguments, the court of appeals did not blend its Commerce Clause and situs discussions. Pet. 32; TASB amici Br. 18-19.

First, the opinion reveals that the Commerce Clause and situs holdings are separate and independent grounds. *See Florida v. Powell*, ___ U.S. ___, 130 S. Ct. 1195, 1202 (2010). The court of appeals identified at the beginning of its analysis its ultimate conclusions as separate and distinct: "the tax violated the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, and . . . the tax was not valid under (Texas Tax Code) Section 21.02(a)(1) due to the temporary period during which the oil was located in Midland County." Pet. App. 10. The court discussed the Commerce Clause and situs in separate parts of the opinion delineated by separate headings, one entitled, "Validity of Tax Under Commerce Clause,"

and the other entitled, "Validity of Tax Pursuant to State Law." *Id.* 15, 18. The opinion's distinct sections provide a "plain statement" that the decision rested on two separate grounds, one of which is an independent and adequate state law matter. *Long*, 463 U.S. at 1040-41. In its concluding paragraph of the appraisal district's appeal, the court again reiterated the separateness of the holdings. Pet. App. 19 (tax not valid under the Commerce Clause *or* § 21.02(a)(1)).

Second, the court of appeals did not treat situs and the Commerce Clause issue as "interchangeable and interwoven." *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 163-65 (1917); *cf. Florida v. Powell*, 130 S. Ct. at 1202. In its situs discussion, the court did not cite or incorporate federal law. Pet. App. 18-19; *cf. Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984). Instead, the court cited the state law provision and proceeded to discuss the facts that demonstrated that the oil was not in Midland County for more than a "temporary period." Pet. App. 18-19 (oil "merely traveled through Midland County," "any delay" was temporary).

Finally, that the court looked to the same facts to support its two independent holdings is not controlling. For example, in *Diamond Shamrock*, the Texas Supreme Court looked to the same facts – stored oil, removed from transit in its state of final destination – to find both nexus and situs. *Diamond Shamrock Ref.*

& Mkt'g Co. v. Nueces County Appraisal Dist., 876 S.W.2d 298, 304 (Tex. 1994).

B. There is no conflict and no important federal question.

On the recommendation of the U.S. Solicitor General that there was no conflict warranting review, this Court denied certiorari in a similar case last year. Brief for the United States as Amicus Curiae at 7-9, 11-12, *Missouri Gas,* (08-1458). Nothing has changed since the Solicitor General's recommendation. *Id.* 7. The potential for conflict between Texas (if the Texas Supreme Court granted review) and Oklahoma foreshadowed by the Solicitor General did not materialize.

The Texas Supreme Court denied review of this case twice. Pet. App. 23-24. First, after requesting full briefing, the Texas Supreme Court denied the appraisal district's petition for review. *Id.* 23. The Court again denied review after a protracted motion for rehearing process that involved numerous filings both by the appraisal district and by amicus curiae that supported the appraisal district's position. *Id.* 24. The Texas Supreme Court also denied review in *Peoples Gas, Light, & Coke Co. v. Harrison Cent. Appraisal Dist.*, 270 S.W.3d 208 (Tex. App. – Texarkana 2008, pet. denied), *cert. filed*, No. 10-896, involving a similar issue from a different appellate district.

Without a Texas Supreme Court opinion, there is no conflict as contemplated by Rule 10(b). *See* SUP.

CT. R. 10(b) (jurisdiction based on conflicting decisions from state courts of last resort). The rule envisions the states' highest courts weighing in after issues have developed and "matured" in the state's lower courts. As the DCAD amicus brief and LCAD amici brief demonstrate, this issue may arise again in numerous Texas counties. Most of the counties identified in the amici briefs must take their appeals from district court judgments to different appellate districts than the court of appeals here. This diversity of review would allow the potential for other intermediate appellate courts to consider the issue before the Texas Supreme Court decides to weigh in. Thus, as it relates to Texas, the issue is not fully developed to support conflict jurisdiction.

Even considering the intermediate court of appeals' opinion, there is no conflict with the Oklahoma Supreme Court to support this Court's jurisdiction. *See* 28 U.S.C. 1257(a). The Oklahoma Court addressed the constitutionality of a tax on natural gas removed from a pipeline and placed in storage for seven months. The court here addressed the constitutionality of a tax on oil moving through a pipeline system that was not stored and that moved through the entire state in two and a half weeks. Both courts applied *Complete Auto* in their Commerce Clause analyses to different facts. The difference in outcomes is attributable to disparate facts. If there is no direct conflict because of factual differences, denial of certiorari is justified. *Bunting v. Mellen*, 541 U.S. 1019,

1021 (2004) (Stevens, J., joined by Ginsburg and Breyer, JJ., respecting denial of certiorari).

Finally, because the two courts agreed on the applicable law, there is no important federal question involved and no legal issue of continuing importance. SUP. CT. R. 10(c); *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("we do not grant a certiorari to review evidence and discuss specific facts.") The issue in this case is not a question of which law applies but a question of application of the facts to a well-settled legal analysis. SUP. CT. R. 10 (certiorari rarely granted with "misapplication of a properly stated rule of law"). This Court decided the "important federal question" more than thirty years ago in *Complete Auto Transit v. Brady*. The appraisal district does not propose using different law or modifying the analysis. Instead, the appraisal district is asking this Court to review a purely factual matter – which facts should be considered in the substantial nexus analysis. That request is nothing more than error correction: reassess the facts and reach a different result. One of the appraisal district's amicus briefs concedes as much: "the Court of Appeals simply applied the *Complete Auto* test to the facts at hand incorrectly and should have found that, under the facts presented, the *Complete Auto* Test is completely and wholly satisfied." DCAD amicus Br. 10.

II. The state court of appeals applied the correct legal standard and reached the right result.

The only issue before this Court is whether a state ad valorem tax on oil moving in an interstate pipeline violates the Commerce Clause and specifically, if the oil has a substantial nexus to the state. The appraisal district's argument in support of its petition is based on an analysis that considers only one factor in the *Complete Auto* analysis – constant presence – and ignores all other factors. This is contrary to the law and misstates the court of appeals' analysis.

A. The state court of appeals applied *Complete Auto.*

The Court set out the proper Commerce Clause analysis for state taxes on property moving in interstate commerce. *Complete Auto Transit*, 430 U.S. at 279-87. Under *Complete Auto*, the Commerce Clause does not prohibit an existing state tax if the tax: (1) applies to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Id.* at 279-80.

The court below applied the correct standard – *Complete Auto* – in its Commerce Clause analysis. Pet. App. 15-18. The court considered a variety of factors to reach its conclusion that the oil lacked a substantial nexus to the state to justify the tax. *Id.*

5-9; 17-18. The oil moved in an interstate pipeline system that prohibited storage. The oil was not removed from transit. The oil's time in the Midland Tank Farm was brief and only served to further its transportation to out-of-state refineries. Under these facts, the court properly concluded that at the moment the oil was taxed it was "present but in transit," and thus had no substantial nexus. *Id.* 17-18.

B. The appraisal district misconstrues the state court of appeals' opinion.

In its petition, the appraisal district tries to create the impression that the court applied the "continuity of transit" analysis instead of applying *Complete Auto.* Pet. 8, 9, & 20. The court of appeals' opinion refutes the appraisal district's argument. As the Solicitor General noted, "various state courts [specifically identifying the court of appeals here] have applied the *Complete Auto* factors, rather than the 'continuity of transit' test, in adjudicating dormant Commerce Clause challenges to local taxation." Br. for U.S. (08-1458), at 11.

The Oklahoma Supreme Court in *Missouri Gas* debated whether to apply the "continuity of transit" analysis or *Complete Auto.* By contrast, the court below did not view the Commerce Clause issue as a choice between "continuity of transit" on the one hand and *Complete Auto* on the other. Pet. App. 15-16. The court correctly applied *Complete Auto* and concluded that there was no substantial nexus. *Id.* 15-18.

The appraisal district assails the continuity of transit discussion in the opinion. Pet. 19. The court of appeals' discussion of continuity of transit, however, was made at the appraisal district's behest. The analysis the appraisal district now criticizes and uses as a basis for certiorari review is the same analysis it urged the court of appeals to follow.

In the court of appeals, the appraisal district argued that the oil was taxable because it was no longer in transit. Pet. App. 10-11. According to the appraisal district, "an analysis of whether property is moving in a way that will trigger constitutional scrutiny is going to involve the questions of when the property entered the taxing state, how long it stayed, and when it left." MCAD Appellant's Br. 22 (11-07-00048-CV).

Under the appraisal district's argument in the court of appeals, had the oil not been in transit, the Commerce Clause would not have been invoked and the oil would have been taxable. Pet. App. 10-15; *Marathon Ashland Petroleum L.L.C. v. Galveston Cent. Appraisal Dist.*, 236 S.W.3d 335, 338 (Tex. App. – Houston [1st Dist.] 2007, no pet.) (if not in the stream of interstate commerce, then taxable with the general mass of property).

In response to the appraisal district's argument that the oil was not in transit, the court of appeals discussed the continuity of transit analysis and concluded that the oil had entered and remained in the stream of interstate commerce. Pet. App. 10-15.

Finally, as the Solicitor General recognized in the Oklahoma Supreme Court's analysis in *Missouri Gas*, the court of appeals' analysis here satisfies *Complete Auto* and the continuity of transit test. *See* Br. for U.S. (08-1458), at 14.

III. Existing law refutes the appraisal district's reasons for granting certiorari.

The appraisal district raises three arguments for granting certiorari all relating to the substantial nexus element of *Complete Auto*: 1) consider only the property's constant presence, 2) ignore continuity of transit, and 3) ignore the "activity" being taxed. As detailed below, the appraisal district's narrow, fact-based arguments are contrary to existing law and present nothing new for this Court to review. The appraisal district's final argument for granting certiorari raises grounds that have never been in dispute in the lawsuit.

A. "Constant presence" alone does not satisfy the substantial nexus factor.

The appraisal district suggests that this Court should decide if constant presence "is sufficient to establish nexus under *Complete Auto*." Pet. 14. Under its argument, the oil is constantly present in Midland County, and that fact alone creates substantial nexus. The appraisal district's argument is contrary to existing law and misconstrues the opinion below.

1. The appraisal district's argument is contrary to existing law.

There is no support for the notion that a single factor, like constant presence, controls the substantial nexus analysis in *Complete Auto*. As this Court has explained, "Commerce Clause jurisprudence now favors more flexible balancing analyses." *Quill Corp. v. North Dakota*, 504 U.S. 298, 314 (1992); *see also D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 32-33 (1988) (nexus based on many factors); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 778 (1992) (requiring a connection between property, person or transaction being taxed). None of these references comports with a single factor controlling a Commerce Clause determination.

In addition, the appraisal district's constant presence argument requires segregation of the tanks in the Midland Tank Farm from the pipeline system to create its purported "storage" and constant presence. The appraisal district did not attempt to tax the oil in the pipeline upstream or downstream of the tank farm. In fact, the appraisal district's expert agreed that oil in the pipeline was in transit and not taxable. RR 9:130-31; RR 10:35-37. Long-standing oil and gas pipeline jurisprudence refutes separating a pipeline system into segments.

This Court has viewed pipeline systems as a whole, not as independent, component parts. As this Court observed ninety years ago, tanks are "pipe(s) of a larger size" in an interstate pipeline system much

like the pipeline system that travels through West Texas and through the Midland Tank Farm. *See Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265, 272 (1921). According to the Court, if "the oil runs into a tank on one side and out on the other[,][t]he tank may be regarded as a pipe of a larger size." *Id.*

Similarly, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court observed that "we do not agree that the flow of gas from the wellhead to the consumer, even though 'interrupted' by certain events, is anything but a continual flow of gas in interstate commerce . . . during the entire journey." *Id.* at 755; *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 295 n.1 (1988) ("underground gas storage facilities are a necessary and integral part of the operation of piping gas from the area of production to the area of consumption.")

These cases describe the pipeline system of which the Midland Tank Farm is a part and how it operates. The tanks in the Midland Tank Farm exist to further transportation and are a part of an interstate pipeline system. They do not store oil or interrupt the overall movement of the oil.

2. The appraisal district's cases do not support a one-factor test.

The cases on which the appraisal district relies do not support the argument that constant presence alone determines substantial nexus. Two of its cases

are storage cases and two do not involve substantial nexus disputes.

The appraisal district relies heavily on *Missouri Gas*. That case, however, did not turn on a single factor in its nexus analysis but on a host of factors. The issue in *Missouri Gas* was the taxability of "storage gas." *Missouri Gas*, 234 P.3d at 948, 954. The gas had been removed from the pipeline and pursuant to storage service contracts placed in storage tanks in a storage facility for up to seven months. *Id.* at 943, 944, 947. The Oklahoma Supreme Court acknowledged the cyclical nature of natural gas demand. *Id.* at 944-45.

The Oklahoma court concluded in light of these factors the storage gas had a substantial nexus to justify the state's tax. *Id.* at 954-55. The court specifically limited its holding to stored natural gas. *Id.* at 954. The court recognized, however, that "actual movement" of property deprives it of the requisite nexus under *Complete Auto*. *Id.* at 954, n.46.

Diamond Shamrock v. Nueces County Appraisal District, also a storage case, is likewise no support. It too turned on many factors, not solely constant presence of stored oil. The oil in that case was imported from foreign sources and placed in a storage facility awaiting transport to a refinery. 876 S.W.2d at 299. The Texas Supreme Court relied heavily on the fact that Texas was the oil's state of final destination – referring to that fact eleven times in the opinion.

Id. at 298, 299, 300-01, 302, 302 n.6, 302 n.7 & 303. The Texas Supreme Court also based its decision on the fact that the oil was stored and "at rest" in the county. *Id.* at 303. It contrasted that fact with oil in continuous transit as follows: "oil passing through a county *without stopping*, in pipelines or on trucks, would thus not be located in that county 'for more than a temporary period' so as to allow taxation under the Code," and would not have nexus. *Id.* at 302-04 (emphasis added).

The appraisal district's two other cases do not involve substantial nexus disputes. Contrary to the appraisal district's description of the case as "approving the tax," in *Japan Line, Ltd. v. County of Los Angeles*, the Court held that a tax on shipping containers used exclusively in foreign commerce was unconstitutional under the Commerce Clause. 441 U.S. 434, 453-54 (1979). The Court did not address substantial nexus. *Id.* at 451 ("Assuming, *arguendo*, that the tax passes muster under *Complete Auto*, it cannot withstand scrutiny under either of the additional tests that a tax on foreign commerce must satisfy.") Instead, the Court struck the tax under the Commerce Clause because it resulted in multiple taxation and prevented the federal government from speaking with one voice in international trade. *Id.* at 453-54. The case at bar does not involve foreign commerce.

Finally, in *Commonwealth Edison Company v. Montana*, the Court upheld a severance tax on coal. 453 U.S. 609, 617-29 (1981). Commonwealth Edison

did not challenge substantial nexus, and instead challenged only the third and fourth elements of *Complete Auto*. *Id.* at 617. Unlike a severance tax, the ad valorem tax in this case is not on oil in the ground or on oil coming out of the ground. The tax assessed was on oil already produced from the ground from multiple counties, placed in an interstate pipeline moving through a tank farm on its way out of state. Pet. App. 26 (FF 5).

3. The court below properly rejected "constant presence" as controlling.

As *Missouri Gas* and *Diamond Shamrock* demonstrate, the facts that make a property constantly present must be considered. In each case, isolating constant presence reveals virtually nothing about the legal ruling. To use constant presence of the oil alone ignores the specific characteristics of the oil and gas transmission and is contrary to *Missouri Gas* and *Diamond Shamrock*. In both cases, the courts considered the totality of the circumstances, including the kind of property, the mode of transportation, actual movement, actual time involved, and the owner's business. No single factor created substantial nexus. Yet, that is the argument the appraisal district asks this Court to adopt.

In its analysis, the court of appeals recognized that substantial nexus is guided by many factors. Contrary to the appraisal district's contention, the court below did not find a lack of nexus because the

oil is "in interstate commerce." Pet. 13. Rather, it found no nexus because the oil was in transit through the state when the tax was assessed. Pet. App. 18. As the opinion explains, the oil moved through Midland County in a matter of hours. Ninety percent of the oil was leaving for out-of-state refineries. The oil moved in an interstate pipeline system of which the tanks were an integral part.

The court below applied the same controlling legal precedent as in *Missouri Gas*, and in fact expressly distinguished the holding in *Missouri Gas* based on the disparate facts. As the court of appeals noted, the facts that made the gas and the oil constantly present in *Missouri Gas* and in *Diamond Shamrock* were different than the facts in this case. In those cases, product was removed from the pipeline and stored. Here, the oil is not removed from the pipeline but continues in transit through a tank farm and is not stored. Pet. App. 29-30 (FF 30-36). As *Missouri Gas* and *Diamond Shamrock* recognized, such movement defeats substantial nexus. *Missouri Gas*, 234 P.3d at 954, n.46; *Diamond Shamrock*, 876 S.W.2d at 302, 304.

Further, in rejecting constant presence, the court of appeals applied the reasoning of a controlling Texas Supreme Court case that, as an intermediate court of appeals, it is required to do. *Virginia Indonesia Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 907, 912 (Tex. 1995) (owner had property constantly present in Houston for 45-175 days, but it was not the same property). In rejecting constant presence

as a controlling factor, the Texas Supreme Court relied on *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 99-101 (1929), which held that constantly present goods remained in interstate commerce. *Id.* at 913-14.

B. "Continuity of transit" is a factor in the nexus analysis.

The appraisal district suggests that continuity of transit is not a consideration in the nexus analysis. Pet. 15. Cases refute its argument and unlike the appraisal district's characterization, the court of appeals did not rely solely on continuity of transit.

1. Courts consider continuity of transit.

Many cases recognize the continued use of "continuity of transit" in a Commerce Clause nexus analysis, including the case on which the appraisal district bases its entire petition, *Missouri Gas*.

In *D.H. Holmes*, decided eleven years after *Complete Auto*, this Court recognized the continued purpose of the continuity of transit test. In *D.H. Holmes*, the Court addressed a Commerce Clause challenge to a tax on property that had been delivered to its state of final destination. The Court noted that the distinction between property at rest or in the stream of interstate commerce "may be of some importance for other purposes (*in determining, for instance, whether a 'taxable moment' has occurred*), but for Commerce Clause analysis it is largely irrelevant." *D.H. Holmes*, 486 U.S. at 31 (emphasis added) (internal citation

omitted). Whether a taxable moment has occurred makes little difference in a case where the state assessing the tax is the state of final destination. *See id.*

Determining a "taxable moment," however, is critical if the state assessing the tax is a state other than one of final destination. *See Diamond Shamrock*, 876 S.W.2d at 304 (oil passing through in pipelines would not be in a county for more than a temporary period to allow taxation). With oil delivered in its state of final destination, the Texas Supreme Court applied *D.H. Holmes* and observed that the "continuity of transit" analysis may be "questionable, at least as to goods *which have entered the state of their final destination*." *Id.* at 302, n.7 (emphasis added).

Similarly, the Oklahoma Supreme Court in *Missouri Gas*, also relying on *D.H. Holmes*, recognized the continued viability of the continuity of transit analysis. It explained that

> goods that move continuously through a state in the course of an interstate journey without stopping are no more amenable to local taxation under [*Complete Auto Transit v.*] *Brady* than they were under the historical analysis, but the reason is not simply that they are 'in transit in interstate commerce.' Rather, it is because their actual movement deprives them of the degree of nexus with the taxing state that would justify the tax under the first prong of the *Brady* analysis.

Missouri Gas, 234 P.3d at 954, n.46.

The Solicitor General explained in *Missouri Gas*:

> Still, the 'continuity of transit' cases remain potentially relevant to the constitutional analysis. In cases like this one, the same factors that the Court previously considered to determine continuity of transit may inform the first prong of the *Complete Auto* inquiry – *i.e.*, whether the relevant goods have a constitutionally sufficient nexus to the taxing State.

Br. for U.S. (08-1458), at 12 (citing *Diamond Shamrock*, 876 S.W.2d at 302).

As the Solicitor General in *Missouri Gas* recognized, the Oklahoma Court did not ignore "continuity of transit." In describing the court's holding, the Solicitor General opined that the "holding reflects a sound application of the first ('substantial nexus') prong of the *Complete Auto* test, as well as comporting with the 'continuity of transit' cases focusing on the purpose of the interruption." *Id.* at 14.

The treatise on which the appraisal district relies is contrary to these cases and the Solicitor General's opinion in *Missouri Gas*. Pet. 27 (citing 1 J. Hellerstein & W. Hellerstein, State Taxation ¶ 4.13[3][a] (3d ed. 2010)).

2. Cases cited do not support the appraisal district's argument.

The appraisal district tries to bolster its argument by alleging other courts have struggled with the

application of the "in transit" analysis. Pet. 17-19. The cases cited either: 1) did not involve a Commerce Clause question, 2) involved the Commerce Clause, but not a dispute over nexus and were resolved on another element of *Complete Auto*, 3) applied *Complete Auto* to different facts, or 4) involved intermediate appellate courts applying "continuity of transit," whose state supreme courts later applied *Complete Auto*.

Several of the cases cited by the appraisal district do not involve a Commerce Clause issue. *Norandex, Inc. v. Limbach*, 630 N.E.2d 329, 333-34 (Ohio 1994) (distinguishing *American Steamship Co. v. Limbach*, 572 N.E.2d 629 (Ohio 1991) on the grounds that it did not address a Commerce Clause issue and recognizing that only questions under the Commerce Clause were whether there was a "taxable event" and whether the *Complete Auto* test was satisfied); *Kentron, Inc. v. State Bd. of Tax Comm'rs*, 572 N.E.2d 1366, 1367-68, 1372 (Ind. Tax Ct. 1991) (stored property awaiting out-of-state shipment was not in interstate commerce and the Commerce Clause did not apply); *Predka v. Iowa*, 186 F.3d 1082, 1084-85 (8th Cir. 1999) (transporting marijuana is not protected by the Commerce Clause).

The appraisal district also cites cases that involved Commerce Clause issues but were resolved on another element of *Complete Auto* other than substantial nexus. *T.A. Operating Corp. v. State of Florida, Dep't of Revenue*, 767 So.2d 1270, 1274, 1272, n.3; 1272-76 (Fla. Dist. Ct. App. 2000) (court applied

Complete Auto; owner did not dispute substantial nexus); *Sterling Custom Homes, Inc. v. Comm'r of Revenue*, 1985 WL 6207 (Minn. Tax. 1985), *aff'd,* 391 N.W.2d 523, 525 (Minn. 1986) (court upheld a state tax under the third element of *Complete Auto* that the tax did not discriminate against out-of-state manufacturers).

Other cases simply applied *Complete Auto* to different facts and reached results contrary to the court here. *Havill v. Gurley*, 382 So.2d 109, 111 (Fla. Dist. Ct. App. 1980) (substantial nexus under *Complete Auto* with products stored in a warehouse whether considered in transit or not); *Mississippi State Tax Comm'n v. Murphy Oil USA, Inc.*, 933 So.2d 285, 289-90, 293-94 (Miss. 2006) (substantial nexus under *Complete Auto* with franchise tax where nexus turned on whether income from business of storing and selling oil was derived from activities conducted within the state).

Finally, to the extent the appraisal district located cases that refer to the continuity of transit test, they are intermediate appellate courts whose state supreme courts later applied *Complete Auto. Chesapeake and Potomac Telephone Co. of Maryland v. Comptroller of the Treasury*, 528 A.2d 536 (Md. Ct. Spec. App. 1987) (interstate journey ended with delivery into destination state and could be taxed there), *aff'd*, 561 A.2d 1034, 1036-37 (Md. 1989) (found substantial nexus based on *Complete Auto* and *D.H. Holmes*). As the Solicitor General pointed out in rejecting a similar conflicts argument in *Missouri*

Gas, while two intermediate appellate court decisions cited continuity of transit – *Mississippi River Transmission Corp. v. Simonton*, 442 So.2d 764 (La. Ct. App. 1983) and *United Gas Pipe Line Co. v. Whitman*, 390 So.2d 913 (La. Ct. App. 1980) – the Louisiana Supreme Court subsequently applied *Complete Auto* to Commerce Clause challenges. Br. for U.S. (08-1458), at 11-12 (citing *Columbia Gulf Transmission Co. v. Broussard*, 653 So.2d 522, 523-24 (La. 1995) and *Word of Life Christian Ctr. v. West*, 936 So.2d 1226, 1241-42 & n.17 (La. 2006)).

3. The court of appeals considered the oil's actual movement.

Contrary to the appraisal district's argument, the court of appeals did not use the "continuity of transit" analysis as an automatic disqualifier for nexus. Instead, the in transit movement of the oil was one factor in the court's analysis. The oil is not in its state of final destination. As the findings of fact reveal, more than ninety percent of the oil leaves Texas. At the time the oil was taxed, it was in actual transit.

C. This Court has endorsed consideration of "activities" in the nexus analysis.

In its last point about substantial nexus as a ground for certiorari review, the appraisal district contends that the court of appeals erroneously based its nexus analysis on the owners' "activities" instead of the property. Pet. 24-26; TASB amici Br. 13-15. The

appraisal district misinterprets the court's reference to "activities of the taxpayer" and overlooks the applicable law. Pet. 9. The court did not focus on the Oil Companies' activities. Instead, the court focused on the oil's movement. In addition, this is an issue in *Peoples Gas* (No. 10-896), but not in the Oil Companies' case. The appraisal district's argument here is simply an attempt to paint this case onto *Peoples Gas*'s canvas.

The court of appeals concluded that the oil had nexus with the *state* as the oil is produced in Texas and a small portion ends up at Texas refineries. Applying the precise terminology used in *Complete Auto*, the court, however, concluded that "the 'activity' being taxed had no such nexus." Pet. App. 17-18. "The 'activity' essentially being taxed in this case was the ownership of oil that was present but in transit on January 1 in a tank farm that constituted an integral part of an interstate, common carrier pipeline system." *Id.*; *see Complete Auto*, 430 U.S. at 279 (tax may be upheld when it is "applied to an *activity* with a substantial nexus with the taxing State") (emphasis added); *see also Allied-Signal, Inc.*, 504 U.S. at 777 (there must be a definite link between a "state and the person, property or transaction it seeks to tax").

Ad valorem taxes in Texas are assessed by counties, not by the state. Thus, the court of appeals' reference to "activity being taxed" is referring to the oil's connection to Midland County. Contrary to the appraisal district's argument, Texas taxes are not "measured solely by the value of the property"

without consideration of the "amount and type of activity." Pet. 25; *see* TAX CODE §§ 11.01(c) & 21.02(a). The court's discussion relates solely to describing the property being taxed–oil moving through a county on January 1 that was part of an interstate common carrier pipeline system. The court of appeals made no mention of the Oil Companies' activities, their offices, or employees in Texas. And, as the appraisal district recognizes, the court of appeals never cited *Quill*, which addressed taxes based on the physical presence of an owner.

D. The Oil Companies never challenged the other *Complete Auto* factors.

The appraisal district's final ground relates to matters that have never been in dispute in this case. Pet. 28-29. The Oil Companies' sole challenge to the *Complete Auto* factors involved only the first element – substantial nexus. The other elements were not before any court below and cannot be raised now. The appraisal district's argument about them should be disregarded.

IV. Amici offer no compelling grounds for granting certiorari.

The amici repackage and rehash the arguments in the petition. To the extent additional arguments are raised, none support this Court's certiorari review.

Amici contend that there is uncertainty or confusion in Texas law. DCAD amicus Br. 4; LCAD amici

Br. 3; TASB amici Br. 1. But clarifying the law among state intermediate appellate courts does not warrant Supreme Court review. In any event, the law in Texas on product moving in interstate commerce is not uncertain or confusing as shown in the case below and in *Peoples Gas* – both of which reached the same conclusion on similar facts. Finally, amici's suggestion is incorrect that a loss of revenue as a result of this case impacts Texas taxing entities. The oil in this case has never been taxed. The taxes in dispute are not money that Texas taxing entities ever had in their coffers. This is not a case of property that had been taxed for many years and then was determined to be not taxable. Rather, the appraisal district began for the first time to appraise and tax the oil moving through the tank farm in 2003. CR 349. Until 2003, the appraisal district never considered the oil in the tank farm taxable and did not tax it.

V. The Court should deny certiorari in this case and in *Peoples Gas*.

This Court should deny the petitions for writ of certiorari in this case and in *Peoples Gas* (10-896). The state intermediate appellate courts in both cases applied this Court's Commerce Clause jurisprudence as well as controlling Texas Supreme Court authority to reach the same conclusion: If property has entered the stream of interstate commerce and remains in uninterrupted transit, it has no substantial nexus to justify the tax.

Nonetheless, the TASB amici alternatively suggest that the Court should stay this case pending the outcome of *Peoples Gas*. TASB amici Br. 17. Given the overlap in issues, the Oil Companies are concerned about the implications for them if the Court grants review in *Peoples Gas* and denies or stays this case.

A decision by this Court in *Peoples Gas* likely will be construed as addressing all pipeline transportation cases. As the two cases demonstrate, however, there are significant distinctions between oil and natural gas production, transportation, marketing and ultimate usage that affect the legal issues before the Court. Further, the owner in *Peoples Gas* relies extensively on an issue not present in this case – lack of ownership of the gas. Ownership is not an issue in this case. In addition, the Oil Companies raise different issues and rely on important factual distinctions that affect the legal issues involved.

Thus, if the Court grants the petition in *Peoples Gas*, it should simultaneously grant this case to allow the Oil Companies to fully participate and the related, but distinct, issues to be heard.

CONCLUSION

For these reasons, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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