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 Writ of Certiorari to the Texas Court of Appeals, Eleventh 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

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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 Midland Central Appraisal District, in the above-captioned matter.[2] The *amici curiae* urge that the petition for a writ of certiorari be granted and the decision of the Texas Court of Appeals, Eleventh Appellate District be reversed.

INTEREST OF THE *AMICI CURIAE*

At the end of 2008, there were over 217,000 miles of interstate pipelines in the United States and over 58,000 miles of pipeline in Texas.[3] 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

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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, *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).

wealth.[4] Texas has an enormous amount of infrastructure relating to transporting, gathering, modifying and storing petroleum products. 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.[5] In addition, several other types of storage or gathering facilities that exist in Texas for products other than natural gas that are shipped in interstate and 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.

The Chambers County Appraisal District, the Liberty County Central Appraisal District, the Smith County Appraisal District of Texas, the Texas

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

[5] 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).

Association of Appraisal Districts[6] 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 revenue from 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 oil, other petroleum products and other 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) 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;

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[6] 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).

(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 during intrastate intermingled with interstate transit; (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 large quantities of petroleum products continually present in a given location that currently exists between Texas and Oklahoma.[7]

SUMMARY OF THE ARGUMENT

Imposition of an *ad valorem* tax on oil located in large tank farms in Texas, pending transport via an interstate pipeline to out-of state owners does not violate the Commerce Clause of the U.S.

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[7] Texas courts in this matter and one regarding Harrison Central Appraisal District, have determined that the Commerce Clause *prohibits* state *ad valorem* taxation of 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 petroleum products on an interstate pipeline located in Oklahoma is taxable but under the similar facts is not in Texas.

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, Midland 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. Location of Petroleum Products in Texas

Texas produces more crude oil than any other state in the nation (excluding federal off shore production). West Texas Intermediate (WTI) is the benchmark for crude oil in the United States. Most WTI is destined for Midwest refineries via interstate pipelines. More than one-fourth of the total refining capacity of the United States is in Texas. The Houston area is the largest refining center in the

United States and interstate pipelines spread from the Houston area across the country.[8]

In addition to oil, every day millions of cubic feet of natural gas are transported through interstate pipelines in the United States. Pipelines transport natural gas from producing states such as Texas and Oklahoma to markets in other states such as California, Michigan, Ohio, and New York.

"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 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).

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

The State of Texas has an enormous amount of oil and natural gas in transit or in storage at any given time. Oil pipelines transport more crude oil and refined petroleum products in the United States than

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[8] U.S. ENERGY INFORMATION ADMINISTRATION, http://www.eia.doe.gov/state/state_energy_profiles.cfm?sid=TX (last visited Feb. 8, 2011).

any other means of transportation.[9] The U.S. Energy Information Administration reports monthly crude oil stocks at tank farms and in pipelines. In 2010, slightly over one million barrels of crude oil stock was available at any given time (1,089,256 barrels in June 2010, for example). Of that amount, the majority is in the United States Strategic Petroleum Reserves (726,591 barrel in June 2010). The next largest amount of the stock, about one-fourth, is located in pipelines or tank farms (242,377 barrels).[10] Approximately one-half of the product located in pipelines and tank farms is located within PADD 3, which are the gulf coast states. (PADD refers to Petroleum Administration for Defense Districts.) Thus it is clear that at any given time, a significant amount of crude oil is in Texas pipelines or tank farms.

Smith County Appraisal District appraises for all the taxing entities within Smith 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.

In addition to tank farms located across Texas, the State also has enormous storage capacity for natural gas. These underground caverns contain a total storage capacity of 355,740,000 barrels of product

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[9] U.S. ENERGY INFORMATION ADMINISTRATION, http://www.eia.doe.gov/oiaf/servicerpt/ulsd/chapter4.html (last visited Feb. 8, 2011).

[10] U.S. ENERGY INFORMATION ADMINISTRATION, http://www.eia.gov/dnav/pet/pet_sum_crdsnd_k_m.htm (last visited Feb. 8, 2011).

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.

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 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.

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.

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 tank farm 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 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.[11]

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 situations exist across the state's vast petrochemical industry.

In this case, oil gathered in Texas is intermingled with oil gathered in a small portion of New Mexico in the same storage tanks. Although the vast majority of oil was apparently gathered in Texas and delivered to the storage tanks in Midland, some also came from out of state. Furthermore, the Court of Appeals treated all of the oil as in interstate

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

commerce when in fact its own findings showed that a little less than 10% of the oil is routinely delivered to three Texas refineries. *Midland*, 282 S.W.3d at 220. Furthermore, the Court of Appeals treated the mixing and blending activities that occurred at the tank farm as part of interstate transit, instead of as a business activity of the owner. See *General Oil v. Crain*, 209 U.S. 211 (1908), where the separation of oil into barrels was treated as the owner's business activity, subjecting the property to a state inspection fee.

All the molecules of the oil brought to Midland from New Mexico and Texas are essentially indistinguishable. The molecules of oil shipped to Texas refineries and those from out of state 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. What is more, in this case, the Court of Appeals has plainly exempted oil that is in intrastate commerce and not interstate commerce. The oil delivered to Texas refineries is more likely to have been gathered in Texas under these facts. But in fact, no one can say which oil molecule was delivered. This intermingling of both intrastate and interstate activity reveals the difficulty of applying the Court's pre-Complete Auto rulings to complex modern commerce. The oil gathered in Midland is not just in interstate commerce, it is also in intrastate commerce.

The intermingling of oil or refined product from out of state with locally gathered oil or refined product from within Texas is also an issue present for *amici*. Also, *amici* continually face issues with some of the same product that is outbound for interstate transit and intrastate transit from the same facility. The application of pre-Complete Auto standards essentially requires one to be able to distinguish when product and activities related to that product are either interstate or intrastate in character. When these products are both, these standards no longer work. Moreover, at all times, both interstate and intrastate commerce is receiving the benefits and protections of local government.

Complete Auto brought this area of jurisprudence closer to the original meaning of the Commerce Clause. The standards announced in that decision should be applicable to goods in interstate and intrastate commerce. When there is a constant presence of substantial amounts of oil or other goods stored incident to transit, as here, the Commerce Clause should not be held to shield such property from paying its fair share of taxation for the benefits that its owner receives from state and local government. *Amici* respectfully request that the Court grant the petition for 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 Grants 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.[12]

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 required to establish substantial nexus.[13] *Quill Corp.*

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[12] 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.

[13] The Court in *Quill* noted the focus of the Commerce Clause and its substantial nexus requirements was not on fairness for

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 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

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individual defendants but on concerns of effects state regulation might have on the national economy. *Quill*, 504 U.S. at 312.

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 oil located at all times in Midland County, Texas throughout the year. The court below recognizes that "there is a substantial quantity of oil that is constantly present in the tanks..." in Midland County. BP owned part of the oil with a physical presence in Midland County. The Court could resolve whether such property constituted a "definite link" and more than "some minimum connection" between BP and Midland 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 Harrison Central Appraisal District, have determined that the Commerce Clause *prohibits* state *ad valorem* taxation of constantly stored large amounts of petroleum product located in mass quantities in a jurisdiction as part of 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 petroleum products 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 being drafted, the fractionator unit at 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 fractionator serves to separate gases for interstate shipment. [14]

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 oil tank farm or one filled with more oil and thus more fire prone.[15]

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[14] 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/7418224.html (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).

[15] 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/7418224.html (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).

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 governmental services to protect the property of owners such as BP.[16]

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 BP' property in Midland County, Texas as of the January 1 assessment date. It is taxed to the same extent as all other personal property in the county.[17]

BP 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

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[16] 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).

[17] 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 2011).

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 costs that are currently skewed against Texas and its citizens.

CONCLUSION

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

Respectfully submitted,

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