No. 08-1458

IN THE

Supreme Court of the United States

MISSOURI GAS ENERGY,
Petitioner,

v.

MONICA SCHMIDT,
WOODS COUNTY, OKLAHOMA ASSESSOR,
Respondent.

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

AMICUS CURIAE BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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AMICUS CURIAE BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

The Interstate Natural Gas Association of America (INGAA) respectfully submits this brief in support of the Petitioner, Missouri Gas Energy (MGE).[1]

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Counsel of record of all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. The parties have consented to the filing of this brief.

STATEMENT OF INTEREST

Petitioner challenges, under the Due Process and the Commerce Clauses of the Constitution, an *ad valorem* tax levied on it by Woods County, Oklahoma for natural gas temporarily held in a storage facility located there. Panhandle Eastern Pipeline Company (Panhandle) operates the facility as an integral part of its system for transporting natural gas in interstate commerce. The District Court of Woods County, Oklahoma held that the assessment violated the Commerce Clause. The Oklahoma Supreme Court (Oklahoma Court) reversed, Justice Watts dissenting.

INGAA's members have a direct interest in this case. INGAA is a national non-profit trade association of natural gas pipeline companies operating in interstate commerce. They are often described as "jurisdictional pipelines" because they are regulated by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act (NGA), 15 U.S.C. §§ 717 *et seq*. (2006). FERC has exclusive jurisdiction over the transportation of gas in interstate commerce. Panhandle is a jurisdictional pipeline.

INGAA's members operate approximately 217,000 miles of interstate pipeline and over 160 underground storage fields in 24 states to ensure the reliable and timely transportation of more than 36 trillion cubic feet of natural gas to customers throughout the United States.[2]

INGAA is concerned by the growing imposition by local jurisdictions of *ad valorem* taxes on gas in

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[2] *Interstate Natural Gas Pipeline Segment*, http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/interstate.html.

storage fields operated by jurisdictional pipelines. The decision of the Oklahoma Court invites taxation by the 156 counties, located in 24 states, where interstate pipelines operate natural gas storage fields,[3] and these numbers could increase with the expanding demand for gas transportation and associated storage.

Because taxes on transportation, including storage, affect the delivered cost of gas, shippers will avoid pipelines whose storage service is taxed when they can choose untaxed services. Accordingly, local storage taxes directly affect interstate pipeline competition and the rates, terms and conditions for storage services offered in pipeline transportation tariffs. INGAA's members thus are affected by the precedent established in this case.

STATEMENT

A. The Role of Storage in the Interstate Transportation of Natural Gas.

The continuous movement of gas in and out of storage fields is essential to interstate gas transportation.[4] Almost all participants in the complex process of moving gas sold in interstate commerce from production fields and market centers to the ultimate consumer utilize the storage of gas by interstate pipelines, including gas producers, marketers, local distribution companies, and the pipelines themselves.

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[3] *Jurisdictional Storage Fields in the United States by Location*, http://www.ferc.gov/industries/gas/indus-act/storage/fields-by-location.pdf.

[4] Thomas O. Miesner *et al.*, *Oil & Gas Pipelines in Nontechnical Language* at p. 291-92 (2006).

Gas can never be still in pipeline systems. To maintain efficient pipeline operations, it must move constantly under varying pressures from injection points and storage fields to withdrawal points. Consequently, gas injected by shippers remains under the exclusive control of the interstate pipeline until it is delivered.

The efficient and uninterrupted transportation of natural gas is essential to the economic well being of the United States, as well as the physical well being of the vast majority of its citizens. Natural gas is used to power industry and commerce, and to heat more than half of the 109 million households in the United States.[5] In fact, customers in over half of the lower 48 states are totally dependent upon the interstate natural gas pipeline system to supply natural gas to heat and cool their homes.[6]

Storage plays a pivotal role in the natural gas industry's ability to provide reliable service to consumers. Since construction of the first U.S. facility in 1916, storage demand has continued to increase. Pipelines use storage to reliably serve traditional markets, and to meet new transportation demands. Since 2000, FERC has approved the construction and operation of seventy new underground storage fields, and an additional seven petitions are currently pending.[7] The INGAA Foundation estimates that

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[5] Kenneth D'Amica, *The Growing Importance of Natural Gas*, American Institute of Economic Research, July 16, 2008, http://www.aier.org/research/commentaries/398-the-growing-importance-of-natural-gas.

[6] *Interstate Natural Gas Pipeline Segment*, *supra*, n. 2 at p. 2.

[7] *Certificated Storage Projects Since 2000 for Expansion of or New Capacity*, http://www.ferc.gov/industries/gas/indus-act/

651 billion cubic feet of new storage will be needed in North America by 2020.[8]

Storage is used to balance seasonal load variations. Shippers inject gas into pipelines between April and October, when demand for gas for residential and commercial heating is low. They withdraw gas between November and March when demand for gas heat is high.[9]

In addition, storage gas is now withdrawn year-round to meet the sharp increase in gas-fired electric generation plants that has occurred over the last two decades. Such plants provide electricity for summer air conditioning.[10] In 2000, 23,453 megawatts of new electric capacity was added in the United States, and almost 95 percent of this additional capacity burns natural gas.[11] The Energy Information Administration estimates that gas fired generation will continue to grow over the next 20 years.[12]

Because electricity cannot be stored, pipelines and their storage infrastructure provide the flexibility needed to meet the continuous variations in peak and

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storage/certificated-for-expansion.pdf, *Pending Storage Projects*, http://www.ferc.gov/industries/gas/indus-act/storage/pending.pdf.

[8] FERC Staff Report, Docket No. AD04-11, *Current State of and Issues Concerning Underground Natural Gas Storage* at p. 1 (Sept. 30, 2004), http://www.ferc.gov/EventCalendar/Files/20041020081349-final-gs-report.pdf.

[9] National Petroleum Council, *Transmission & Distribution Task Group Report* p. T-29 (2003).

[10] *Id.* at p. T-30.

[11] *Electric Generation Using Natural Gas*, http://www.naturalgas.org/overview/uses_eletrical.asp.

[12] *Id.*

off-peak electricity demand. Such year-round demand has stimulated development of new transportation and storage arrangements, enabling pipeline systems to provide flexible and reliable service at the lowest cost.

The constantly flowing gas molecules in a pipeline system cannot be physically identified with the parties holding title to them. To maintain operational integrity in their systems, pipelines must continuously move gas in and out of storage in response to the dynamic fluctuations in gas volumes and pressures resulting from daily injections and withdrawals of gas.[13] Shippers similarly use storage to meet demand fluctuations. In consequence, interstate pipeline tariffs require shippers to nominate (*i.e.*, specify time, place, and quantity), confirm, and schedule in advance the volumes of gas to be injected at receipt points into the pipeline, and the volumes to be withdrawn at delivery points out of the pipeline. This process provides pipeline operators the information needed to predict the capacity and compression required on any given day in order to receive volumes into their system and deliver volumes out at the designated delivery points. Moreover, because of demand fluctuations, shippers are often unable to accurately gauge the exact quantity of gas they will need daily to meet demand. Shippers are often forced to "borrow" gas from pipelines to meet their daily requirements. Shippers then use storage gas to repay the borrowed volumes.[14]

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[13] T&D p. T-33.

[14] *Id.* at p. T-32.

Interstate natural gas storage also facilitates competitive natural gas markets. For example, due to the volatility of gas prices, marketers and producers may nominate gas for temporary storage and withdraw it as market prices rise.[15] Further, in 2008, there were 24 gas market centers located in key pipeline corridors in the United States.[16] The centers are a source of pipeline competition because their proximity to interconnecting pipelines and underground gas storage fields offer customers a choice among the rates, terms and conditions of transportation. Such competition stimulates efficiency among pipelines and ultimately benefits consumers.

B. The Concurrent Factual Findings of the Oklahoma District and Supreme Courts.

The concurrent factual findings of the Oklahoma courts confirm the following:[17]

- MGE purchases natural gas from suppliers in Texas, Kansas and Oklahoma and contracts with Panhandle to transport the gas to the state of Missouri.
- All of MGE's gas is delivered to customers in Missouri.
- MGE does not have any facilities or employees in the state of Oklahoma.

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[15] *Storage of Natural Gas*, http://www.naturalgas.org/naturalgas/storage.asp.

[16] *Natural Gas Market Centers: A 2008 Update*, http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.

[17] Pet. App. 3a (¶ 2), 5a (¶¶ 6-8), 6a (¶ 6), 7a (¶ 12), 8a (¶¶ 14-16), 64a (¶¶ 10, 13, 16), 65a (¶ 20), 66a (¶ 21), 67a (¶¶ 26-28), 68a (¶ 29), 69a (¶35), 71a (¶¶ 7, 11).

- Panhandle's pipeline system consists of two legs: the Elk City System, which traverses Oklahoma; and the Hansford System, which traverses Texas and Kansas. The two legs converge into a single pipeline at a compressor station located in Haven, Kansas.
- Suppliers deliver the gas purchased by MGE in Texas or Oklahoma into one of the legs of the system.
- It is physically impossible to trace individual molecules of gas once they enter Panhandle's system.
- Once the gas enters Panhandle's system, it is commingled with other gas and cannot be identified as belonging to any shipper.
- While title to the gas injected remains with the shipper, Panhandle, not the shipper, retains exclusive control over the physical movement of the gas from the time it enters the system until it is delivered.
- Panhandle offers storage service to shippers as part of its transportation service.
- Such storage is an integral part of Panhandle's system and is necessary to provide reliable transportation service to its customers.
- Panhandle has two natural gas storage facilities located in the Field Zone: the Borchers Storage Facility located in Kansas receives gas from suppliers in Texas; and the North Hopeton Storage Facility located in Woods County, Oklahoma, receives gas from suppliers in Oklahoma.
- Shippers cannot nominate gas to a specific storage field because Panhandle operates its storage fields on an aggregate basis. Panhandle determines which storage field should be used

for injections and withdrawals based on its analysis of the needs of its entire system.

- Under Panhandle's tariff and the parties' transportation contracts, shippers' gas is deemed to be stored at Haven, Kansas and not at the actual location of Panhandle's storage facilities.

C. Opinion of the Oklahoma Supreme Court.

The Oklahoma Court agreed with the district court that gas injected into Panhandle's system cannot be physically traced to any specific shipper, is commingled with all other gas in that system, "is owned in common by all shippers with positive storage account balances (Pet. App. 20a-23a), and "that MGE has no control over the gas [except] the timing of its return[.]" (Pet. App. 31a ¶52). The court nevertheless held that Woods County's tax had been properly levied on the undifferentiated gas temporarily stored in Woods County (Pet. App. 10a-15a). It then ruled that under the Due Process Clause this undifferentiated gas had a situs in Woods County taxable to MGE. (Pet. App. 18a (¶31)-19a (¶33)).

Turning to the Commerce Clause, the Oklahoma Court ruled, under *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) (*Complete Auto Transit*) that (1) there was a substantial nexus between MGE's share of the undifferentiated storage gas and Woods County, (2) the tax was fairly apportioned to MGE's storage activities in the County, (3) the tax did not discriminate against interstate commerce, and (4) the tax was reasonably related to services provided by Woods County to MGE. In making these determinations, the court brushed aside this Court's statement that "[u]nderground 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;"[18] the Sixth Circuit's holding that storage by interstate pipelines is subject to FERC's jurisdiction because it is a key component of the transportation of gas in interstate commerce;[19] and FERC's regulation that "Transportation includes storage, exchange, backhaul, displacement, or other methods of transportation."[20] The Oklahoma Court stated that none of these authorities "bears on . . . whether the taxation of stored gas destined to be shipped out of state conforms to the Commerce Clause[,]" (Pet. App. 32a-33a (¶54)), and that its decision "ha[d] nothing to do with these regulatory concerns." (Pet. App. 34a (¶55)). It therefore concluded that there was "nothing in the record to support the trial court's conclusion that the [*Complete Auto Transit*] test is not met in this case other than the bare fact that the natural gas at issue is in some sense in interstate commerce." (Pet. App. 42a (¶66)). Justice Watt dissented: "Because there is no substantial nexus between MGE and its activities within Oklahoma, the gas may not be taxed under the commerce clause." (Pet. App. 59a (¶11)).

SUMMARY OF ARGUMENT

Woods County taxes shippers' interests in gas transported in interstate commerce. Storage is integral to the transportation of natural gas by interstate pipelines. All gas within such systems, including gas

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[18] *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 295, n. 1 (1988) (citations omitted).

[19] *Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement,* 776 F.2d 125, 129 (6th Cir. 1985).

[20] 18 C.F.R. § 284.1(a) (2008). The FERC has exclusive jurisdiction over all forms of the transportation of natural gas in interstate commerce. 15 U.S.C. § 717(b).

temporarily held in storage, is in constant physical movement in interstate commerce. Such gas has no fixed situs or point of contact within any state or local jurisdiction. It lacks a substantial nexus to such jurisdictions, cannot be fairly apportioned to shippers, and the burden of any property taxes on it falls principally outside the taxing jurisdiction. Therefore *ad valorem* property taxes on such gas violate the Due Process and Commerce Clauses of the United States Constitution.

ARGUMENT

I. The Petition Presents Questions With Enormous Significance to Interstate Gas Pipelines and Their Customers.

The factual findings in this case generally describe the relationships between any interstate pipeline and its shippers. They show that the imposition of state or local *ad valorem* taxes on natural gas storage facilities threatens the interstate pipeline industry, as well as the nation's consumers of natural gas.

The numerous market centers that have developed both upstream in gas production areas and downstream in market areas serve gas consumers in multiple states. They have enhanced competition by giving buyers and sellers access to alternative pipelines and a meaningful choice among the rates, terms and conditions of service the pipelines offer. However, pipelines operating natural gas storage fields in states that do not impose *ad valorem* tax on storage gas have a distinct competitive advantage over pipelines subject to the tax. Shippers will naturally seek to transport and store their gas on pipelines where they can avoid such taxes. Pipelines with storage in taxing states must counter the advantage of pipelines with storage in non-taxing states by changing service tariffs or operations across their systems. Local taxation of storage thus forces pipelines to take actions unrelated to the efficient and economic operation of their pipelines, and undermines the ability of the natural gas industry to provide abundant supplies of natural gas to consumers at the lowest cost.

The imposition of *ad valorem* taxes on storage gas will also impact the millions of customers who rely on natural gas to supply their everyday energy needs. Interstate natural gas storage fields are located in 24 states and 156 counties across the country. In one form or another, any storage tax on shippers will flow through the economy to the consumer. It will appear in the price of goods and services, and in higher rates for electricity, heating, and cooling. The impact on residential consumers alone will be substantial because more than 62% of homes in the United States rely on natural gas for heating and cooling.[21]

II. The Oklahoma Court's Ruling that Gas Stored In The North Hopeton Facility Has a Taxable Situs In Woods County Violates The Due Process Clause.

The findings of the Oklahoma Court and district court show that gas in Panhandle's system is fungible, physically undifferentiated, and constantly flowing in and out of storage and through the pipeline's entire interstate system. They also show that the gas cannot be physically identified with any owner. Except for MGE's right to control the timing of the delivery of gas into and out of Panhandle's system, Panhandle alone controls the gas. Such

[21] *How Natural Gas is Used?* http://www.eia.doe.gov/kids/energyfacts/sources/non-renewable/naturalgas.html#WHATITIS USEDFOR.

control by the pipeline of the stream of gas and of the locus of its storage is necessary to assure safe and efficient pipeline operation.

Central to the Oklahoma Court's decision is its holding that the gas stored at Panhandle's North Hopeton facility is owned in common by all shippers with storage volumes on the Panhandle system. (Pet. App. 20a-24a). That does not, however, establish a situs for the volumes MGE can claim, because no identifiable gas can be attributed to any particular shipper.

The Oklahoma Court's approach rejects the reality of pipeline operations reflected in its findings on the ground that to accept that reality would produce an "absurd result." (Pet. App. 22a (¶38)). Instead, it holds that MGE's right to claim volumes of undifferentiated gas designated for storage in a facility from which gas is constantly flowing in and out within a closed pipeline system, is sufficient to establish a taxable situs. It fails to recognize that gas in storage and gas in Panhandle's pipeline constitute a single dynamic and fungible commodity flowing through such systems. The difference between gas in the pipeline and gas in storage lies only in the rates, terms and conditions for nominating injections and withdrawals—a difference defined by pipeline tariffs, not by the physical situs of the flowing gas.

The Oklahoma Court's theory logically leads to the conclusion that any gas volumes that shippers have the right to withdraw could be deemed to have a taxable situs at any point in the system, and thus be subject to taxation by any state or county through which the system passes. The Oklahoma Court attempts to forestall that result by insisting that the assessment was "not a tax on property that is *merely* passing through Woods County" because although the volume of gas in North Hopeton fluctuates, "some volume of gas is there at all times." (Pet. App. 19a (¶33)). The same, however, can be said of gas contained in every part of every interstate pipeline system.

Proper determination of taxable situs is indispensable to deciding whether an *ad valorem* property tax on physical property meets the requisites of the Due Process Clause. Location matters because the validity of the tax under the Clause requires that land or chattels to be taxed be *physically* located in the taxing jurisdiction. *Curry v. McCanless*, 307 U.S. 357, 364 (1939) (*Curry*). It follows that specific physical property must be identifiably owned before it can be taxed. As the findings show, such locational identification is impossible in the case of gas in an interstate pipeline and storage system. Because *Curry*'s requirements have not been met here, the Oklahoma Court had no basis to proceed to the next step and conclude that Woods County's tax on MGE was fundamentally fair under the Due Process Clause.

The Oklahoma Court's focus on shippers' right to withdraw volumes of gas equivalent to those they injected violates the Due Process Clause for another reason: the almost inevitable extra-territorial application of the tax. To determine whether a shipper's gas is putatively located within a taxing jurisdiction, the tax assessor must resort to artificial allocation formulas. These formulas typically consist of some version of the ratio of the shipper's volumes designated for storage somewhere on the system to the total of the volumes in the pipeline's storage facilities.

The formula in this case is an example. (Pet. App. 23a ¶41, n. 35) 69a (¶37)).[22] Because jurisdictional pipeline storage facilities are concentrated in production areas (field zones) and market areas (market zones) along legs of pipeline systems that stretch across the entire country,[23] local taxation under such formulas will have extraterritorial effects. Taxation with such effects violates fundamental rulings that states may not tax goods located in another state,[24] otherwise "tax 'extraterritorial values[,]'"[25] or expose taxpayers to the risk of multiple taxation.[26]

The risk of multiple taxation is real. Under the Oklahoma Court's approach, a shipper's storage volume taxed by local jurisdictions in the field zone, could be taxed again at by the local jurisdictions in the market zone because "some volume of gas is there at all times." (Pet. App. 20a (¶33)). Storage gas presents a tempting target for local taxing authorities because the burden of the tax falls principally outside of their jurisdictions, so that the usual political restraints on taxation are inapplicable.[27] Such risks of multiple taxation of storage gas render state

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[22] *See also Peoples Gas, Light & Coke Co. v. Harrison Cent. Appraisal Dist.*, 270 S.W. 3d 208 (Tex. App. Texarkana 2008).

[23] *Current State of and Issues Concerning Underground Natural Gas Storage*, *supra*, n.8.

[24] *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905).

[25] *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 128 S. Ct. 1498, 1502 (2008) (citations omitted).

[26] *Tyler Pipe Indus., Inc. v. Wash. State Dep't Revenue*, 483 U.S. 232, 242 (1987).

[27] *S.C. Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185, n. 2. (1938).

and local taxes on storage gas inconsistent with the Due Process Clause.

III. Gas in Interstate Pipeline Storage is Being Transported in Interstate Commerce.

In addressing Petitioner's Commerce Clause contentions, the Oklahoma Court acknowledged that "federal courts have indeed recognized that storage of natural gas is an important component of interstate gas transportation," (Pet. App. 32a (¶54)), but it disregarded the significance of those cases for its Commerce Clause analysis on the ground that none pertained to the taxation of stored gas under the Commerce Clause. (Pet. App. 32a-33a). Among those cases were *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (*Schneidewind); Maryland v. Louisiana*, 451 U.S. 725 (1981) (*Maryland*); *Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement*, 776 F.2d 125 (6th Cir. 1985)(*Columbia Gas*); and *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281 (D.C. Cir. 1994) (*Oklahoma Gas*).

In *Schneidewind*, this Court reasoned that transportation in interstate commerce includes storage because "[u]nderground 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*, 485 U.S. at 295, n.1 (quoting *Columbia Gas*, 776 F.2d at 129, and 578 F.Supp. 930, 933 (ND Ohio 1983).

In *Oklahoma Gas*, the D.C. Circuit held that all gas commingled in an interstate pipeline is being transported in interstate commerce whether its component molecules remain within one state or not. 28 F.3d at 1286.

In *Maryland*, the state of Louisiana argued that certain taxable "uses" of natural gas within the state after its production from federal offshore lands "break the flow of [interstate] commerce and are wholly local events." *Maryland*, 451 U.S. at 754.[28] This Court, however, rejected that argument, explaining "we do not agree that the flow of gas from the wellhead to the consumer, even though 'interrupted' by certain events, is anything but a continual flow of gas in interstate commerce. Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Id.* at 755 (citations omitted).

These and similar cases provide the legal basis for FERC's regulation providing that storage is a form of transportation in interstate commerce: "Transportation includes storage, exchange, backhaul, displacement, or other methods of transportation." 18 C.F.R. §284.1(a) (Pet. App. 32a, n.54).

The Oklahoma Court failed to recognize that these authorities establish the basic premise of the Commerce Clause question before it: storage gas is being transported in interstate commerce. That proposition does not, of course, conclude the Commerce Clause analysis. For that, contemporary jurisprudence turns to *Complete Auto Transit*.

IV. The Oklahoma State *Ad Valorem* Tax Is Not Valid Under The *Complete Auto Transit* Test.

The Commerce Clause of the United States Constitution reserves to the Congress the power "to regu-

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[28] The "uses" considered by the Court included gas gathering, processing, compression and other similar activities.

late commerce . . . among the several states." United States Const., Art. I, Sec. 8. 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.'" *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (citations omitted) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437(1980)).

Although a state tax on goods moving in interstate commerce is not per se invalid, a state's authority to tax interstate commerce is limited by the Commerce Clause. The limitations are set forth in *Complete Auto Transit*'s four elements: (1) whether the tax is applied to an activity with a substantial nexus with the taxing state; (2) whether the tax is fairly apportioned; (3) whether the tax discriminates against interstate commerce; or (4) whether the tax is fairly related to services provided by the state. *Complete Auto Transit*, 430 U.S. at 279. If the challenged tax fails to satisfy any one of these elements, it violates the Commerce Clause and cannot be constitutionally applied. *Id.* at 277-79.

The taxes assessed by the Woods County Assessor do not pass the tests in *Complete Auto Transit*. INGAA agrees with the Petitioner's analysis of all four elements, but briefly supplements its discussion of the first, fourth, and second tests.

A. There Is No Substantial Nexus Between the State of Oklahoma and Storing Gas In a FERC Jurisdictional Facility.

The substantial nexus test of *Complete Auto Transit* requires that the tax be "applied to an activity with a substantial nexus with the taxing State," *id.* at 279, so that it is "sufficiently connected to the State to justify the tax," *id.* at 287. This requirement ensures that a state taxing authority cannot unduly burden interstate commerce by exacting a fee simply for the privilege of passing through the state. *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (*Quill*). Allowing states to enact such a tax would lead to grave consequences for the national economy. *Id.*

The Oklahoma Court ruled that the gas held in storage at North Hopeton cannot be characterized as volumes passing through to interstate destinations because "[w]hile the volume of gas increases and decreases over the year, some volume is stored in the county at all times during the year." (Pet. App. 30a (¶50)). The court simply ignored the undisputed findings describing pipeline operations, the impossibility of identifying physical ownership, MGE's lack of control over the gas, and the fungible nature of all gas being transported in Panhandle's interstate system, whether it is in storage or in the pipeline.

These findings demonstrate the irrationality of the Oklahoma Court's conclusion that a substantial nexus existed between the storage gas and Oklahoma because "some" volume of gas controlled by Panhandle was present in Woods County. (Pet. App. 30a (¶50)). Both *Complete Auto Transit* and *Quill* hold that the actual movement of goods in interstate commerce is enough to deprive the goods of the degree of nexus with the taxing state necessary to justify the tax under the first test in *Complete Auto Transit*. *D.H. Holmes Co., Limited. v. McNamara*, 486 U.S. 24, 30-31 (1988). As shown above, storage gas is in continuous movement in interstate commerce because such movement is intrinsic to the operation of closed, integrated pipeline systems.

Prior to this Court's decision in *Complete Auto Transit*, the analysis of whether a tax violated the dormant Commerce Clause depended upon whether the goods were "at rest" or "in transit". While the Oklahoma Court purported to eschew the "at rest" theory, its decision plainly rests on the continuous presence of "some volumes" in the Woods County facility, albeit in constant motion and not physically identifiable to any owner. This Court rejected that approach in a closely parallel case, *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929) (*Carson Petroleum*), involving the brief storage of oil for export until a ship arrived or shipload quantities accumulated. This Court ruled that oil held in temporary storage for such operational reasons was not taxable under the Commerce Clause. The temporary storage and constant flow of undifferentiated gas in and out of North Hopeton is a similar operational necessity. That fact, plus the impossibility of physically linking the gas to any specific owner, confirms the conflict between *Carson Petroleum* and the Oklahoma Court's substantial nexus holding.

B. The State Tax Is Not Fairly Related to the Services Provided by the State of Oklahoma.

The fourth test of the *Complete Auto Transit* is closely connected to the first. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981). Beyond the threshold requirement that the activity must have a substantial nexus with a state before any tax may be levied on it, the fourth test requires the tax to be reasonably related to the extent of the contact. *Id.* at 626. The services provided by Woods County, however, provide no benefit to MGE or other shippers with rights to gas being temporarily stored there.

It is Panhandle, and not its storage shippers, that bears the risk of loss associated with gas stored at North Hopeton. Panhandle does not assign a shipper's storage gas to a particular storage location, so MGE's storage gas account would not be affected in the event of loss of the volumes there for any reason, including disasters to which the County might respond. (Pet. App. 7a (¶12), 66a (¶21)). Further, MGE has no offices or employees in Woods County. (Pet. App. 3a (¶2), 69a (¶35)), and MGE does not benefit from any other services provided by the county. Because the *ad valorem* tax assessed on shippers by the Woods County assessor is not related to benefits provided to the taxpayer by the taxing jurisdiction, it fails the fourth test in *Complete Auto Transit.*

C. The State Tax Is Not Fairly Apportioned.

The second test in *Complete Auto Transit* requires that the state tax be fairly apportioned in order to prevent multiple taxations. *Complete Auto Transit*, 430 U.S. at 279. "[T]he central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989) (citation omitted). To determine whether a tax is fairly apportioned, the Court examines among other sectors, whether the "tax [is] structured so that if every State were to impose an identical tax, no multiple taxation would result[.]" *Id.* at 261.

In this case, there is a clear risk of multiple taxation. The Oklahoma Court reasoned that the allocation formula assessed MGE only for its share of volumes stored in Oklahoma, and that there was no risk that Kansas would impose a similar tax because its statute exempted public utility companies from such taxation. (Pet. App. 38a (¶60)). Kansas, however, recently passed new legislation that specifically allows the imposition of an *ad valorem* tax on natural gas held in storage.[29] This development illustrates the growing threat of multiple taxation of gas moving in interstate commerce through the indispensable storage facilities of interstate pipelines. The risk of multiple taxation causes state or local taxation of gas stored by interstate pipelines to not only violate the Due Process Clause, but also to fail the "fair apportionment" test of *Complete Auto Transit*.

CONCLUSION

For the reasons set forth in the Petition and this Brief *Amicus Curiae*, the Court should grant a writ of certiorari to review the judgment of the Supreme Court of Oklahoma.

Respectfully submitted,

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[29] *See* Kan. H. Sub. S.B. 98, 2009-2010 Leg. Sess., § 5 (Apr. 17, 2009); K.S.A. § 72-6431(effective July 1, 2009).