No. 10-896

In the Supreme Court of the United States

HARRISON CENTRAL APPRAISAL DISTRICT,
Petitioner,

v.

THE PEOPLES GAS, LIGHT AND COKE COMPANY,
Respondent.

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

BRIEF OF THE TEXAS MUNICIPAL LEAGUE, THE TEXAS CITY ATTORNEYS ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS, THE MICHIGAN TOWNSHIPS ASSOCIATION, THE MICHIGAN MUNICIPAL LEAGUE, THE ALABAMA LEAGUE OF MUNICIPALITIES, AND THE NEW JERSEY LEAGUE OF MUNICIPALITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LAURA MUELLER
ASSISTANT GENERAL COUNSEL
Counsel of Record
TEXAS MUNICIPAL LEAGUE
1821 RUTHERFORD LANE, SUITE 400
AUSTIN, TEXAS 78754
TEL: (512) 231-7400
FAX: (512) 231-7490
Laura@tml.org

February 9, 2011 *Attorney for Amici Curiae*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Blank Page

INTEREST OF *AMICI CURIAE*

The *amici* submit this brief in support of Petitioner, the Harrison Central Appraisal District.[1] The Texas Municipal League (TML) is a non-profit association of more than 1,100 incorporated cities. TML provides legislative, legal, and educational services to its members. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of more than 400 attorneys who represent Texas cities and city officials in the performance of their duties. Other *amici* include the National League of Cities, the International Municipal Lawyers Association, the National Association of Townships and Towns, the Michigan Townships Association, the Michigan Municipal League, the Alabama League of Municipalities, and the New Jersey League of Municipalities. The *amici* collectively work to better local governments throughout the United States.

SUMMARY OF THE ARGUMENT

This case concerns when goods are constitutionally protected from ad valorem taxation under the Commerce Clause of the United States Constitution. U.S. CONST., Art. I, § 8, cls. 1 & 3. Specifically, the question presented is whether the Commerce Clause prohibits the taxation of natural gas that is stored in

---

[1] In accordance with Rule 37.6, *amici* state that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amici* or their members, have made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. The parties have consented to the filing of this brief.

one state before being transferred to another state for final distribution. The resolution of this issue is of substantial importance to local governments because of the significant implications that the ad valorem taxation of natural gas could have on the budgets of these governments.

ARGUMENT

I. The dormant Commerce Clause allows the ad valorem taxation of property that is stored in the state.

The parties in this case dispute whether natural gas stored in Texas during shipment is taxable under the Commerce Clause. The Texas court of appeals held that the gas was not taxable under the United States Constitution's Commerce Clause because: (1) the goods are in transit; (2) the owner did not have a "physical presence" in Texas; (3) the owner did not have a substantial nexus to the taxing entity; and (4) the owner did not use the services of the taxing entity. To the contrary, gas stored in Texas can be constitutionally taxed by local entities. Harrison Central argued below, and in this Court, that the stored gas avails itself of the services provided by Harrison County and has a sufficient relationship to Harrison County to be taxed. Under the Court's prior cases, the gas is taxable when stored within a taxing entity. We ask this Court to review this issue to determine for this entity, and all taxing entities, as to whether property stored in a certain location, but before being transported to its final destination, may constitutionally be taxed.

Most real and personal property in Texas is taxed. The Texas Constitution provides that:

> All real property and tangible personal property in this State, unless exempt as required or permitted by this Constitution, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.

TEX. CONST. art. VIII, § 1(b). Section 11.01 of the Tax Code mirrors this language and states that, "[a]ll real and tangible personal property that this state has jurisdiction to tax is taxable unless exempt by law." TEX. TAX CODE § 11.01.

The Commerce Clause of the United States Constitution places limits on what property is taxable based on the property's relationship with the taxing entity and whether the property is in interstate commerce. The Commerce Clause states that, "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;." U.S. CONST., ART. I, § 8, cls. 1 & 3. The "dormant Commerce Clause" prohibits a law or regulation that discriminates against interstate commerce. *Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 338 (2008). However, "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock v. Bureau of Rev.*, 303 U.S. 250, 254 (1938).

The Court has interpreted the clause many times to determine whether or not property is taxable. In this case, multiple tests were used to make the underlying decision. These tests included: (1) the "continuity of transit" test from *Minnesota v. Blasius*, 290 U.S. 1 (1933) and other cases; (2) the "physical presence" requirement as discussed in the context of sales and use taxes in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); and (3) the *Complete Auto* test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Harrison Central Appraisal District has argued that the primary test should be the four-part test in *Complete Auto*, and we agree. Further, gas stored underground meets the constitutional requirements of *Complete Auto*.

a. *Is the "continuity of transit" test still essential to dormant Commerce Clause analysis after* Complete Auto?

The "continuity of transit" test is no longer essential to dormant Commerce Clause analysis and has been superseded by *Complete Auto's* test of the taxed property's relationship with the taxing entity. *See Blasius*, 290 U.S. 1; *Complete Auto Transit, Inc.*, 430 U.S. at 279. Reviewing the issues for taxation of property in interstate commerce, the Court stated in *Blasius* that, " . . . the states may not tax property in transit in interstate commerce." *Blasius*, 290 U.S. at 9. The Court held that whether property was still in transit was a decision to be made on a case-by-case basis hinging upon whether or not the goods were still in interstate commerce or had come to rest "so that [the owner] may dispose of it either within the state, or for shipment elsewhere, as his interest dictates. . . . " *Id.* at 10-11. In contrast to that analysis, the Court in

Complete Auto disregarded the issue of whether property is "in transit" or in "interstate commerce" and instead looked at whether it made sense under the Constitution to allow a state or local entity to tax the property. 430 U.S. at 288. Interstate commerce, in and of itself, is not immune from taxation. *Id.* at 288; *see also Western Live Stock*, 303 U.S. at 254 (holding that products in interstate commerce are not immune from taxation). Because property in interstate commerce can be taxed locally, the "continuity of transit" rule that relies solely on whether a product is still moving in interstate commerce (or not) is no longer a reasonable approach to taxation of property. As noted in Harrison Central's brief, both the former Solicitor General and the Supreme Court of Oklahoma have stated that the "continuity of transit" test is no longer the appropriate inquiry. Pet. for Cert. at 14-16. We agree and would ask the Court to determine that a more comprehensive test, like that stated in *Complete Auto*, is the correct test for the constitutionality of ad valorem taxation of products that may be in transit.

b. Is the "physical presence" of the business necessary for the constitutional ad valorem taxation of personal property?

Physical presence of the property, rather than the business, should be the test for determining sufficient contacts for constitutional ad valorem taxation. Another test of whether an activity could be taxed is based on whether the owner of the property has sufficient contacts with the state through the physical presence of the business, or his agents, in the locality. *Quill Corp.*, 504 U.S. 298 (1992); *Nat'l Bellas Hess, Inc. v. Dep't of Rev. of State of Ill.*, 386 U.S. 753, 757-58 (1967). The Court stated in *Bellas Hess* that a state

cannot tax a business "whose only connection with customers in the State is by common carrier or the United States mail." *Bellas Hess*, 386 U.S. at 758. The Court emphasized that there is a difference in the ability to tax a business that has a shop or a salesman in a locality, which allows taxation, and a business that solely requests business by mail, where there would be insufficient contacts to allow taxation. *Id.* In *Quill Corp.*, the Court upheld the rule of *Bellas Hess* as it relates to sales and use taxes, but did not make a final determination as to whether the *Bellas Hess* "physical presence" rule would apply to ad valorem taxation. *Quill Corp.*, 504 U.S. at 314. "Although we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes, that silence does not imply repudiation of the *Bellas Hess* rule." *Quill Corp.*, 504 U.S. at 314. Thus, it is undecided whether "physical presence" of the property owner is necessary for an ad valorem taxation analysis. The Court's acceptance of Harrison Central's petition for certiorari would enable the Court to decide this issue and help local governments determine what property can be taxed. In doing this analysis, it makes sense to require the "physical presence" of the business for taxation when the selling of the product is being taxed because the activity being taxed is the *sales and use* of property. Similarly, it makes sense to apply the "physical presence" requirement for ad valorem taxation to the property in question because the *property itself* is what is being taxed, not the activity of the seller or owner. In the case of stored natural gas, the presence of the natural gas in the locality should be enough to meet the "physical presence" requirement. However, that would not end the inquiry.

c. *Can the natural gas stored in either an underground storage facility connected to an interstate pipeline be taxed by a state or local government under the* Complete Auto *four-part test?*

Natural gas stored in a locality before being transported to its final destination in another state has sufficient contacts to be taxable under the *Complete Auto* test. *Complete Auto* involved vehicles that were manufactured in other states and then transported to Mississippi for sale. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 276. The tax on the vehicles was a sales tax assessed by the State of Mississippi. *Id.* at 275. The Court reviewed prior case law and stated the following test for determining the validity of the taxation:

> . . . have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

Id. at 279. The components of the *Complete Auto* test in question in this case are: (1) whether the "activity has a substantial nexus with the taxing" entity; and (2) whether the tax is "fairly related to the services provided by" the taxing entity.

Substantial Nexus

The substantial nexus requirement is similar to the physical presence requirement addressed in *Quill Corp.* and *Bellas Hess*. The purpose of the substantial nexus test is to "limit[] state burdens on interstate commerce." *Quill Corp.*, 504 U.S. at 313. No specific criteria or definition is given for "substantial nexus," but the Court has held that contact by mail or common carrier is not enough for a substantial nexus. *Nat'l Bellas Hess*, 386 U.S. at 758. The Supreme Court of Oklahoma, in a case similar to this one, discussed the substantial nexus issue as it relates to natural gas storage. *In re Assessment of Personal Property Taxes Against Missouri Gas Energy, Div. of Southern Union Co., for Tax*, 234 P.3d 938, 954-58 (Okla. 2008). The court stated that, "[u]nlike the sporadic communications with random consumers in a state deemed lacking in *National Bellas Hess*, MGEs storage gas has a substantial physical presence in the state throughout the year." *Id.* at 955. In this case, the activity and property at issue is the same, the storage of natural gas. The gas is not simply passing through the state, but is coming to rest in Harrison County to wait for distribution. A gas company that stores gas is not simply contacting individuals in a state or sending them products through the mail. Rather, it is contacting the state and county through the storage of its property. We request that the Court review this case and hold that the storage of natural gas is sufficient contact with a governmental entity to meet the substantial nexus sufficient to tax the property.

Related to Services

The "fairly related to services provided by" the taxing entity prong examines whether the taxed property or activity has enough contact with the locality to be eligible to receive services from the locality. *Complete Auto*, 430 U.S. at 279, 287; *see also Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108-109 (1975) (holding that a franchise tax was constitutional where the activity bore a special relation to the protections and privileges provided by the taxing entity). The Court reviewed the constitutionality of a "severance" tax for coal mining in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). The Court reviewed the *Complete Auto* test and held that the tax was constitutional in part because the tax was related to the services provided by the state. *Id.* at 628-29. The Court also analyzed the issue of whether there should be a determination of the amount of the tax based on how many "services" the business was actually receiving. *Id* at 627. The ultimate conclusion was that the legislative branch should decide how much the tax should be, and the Court should decide only whether the activity's or property's relation to the taxing entity was enough to warrant the tax. *Id.* at 627-29. In the case of the coal mining, the relationship of mining the coal within the locality was sufficient. *Id.* The Supreme Court of Oklahoma held that gas storage was "fairly related to services provided by" the taxing entity in its state. *In re Assessment of Personal Property Taxes Against Missouri Gas Energy, Div. of Southern Union Co., for Tax*, 234 P.3d at 954-58. It stated that:

> The Commerce Clause does not shield property and activities connected to interstate commerce

> from having to contribute to the general cost of providing governmental services even if those costs are not readily attributable to the taxed property or activity. . . . The tax in this case operates on the presence of personal property in Woods County. It is taxed to the same extent as all other personal property in the county. MGE is therefore being asked to shoulder no more than its fair share for the support of government-provided services and the receipt of "the advantages of a civilized society."

Id. at 959 (citations omitted). In this case, the property–the natural gas–is also being stored in the taxing entity's jurisdiction. The working gas, as the pipeline terms it, is receiving the same services and protection as the cushion gas that continuously resides in the storage facility. If there is a fire, a fire truck from the locality would service the location. The public safety services, among others, are not just providing protection to the pipeline business, or to the cushion gas, but also to the working gas stored in the locality. The protections and privileges of Harrison County, the State of Texas, and other localities are offered to the property that is located in the locality, not only to the businesses that operate there. The natural gas in this case is eligible to receive the same services as any other property stored or used in the state, and should be made to pay the same burden as other taxed property. We request that the Court review this case and hold that the owners of the natural gas be required to pay the same ad valorem taxes that owners of other personal property in the state are required to pay.

II. Whether the dormant Commerce Clause allows the ad valorem taxation of property that is stored in the state needs to be decided in order to provide stability to taxation required by local governments and incurred by property owners who are engaged in interstate commerce.

In Texas, cities and counties, as well as schools, depend on ad valorem taxation to help pay for the services they provide. Almost 35% of city resources in Texas come from ad valorem taxes. "Where Do Texas Cities Get Their Money?" *Texas Town & City* January 2011 at 18, available at http://www.tml.org/legal_pdf/WhereDoCitiesGetTheirMoney.pdf. The majority of county funds in Texas also come from ad valorem taxes. *County Expenditures Survey 2010,* County Information Project, Texas Association of Counties, available at http://www.county.org/resources/countydata/products/financial/Expenditures_2010_Final.pdf. Counties and cities provide their services to everyone, including the owners of natural gas, regardless of whether the actual business is in Texas or in another state. As briefed by Harrison Central, 400 underground natural gas storage facilities operate in the United States. Thirty-four of them are in Texas. U.S. Energy Information Admin., Independent Statistics and Analysis, About U.S. Natural Gas Pipelines, Underground Natural Gas Storage, Underground Storage by U.S. Region, http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/undrgrnd_storage.html (last visited Feb. 7, 2011). As stated in the underground storage report, these facilities are not simply used to transport gas but are there to provide "an inventory management tool, seasonal supply

backup, and access to natural gas needed to avoid imbalances between receipts and deliveries on a pipeline network." All taxing entities and taxed businesses need to know what can be taxed. In Oklahoma, stored gas is taxed. But in Texas it cannot be taxed. Stored gas is receiving similar government services, is being used in the same way, as described above, and touches the taxing entities in the same way. This property should be treated the same way for constitutional purposes. The Supreme Court of Oklahoma was correct when it stated that gas owners are being asked only to, "shoulder no more than its fair share for the support of government-provided services and the receipt of 'the advantages of a civilized society.'" *In re Assessment of Personal Property Taxes Against Missouri Gas Energy, Div. of Southern Union Co., for Tax*, 234 P.3d at 959. Because the stored natural gas has sufficient contacts with the locality, and receives the same services, it should be taxed the same.

CONCLUSION

Amici fully acknowledge the Constitution's protection of interstate commerce and the need to avoid multiple taxation and discriminatory taxation. But there is also the need to have each type of property share the tax burden when it has sufficient contacts with the state and receives similar services. This is true whether the property is part of intrastate commerce or if the property has a final destination in another locality. The Commerce Clause and *Complete Auto* provide an analysis that allows the Court to balance these policies. Pursuant to the Court's past Commerce Clause cases, the services provided to the property in the state, and the property being taxed, we

argue that local governments should be able to tax property that is stored in their jurisdiction. For the time the property rests in a locality, it should be required to pay for the privileges and services it receives. For the above reasons, *amici* respectfully request this Court grant Harrison Central's Petition for Writ of Certiorari.

Respectfully submitted,

Laura Mueller
Assistant General Counsel
Counsel of Record

Texas Municipal League
1821 Rutherford Lane, Suite 400
Austin, Texas 78754
Tel: (512) 231-7400
Fax: (512) 231-7490
Laura@tml.org

Attorney for Amici Curiae
The Texas Municipal League, the Texas City Attorneys Association, the National League of Cities, the International Municipal Lawyers Association, the National Association of Towns and Townships, the Michigan Townships Association, the Michigan Municipal League, the Alabama League of Municipalities, and the New Jersey League of Municipalities

Blank Page