No. 10-896

FILED
FEB 10 2011

In The Supreme Court of the United States

Harrison Central Appraisal District,
Petitioner,

v.

Peoples Gas, Light and Coke Co.,
Respondent.

On Petition for Writ of Certiorari to the Texas Court of Appeals, Sixth Appellate District

BRIEF OF CHAMBERS COUNTY APPRAISAL DISTRICT, LIBERTY COUNTY CENTRAL APPRAISAL DISTRICT, SMITH COUNTY APPRAISAL DISTRICT, AND THE TEXAS ASSOCIATION OF APPRAISAL DISTRICTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Michael Darlow*
Robert Mott
Sandra Griffin
Christopher Jackson
Perdue Brandon Fielder Collins & Mott LLP
3301 Northland Drive, Suite 505
Austin, Texas 78731
(512) 302-0190
mdarlow@pbfcm.com

* *Counsel of Record*

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MISCELLANEOUS

Pursuant to Rule 37 of this Court, the Chambers County Appraisal District, the Liberty County Central Appraisal District, the Smith County Appraisal District of Texas and the Texas Association of Appraisal Districts (hereinafter "the Districts")[1] respectfully submit this brief in support of the Petitioner, the Harrison Central Appraisal District, for a writ of certiorari in the above-captioned matter.[2] The *amici curiae* urge that the Court grant the petition for a writ of certiorari and that the decision of the Texas Court of Appeals, Sixth Appellate District be reversed.

INTEREST OF THE *AMICI CURIAE*

Interstate pipelines operate natural gas storage fields throughout the United States.[3] At the end of 2008, there were over 217,000 miles of interstate pipelines in the United States and over 58,000 miles

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[1] In accordance with Rule 37.6, *amici* state that no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amici curiae*, have made a monetary contribution to the preparation or submission of this brief.

[2] In accordance with Rule 37.2(a), *amici* state that the counsel of record for all parties received notice of their intention to file a brief in support of the Petitioner at least 10 days prior to the due date for the brief. Written consent of the Petitioner and Respondent was obtained from their counsel of record.

[3] U.S. ENERGY INFORMATION ADMINISTRATION, *Interstate National Gas Supply Dependency*, 2007, http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/dependstates_map.html (last visited Feb. 8, 2011).

of pipeline in Texas.[4] Approximately, 1,772,335 jobs are supported by the natural gas and petroleum industries in Texas. These jobs add $293.8 billion to Texas' gross state product, or 24.2% of its wealth.[5] At the end of 2007, there were approximately 400 underground natural gas storage facilities in the United States. Many of these storage facilities were located in Texas.[6] There are other storage facilities in Texas that include stored products other than natural gas that are shipped in intrastate commerce, such as oil and manufactured goods. Therefore, the issue of appraising and taxing stored goods in interstate commerce is a significant concern for Texas property tax authorities.

Like the Petitioner, the Districts are all political subdivisions of the State of Texas. *See* TEX. TAX CODE ANN. § 6.01(c) (West, Westlaw through 2009 Reg. Legis. Sess.). Moreover, like the Petitioner, interstate pipelines operate and store natural gas with other petroleum and industrial products in the Districts' jurisdiction.

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[4] U.S. ENERGY INFORMATION ADMINISTRATION, *Estimated Natural Gas Pipeline Mileage in the Lower 48 States, Close of 2008*, http://www.eia.doe.gov/pub/oil_gas/ natural_gas/ analysis_publications/ngpipeline/mileage.html (last visited Feb. 8, 2011).

[5] AMERICAN PETROLEUM INSTITUTE, http://www.api.org/ policy/americatowork/upload/JOBS_TEXAS.pdf (last visited Feb. 8, 2011).

[6] U.S. ENERGY INFORMATION ADMINISTRATION, *U.S. Underground Natural Gas Storage Facilities, Close of 2007*, http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/undrgrndstor_map.html (last visited Feb. 8, 2011).

The Chambers County Appraisal District, the Liberty County Central Appraisal District, the Smith County Appraisal District of Texas, the Texas Association of Appraisal Districts[7] and other appraisal districts in this country need clear guidance from this Court on what properties they can include on their property tax rolls. The taxing units that the *amici* appraise for also are significantly impacted because they depend on property taxes on such properties to provide critical governmental services.

REASONS TO GRANT THE PETITION FOR WRIT OF CERTIORARI

Because the annual *ad valorem* appraisal and potential taxation of stored natural gas and other "stored" goods in interstate commerce present recurring issues for these Districts and the taxing units they appraise for in Texas (in addition to many others throughout the United States) the Court should grant the Petitioner's writ of certiorari.

By granting the petition for writ of certiorari in this case the Court would have the opportunity to: (1)

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[7] The Texas Association of Appraisal Districts, Inc. is a statewide, voluntary non-profit organization incorporated and organized to promote the effective and efficient functioning and administration of appraisal districts in Texas. In 2010, more than 90 percent of the state's 254 appraisal districts belong to TAAD, as well as numerous tax officials from school districts, cities, counties, state agencies and other entities, and other property tax professionals. TAAD, *About Us*, http://www.taad.org/about_us.html (last visited Feb. 8, 2011).

address the correct application of the four part "test" this Court set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) to an *ad valorem* tax matter, which would be an issue of first impression; (2) address the impact of the *Complete Auto* case on this Court's precedents regarding the ability of State and local taxing units to assess *ad valorem* taxes on goods stored by a common carrier prior to the beginning of interstate transit in interstate commerce; (3) provide taxpayers as well as state and local taxing units needed guidance as what constitutes "substantial nexus" under the first prong of the *Complete Auto* Test; and (4) resolve the disagreement and confusion regarding the constitutional limitations on a local or state taxing entity's ability to impose an *ad valorem* tax on stored natural gas that currently exists between Texas and Oklahoma.

SUMMARY OF THE ARGUMENT

Imposition of an *ad valorem* tax on natural gas stored in the State pending transport via an interstate pipeline to out-of state owners does not violate the Commerce Clause of the U.S. Constitution. By granting the petition for writ of certiorari, this Court can confirm this conclusion and further its Commerce Clause jurisprudence, especially as it relates to *ad valorem* taxation. Ever mindful of the Court's admonition in Rule 37.1 to not burden it with repetitious arguments, we defer to the Petitioner, Harrison Central Appraisal District's brief on behalf of the *amici* for most arguments.

ARGUMENT

A. Overview

1. The Texas *Ad Valorem* Appraisal and Tax Structure.

Article VIII, section 1 of the Texas Constitution requires that all real and tangible personal property used for the production of income, unless exempt, be taxed "in proportion to its value, which shall be ascertained as may be provided by law." TEX. CONST. art. VIII, § 1(b); *see also* TEX. TAX CODE ANN. § 11.01 (West, Westlaw through 2009 Reg. Legis. Sess.). It also requires that taxation be "equal and uniform." TEX. CONST. art. VIII, § 1(a). The Texas Constitution further requires that "all lands and other property not rendered for taxation by the owner thereof shall be assessed at its fair value by the proper officer." TEX. CONST. art. VIII, § 11.

The Texas Tax Code codifies the constitutional obligation of our state government to appraise and assess property for purposes of taxation. *See Atascosa County v. Atascosa County Appraisal Dist.*, 990 S.W.2d 255, 257 (Tex. 1999). As a part of this codification, the Texas Legislature in the Tax Code created appraisal districts to begin operation January 1, 1982, as political subdivisions of the state. *See* TEX. TAX CODE ANN. § 6.01 (West, Westlaw through 2009 Reg. Legis. Sess.). This statute establishes an appraisal district in each county and makes the appraisal district responsible for appraising property in the district for *ad valorem* tax

purposes of each taxing unit that imposes *ad valorem* taxes on property in the district.

Consequently, the appraisal districts are the Texas entities that must determine the taxability of all real and personal property for all local governments that impose a property tax. The appraisal districts must make the determination as to whether a particular property is taxable or exempt. *See* TEX. TAX CODE ANN. § 11.45(a) (West, Westlaw through 2009 Reg. Legis. Sess.). Therefore, the appraisal districts must annually determine whether goods are exempted by operation of the Dormant Commerce Clause.

2. Underground Storage.

Natural gas is an abundant, colorless, odorless, gaseous hydrocarbon that supplies the United States with 23.4 percent of its energy.[8] Every day millions of cubic feet of natural gas are transported from producing states to markets in other states through interstate pipelines. In 2007, Texas, Oklahoma, New Mexico and Louisiana were four of the top five natural gas producing states.[9] Texas is the nation's

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[8] U.S. ENERGY INFORMATION ADMINISTRATION, *U.S. Primary Energy Flow By Source and Sector, 2009*, http://www.eia.doe.gov/aer/pecss_diagram.html (last visited Feb. 8, 2011); U.S. ENERGY INFORMATION ADMINISTRATION, *Kids Glossary*, http://www.eia.doe.gov/kids/energy.cfm?page=kids_glossary#N (last visited Feb. 8, 2011).

[9] U.S. ENERGY INFORMATION ADMINISTRATION, *Top Natural Gas Producing States 2007*, http://www.eia.doe.gov/neic/experts/natgastop10.htm (last visited Feb. 8, 2011).

largest producer of natural gas, accounting for three-tenths of total U.S. natural gas production.[10]

"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." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 295 n.1 (1988).

The U.S. Department of Energy's Energy Information Administration reports that at the close of 2007 there were 400 underground natural gas storage facilities in 30 states, with several in Texas.[11] In 2009, Texas' natural gas storage capacity was 766,768 billion cubic feet, placing it fourth in the nation behind Michigan, Illinois, and Pennsylvania.[12]

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[10] U.S. ENERGY INFORMATION ADMINISTRATION, *State Energy Profiles, Texas*, http://www.eia.doe.gov/state/state_energy_profiles.cfm?sid=TX (last visited Feb. 8, 2011); U.S. ENERGY INFORMATION ADMINISTRATION, *Top Natural Gas Producing States 2007*, http://www.eia.doe.gov/neic/experts/natgastop10.htm (last visited Feb. 8, 2011).

[11] U.S. ENERGY INFORMATION ADMINISTRATION, *U.S. Underground Natural Gas Storage Facilities, Close of 2007*, http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/undrgrndstor_map.html (last visited Feb. 8, 2011).

[12] U.S. ENERGY INFORMATION ADMINISTRATION, *Underground Natural Gas Storage Capacity Summary, 2009*, http://www.eia.gov/dnav/ng/ng_stor_cap_a_EPG0_SAC_Mmcf_a.htm (last visited Feb. 8, 2011).

Underground product is typically stored in three types of facilities: (1) depleted reservoirs in oil and/or gas fields; (2) aquifers; and (3) salt cavern formations. Two of the most important characteristics of an underground storage reservoir are: (1) its capacity to hold product for future use; and (2) the rate at which product inventory can be withdrawn—its deliverability rate.

Natural gas in the United States is typically stored in depleted natural gas or oil fields that are close to consumption centers. Conversion of a field from production to storage duty takes advantage of existing wells, gathering systems, and pipeline connections. Depleted oil and gas reservoirs are the most commonly used underground storage sites because of their wide availability.[13]

Aquifers are suitable for gas storage if the water bearing sedimentary rock formation is overlaid with an impermeable cap rock. While the geology of aquifers is similar to depleted production fields, their use in gas storage usually requires more base (cushion) gas and greater monitoring of withdrawal and injection performance. Deliverability rates may be enhanced by the presence of an active water drive. Most aquifers that are now converted gas storage reservoirs are located in the Midwestern United States.[14]

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[13] NATURALGAS.ORG, *Storage of Natural Gas*, http://www.naturalgas.org/naturalgas/storage.asp (last visited Feb. 8, 2011).

[14] *Id.*

Salt caverns provide very high withdrawal and injection rates relative to their working gas capacity. Base gas requirements are relatively low. Salt cavern construction is more costly than depleted field conversions when measured on the basis of dollars per thousand cubic feet of working gas capacity. However, the ability to perform several withdrawal and injection cycles each year reduces the per-unit cost of each thousand cubic feet of gas injected and withdrawn.[15] The majority of salt cavern storage facilities are in Texas, and in a few Gulf Coast states, such as Louisiana and Mississippi.[16]

The principal owners/operators of underground storage facilities are interstate pipeline companies. If a storage facility serves interstate commerce, it is subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC).

Owners/operators of storage facilities are not necessarily the owners of the product held in storage. Indeed, most working product held in storage facilities is held under lease with shippers or end users who own the gas.

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[15] *Id.*

[16] U.S. ENERGY INFORMATION ADMINISTRATION, *U.S. Underground Natural Gas Storage Facilities, Close of 2007*, http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/undrgrndstor_map.html (last visited Feb. 8, 2011).

3. This Issue Has A Substantial Impact on *Amici*.

According to Capital Appraisal Group, which is the independent appraisal company hired by Chambers CAD to list and appraise the storage caverns and inventory contained therein for *ad valorem* tax purposes,[17] one of the largest underground salt dome storage terminals for natural gas liquids in North America is in Chambers County, Texas. These facilities located in Chambers County are actually 31 individual caverns, interconnected by piping. The inventory can be up to 18 different types of products, such as propane, ethane, butane or diesel. However, the facility is also used to store natural gas. These underground caverns contain a total storage capacity of 355,740,000 barrels of product according to the Texas Railroad Commission H10-H reports. These domes are located under the City of Mont Belvieu, Texas. The 31 caverns have 117 injection wells for insertion and removal of stored product. There are six owners of the caverns.

Normally those caverns may only operate at 17 or 18% of their total capacity. In dollar terms, for the recent tax years in 2008, $1,318,252,170 was the taxable value, with $146,964,020 exempted, in 2009, $919,095,870 in value was taxed, $136,161,120 was exempted and in 2010, $901,638,200 was taxed, $361,143,150 was exempted. The amounts exempted were based upon this Court's prior rulings

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[17] TEX. TAX CODE ANN. § 25.01(b) (West, Westlaw through 2009 Reg. Legis. Sess.).

prohibiting taxation of property in the hands of a common carrier for interstate shipment. The taxing authority attempted to include only product in storage for this purpose.

The Chambers County salt domes are connected to eleven Federal Energy Regulatory Commission regulated pipelines and numerous intrastate pipelines, which transport product to out of state purchasers, in-state purchasers, and, in some cases, back to in-state refineries (some of the stored product is used as refinery feedstock). The principal gas pipeline is an interstate pipeline that travels through East Texas into other states, with branches to Florida, Eastern Tennessee and Pennsylvania. This facility is a veritable cluster of caverns and pipelines. A map of the facility resembles a spider's web of pipelines. The economic relationships among the storage facility owners, stored product owners, ultimate customers, and pipeline owners are vastly more complex.

Perhaps most important for the Court's consideration is that the benefits and protections afforded to the owners of taxable, intrastate bound product and exempt interstate bound product are identical. The product of one owner, stored in a portion of the same facility, will be taxed because it has an in-state destination, while the product of another will be exempt because it has an out-of-state destination and is in a storage cavern owned by and connected to an interstate common carrier pipeline. In one case, a company owns two caverns, one connected to an interstate pipeline and the other

connected to an intrastate pipeline, with the two caverns connected to each other. That company can transfer the product between the two caverns to suit its business needs.

Of *amici*, the facts in Chambers County are most similar to the facts in the present case and in *In re Assessment of Personal Property Taxes Against Missouri Gas Energy*, 234 P.3d 938, 959 (Okla. 2008), *cert denied*, 130 S. Ct. 1685 (2010). Most, but not all, of the product stored is produced in Texas refining facilities or chemical plants. Other storage facilities are utilized for natural gas. Those products that are bound for out-of-state delivery are in the hands of the common carrier pipeline. The interstate journey for most begins at the facility. Much of the product has been purchased for out-of-state delivery while awaiting shipment at the storage facility, just as was the case in Oklahoma. *Id.* at 943. The seminal issue regarding most of the stored products in Chambers County is when the interstate journey begins. The interstate pipelines mostly begin at this location. However, as with other facilities, some stored product at this location may have been delivered from refineries or gas fields in other states or foreign nations, thus prompting the need to determine whether interstate transit has been interrupted by the owner's business needs or by storage necessary for interstate transit.

Smith County Appraisal District appraises for all the taxing entities within Smith County, Texas. It is also located near Harrison County, Texas. Smith CAD has several oil tank farms within its

jurisdiction. The market value of the oil in tanks in Smith County is over $65,000,000.

Liberty County Central Appraisal District also possesses salt domes with working gas capacity in the billions of cubic feet in its jurisdiction. Liberty County's salt domes are proximate to interstate and intrastate pipelines, along other facilities. There is currently $443,321,400 worth of inventory contained in storage caverns within Liberty County, Texas.

Also within the Liberty County Appraisal District is a rail yard, where millions of dollars worth of product sits in railcars at any given time. The product is sent there to wait for orders from customers. Once the order is received the car is sent out. However, like the storage cavern in this case, the rail yard is used to store product for the convenience and business purpose of the owner until the owner needs the product. For the 2010 Tax Year, there was $276,418,970 worth of taxable product sitting in the rail yard on January 1. That amount of value represents 43% of the appraisal roll of the City of Dayton, Texas.

B. This Matter Gives The Court An Opportunity to Further Address the Commerce Clause, Especially In Regards To *Ad Valorem* Taxation.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court overruled a line of decisions which established a *per se* bar to the taxation of property in interstate commerce. In doing so, it

adopted a four-prong test for deciding whether a particular state tax survives Commerce Clause scrutiny. A state tax will be sustained if it: (1) is applied to an activity with a substantial nexus to 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.

Ad valorem taxes are assessed by state and local governments across the United States. *Ad valorem* taxes are one of the primary pillars supporting the services state and local governments provide. By granting certiorari and addressing the issues in this case, the Court, in a matter if first impression, could address the *Complete Auto* Test as it relates to *ad valorem* taxes on goods in interstate transit on massive amounts of goods constantly present in a jurisdiction, in interstate commerce.

Presently most of the property tax issues concerning taxation of interstate commerce are issues related to the taxation of goods stored incident to interstate and intrastate transit. Most issues involving the instrumentalities of commerce have been resolved utilizing *Complete Auto* standards. The law concerning taxation of goods stored incident to interstate and intrastate commerce, however, is governed by rules which substantially predate the *Complete Auto* decision. Those rules were developed in eras where commerce was substantially slower and simpler. They involve taxation of lumber being transported by river (*Coe v. Town of Errol*, 116 U.S. 517, (1886), *Hughes Bros. Timber v State of Minn.*,

272 U.S. 469 (1926)); cattle in stockyards (*Minn. v. Blasius*, 290 U.S. 1 (1933)); sheep pasturing while traveling through a state (*Kelley v. Rhoads*, 188 U.S. 1 (1903)); and oil segregated in barrels for shipping (*General Oil v. Crain*, 209 U.S. 211 (1908)).

Essentially, these cases were developed in the late 19th and early 20th centuries in the context of a Court imposed prohibition upon the taxation of interstate commerce that existed until *Complete Auto*. The rules turn on determining when the transit physically or constructively begins. Once the transit has begun and is interrupted by storage, a fine-line must be drawn between whether the storage was necessarily incident to the goods' interstate transit or for the owner's business reasons.

After *Complete Auto* where the Court removed the blanket prohibition on the taxation of interstate commerce and replaced it with a modern analysis that seeks to prevent taxation from becoming an undue burden on interstate commerce, the pre-*Complete Auto* rules on taxation of goods in transit are anachronistic and difficult to administer in the modern world of complex commerce.

At least one treatise has characterized this Court's opinions in this field as being not very helpful when determining when a state may tax during an interruption to an interstate journey. Paul Hartman, *Federal Limitations on State and Local Taxation* 383 (1981). Equal difficulties arise in determining when interstate commerce begins.

Texas taxing authorities have struggled with the difficulty of applying this Court's pre-*Complete Auto* rules to the taxation of goods in commerce. As Texas authorities understand these rules, interstate journey begins when the property movement has begun or when the property is delivered to a common carrier for shipment. *See Coe v. Town of Errol*, 116 U.S. 517 (1886); *Marathon Ashland Petroleum L.L.C. v. Galveston Cent. Appraisal Dist.*, 236 S.W. 3d 335 (Tex. App.—Houston [1st Dist.] 2007, no pet.) In *Marathon Ashland* for example, the issue of taxability turned on the fact that the owner stored the product in its own facilities, which were connected to the interstate pipeline by a valve. Id. at 336. In *Virginia Indonesia Co., v. Harris County Appraisal District*, 910 S.W.2d 905, 912-13 (Tex. 1995), *cert. denied*, 518 U.S. 1004 (1996), the Texas Supreme Court, while addressing an export issue, expressly stated that until the United States Supreme Court overruled *Coe v. Town of Errol*, the court would continue to apply the doctrines to Texas cases.[18]

In Chambers County, the common carrier pipelines own many of the storage caverns, in which they constantly store refined product or natural gas incident to interstate shipment, after taking delivery of the product. The product is often sold while awaiting interstate shipment. There is a constant presence of stored product at this location. Similar

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[18] Following this Court's statement in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, (1989).

situations exist across the state's vast petrochemical industry.

As briefly noted above and as documented in the facts applicable in the companion case, locally gathered product is often intermingled with imported product in the same storage facility. *See Midland Cent. Appraisal Dist. v. BP Am. Prod. Co.*, 282 S.W.3d 215, 219 (Tex. App. – Eastland 2010 pet. denied), *seeking cert.* cause no. 10-890. All the molecules are the same. This makes application of the Court's distinction between temporary storage for the owner's business reasons and storage incident to interstate transit extremely difficult.

When trying to apply the Court's standard of whether property is in the hands of a common carrier, current federal agency documentation regarding the destination of products held by a common carrier and destined for interstate transit is profoundly unhelpful. When the issue turns on whether a valve has been turned or even exists, the taxing authorities may not possess sufficient technical expertise to make the distinctions required by the Court's historical approach. The Court has never considered such documentation to be determinative, but tax administrators must rely on such information to make the threshold determinations of the product's status in transit.

Also, federal regulations make these determinations even more difficult. Property owners have relied upon Federal Energy Regulatory Commission rules to evade taxation. For example, property owners in

Texas have claimed that storage prior to shipment places the product in the protected interstate commerce stream, relying upon 18 C.F.R. § 284.1. This regulation simply defines transportation to include storage, exchange, backhaul, displacement, or other methods of transportation and was intended as a part of a process to prohibit discrimination in the shipping of natural gas. Nonetheless, it was a subject in the dissent in the Oklahoma Supreme Court's case on the same matter. *See In re Assessment of Pers. Prop. Taxes Against Mo. Gas Energy*, 234 P.3d at 956-7. The problem that these issues illustrate is that the reliance on pre-*Complete Auto* formulaic standards do not reflect the necessary policy considerations in determining whether a state or local tax should be considered an undue burden on interstate commerce.

Complete Auto brought this area of jurisprudence closer to the original meaning of the Commerce Clause. The standards announced in that decision should similarly be applicable to goods in interstate transit. *Amici* respectfully request that the Court grant petition for a writ of certiorari and provide a modern framework to address the issues that arise in the taxation of goods in interstate transit.

C. This Matter Gives the Court An Opportunity to Clarify Whether the Applicability of the Physical Presence Test To *Ad Valorem* Taxes and Further Explore What Constitutes "Substantial Nexus."

The Commerce Clause of the United States Constitution reserves to the Congress the power "to regulate commerce.., among the several states." U.S. Const., art. I, § 8, cl. 3. This Court has previously recognized a "negative" or "dormant" Commerce Clause power that "prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby, "imped[es] free private trade in the national marketplace." *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980).

Congress can act regarding interstate commerce, such as in the case of Public Law 86-262, 15 U.S.C. § 381, and the Mobil Telecommunications Tax Sourcing Act (MTSA), 4 U.S.C. § § 116-126, but unless and until it does so, state and local governments are faced with the distinct possibility that their exercise of taxing authority will impair interstate commerce. Therefore, they must err on the side of caution and not exercise that authority. If a state or local government does not hold back on the exercise of its authority, it risks violating the Constitution by trespassing on and narrowing congressional constitutional authority. The avoidance of that violation of congressional

authority is the foundation of all substantial nexus analysis.[19]

However, over the past quarter-century, nexus standards have been blurred for several reasons: (1) this Court has moved on from its historic holdings; (2) Congress has refused to act and clarify the issues involved; (3) state and local governments lack clear and commonly understood nexus standards and react in a number of various ways; and (4) when these state and local actions are taken to courts, inconsistent theoretical challenges to traditional physical presence nexus has manifested itself through a patchwork of recent cases. The cherry on this ice cream sundae of uncertainty regarding what constitutes constitutional nexus is the expanding pace and breadth of modern commercial transactions.

Based on the plain reading of this Court's jurisprudence, some sort of physical presence is

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[19] The courts, for sales and transactions taxes, have placed strict bounds on when a taxing authority may lawfully assert its authority over a remote taxpayer and that is only when the taxpayer has physical presence within that state. *See Quill v. N.D.*, 504 U.S. 298 (1992), citing *Gibbons v. Ogden*, 9 Wheat. 1, 231-232, 239 (1824). Only when a taxpayer is physically present in a state can that state exercise its taxing authority and compel an out-of-state taxpayer to collect and remit sales taxes on its behalf. Physical presence is created in various ways, including, but not limited to, offices, property, and employees located in a state. When those activities are direct, it can create substantial nexus and legally make a taxpayer subject to a state's taxing authority.

required to establish substantial nexus.[20] *Quill Corp. v. N.D.*, 504 U.S. 298 (1992); *Nat'l Bellas Hess v. Ill. Dep't of Revenue*, 386 U.S. 753 (1967). The "substantial nexus" prong of the *Complete Auto* Test is satisfied if there is "some definite link, some minimum connection between a state and the ... property ... it seeks to tax." *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 777 (1992).

However, while the Court in *Quill* elaborated on, it did not reject all of, its prior dormant Commerce Clause analysis. Therefore, an unintended result is uncertainty of whether the physical presence requirements extend to taxes other than sales and use taxes. *Id.* at 314-317.

A leading tax commentator, has noted this uncertainty. Although "[s]ome of the results of the doctrinal changes" brought on by this Court in recent years "are clear,...the impact of the contemporary Commerce Clause philosophy on other cases decided in earlier eras, and the doctrine they spawned are less clear." 1 J. Hellerstein & W. Hellerstein, *State Taxation* para 4.13[1] (3d ed. 2010).

By granting the petition for writ of certiorari in this case, the Court could also clarify *Quill* and *Complete*

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[20] The Court in *Quill* noted the focus of the Commerce Clause and its substantial nexus requirements was not on fairness for individual defendants but on concerns of effects state regulation might have on the national economy. *Quill*, 504 U.S. at 312.

Auto's holdings for taxing units and taxpayers alike on the issue of whether temporarily stored goods "in transit" have a physical presence that subjects them to *ad valorem* taxation and whether such taxation contravenes the Commerce Clause. By granting the petition for writ of certiorari, this Court could also address whether the first prong of the *Complete Auto* Test is met under certain facts. In this case, there was a substantial amount of natural gas stored at all times in Harrison County, Texas throughout the year. Peoples owned part of the natural gas with a physical presence in Harrison County. The Court could resolve whether such property constituted a "definite link" and more than "some minimum connection" between Peoples' gas and Harrison County. In doing so, it would further the "substantial nexus" jurisprudence of this Court.

D. By Granting the Petition and Deciding This Case the Court Would Resolve the Disagreement Between Texas and Oklahoma, Equalizing the Demand on Government Services.

This Court should grant the petition for writ of certiorari to resolve the disagreements between Texas and Oklahoma's courts on the same constitutional question. Texas courts in this matter and one regarding Midland Central Appraisal District, have determined that the Commerce Clause *prohibits* state *ad valorem* taxation of constantly stored natural gas in an interstate pipeline system. *See Peoples Gas, Light and Coke Co. v Harrison Cent. Appraisal Dist.*, 270 S.W.3d 208 (Tex. App—

Texarkana 2008, pet. denied); *Midland Cent. Appraisal Dist. v. BP Am. Production Co.*, 282 S.W.3d 215 (Tex. App. —Eastland 2010 pet. denied). The Supreme Court of Oklahoma has held that the Commerce Clause *permits* such a tax. *See In re Assessment of Personal Prop. Taxes Against Mo. Gas Energy*, 234 P.3d 938, 959 (Okla. 2008), cert denied, 130 S. Ct. 1685 (2010). This conflict means natural gas on an interstate pipeline stored in Oklahoma is taxable but under the same facts is not in Texas. These rulings distort governmental services and the burdens paying for them.

The fourth prong of the *Complete Auto* Test requires the tax to be reasonably related to the extent of the contact. *Commonwealth Edison Co. v. Mont.*, 453 U.S. 609, 626 (1981).

A tax is a means of distributing the burden of the cost of government, not an assessment of benefits. *Id.* at 622-23. The "relevant inquiry" is not "the amount of the tax o[r] the value of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities," but whether the tax is "reasonably related to the extent of the taxpayer's contact" with the taxing jurisdiction. *Id.* at 626. In other words, "has the State given anything for which it can ask in return" *Id.* at 625.

Such benefits and protections are not hypothetical. While this brief was drafted, the fractionators unit at the Texas Enterprise Products facility at the salt domes in Mont Belvieu, Chambers County, Texas

exploded, within a few miles of a school, bringing local fire and police units into play. The fractionators serve to separate gases for interstate commerce.[21]

If the current split between the Texas ruling in this case and the Oklahoma Supreme Court's stands, there will be a clear economic incentive for property owners to store their product in Texas, where it will not be taxed, instead of Oklahoma where it will be taxed.

As noted above and as an example, the storage facility in Chambers County could go from normally operating somewhere around 18% of capacity to storing a much greater quantity of product. As capacity grows, the potential for an emergency would logically increase. This point could be illustrated by imagining by which facility you would prefer your house to be located – an empty storage cavern or a storage cavern filled with more propane and thus more fire prone. Although the taxing units of Chambers County will receive no additional revenue, they will have to provide more police protection, fire protection, emergency services, and other

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[21] CNN, *Fire Burning at Texas Natural Gas Facility,* http://www.cnn.com/2011/US/02/08/texas.plant.fire/ (last visited Feb. 8, 2011); HOUSTON CHRONICLE, *Plant Burns In Mont Belvieu Enterprise Products Operates Facility in Chambers Co.*, http://www.chron.com/disp/story.mpl/metropolitan/ 418224.tml (last visited Feb 8, 2011); KHOU, *Multiple Explosions, Fire at Mont Belvieu Plant,* http://www.khou.com/news/cnn/Explosions-fire-at-Mont-Belvieu-plant--115579109.html (last visited Feb. 8, 2011).

governmental services to protect the property of owners such as Peoples'.[22]

Texas's *ad valorem* tax is a general revenue tax imposed for the support of local governments. The tax in this case applies to the presence of Peoples' property in Harrison County, Texas as of the January 1 assessment date. It is taxed to the same extent as all other personal property in the county.[23] Peoples is therefore being asked to shoulder no more than its fair share for the support of government-provided services and the "advantages of a civilized society." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979).

By granting the petition for writ of certiorari in this case and making a ruling that resolves this current disagreement between the highest Courts in Texas and Oklahoma, this Court would also level the demand for government services and their burdens to taxpayers between the two states – demands and

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[22] Professor Hellerstein sees 'no basis for the conclusion that the taxpayer's gas does not receive 'police and fire protection ... and the advantages of a civilized society.'" 1 J. Hellerstein & W. Hellerstein, *State Taxation* para 4.13[3][a] (3d ed. 2010).

[23] Contrary to the opinion of the Texas Court of Appeals in this case, it is not a tax on any activity of a business owner. Furthermore, ownership, location, and taxability of business personal property are not contingent upon a property owner having a physical business location. Business personal property that is stored in Texas is taxable, regardless of whether it is stored in a location owned by the owner of the personal property, or stored in a leased warehouse. *See* Tex. TAX CODE ANN. § 32.07(a) (West, Westlaw through 2009 Reg. Legis. Sess.).

costs that are currently skewed against Texas and its citizens.

CONCLUSION

For the above reasons, *amici* respectfully request this Court grant Harrison Central Appraisal District's Petition for Writ of Certiorari and reverse the decision below.

Respectfully submitted,

MICHAEL J. DARLOW *
*COUNSEL OF RECORD

ROBERT MOTT
SANDRA GRIFFIN
CHRISTOPHER S. JACKSON
Perdue, Brandon, Fielder, Collins & Mott, L.L.P.
3301 Northland Dr., Ste. 505
Austin, Texas 78731
(512) 302-0190
(512) 323-6963 (fax)
mdarlow@pbfcm.com

Counsel for *Amici Curiae*