No. 13-1216

IN THE

Supreme Court of the United States

MISSOURI GAS ENERGY, *ET AL.*,

Petitioners,

v.

STATE OF KANSAS, DIVISION OF PROPERTY VALUATION,

Respondent.

On Petition for a Writ of Certiorari to the Kansas Supreme Court

BRIEF *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICUS CURIAE*

Council On State Taxation ("COST") is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST represents over 600 multistate businesses in the United States, including companies in numerous industries. As *amicus*, COST has participated in many of the significant tax cases to come before this Court in recent years, including: *Levin v. Commerce Energy*, 560 U.S. 413 (2010), *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1 (2009), *MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16 (2008), and *CSX Transportation, Inc. v. Georgia State Board of Equalization*, 552 U.S. 9 (2007).[1]

COST's membership has a vital interest in ensuring that states do not impede the ability of businesses to engage in interstate commerce. To that end, it is important to COST members that states do not unconstitutionally inhibit interstate commerce through overly broad *ad valorem* taxes on gas companies with no control over how much and when their gas is stored in that state. While this case is ostensibly about the *ad valorem* taxation of natural gas, it also serves as a proxy for the *ad valorem* taxation of other products that move through interstate commerce. Hundreds of billions of dollars of goods[2] find themselves traveling

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of amicus' intent to file this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

[2] *See Annual Survey of Manufactures: Value of Products Shipments: Value of Shipments for Product Classes: 2011 and*

across state lines in pipelines, trucks, and trains. Many of these goods could be subject to similar sorts of unjustified taxation. It is vital, therefore, for the Court to review this case to determine if interstate commerce should be burdened by this mode of state taxation.

Amicus represents many of the largest businesses in our nation's state and local economies. Individuals and businesses alike have an urgent need for this court to clarify a state's limits in imposing *ad valorem* taxes on out-of-state businesses. *Amicus'* members continue to face substantial difficulties and significant costs in complying with complex and varying state and local tax laws in all the states, the District of Columbia, and thousands of localities.

STATEMENT OF THE CASE

Petitioners are natural gas companies that contract with interstate pipeline companies for the transportation of natural gas. Pet'rs' App. 6a. The pipelines accept delivery of Petitioners' natural gas, comingle it with all their other sources of natural gas that have been deposited into their pipeline transit system and subsequently transport the gas to provide Petitioners an equivalent amount of gas at a designated point of delivery. *Id.* The pipeline system used by Petitioners traverses several states and includes a number of underground storage facilities in Kansas and other states. *Id.* at 6a-7a, 48a.

Storage is integral to the pipeline system as it allows for the continuous movement of gas throughout the

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2010, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ASM_2011_31VS101&prodType=table (retrieved May 12, 2104).

system while maintaining essential pipeline pressure and balancing requirements in conjunction with near continuous receipt and delivery of gas throughout the pipeline system. Once tendered to an interstate pipeline company, Petitioners relinquish control of their gas and it is commingled with all other gas in the pipeline system. Petitioners simply have a contractual right to an equivalent amount of gas tendered at the designated point of delivery. *Id.* at 48a. The interstate pipeline companies are regulated under federal law by the Federal Energy Regulatory Commission ("FERC"), and as such, the interstate pipeline companies bear all liability while in possession of the natural gas. *Id.* at 7a, 47a. Petitioners have neither the ability nor the right to control or direct where the gas is stored in the interstate pipeline system or how it is moved within the interstate pipeline system. *Id.* at 7a.

Even though Petitioners do not do business in Kansas, the Kansas Division of Property Valuation ("Division") classified Petitioners as public utilities, and assessed *ad valorem* taxes in excess of $41 million. Pet. for Cert. 7. All gas in the pipeline is intermixed in the pipeline, so the Division could not ascertain which gas belonged to each Petitioner. Pet'rs' App. 7a. The Division attributed ownership to each Petitioner using an apportionment formula from a FERC-approved tariff, which divided a pipeline's Kansas inventories of gas by their total inventory of gas everywhere, and multiplied the quotient by Petitioner's volume in the pipeline system. *Id.* at 4a-5a. The Division applied this formula without regard to whether the Petitioners' gas was actually located in Kansas. *Id.* at 8a.

Petitioners and others originally filed suit against the Division, claiming the taxes were unconstitutional

under the U.S. Constitution and exempt under Kansas's law and Constitution. *Id.* at 3a. The Court of Tax Appeals denied the exemption, but did not address the constitutionality of the taxes. *Id.* at 56a, 64a. Petitioners and others appealed, and the case was transferred to the Kansas Supreme Court. *Id.* at 10a. Petitioners' argued "(1) taxing their gas violates the Due Process and Commerce Clauses of the United States Constitution; (2) the gas is exempt merchants' and manufacturers' inventory under K.S.A. 79-201m and Article 11, § 1(b) of the Kansas Constitution (2012 Supp.); (3) the gas is exempt under K.S.A. 2012 Supp. 79-201f(a) because it is moving in interstate commerce and not considered public utility inventory under K.S.A. 2012 Supp. 79-5a01; and (4) the out-of-state municipal utilities qualify for exemption under Article 11, § 1(b) of the Kansas Constitution (2012 Supp.) and K.S.A. 2012 Supp. 79-201f(a)." *In re Appeals of Various Applicants from a Decision of the Div. of Property Valuation of Kansas for Tax Year 2009 Pursuant to K.S.A. 74-2438,* 298 Kan. 439, 445 (2013) (hereafter "Kan. Sup. Ct.").

The Kansas Supreme Court rejected Petitioners' arguments and found the taxes met the constitutional test under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). 298 Kan. at 452. Petitioners are seeking review of the Commerce Clause ruling made by the Kansas Supreme Court. Pet. for Cert. 11. The Court did hold the natural gas for some of the other original petitioners was exempt from Kansas's *ad valorem* tax.

SUMMARY OF THE ARGUMENT

This case involves the imposition of *ad valorem* property tax on natural gas while it is transported via common carrier by way of an interstate pipeline transportation system. Part of that interstate pipeline

transportation system involves underground storage facilities that serve multiple purposes, which include: 1) the accumulation of natural gas for later transport or use, 2) the addition and removal of natural gas through interconnections in multiple states, and 3) the maintenance of appropriate pressurization and balance throughout the whole system. The interstate pipeline system is in a constant state of flux and flow. The gas within the system, including any temporary storage, serves a continuous and essential function for it to move in interstate commerce.

As one of the nation's oldest forms of taxation, this Court has over the years reviewed many states' *ad valorem* property taxes and their impact on interstate commerce.[3] While the Court undertook to clean up the "tangled underbrush of past cases" arising under the Commerce Clause, culminating in the modern framework announced in *Complete Auto*, this Court

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[3] *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319, 21 L. ed. 179, 186 (1872) ("Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction"); *Coe v. Errol*, 116 U.S. 517, 525 (1886) (Interruption of the interstate transportation of logs will not necessarily take the goods out of the stream of commerce); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (1891) (Nothing prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction); *Carstairs v. Cochran*, 193 U.S. 10 (1904) (A state has the undoubted power to tax private property having a situs within its territorial limits); *Champlain Realty Co. v. Brattleboro*, 260 U.S. 366 (1922)(when property is shipped by a common carrier from one State to another, in the course of such an uninterrupted journey it is clearly immune from taxation); *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 101 (1929)(property found temporarily in a state if in continuous transit, cannot be taxed).

has yet to address prior precedents specific to *ad valorem* property taxation within the modern framework. Many of this Court's most important precedents evaluating the implication of *ad valorem* taxation on interstate commerce pre-date the modern framework under *Complete Auto*. Consequently, state courts have struggled to reconcile whether those cases are of continued vitality, producing conflicting results.

Even aside from this uncertainty and the difficulty it presents for taxpayers, this case deserves this Court's review because of the vital role natural gas serves in our nation's drive towards energy independence.[4] *Amicus* does not suggest that interstate commerce insulates the Petitioners from paying their fair share, but that the importance of this particular commodity to the nation's future warrants this Court's review to resolve state conflicts and the lingering uncertainty concerning this Court's precedents. It is also relevant to the states' ability to tax other goods that have entered but not completed their journey in the stream of interstate commerce.

REASONS FOR GRANTING THE PETITION

I. THIS COURT NEEDS TO RESOLVE A CONFLICT AMONG STATE COURTS ON THE CONSTITUTIONALITY OF *AD VALOREM* TAXES APPLIED TO NATURAL GAS IN INTERSTATE PIPELINES

Amicus believes the Court should grant review of this case to clarify whether *ad valorem* taxes on natural gas stored in interstate pipelines, incident to

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[4] The President of the United States of America, State of the Union Speech, declared natural gas the "bridge fuel" to our energy independence. President Barack Obama, State of the Union Address (Jan. 28, 2014).

its movement in interstate commerce, violate the Commerce Clause. This question was presented to the Court on *writ of certiorari* in a similar case in Oklahoma five years ago. *See Missouri Gas Energy v. Schmidt*, 558 U.S. 811 (2009). In that case in which the taxpayer lost, the Court requested the opinion of the Solicitor General on whether the Court should allow the taxpayer's *writ*. *Id.* The Solicitor General suggested the Court deny the *writ* because "[n]o other state court of last resort . . . has passed on the questions presented here." Br. for United States as *Amicus Curiae*, *Missouri Gas Energy v. Schmidt*, 2010 WL 304443 (2010) (hereinafter "SG Okla. Br.").

At the time of this Court's consideration of the Oklahoma case, a Texas Court of Appeals decision on a similar fact pattern in favor of the taxpayer on Commerce Clause grounds was still pending review before the Texas Supreme Court. Since the Court denied the petition in *Schmidt*, two other states, Texas and Kansas, have determined whether such a tax is constitutional, falling on opposite sides of the issue. *See Peoples Gas, Light, & Coke Co. v. Harrison Cent. Appraisal Dist.*, 270 S.W.3d 208 (Tex. Ct. App. 2008). The Texas Supreme Court chose to deny review of the *Peoples* case despite the obvious conflict between the Texas and Oklahoma decisions and left standing the Texas Court of Appeals decision in favor of the taxpayers. Five years later, in the instant case, the Kansas Supreme Court upheld the *ad valorem* tax on natural gas stored in the state, making it a two-to-one split among the states. As a result, whether *ad valorem* taxes on natural gas temporarily stored in an interstate pipeline system violate the Commerce Clause is ripe for this Court's review. These conflicting decisions in three different states have created confusion regarding what taxes the states can impose

on the transportation of goods in interstate commerce not only in the natural gas industry, but among all industries.

In *Peoples*, the Texas Court of Appeals held *ad valorem* taxes on natural gas in interstate pipelines violated the Commerce Clause. 270 S.W.3d at 217-219. In facts almost identical to the present case, with an out-of state gas company whose natural gas was stored and transported through interstate pipelines in Texas, the Texas Court of Appeals found the company lacked sufficient connections to have substantial nexus "between Texas and the entity, property, or transaction to be taxed." *Id.* at 219. The Court noted that: 1) the out-of-state company owned the gas, 2) the gas was placed in interstate commerce, and 3) storage in Texas does not remove the gas from interstate commerce. *Id.* at 212-217.

Since Congress, not the states, has the power to regulate interstate commerce through the Commerce Clause, Texas could not tax the company for the gas placed in interstate commerce, even though some of the gas was stored in—and traveled through—Texas. *Id.* at 218. The Texas Court of Appeals held the tax failed to satisfy the first and fourth prongs of the *Complete Auto* test required to sustain a tax under the dormant Commerce Clause, and thus the state could not impose the *ad valorem* tax. *Id.* After multiple requests and briefings, the Texas Supreme Court denied review of *Peoples*.

Soon after the *Peoples* decision, the Oklahoma Supreme Court declined to follow the Texas Court of Appeals' lead, creating a divide among state courts on the constitutionality of *ad valorem* taxes on out-of-state natural gas traveling through a state. *In re Assessment of Pers. Prop. Taxes against Missouri Gas*

Energy, 234 P.3d 938, 959 (Okla. 2008) (hereafter "*Missouri Gas OK*"). The *Missouri Gas OK* case involved a similar challenge to *ad valorem* taxes levied on natural gas companies for gas produced in-state running though pipelines located in Oklahoma. *Id.* The pipeline stored gas in Oklahoma and Kansas, and *the gas company could not choose in which state the gas was stored. Id.*

In the *Missouri Gas OK* case, the court also applied the four-prong test of *Complete Auto*, but unlike the *Peoples* case, the court in *Missouri Gas OK* found the *ad valorem* tax satisfied each of the four prongs of the test. *Id.* The court found the tax constitutional, even though it recognized the "fact that the natural gas at issue is in some sense interstate commerce." *Id.* at 959. The dissenting opinion points to this constitutional flaw of the State legislating in an area of federal jurisdiction, stating "[a]lthough the majority recognizes that '[t]he nexus requirement ensures that, with respect to goods in interstate commerce, a state will not be able to exact a fee simply for the privilege of passing through a state,' it determines that the storage of natural gas for a substantial portion of the year is sufficient to create the nexus requirement under *Brady*." *Id.* at 963 (Watt, J., dissenting).

Finally, in the instant case, the Kansas Supreme Court added to the conflicting decisions among the states by finding the State can impose *ad valorem* taxes on an out-of-state gas company whose gas travels through interstate pipelines located in Kansas. *Kan. Sup. Ct*. at 467-68. In holding the Commerce Clause did not bar the State from imposing these taxes, the Kansas Supreme Court stated, "There is axiomatically a substantial nexus between Kansas and the gas stored in this state. And *ad valorem* taxes,

which are levied upon property situated in Kansas, are fairly related to the taxpayers' contact with Kansas, *i.e.*, their storage of gas in this state. All property in Kansas is subject to *ad valorem* taxation, unless otherwise exempt." *Id.* (Italics in original.)

The Texas, Oklahoma and Kansas cases are remarkably similar, except for the outcomes. It is important for this Court to grant Petitioners' *writ of certiorari* to resolve the sharp conflict between states on the constitutionality of imposing *ad valorem* taxes on out-of-state gas companies whose gas is transported through the state by interstate pipeline companies.

II. THE FIRST AND FOURTH PRONG OF *COMPLETE AUTO'S* FOUR-PART TEST NECESSITATE THIS COURT'S REVIEW TO ADDRESS COMMERCE CLAUSE CONCERNS WITH THE STATES TAXING GOODS STILL IN TRANSIT IN INTER-STATE COMMERCE

The modern framework for evaluating state taxes under the Commerce Clause was articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The Court overruled *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951), which held a state tax on the privilege of doing business was *per se* unconstitutional when applied to interstate commerce. In jettisoning *Spector's* formalistic approach, *Complete Auto* emphasized the importance of looking past "the formal language of the statute [to] its practical effect" and held that a state tax will be sustained against a dormant Commerce Clause challenge if it satisfies the following four-part test:

(1) applied to an activity with a substantial nexus with the taxing state,

(2) is fairly apportioned,

(3) does not discriminate against interstate commerce, and

(4) fairly related to services provided by the state.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617 (1981) (citing *Complete Auto*). *Amicus* seeks this Court's review to determine whether the Kansas *ad valorem* property tax imposed on Petitioners' natural gas is sustainable: (1) under the first prong (substantial nexus with the state) and (2) the fourth prong (fairly related to services provided by the state) for the reasons below.

A. THE PETITIONERS' NATURAL GAS STILL IN TRANSIT IN AN INTER-STATE PIPELINE SYSTEM DOES NOT CREATE SUBSTANTIAL NEXUS FOR KANSAS TO IMPOSE AN *AD VALOREM* TAX.

Applying the substantial nexus prong of *Complete Auto*, the Kansas Supreme Court sustained the imposition of *ad valorem* property tax, concluding there was "axiomatically" a "substantial nexus" between Kansas and the gas stored in the pipeline system. *Kan. Sup. Ct.* at 453. "We agree with the Oklahoma Supreme Court that the most important factor in determining whether a substantial nexus exists . . . is that this is a personal property tax on stored natural gas that was located in Kansas on the assessment date." Pet'rs' App. 21a. This "mere presence of property" construct appears inconsistent with this Court's Due Process jurisprudence (See infra *J. McIntyre Machinery, Ltc. v. Nicastro*, 131 S.Ct. 2780 (2011)) much less "substantial nexus" under the Commerce Clause (*See Quill Corp. v. North Dakota*,

504 U.S. 298 (1992)("substantial nexus" is not satisfied when the only connection a retailer has with a state is by common carrier or United States mail service).

The Kansas Supreme Court's opinion, however, reflects a continuing misconception regarding the vitality of pre-*Complete Auto* precedent.

> This Court has not yet decided whether or to what extent *Complete Auto* displaces the older line of "continuity of transit" cases in the specific context of state *ad valorem* taxes on goods temporarily held in storage during the course of interstate transport.

SG Okla. Br., *supra*, at 10.

Complete Auto's rejection of the abstract notion that interstate commerce "itself" is outside the bounds of state taxation should not suggest this Court's prior precedents regarding Commerce Clause limits on state taxation no longer apply. *Complete Auto*'s modern framework of Commerce Clause jurisprudence was not invented from whole cloth by this Court in 1977, but reflected a synthesis of this Court's admittedly "tangled underbrush" of prior Commerce Clause precedent.[5] Even the Solicitor General, while

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[5] "These decisions (citing *e.g., General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Northwestern Cement Co. v. Minnesota*, 358 U. S. 450 (1959); *Memphis Gas Co. v. Stone*, 335 U. S. 80 (1948); *Wisconsin v. J.C. Penney Co.*, 311 U. S. 435 (1940)) 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." *Complete Auto* at 279.

ultimately arguing against review in an identical case acknowledged, in particular, the Court's pre-*Complete Auto* cases concerning "continuity of transit", "may inform the first prong of the Complete Auto inquiry" to determine "whether the relevant goods have a constitutionally sufficient nexus to the taxing State." SG Okla. Br. at 12.

1. The "Continuity of Transit" Doctrine Proscribes The Kansas Tax.

The "continuity of transit" doctrine can generally be described as proscribing state taxation of personal property temporarily in a state if the property maintains a "continuity of transit" in interstate commerce. See *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929)("the crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit.")

> If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement. Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. *Indep. Warehouses v. Scheele*, 331 U.S. 70, 73 (1946) (quoting *Minnesota v. Blasius*, 290 U.S. 1, 9-10, (1933)).

When property has stopped its interstate transit, it is necessary to evaluate whether the "stoppage" breaks the "continuity of transit". *Id.* In determining whether a stoppage disrupts the continuity of transit, it "is the purpose of the stoppage that is important." *Champlain Realty Co. v. Town of Brattleboro,* 260 U.S. 366, 376–77 (1922); and *Minnesota v. Blasius*, 290 U.S. 1, 11–12, (1933)). When the stoppage is attributable to a benefit or purpose of the owner, continuity of transit is broken and the goods are said to come to rest in the State and are subject to taxation there. *Id*. However, if the stoppage is a necessity of the transit or for the pleasure, convenience or safety of the carrier, the stoppage does not interrupt the continuity of transit. *Id. See also Indep. Warehouses*, *supra*, at 73.

While comprised of cases decided prior to the modern *Complete Auto* framework, the "continuity of transit" cases reflect an ongoing concern of Commerce Clause jurisprudence; the power of states to exact taxes that impede the free flow of commerce among the several states. Here the facts show that Petitioners deliver natural gas to a common carrier pipeline company outside the state of Kansas. Control of that natural gas lies solely with the pipeline company. Petitioners have no knowledge of or control over where the natural gas they deliver to the pipeline is transferred to or is stored. Even when gas is temporarily stored in an interstate pipeline system, the Petitioners still have no control over whether their natural gas property is or is not stored in Kansas.

2. *Quill's* "Physical Presence" Requirement Proscribes the Kansas Tax.

In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967) this Court held the Commerce Clause barred Illinois from imposing tax

collection and payment duties upon an out-of-state mail order retailer with no physical presence in Illinois. This Court observed that while it had sustained various taxes against Commerce Clause challenges in the past, those cases always involved an active presence of the payer within the state. *Id.* at 757. Focusing on the facts before it, the Court observed that it had never held that a state could impose a tax payment obligation upon a seller whose only connection with a state was by mail or common carrier. *Id.* at 758.

Like the "continuity of transit" cases, *Bellas Hess* was decided before the Court's articulation of the modern Commerce Clause framework in *Complete Auto*. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) the Court had the opportunity to consider the pre-*Complete Auto* physical presence requirement of *Bellas Hess* and confirmed the bright-line "safe harbor for vendors whose only connection with customers in the taxing State is by common carrier or the United States mail." *Id.* at 315.

Here the Kansas Supreme Court sidesteps the common carrier safe harbor by exacerbating a split of authority among jurisdictions as to whether *Quill* applies to taxes other than sales and use taxes. Kan. Sup. Ct. at 439, *citing Lanco, Inc. v. Director, Div. of Taxation*, 188 N.J. 380,382-83 (2006)(noting the split). "We agree with the *Lanco* Court. *Quill* is best restricted to sales and use taxes…". It is precisely the existence of this ongoing split of authority on the application of *Quill's* physical presence standard that necessitates this Court's review in this case.

In a case like this, where the substantial nexus prong of *Complete Auto* rests in the balance between a taxpayer, a common carrier, and a taxing state,

resort to this Court's prior precedents provides the "practical" answer that Kansas's *ad valorem* taxation violates the substantial nexus prong of *Complete Auto*. This is not because goods shipped by common carrier are formalistically immune within the meaning of *Spector*. It is because to uphold the opinion of the Kansas Supreme Court means that taxpayers will have substantial nexus wherever their goods are in transit under the control of a common carrier. Such a holding seriously undermines the substantial nexus prong of *Complete Auto*.

B. DUE TO THE PETITIONERS' LACK OF CONTROL AND DIRECTION OVER THE PIPELINE COMPANIES' STORED GAS IN KANSAS, THE PETITIONERS DO NOT RECEIVE ANY MEANINGFUL SERVICES FROM THE STATE.

After *Complete Auto*, this Court further elaborated on the fourth prong of *Complete Auto* in its *Commonwealth Edison* decision. 453 U.S. 609 (1981). The Court noted that "this test is closely connected to the first prong of the *Complete Auto Transit* test." *Id.* at 625-26. However, "the forth prong of the *Complete Auto Transit* test imposes the additional limitation that the measure of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden.'" *Id.* at 626 (citing *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)). The contacts in *Commonwealth Edison* are distinguishable from the Petitioners' connections with the State in this case. Commonwealth Edison purposefully directed its business activity of severing coal in Montana. The Petitioners in this case, however, have no purposefully

directed contact with Kansas for the State to impose a property tax on the Petitioners' gas; the Petitioners are merely using interstate pipeline companies that happen to have some—but not all—of their gas storage capabilities in Kansas.

Other cases affirming a tax on interstate business are based on similar findings to *Commonwealth Edison*, in that the taxpayers had known, and intentional, contacts with the taxing state. *See Pacific Power and Light v. Montana Department of Revenue*, 237 Mont. 77, 773 P.2d 1176 (Mont. 1989) (holding a state could impose tax on the owners of electric generating plants that contracted for an entity to construct and operate a transmission line); *Allegro Services, LTC v. Metropolitan Pier and Exposition Authority*, 172 Ill.2d 243, 665 N.E.2d 1246 (Ill. 1996) (upholding an airline departure tax); and *Owner-Operator Independent Drivers Association v. Bower*, 325 Ill.App.3d 1045 (2001) (upholding an Illinois motor fuel tax on persons voluntarily using Illinois' toll roads). In those cases, the taxpayers knew they were purposefully directing a business activity towards the taxing state. This case is very different. The Petitioners are not seeking to do business in Kansas; they lack knowledge and control over where the gas they put into the interstate pipeline system is stored—they have no ability to control (or dictate) where an operator of an interstate pipeline will temporarily store their gas.

The Petitioners' case is more akin to *Am. River Transp. Co. v. Bower*, 813 N.E.2d 1090 (Ill. App. Ct. 2004), *appeal den.* 824 N.E.2d 282 (Ill. 2004), where an Illinois appellate court addressed whether Illinois could impose a use tax on fuel and supplies that were purchased by a tugboat operator in Missouri. In

holding the tax was not fairly related to the services provided by the State, the court noted "[t]he waters are all navigable waterways of the United States and are maintained by the United States, not Illinois." *Id.* at 1092-93. *See also Northwest Airlines, Inc. v. Department of Revenue of State of Ill.*, 692 N.E.2d 1264 (Ill. App. Ct. 1998), where the court excluded flyover miles in Illinois from an apportionment factor.

Trying to defend its determination, Illinois argued that the use tax determination was justified because the taxpayer received benefits from Illinois in the form of "[un]polluted waterways" and in the form of "protection of aquatic life." *Am. River Transp.* at 1093. This contention was rejected. The appellate court used an analogy to explain why the State's contentions failed:

> In an analogous situation, an aircraft owner does not pay Illinois tax for fuel purchased and loaded out of state yet consumed while flying over this state. This is so even though the aircraft is in Illinois airspace and Illinois provides services to help keep the air clean as well as emergency services and other indicia of 'civilized society.'. . . As is the case with the harbor service tugs, aircraft that do use ground facilities and fuel purchased in Illinois do pay the appropriate taxes. However, neither boats merely floating in the middle of the Mississippi nor planes passing over Illinois are provided benefits and services by Illinois such that the use tax would pass constitutional muster in those instances.

Id. at 1094 (internal citations omitted).

Petitioners' facts are similar. The Petitioners are one-step removed from the services provided by the

state. The interstate pipeline companies, not the Petitioners, are receiving the benefit of Kansas's services. The benefit of any services Kansas provides to aid in the transportation of the gas is directly attributable to the activities of operators of the interstate pipelines.

The Kansas Supreme Court in its analysis of *Complete Auto* misconstrued the test for the fourth prong. The Kansas Supreme Court limited the fourth prong to a question of "whether the state has given anything for which it can ask return." Kan. Sup. Ct. at 439, 452 (internal citation omitted). Such generalized and amorphous state protections do not satisfy the fourth prong of *Complete Auto*.

Additionally, the fourth prong of *Complete Auto's* test is derived from *Wisconsin v. J.C. Penney* Co., 311 U.S. 435 (1940) and *General Motors Corporation v. Washington*, 377 U.S. 436 (1964). *Commonwealth Edison* at 626 n. 14. Both the *J.C. Penney* decision and the *General Motors* decision raised due process concerns with the states' imposition of a tax. Thus, the fourth prong has its roots in ascertaining that a tax does not offend due process.

With this due process background and its relation to whether a tax is fairly related to the services provided by a state, a review of this Court's recent Due Process Clause decisions to the case at hand is appropriate.

In *Goodyear Dunlap Tires Operations, S.A.V. Brown*, 131 S.Ct. 2846 (2011), the Court held that even though some tires manufactured abroad by a foreign subsidiary of Goodyear found their way through the "stream of commerce" and were used on buses in North Carolina, the foreign subsidiaries lacked the kind of "continuous and systematic contacts" with North

Carolina sufficient to establish jurisdiction under the Due Process Clause. *Id.* at 2857. The Petitioners' are in a similar position. They are not engaged in the type of continuous and systematic general business activities in Kansas to warrant due process jurisdiction. Even to the extent they are deemed by a FERC regulatory formula to have natural gas in the pipeline system in Kansas, they have no control over or knowledge of it being there. The Petitioners' primarily conduct their business activity in other locations; where they purchase gas and where they distribute the gas to their customers. Any services provided by Kansas (*e.g.,* police and fire) were not to the Petitioners' benefit, but to the owners of the interstate pipelines.

J. McIntyre Machinery, Ltc. V. Nicastro, 131 S.Ct. 2780 (2011), is also instructive. Quoting from *Hanson v. Denckla*, 357 U.S. 235 (1958), this Court in *J. McIntyre* stated, "As a general rule, the sovereign's exercise of power requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253 (internal quotations omitted). This Court rejected the idea that a product, merely by its placement into the "stream-of-commerce" established due process jurisdiction wherever that product may come to rest; instead holding a defendant must "purposefully [avail] itself of the privilege of conducting activities within the forum State . . .". In other words, "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State." *J. McIntyre.* at 2788, quoting *Hanson*, at 253.

Clearly, the Petitioners have not directed that their gas be stored in Kansas. The interstate pipeline companies have complete control of the gas. Any ownership attributed to the Petitioners at a storage location is speculative based on a FERC allocation formula. Lacking purposefully directed activity to Kansas, the Petitioners have not invoked any benefits and protections of Kansas law for the stored gas.

This Court's recent decisions in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), and *Walden v. Fiore* et al., 134 S.Ct. 1115 (2014), are also relevant. In *Daimler*, this Court rejected an agency theory (based on "important" activities conducted by a subsidiary) as a basis for establishing Due Process jurisdiction. *Daimler* at 759-60. In this instant case the Petitioners' may have a bailment relationship with the interstate pipeline companies, but Petitioners are unrelated to and have no agency relationship with them.

In *Walden*, this Court considered an attempt by a Nevada resident to assert personal jurisdiction in Nevada over a Georgia police officer based on intentional torts that occurred while the Nevada resident was in Georgia. *Walden* at 1117. The Ninth Circuit Court of Appeal had ruled that the Georgia resident knew his intentional torts would affect persons with a "significant connection" to Nevada and therefore justified in personam jurisdiction in Nevada. *Id.* at 1120. This Court held the relationship with the forum state must (1) arise out of contacts "that the 'defendant himself' creates" (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); and (2) the "minimum contacts" analysis "looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." (citing *International Shoe Co. v. Washington*, 326 U.S.

310, 319 (1945) *Walden* at 1118. As with the Georgia police officer in *Walden*, the Petitioners' contacts in this case were not directed towards Kansas simply because they had their gas transported in interstate commerce. *Walden* at 1125. The Petitioners' contact points with a given state are either at the beginning of the transportation or at its end; it should not encompass those states where the Petitioners did not direct any of their activity. With no directed activity towards the State, Kansas is not providing the Petitioners with any meaningful benefits of the State's services.

Taxpayers and the states need this Court's guidance on the limits *Complete Auto* imposes on business transactions occurring in the stream of interstate commerce.

CONCLUSION

Amicus respectfully requests that this court grant Petitioners' petition for a *writ of certiorari*.

Respectfully submitted,

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