

MAR 11 2010

No. 10-890

In The Supreme Court of The United States

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,

v.

BP AMERICA PRODUCTION CO., *ET AL.*,
Respondents.

**On Petition for a Writ of Certiorari
to the Texas Court of Appeals,
Eleventh Appellate District**

BRIEF IN OPPOSITION

RAY ALBRECHT
EPCO, INC.
1100 Louisiana
Houston, TX 77002
(713) 381-8380

WILLIAM IKARD
Counsel of Record
WILLIAM W. KILGARLIN
J. JORDAN HAEDICKE
IKARD WYNNE LLP
515 Congress Ave.
Suite 1320
Austin, TX 78701
(512) 275-7880
bill@ikardwynne.com

*Counsel for TEPPCO Crude Oil LLC and TEPPCO
Crude P/L LLC Respondents*

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QUESTION PRESENTED

Whether this Court lacks jurisdiction to grant this Petition for Writ of Certiorari involving an attempt to overturn Texas' courts invalidating a tax on oil temporarily located in Texas and Midland County.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

The Petitioner is Midland Central Appraisal District. The Respondents are 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.

Pursuant to Sup. Ct. R. 29.6, respondents TEPPCO Crude Oil LLC and TEPPCO Crude P/L LLC state that their parent company is Enterprise Products Partners L.P. and that no other publicly held company owns 10% or more of these respondents' stock.¹

¹ Effective March 24, 2010, TEPPCO Crude Oil LLC is now Enterprise Crude Oil LLC and TEPPCO Crude P/L LLC is now Enterprise Crude P/L LLC.

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INTRODUCTION

The instant Petition for Writ of Certiorari is a continuation of a nine year dispute concerning Midland Central Appraisal District's ("MCAD") ability to list and appraise for property tax purposes crude oil which is located in Texas and Midland County for no more than a temporary period. Through those years, the involvement of three different courts has narrowed the issues to the question of whether the oil is taxable under Texas Property Tax Code §§11.01 and 21.02 ("Tax Code"), and incidentally addressed is taxability under the Commerce Clause of the United States Constitution.

WHY NO JURISDICTION EXISTS

This Court has held that it does not have jurisdiction in a case that has been decided on independent and adequate state grounds. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) ("*Long*"); *See also, Arizona v. Johnson*, 129 S.Ct. 781 (2009); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (2009); *Ohio v. Robinette*, 519 U.S. 33, 33-37 (1996); *Coleman v. Thompson*, 501 U.S. 722 (1991) ("*Coleman*"); *Harris v. Reed* 489 U.S. 255, 261 n. 7 (1989). Throughout the Texas court proceedings, this case has been decided on independent and adequate state grounds; therefore, this Court does not have jurisdiction and should not grant certiorari.

STATE ACTION

The final judgment of the state trial court recites that "[t]he Court renders judgment pursuant to Texas Tax Code section 42.24" and "[i]t is, therefore, ordered, adjudged and decreed that

Plaintiffs' property that is the subject of this lawsuit is not taxable during tax years 2003 and 2004 pursuant to Texas Tax Code sec. 11.01." C.R., 269, 271.

The Texas Court of Appeals affirmed the judgment of the trial court and the Supreme Court of Texas denied the MCAD's Petition for Review. The fact that the court of appeals addressed points of error raised by the MCAD, as it should, and denied them, in no way alters the sole basis for its affirming the trial court judgment, which was Tax Code provisions. A recent opinion of this Court, *Lambrix v. Singletary*, 520 U.S. 518, 522 (1997), restating language from *Coleman*, 501 U.S. at 722 is dispositive, pronouncing "this Court 'will not review a question of federal law decided by a state court if the decision of that court rests on a state ground that is independent of the federal question and adequate to support the judgment'." The Court cannot hear the case if the Court's reversal of the federal law ruling will not alter the result because the state court's decision as to state law will mandate the same outcome. Chemerinsky, *Federal Jurisdiction*, 4th Ed., 2003, p. 686.

COUNTERSTATEMENT

In 2003 for the first time in over seventy years, Petitioner MCAD listed on its appraisal roll crude oil flowing through a common-carrier pipeline system traversing Midland County, some of which MCAD alleged was owned by the TEPPCO Crude Oil LLC and TEPPCO Crude P/L LLC (jointly "TEPPCO") Respondents. See R.R., vol. 2 at 64: 11-

14. The oil was held to be only temporarily in Texas and Midland County, thus not taxable under the Tax Code. TEPPCO and other Respondents contested the listing because: (1) the oil is transitory and located only temporarily in the state, so it is not subject to the state's jurisdiction to tax under section 11.01 of the Tax Code; (2) similarly, because the oil is not located in Midland County for more than a temporary period, it never acquired taxable situs there under section 21.02 of the Tax Code; and (3) oil flowing into and across Texas is exempt from *ad valorem* tax under section 11.12 of the Tax Code.²

Concluding that under state law, (i) the state lacked jurisdiction to tax the oil and (ii) the oil did not acquire taxable situs in Midland County, the trial court rendered judgment for TEPPCO and the other Respondents based solely on Texas state statutes. TEX. TAX CODE §§ 11.01(c); 21.02. Moreover, the trial court made no reference to federal law in its judgment.³ Nor is federal law referred to in the judgment of the Eleventh Court of Appeals which in pertinent part stated, "... the judgment of the trial court is in all things affirmed."⁴ *Midland Central Appraisal District v. BP America*

² Section 11.12 is the codification of a state exemption from property tax for any property that is exempt under federal law.

³ The trial court did conclude that in the alternative (to a judgment based on state law grounds) the oil was also (but independently) exempt from taxation under federal law. C.R., 348, 354.

⁴ While the court of appeals' judgment makes no reference to federal law, its opinion does address and reject the Petitioner's points of error based on federal law.

Production Company et al., 282 S.W.3d 215 (Tex.App.—Eastland 2009, pet. denied) (“*MCAD*”).

In *Long*, this Court held that the Court will presume jurisdiction unless the state court opinion “plainly states that it is based on a bona fide separate, adequate, and independent grounds.” 463 U.S. at 1040-41. It is clear in the trial court judgment and appellate court judgment and opinion that this case was decided on separate, adequate, and independent state grounds. This is illustrated by the trial court’s judgment which does not even mention federal law, and the appellate court opinion which addresses the federal and state law issues completely separate, independent and under bold subject headings.⁵ Therefore, the U.S. Supreme Court lacks jurisdiction to grant certiorari in this case.

Because the absence of a jurisdictional basis is so glaring, TEPPCO will not address the merits of Petitioner’s federal question in this paper. In the event certiorari is granted and/or further briefing requested, TEPPCO reserves the right to respond to the Petitioner’s erroneous contention that the oil is taxable under Commerce Clause jurisprudence.

⁵ For example, the court of appeals below divided its opinion into four main parts which were delineated by Roman numerals I-IV. The third, “*III MCAD’s Appeal*” includes two sections, A and B. The latter, section IIIB is entitled: “*B. Was the oil Taxable in Midland County?*” Under that section there are three subsections: “*1. Interstate Commerce.*”, “*2. Validity of Tax Under Commerce Clause.*” and “*3. Validity of Tax Pursuant to State Law.*” Emphasis in the original. *MCAD*, 282 S.W.3d 215. Appendix A-5, A-7, A-8, A-13, A-17, respectively.

ARGUMENT

I. The Texas Courts Invalidated the Tax Based on State Law

In *Murdock v. Memphis*, 87 U.S. 590 (1875) (“*Murdock*”) and others that have built on it⁶, the court laid down two fundamental propositions. The Court will not review a case, even though it contains a federal question, if there is an adequate state ground that supports the decision of the state court. Further, the Court will accept as binding upon it the state court’s decision on questions of state law. It has considered that the state courts speak with final authority on questions of state law. *Murdock*, 87 U.S. at 636.

The exceptions to this principle are very few. Decisions of the state court on state law are only persuasive, rather than controlling, when state law is incorporated by reference in a federal statute, *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204 (1946), or when protection of a federal constitutional right would be thwarted if the state has the last word on state questions, *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992), or when the state court interpretation of state law appears to be an “onerous subterfuge to evade consideration of a federal issue.” *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945). Nor can there be review when the state court has decided both the state and

⁶ *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Berea College v. Kentucky*, 211 U.S. 45 (1908); *Eustis v. Bolles*, 150 U.S. 361 (1893).

federal questions, if its decision of the federal question was unnecessary in light of its disposition of the state questions. *Sochor v. Florida*, 504 U.S. 527, 534 (1992).

MCAD attempts to frame a constitutional issue of potentially long ranging effect: whether oil passing through Texas on its way to another state is taxable under the Commerce Clause. MCAD lauds the many reasons why this issue needs to be resolved, but this case is an inappropriate vehicle to present that issue because it was decided primarily on independent and adequate state law grounds. In fact, Texas courts are instructed to resolve a case, if possible, on other than constitutional grounds. *VanDevender v. Woods*, 222 S.W.3d 430, 432-33 (Tex. 2007) (“*VanDevender*”).

This is another indicia for concluding that the trial and appellate court judgments in this case are based on the Tax Code, independent of and not interwoven with any Commerce Clause considerations. That same judicial restraint is likewise evidenced by this Court not rendering advisory opinions. *Lambrix*, 520 U.S. at 522. Judicial restraint cautions that when a case may be decided on non-constitutional grounds, a decision should rest on that ground and not wade into ancillary constitutional questions. *VanDevender*, 222 S.W.3d at 432-33. Both the trial court and the appellate court exhibited judicial restraint in their judgments.

To understand why the U.S. Supreme Court lacks jurisdiction in this case, a simple illustration is useful: If a state court *invalidates* a tax under both state law and federal law then the U.S. Supreme Court must deny certiorari because the tax would be invalidated even if the state court's federal law ruling were incorrect.⁷ But compare if a state court *validated* a tax under state law and federal law then the U.S. Supreme Court can grant review because a reversal of the state court's federal law decision would change the outcome of the case, i.e., the tax would be invalid under federal law. In the present case, the former situation is implicated. Moreover, even if the court of appeals wrongfully applied federal law as subsequently determined by this Court, the judgments of the courts below would stand. Irrespective of the validity of the lower courts' analysis of federal law, in this case the tax remains invalid under state law.

Trial Court Judgment Decided on State Law Grounds

The trial court judgment clearly rests on state law grounds. The court found as fact that the oil was not in Texas or in Midland County for longer than a temporary period, and thus concluded as a matter of law that the state had no jurisdiction to tax it under Tax Code §11.01. C.R., 348, 354 (CL 2). The court also held as fact that the ownership allocation of the tax by MCAD was not reasonably tied to the percentage of ownership of the oil to the

⁷ Of course under this scenario, the Court would never reach the merits of the federal question because the Court would lack jurisdiction.

respective Respondents. That fact finding by the court invalidated the tax on another separate state law ground: unlawful multiple taxation. C.R., 348, 351-353. Further, the trial court concluded, as a matter of law, that the oil had not acquired taxable situs in Midland County because it did not remain in the county for more than a temporary period. C.R., 348, 354. The trial court judgment signed by Judge Hyde does not even mention or make reference to federal law.

As the Texas courts exhibited, this case was decided based purely on state law grounds, as there are sufficient state statutes to guide the courts in correctly determining the taxability of the oil. The crux of determining the legality of an *ad valorem* tax in Texas on personal property is determining whether the property is in the state for more than a temporary period. TEX. TAX CODE § 11.01 . The genesis of this litigation came from the Respondents primary contention not that the oil was exempt, but that the oil was not taxable at all. Article VIII, section 1(b) of the Texas Constitution and various state statutes (§§11.01, 21.02, etc...) all relate to the determination of whether the personal property is not “in the state”, and the state lacks jurisdiction to tax property not “in the state.” If the property is not in the state (i.e., not there for more than a temporary period) it is not taxable, and no federal law or question is implicated.⁸

⁸ In *Fairchild Aircraft, Inc. v. Bexar Appraisal Dist.*, the Court of Appeals concluded that “as a general rule, jurisdiction to tax exists based on the length of time property is located in the taxing unit within Texas.” 47 S.W.3d 577, 581 (Tex.App.—San

The Eleventh Court of Appeals' opinion and judgment upheld the trial court's ruling, solidifying the judgment based on state law grounds. In its opinion, the appellate court held that the tax was not valid under §21.02 of the Tax Code due to the temporary period during which the oil was located in Midland County, additionally writing that such a tax would violate the Commerce Clause. In its judgment, the appellate court held that the "judgment of the trial court is in all things affirmed." In the opinion, the appellate court did address federal law issues first, but, did so, simply because the court was addressing the points of error in the order and sequence in which MCAD had presented them in its appellate brief. The court of appeals, rightly so, was ruling on the issues which the MCAD based its appeal. The court explicitly addressed

Antonio 2001, pet. denied) (citing *Pratt & Whitney Canada, Inc. v. McLennan County Appraisal Dist.*, 927 S.W.2d 641 (Tex.App.—Waco 1996, writ denied). Both cases demonstrate that the Legislature's plain language test under § 11.01 is the threshold inquiry, determines if property "is taxable," and precedes consideration of exemption under state or federal law. In *Pratt & Whitney*, the Court of Appeals held that there was no "taxable value" in dispute if the state has no jurisdiction to tax under § 11.01. *Id.* at 643-44. "Whether property is located in a taxing district for more than a temporary period of time is an issue of fact." *Aransas County Appraisal Dist. v. Patterson-UTI-Drilling (South) LP, LLLP*, No. 13-04-502-CV, 2005 Tex. App. LEXIS 7033 (Tex.App.-- Corpus Christi Aug. 26, 2005, no pet.)(mem. op., not designated for publication). In *Diamond Shamrock Ref. and Mktg. Co. v. Nueces County Appraisal District*, 876 S.W.2d 298, 304 (Tex. 1994), Chief Justice Phillips states that "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."

situs but not Texas jurisdiction because Texas jurisdiction was not raised as a point of error by the MCAD. However, the trial court did rule upon Texas' lack of jurisdiction to tax the oil, which is the ruling that stands.

Proving that the state law and federal law issues in this case are not so interwoven, as the Petitioner claims, is the court of appeals opinion which has a separate, independent section in the opinion that is entitled (in italics) *Validity of Tax Pursuant to State Law*. (see footnote 5, *infra*). Obviously the Eleventh Court of Appeals found that the state law and federal law issues were separate and independent from one another.

II. Opinion and Judgment Based on Adequate, Independent State Ground, So No Jurisdiction Exists

The most important and most difficult limitation on Supreme Court review of state court decisions has been well stated by Justice Jackson:

This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds... Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same

judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). Granting certiorari review in this case would amount to nothing more than an advisory opinion, because even if the Court reversed the lower courts' analysis and application of federal law, the same overall result would nonetheless occur. A reversal on federal grounds would not necessitate a reversal on state law grounds, because the case was decided based on Texas statutes, Tax Code §§ 11.01 and 21.02, and the MCAD's improper allocation of ownership among the Respondents.

In order to bar Supreme Court review, the state ground must be "adequate." 16B Wright, Miller & Cooper, Jurisdiction 2d §§4025-4028. To bar review, the state ground also must be "independent." The Supreme Court can review if the state ground is "so interwoven with the other as not to be an independent matter." *Abie State Bank v. Weaver*, 282 U.S. 765, 773-777 (1931). The state ground is not independent if the state court appears to have believed that federal law compelled a particular interpretation of state law. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-68 (1977). In this case, it is clear that the federal law did not compel nor influence the state law interpretation. The trial court judgment did not even mention federal law, so it explicitly rests solely on adequate, independent state grounds. And the

court of appeals opinion discusses state law and federal law wholly separate from one another.

In 1983, in *Long*, 463 U.S. 1032, the Court announced a then new approach:

[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedent of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Id. at 1040-41. The Court recognized in *Long* that there might still be cases in which clarification of the state decision might be necessary or appropriate. *Id.* at 1041, n. 6, but in most cases it has applied the “plain statement” rule without difficulty. *Harris v. Reed*, 489 U.S. 255, 261, n. 7 (1989). The rule applies regardless of whether the disputed state law ground is substantive or procedural. *Id.* at 261. But there is no need for a plain statement by the state

court to bar Supreme Court review if the decision does not appear to rest primarily on, or to be interwoven with, federal law. *Coleman*, 501 U.S. at 722. The decisions below in this case do not rest primarily on or are interwoven with federal law.⁹

III. Court of Appeals’ Ruling on Texas Tax Code § 21.02 is Independent of its Writing on the Dormant Commerce Clause

Under the plain language of the Tax Code, Texas has no jurisdiction to tax the oil in question. Nor did the oil acquire taxable situs in Midland County. The trial court and court of appeals followed the directive in *VanDevender*: “Judicial restraint cautions that when a case may be decided on a non-constitutional ground, we should rest our decision on that ground and not wade into ancillary

⁹ In addition, the existence of differing laws in different states does not confer jurisdiction on this Court. For example, inventory (including crude oil inventory like that at issue here) is exempt from property tax in all but 14 states. Accordingly, the fact that a petrochemical product in interstate pipelines may be subject to property tax in Oklahoma but not taxable in Texas does not create a constitutional “conflict.” To the contrary, it is not uncommon in practice. For instance, in Kansas, oil in pipelines is not taxable under state statutes, in Oklahoma oil in pipelines is taxable under state law and federal law, and in Texas oil in pipelines is not taxable under state law and coincidentally not taxable under federal law. Contrary to *amici* (Texas Association of School Boards, *et al.*, Chambers County Appraisal District, *et al.*, and Dallas Central Appraisal District) and Petitioner, there is no conflict of law in Texas. The Texas Supreme Court twice denied the Petitioner’s petition for review, so the law is settled in Texas, with the trial court and appellate court in agreement.

constitutional questions.” *VanDevender*, 222 S.W.3d at 432-433; see also *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003) (“As a rule, we only decide constitutional questions when we cannot resolve issues on non-constitutional grounds.”). The rule is no different in this Court and it requires a denial of certiorari based on lack of jurisdiction. The U.S. Supreme Court lacks jurisdiction to review on direct appeal a question of federal law decided by a state court, if the state court decision rests on a state law ground that is independent of the federal question and is adequate to support the judgment; since the state law determination is sufficient to sustain the decree, any Supreme Court opinion on the federal question will be purely advisory. *Lambrix*, 520 U.S. at 521-523.

In its judgment, the court of appeals adopted the trial court’s findings. The trial court’s judgment was based solely on state law ground, with no mention of federal law. The court of appeals affirmed the trial court’s fact finding that the oil was not present for “longer than a temporary period,” so jurisdiction to tax and taxable situs respectively under Tax Code §§ 11.01 and 21.02 are not met. The relevant facts were determined sufficient to support the judgment and are immutable. On review of decisions of state courts, the stated rule is that “all those matters which are usually termed issues of fact are for conclusive determination by the state courts and are not open for reconsideration by this court. Observance of this restriction in our review of state courts calls for the utmost scruple.” *Watts v. Indiana*, 338 U.S. 49, 50 (1949).

CONCLUSION

The trial court's fact finding that the oil was not in Texas for longer than a temporary period, the sufficiency of which was affirmed by the court of appeals, cannot now be challenged by the MCAD. Under this finding, §§ 11.01 and 21.02 of the Tax Code are not met. The MCAD has never alleged that §§ 11.01 and 21.02 are unconstitutional; therefore, there is no federal question in this case in that regard. The conclusions of law of the trial court clearly set out that this is not primarily an exemption case, but a taxability case. In its conclusions of law, the trial court made clear that its judgment was based on §§ 11.01 and 21.02 of the Tax Code and the illegality of the tax based on improper allocation and ownership. The reason the trial court's judgment lacks any reference to federal law is because it is unnecessary. The opinion of the court of appeals indicates a holding based on independent and adequate state law grounds. There is no interweaving.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Ray Albrecht
EPCO, Inc.
1100 Louisiana
Houston, TX 77002
(713) 381-8380

William Ikard
Counsel of Record
William W. Kilgarlin
J. Jordan Haedicke
Ikard Wynne LLP
515 Congress Ave.,
Suite 1320
Austin, TX 78701
(512) 275-7880
bill@ikardwynne.com

*Counsel for TEPPCO Crude Oil LLC and TEPPCO
Crude P/L LLC Respondents*