No. 08-1458

In the Supreme Court of the United States

MISSOURI GAS ENERGY, PETITIONER

v.

MONICA SCHMIDT, WOODS COUNTY, OKLAHOMA ASSESSOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Due Process Clause or the dormant Commerce Clause prohibits a State from imposing an ad valorem tax on natural gas stored in the State but connected to an interstate pipeline system for out-of-state transport.

2. Whether the Due Process Clause or the dormant Commerce Clause prohibits a State from using the particular formula applied in this case for allocating ownership of stored natural gas among various shippers for purposes of assessing an ad valorem tax.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

This case involves a State's taxation of natural gas stored in underground facilities located in the State and connected to a pipeline system for interstate transport. The Oklahoma Supreme Court upheld the tax against Due Process and dormant Commerce Clause challenges. Pet. App. 1a-59a.

1. Panhandle Eastern Pipeline Company (Panhandle) owns and operates an interstate natural gas pipeline. One branch of the pipeline begins in Texas, and the other branch begins in Oklahoma. The branches are not connected until they converge into a single pipeline in

Kansas. Gas in the pipeline moves in only one direction—from high pressure to low pressure—which, in geographic terms, means from Texas and Oklahoma toward Kansas. Pet. App. 4a-6a.

Shippers purchase natural gas from suppliers located in Texas and Oklahoma, who deliver the purchased gas into one of the branches of the system at metered receipt points. Because multiple shippers use the pipeline simultaneously and all of their gas is commingled, tracing the ownership of individual molecules of gas is physically impossible from the moment the gas enters the pipeline. The molecules of gas delivered by the pipeline to the shipper at the delivery point are very unlikely to be the same molecules of gas that the supplier put into the system at the shipper's request. Pet. App. 5a.

Panhandle also offers a storage service to shippers. Panhandle has one storage facility in Kansas (on the Texas branch of the pipeline before the two branches converge) and one in Woods County, Oklahoma (on the Oklahoma branch of the pipeline). The storage volumes fluctuate seasonally: gas is injected into storage during spring and summer and withdrawn during fall and winter. Pet. App. 5a-6a.

Delivery and storage transactions are executed by means of a scheduling system, whereby the shipper requests delivery or storage of a volume of gas equivalent to the volume it has had supplied to the pipeline. A shipper can generally determine, based on the location at which gas is supplied and its knowledge of the pipeline's configuration, which storage facility will receive that gas. The shipper has no contractual right, however, to insist that the gas be stored at a particular facility. A shipper likewise has no right to choose from which storage facility Panhandle will draw the gas that it provides to the shipper at the delivery point. The shipper retains title to the gas at all times it is in the pipeline or storage facilities. Pet. App. 6a-9a.

2. Petitioner, a Missouri natural gas distribution company, purchases gas from suppliers in Texas and Oklahoma and contracts with Panhandle to store and transport the gas to Missouri. Pet. App. 2a-3a.

Pursuant to Oklahoma law (Pet. App. 79a-80a), respondent (the county assessor) determined that gas stored in Panhandle's Oklahoma storage facility was subject to ad valorem taxation. Respondent requested from Panhandle a list of shippers and the amount of gas each shipper had stored at the Oklahoma facility as of January 1, 1998, 1999, and 2000. Using an allocation formula from its Federal Energy Regulatory Commission (FERC)-approved tariff, Panhandle provided the requested information. *Id.* at 3a.[1]

Based on that information, respondent levied the ad valorem tax at issue in this case. Respondent denied petitioner's protest, and the county Board of Equalization affirmed. Pet. App. 3a. Petitioner appealed the Board's decision to a state trial court. After a bench trial, the court denied petitioner's challenge under the

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[1] The formula in the FERC-approved tariff provides:

> For purposes of reporting Storage inventories for state ad valorem taxes, the total inventories of Gas in * * * Storage Facilities in any particular state shall be determined. Inventories * * * shall be allocated to all Shippers with inventories [under various FERC Rate Schedules], based on the ratio of total Storage inventories for the state divided by total Storage inventories for all states times the Shipper's total Stored Volume under such Rate Schedules.

Pet. App. 24a-25a n.35 (quoting Panhandle Tariff, General Terms and Conditions § 27.4(c)).

Oklahoma Constitution, but concluded that the tax violated the dormant Commerce Clause. *Id.* at 4a, 62a-75a.

3. The Oklahoma Supreme Court reversed. Pet. App. 1a-59a.

The Oklahoma Supreme Court first rejected petitioner's due process challenge, which was premised on the view that the natural gas stored in Oklahoma could not acquire a tax situs in the State because it was awaiting interstate transport. Pet. App. 15a-16a. The court explained that "[t]he contested assessment is not a tax on property that is *merely* passing through [the Oklahoma county] to an out-of-state destination. It is a tax on tangible personal property actually located in [the county] on the assessment dates." *Id.* at 19a-20a. The court therefore concluded that "despite the parties' intention that [petitioner's] stored natural gas will ultimately be delivered to Missouri, its sojourn in storage in Oklahoma gives it at least a minimal nexus to this state sufficient to establish tax situs and to survive a due process attack." *Id.* at 19a.

The court then rejected petitioner's dormant Commerce Clause challenge. It determined that the applicable inquiry is the four-pronged test set forth by this Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), rather than the pre-*Complete Auto* test, which focused on the presence or absence of an interruption in transit that took the goods out of interstate commerce. Pet. App. 25a-29a.

Applying the first prong of *Complete Auto*, the court found a "substantial nexus" between the property sought to be taxed (stored natural gas) and the taxing state (Oklahoma). Pet. App. 29a-37a. The court explained that the nexus requirement prevents a State from exacting a fee on goods simply for the privilege of passing through the State. The court found here that because "[l]arge volumes of gas are stored in [the county] for a substantial part of the year," the gas has "a substantial presence in [the county] and is not in transit in such a way as to invoke the protection of the Commerce Clause." *Id.* at 30a. The court further explained that storage benefits both the shipper of natural gas (by enabling it "to accumulate gas when demand is low") and the pipeline (by enabling it "to maintain pressure in its system"). *Id.* at 31a. The court also rejected petitioner's reliance on a FERC regulation that defines the transportation of natural gas to include storage, explaining that the regulation does not speak to the constitutional question but simply ensures open access to storage by non-pipeline owners of gas who use the pipeline system. *Id.* at 33a-36a (citing 18 C.F.R. 284.1(a); FERC Order No. 636, 57 Fed. Reg. 13,267-13,289 (1992)).

Applying the second prong of the *Complete Auto* test, the court held that the tax was "fairly apportioned" to property located in the State and owned by petitioner. Pet. App. 37a-39a. The court found that the ad valorem tax allocation formula contained in Panhandle's FERC-approved tariff "present[s] a reasonable allocation method approved by the federal regulatory agency with special knowledge of the workings of the natural gas industry in general and of the transportation and storage facets of the natural gas business." *Id.* at 24a. The court reasoned that the ad valorem tax assessed in this case was "internally consistent" because if every State were to use the same formula, no multiple taxation would result. The court also stated the tax was "externally consistent" because it seeks only to tax gas located within the State. *Id.* at 38a-39a.

Applying the third prong of the *Complete Auto* test, the court determined that the tax did not discriminate against interstate commerce because it does not favor in-state business over out-of-state business. Pet. App. 39a-40a. Rather, the court found, "[i]t falls on anyone owning property located within the state on the assessment date." *Id.* at 40a. Applying the fourth prong, the court held that the tax is "reasonably related" to the services provided by the state to the taxpayer. The court explained that the ad valorem tax at issue operates on the presence of personal property in the county and that the stored natural gas is taxed to the same extent as all other personal property in the county. *Id.* at 40a-42a.

One judge dissented on the dormant Commerce Clause issue. Pet. App. 54a-59a.

DISCUSSION

Petitioner contends (Pet. 16-24) that the Due Process and dormant Commerce Clauses preclude state ad valorem taxation of natural gas stored on behalf of shippers in a pipeline's storage facilities pending interstate transport of the gas. In the alternative, petitioner argues (Pet. 24-30) that the allocation formula used to identify ownership interests in the stored gas in this case is constitutionally defective. Those contentions do not warrant further review at this time.

No other state court of last resort or federal court of appeals has passed on the questions presented here. The Oklahoma Supreme Court applied the correct legal standard and, based on the record below, reached the correct result. Because the danger of multiple taxation predicted by petitioner has not yet materialized (and may never do so), and because FERC has authority to disapprove a tariff specifying an objectionable allocation formula, there is no pressing need for this Court's intervention now.

A. There Is No Conflict In Authority Warranting This Court's Review

The court below is the first and only state court of last resort to have decided whether a State may levy an ad valorem tax on natural gas stored in the State pending transport via an interstate pipeline. Petitioner has not cited any pertinent decision, let alone a conflicting decision, by a federal court of appeals. Instead, petitioner alleges a conflict with a pair of decisions from intermediate Texas appeals courts, a pair of decisions from an intermediate Louisiana appeals court, and dicta from the Kansas Supreme Court. Pet. 21-23. The purported conflicts between those rulings and the decision below do not warrant this Court's review.

Based on the first prong of the dormant Commerce Clause test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), two Texas intermediate courts have invalidated local taxes on stored natural gas and oil that was owned by shippers but in the possession of an interstate pipeline operator. See *Peoples Gas, Light, & Coke Co.* v. *Harrison Cent. Appraisal Dist.*, 270 S.W.3d 208, 217-219 (Tex. App. 2008) (natural gas stored by pipeline operator in underground facilities), petition pending, No. 09-0053 (Tex. filed Jan. 21, 2009); *Midland Cent. Appraisal Dist.* v. *BP Am. Prod. Co.*, 282 S.W.3d 215, 223-224 (Tex. App. 2009) (oil passing through tank farms operated by pipeline system), petition pending, No. 09-0273 (Tex. filed May 20, 2009). The Texas Supreme Court, however, is in the process of deciding whether to grant further review and has ordered full merits briefing in both cases. See 09-0053 Docket entry (Tex. June 5, 2009) (*Peoples Gas*); 09-0273 Docket entry (Tex. Aug. 26, 2009) (*Midland Cent.*).

The Louisiana appeals court decisions cited by petitioner *upheld* ad valorem taxes on stored natural gas. See *Mississippi River Transmission Corp.* v. *Simonton*, 442 So. 2d 764 (La. Ct. App. 1983); *United Gas Pipeline Co.* v. *Whitman*, 390 So. 2d 913 (La. Ct. App. 1980). Petitioner seeks (Pet. 22-23) to distinguish those cases on the ground that the pipeline company owned the gas being stored. The pipeline company's ownership of all the gas at issue presumably would eliminate any dispute over the proper allocation of any ad valorem tax that the State was authorized to impose. See pp. 17-20, *infra*. But the identity of the owner does not affect the nexus between the gas and the State, and it therefore does not bear on the question whether the stored gas is subject to state taxation at all. Although the Louisiana court relied on pre-*Complete Auto* precedents only, in contrast to the decision below (which applied the four-part *Complete Auto* inquiry), its conclusion as to taxability is the same as that of the Oklahoma Supreme Court. See *Simonton*, 442 So. 2d at 770; *Whitman*, 390 So. 2d at 916-917.

The only decision petitioner cites from another state court of last resort—*In re Central Illinois Public Services Company*, 78 P.3d 419 (Kan. 2003)—did not actually decide the questions presented here. See Pet. 23 (acknowledging that "the Kansas Supreme Court did not expressly resolve that Commerce Clause issue"). Because the Kansas scheme at issue in that case taxed natural gas inventories of in-state but not out-of-state utilities, the Kansas Supreme Court had no occasion to decide whether the State could constitutionally tax gas held in storage for out-of-state shippers. Rather, in rejecting an Equal Protection Clause challenge to the Kansas scheme, the court remarked only that the disparate treatment was permissible because it would "arguably" have been "a potential violation of the Commerce Clause" to tax gas owned by an out-of-state utility. *In re Central Ill. Publ. Servs.*, 78 P.3d at 428. That observation does not give rise to a conflict in authority warranting this Court's review.

B. The Decision Below Correctly Rejected The Dormant Commerce Clause Challenge On The Current Record

Resolution of this case would require the Court both to determine the proper analytic framework for assessing the taxability by States of goods temporarily held in storage pending interstate transport and to apply that framework to stored natural gas. The Oklahoma Supreme Court correctly held that, under this Court's modern dormant Commerce Clause jurisprudence, petitioner had failed to establish the unconstitutionality of applying the State's ad valorem tax on personal property to stored natural gas. That conclusion could be revisited in the future if taxing regimes like the one at issue prove disruptive to interstate natural gas distribution.

1. In determining the applicable legal framework, the Oklahoma Supreme Court considered two different lines of dormant Commerce Clause precedents. See Pet. App. 25a-29a. In its earlier cases, dating back to the late nineteenth century, this Court applied a "continuity of transit" analysis to determine whether goods being transported through a State could be subjected to state property taxes. See, *e.g.*, *Minnesota* v. *Blasius*, 290 U.S. 1, 9-12 (1933); *Bacon* v. *Illinois*, 227 U.S. 504, 511-517 (1913). Under that approach, the critical question

was whether the interstate transit of goods had been sufficiently interrupted for purposes other than merely facilitating the transit; if so, the goods were deemed locally taxable. *Ibid.*; see pp. 14-15, *infra*.

In *Complete Auto*, *supra*, this Court announced a new general framework for resolving dormant Commerce Clause challenges to state taxes. The Court held that a state tax will be sustained against a dormant Commerce Clause challenge if it (1) is applied to an activity with a substantial nexus to the taxing State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State. 430 U.S. at 279. The Court also overruled its prior holdings that any tax on the "privilege of doing [interstate] business" was unconstitutional per se. *Id.* at 288-289. As compared to the Court's prior "continuity of transit" decisions, the *Complete Auto* framework requires a more comprehensive inquiry, consistent with the Court's rejection of the per se rule against state taxation of interstate commerce.

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. In upholding a use tax on catalogs shipped to Louisiana residents from outside the State, however, the Court cast doubt on the continuing applicability of those older decisions. See *D.H. Holmes Co.* v. *McNamara*, 486 U.S. 24, 30-31 (1988).[2] The Court stated that because "*Complete Auto*

[2] A use tax "is designed to compensate the State for sales tax that is lost when goods are purchased out-of-state and brought for use into [the State]." *D.H. Holmes*, 486 U.S. at 27-28. Although this Court before *Complete Auto* did not expressly apply to use taxes the "continuity

abandoned the abstract notion that interstate commerce 'itself' cannot be taxed by the State * * * , it really makes little difference for Commerce Clause purposes whether [the taxpayer's] catalogs 'came to rest' in the mailboxes of its Louisiana customers or whether they were still considered in the stream of interstate commerce." *Ibid.*

Adopting that view, various state courts have applied the *Complete Auto* factors, rather than the "continuity of transit" test, in adjudicating dormant Commerce Clause challenges to local taxation. See, *e.g.*, *Peoples Gas*, *supra* (ad valorem tax on stored gas); *Midland Central*, *supra* (ad valorem tax on oil in tank farm); *Moran Towing Corp.* v. *Urbach*, 787 N.E.2d 624, 627-628 (N.Y. 2003) (business tax on fuel consumption); *TA Operating Corp.* v. *Department of Revenue*, 767 So. 2d 1270, 1272-1273 & n.3 (Fla. Dist. Ct. App. 2000) (excise tax on fuel purchase); *J.C. Penney Co.* v. *Olsen*, 796 S.W.2d 943, 946-947 (Tenn. 1990) (use tax on catalogs shipped into the state). Although petitioner cites the two Louisiana appeals court decisions discussed above (p. 8, *supra*) to argue that state courts have continued to apply the "continuity of transit" analysis, those two cases were decided before *D.H. Holmes*. Subsequent Louisiana Supreme Court decisions, albeit in the context of a use tax, have applied the *Complete Auto* test to adjudicate dormant Commerce Clause challenges. See *Columbia Gulf Transmission Co.* v. *Broussard*, 653 So. 2d 522, 523-524 (La. 1995); see also *Word of Life Chris-*

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of transit" test that it had applied to personal property taxes, the Court's analysis of use taxes reflected the same concern with taxing the privilege of engaging in interstate commerce. See *Helson & Randolph* v. *Kentucky*, 279 U.S. 245, 252 (1929) (invalidating use tax on gasoline consumed in the State during interstate ferryboat journeys).

tian Ctr. v. *West*, 936 So. 2d 1226, 1241-1242 & n.17 (La. 2006).[3]

There is no sound reason to decline to apply the *Complete Auto* framework to petitioner's as-applied challenge to the State's ad valorem tax. It has become the operative test for dormant Commerce Clause challenges to state taxes generally and provides a more comprehensive inquiry than the older "continuity of transit" cases. Still, the "continuity of transit" cases remain potentially relevant to the constitutional analysis. In cases like this one, the same factors that the Court previously considered to determine continuity of transit may inform the first prong of the *Complete Auto* inquiry—*i.e.*, whether the relevant goods have a constitutionally sufficient nexus to the taxing State. Cf. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 311 (1992) (recognizing continuing vitality of a pre-*Complete Auto* rule—that a vendor whose only contacts with a State are by mail or common carrier may not be taxed by that State—because it informs *Complete Auto*'s first prong); *Diamond Shamrock Ref. & Mktg. Co.* v. *Nueces County Appraisal Dist.*, 876 S.W.2d 298, 302 (Tex. 1994) (stating that the "continuity of transit" analysis "may" inform the first prong of *Complete Auto*). Petitioner appears to agree with this approach. Although the petition for a writ of certiorari asserts the continued validity of the "continuity of transit" cases, petitioner clarifies in its reply brief (at 2-3) that it too believes that *Complete Auto* governs this case. Petitioner simply argues that the older cases

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[3] Although some state courts (including in Louisiana) still make use of the "continuity of transit" analysis, they appear to do so only with respect to a separate *statutory* requirement under state law that goods in interstate commerce must "come to rest" before they can be taxed. See, *e.g.*, *Columbia Gulf Transmission*, 653 So. 2d at 524.

should "inform[] the 'substantial nexus' prong of the *Complete Auto* test." Reply Br. 3.

The Oklahoma Supreme Court's decision in this case is consistent with this understanding of the appropriate legal analysis. The court did not ignore the "continuity of transit" test. It merely observed that the test—which focused in substantial part on whether a particular interruption serves an independent business purpose of the owner or simply facilitates the transportation, see Pet. App. 28a n.45—would be inconclusive on the facts of this case because "[petitioner] and Panhandle each has its own independent reasons for storing gas." *Id.* at 31a. There is consequently no pronounced difference between petitioner's proposed test and the framework that the Oklahoma Supreme Court applied.

2. Petitioner's primary contention (Pet. 16-24) is that the dormant Commerce Clause categorically bars state ad valorem taxation of natural gas stored by an interstate pipeline operator at the behest of a shipper because such gas lacks the "substantial nexus" to the taxing State that the *Complete Auto* test requires. Based on the current record, the Oklahoma Supreme Court correctly held that petitioner had failed to establish the invalidity of this application of the State's ad valorem tax.[4]

[4] The tax at issue in this case is not specific to natural gas but applies to all personal property located within Oklahoma. See Pet. App. 20a & n.31. Petitioner does not and could not plausibly contend that such a tax is generally invalid; it argues instead that the tax cannot constitutionally be applied to a particular category of personal property. As the Oklahoma Supreme Court recognized, the plaintiff in such a challenge bears the burden of establishing "that application of the state statute to him or her violates the Commerce Clause." *Id.* at 29a n.49.

The Oklahoma Supreme Court observed that "even if [petitioner's] storage gas is in transit in interstate commerce, that does not automatically mean that a tax levied against it would contravene the Commerce Clause because 'interstate commerce may be required to pay its fair share of state taxes.'" Pet. App. 28a (quoting *D.H. Holmes*, 486 U.S. at 30-31). The court further recognized, however, that "goods that move continuously through a state in the course of an interstate journey without stopping" are not subject to state taxation "because their actual movement deprives them of the degree of nexus with the taxing state that would justify the tax under the first prong of the [*Complete Auto*] analysis." *Id.* at 28a n.46. Based primarily on the presence of large volumes of gas in the state's storage facility for extended periods, the court held that the stored gas has "a substantial presence in [the State] and is not in transit in such a way as to invoke the protection of the Commerce Clause." *Id.* at 30a.

That holding reflects a sound application of the first ("substantial nexus") prong of the *Complete Auto* test, as well as comporting with the "continuity of transit" cases focusing on the purpose of the interruption. Applying the pre-*Complete Auto* analytic framework, this Court repeatedly upheld local taxes against Commerce Clause challenges in cases involving temporary storage or removal from interstate transport of shipped goods. In *Bacon* v. *Illinois*, *supra*, the owner of grain being shipped by railroad (from southern and western states to eastern cities via Illinois) removed the grain in Chicago to a grain elevator for the purpose of inspecting, weighing, grading, and mixing it, and then returned it immediately to the railroad for continued interstate transport. 227 U.S. at 515. The Court sustained the application of an Illinois property tax to that grain, noting that "the property was held within the state for purposes deemed by the owner to be beneficial" and that "it was not in actual transportation" during that time. *Id.* at 517. Similarly, in *Susquehanna Coal Co.* v. *Mayor & Council of S. Amboy*, 228 U.S. 665 (1913), coal was shipped from Pennsylvania to New York via New Jersey, where it was stored in the railroad company's yard prior to being loaded onto bottoms for continued transport. *Id.* at 666-667. In sustaining the tax, the Court reasoned that maintaining stored inventory permitted the owner to fill customer orders without delay and "was something more, therefore, than an incidental interruption of the continuity of its journey through the State." *Id.* at 668-669. Those decisions reflect an understanding that a State generally may levy property taxes on an owner's inventory stored in that State for a substantial part of the year, even if the storage occurs at an intermediate stage in the process of interstate transport.

Petitioner cites other "continuity of transit" cases in which the Court invalidated local taxation of goods in temporary storage during interstate transport. Pet. 18 (citing, *e.g.*, *Champlain Realty Co.* v. *Town of Brattleboro*, 260 U.S. 366 (1922); *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95 (1929)). Those cases, however, involved storage solely to facilitate safe transport of the goods (*e.g.*, to protect against dangerous shipping conditions, *Champlain Realty Co.*, 260 U.S. at 373-374, or to await arrival of ships to complete foreign export, *Carson Petroleum Co.*, 279 U.S. at 108-109), rather than to advance other business purposes of the owner. Storage of natural gas, by contrast, furthers petitioner's business interests by "allow[ing] [petitioner] to accumulate gas when demand is low so that it can fulfill its customers' needs and meet the requirements of state (Missouri) regulators for gas during the winter." Pet. App. 31a.

In the court below, petitioner relied on a FERC regulation that defines transportation of natural gas to include storage. See 18 C.F.R. 284.1(a) ("Transportation includes storage."); Pet. App. 30a, 33a & n.54; Pet. 5. While appropriately acknowledging FERC's role in regulating the natural gas industry, the Oklahoma Supreme Court correctly concluded that the ad valorem tax at issue here does not conflict or interfere with FERC's regulatory authority. Pet. App. 32a-37a. As the court determined, FERC included storage in the definition of transportation "to ensure open access to storage by non-pipeline owners of natural gas who use the pipeline system." *Id.* at 33a; see *id.* at 34a-36a (citing Order No. 636, 57 Fed. Reg. at 13,267-13,289).[5] Given its limited non-discrimination purpose, the FERC regulation does not bear on the analytically distinct question whether stored natural gas has a sufficient nexus to the State in which storage occurs to permit state taxation under the *Complete Auto* test. As the Oklahoma Supreme Court explained (*id.* at 34a), allowing state taxation of stored gas would not, in and of itself, impair FERC's ability to apply to storage services relevant anti-discrimination requirements. And the *Complete Auto* Court's holding

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[5] Order No. 636 generally required interstate pipelines to unbundle their sales and transportation services and to offer all customers equal access to those services. See *United Distrib. Co.* v. *FERC*, 88 F.3d 1105, 1121-1127 (D.C. Cir. 1996), cert. denied, 520 U.S. 1224 (1997). Although the relevant statute does not by its terms prohibit discrimination with respect to storage, the FERC regulation ensures that storage services are covered. See *id.* at 1133 ("By defining 'transportation' to include 'storage,' [FERC] made storage subject to the same non-discrimination requirements as capacity rights.") (citation omitted).

that interstate commerce has no per se immunity from state taxation forecloses any argument that FERC's reasonable decision to treat storage as part of transportation for one statutory purpose precludes an ad valorem tax on stored gas.

3. Petitioner further argues (Pet. 24-30) that the allocation formula used to identify ownership interests in the stored gas in this case violates the dormant Commerce Clause because use of that formula results in an extraterritorial tax that discriminates against interstate commerce and creates a risk of multiple taxation. That contention is at best premature.

As explained above (p. 3, *supra*), the tax here was assessed based on a formula drawn from the pipeline operator's FERC-approved tariff. That formula specified that, in allocating stored gas to individual shippers for use in calculating state ad valorem taxes, the pipeline should determine the ratio of the volume of gas stored by the pipeline in the taxing State to the volume stored by the pipeline in all States, and should then multiply that ratio by the shipper's total stored volume. See note 1, *supra* (citing Panhandle Tariff, General Terms and Conditions § 27.4(c)). Under that approach, if 50% of the total gas stored by Panhandle in the Oklahoma and Kansas facilities combined was stored in the Oklahoma facility, 50% of petitioner's storage inventory would be treated as held in the Oklahoma facility—even if it could be shown that most or all of the gas that petitioner had provided to the pipeline had been stored in Kansas rather than in Oklahoma.

Petitioner contends (Pet. 24-27) that, under the formula specified in Panhandle's tariff, petitioner is being taxed by Oklahoma on gas stored in Kansas, and that the dormant Commerce Clause forbids that extraterritorial effect. Petitioner emphasizes (see Pet. 7-10, 26) that, given the locations at which it had supplied gas to Panhandle in 1998, all that gas would necessarily have been stored at Panhandle's Kansas facility. As explained above (pp. 2-3, *supra*), however, a shipper like petitioner has no contractual right to retake at the other end of the pipeline the same molecules of gas that it has supplied. Rather, regardless of the location at which a particular shipper supplies gas to a pipeline, the pipeline operator may deliver gas to that shipper from wherever in the pipeline system the operator chooses. Accordingly, even in years when most or all of the gas that petitioner supplied to Panhandle was stored in Kansas, the gas that petitioner received in return may well have come from the Oklahoma facility. It was therefore reasonable for Panhandle and respondent, in accordance with the formula drawn from the FERC-approved tariff, to treat petitioner as owning a proportionate share of the gas stored in both Kansas and Oklahoma.

Petitioner's contention that the allocation formula impermissibly discriminates against out-of-state goods (Pet. 27-29) fails for largely the same reasons. As petitioner acknowledges, "[o]n its face, the Oklahoma ad valorem tax statute does not discriminate because it seeks to tax tangible personal property located within the State on January 1." Pet. 27. Contrary to petitioner's suggestion, the allocation formula used here does not cause gas purchased and supplied to Panhandle in Oklahoma to be taxed at a lower rate than gas purchased and supplied elsewhere. Rather, the effect of the apportionment formula is to tax an equivalent percentage of the gas stored by the pipeline for a shipper regardless of where it was purchased, supplied, or stored. That formula might remove an incentive that would otherwise exist to supply gas to the pipeline at an out-of-state location (in order to ensure that the gas supplied would be stored in Kansas), but it does not create an affirmative incentive to buy gas in Oklahoma.

Petitioner further contends (Pet. 29) that the allocation formula at issue here subjects petitioner and other shippers of natural gas to "an unconstitutional risk of multiple taxation." But, as the Oklahoma Supreme Court determined (Pet. App. 38a-39a), if every State that levied an ad valorem tax on natural gas stored within its borders were to use the same formula, no multiple taxation would result. Petitioner does not dispute that fact. Nor does petitioner identify any State that currently uses a different allocation formula to tax gas stored in connection with transport by an interstate pipeline. Rather, petitioner argues (Pet. 30) that multiple taxation could result *if* Kansas taxed natural gas stored within its borders *and* used a different formula to allocate ownership among various shippers.

The hypothetical possibility of multiple taxation under the circumstances posited by petitioner neither establishes a current constitutional violation nor provides a sound reason for this Court to intervene now. To be sure, state taxes on stored natural gas might under certain circumstances burden its interstate transport—particularly if different States were to adopt different apportionment formulas.[6] But that harm has not yet

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[6] Even without the use of inconsistent apportionment formulas, the transportation of natural gas could be significantly burdened if multiple States attempted to tax the same volume of gas based solely on its movement through an interstate pipeline. But concluding that the natural gas at issue bore a constitutionally sufficient nexus to the taxing State, the Oklahoma Supreme Court carefully limited its holding to *stored* natural gas. See Pet. App. 30a (concluding that "[petitioner's]

materialized (and may never do so), and the constitutional analysis in a future case is likely to depend on how different apportionment formulas interact in practice. Cf. *Complete Auto*, 430 U.S. at 278 (rejecting dormant Commerce Clause challenge and explaining that, although the plaintiff had argued that the state tax "creates an unacceptable risk of discrimination and undue burdens, it does not claim that discrimination or undue burdens exist in fact") (citation omitted).

Moreover, FERC always possesses the authority to disapprove a tariff specifying an allocation formula that the agency regards as inconsistent with statutory directives governing the interstate transportation of natural gas. See 15 U.S.C. 717c and d; see also *Associated Gas Distribs.* v. *FERC*, 824 F.2d 981, 998 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988). No comments or protests were filed concerning the provision proposing the allocation formula at issue in this case, and FERC approved it as part of Panhandle's tariff in March 1993. See *Panhandle Eastern Pipe Line Co.*, 62 F.E.R.C. ¶ 61,288 (1993). We are informed by FERC that, although shippers have been on notice of the ad valorem tax provision ever since, the agency has not received any formal complaints seeking reconsideration of that provision. But FERC could act on such a request or on its own authority in the future, if either that or another allocation formula proved unworkable. For all these reasons, the Court's intervention in this case would be premature.

In sum, petitioner has not carried its burden of demonstrating that the ad valorem tax at issue violates the dormant Commerce Clause. That conclusion could

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storage gas cannot be characterized as goods that are merely passing through the state"); see also *id.* at 19a-20a, 28a n.46; p. 14, *supra*.

change in a future case if facts come to light indicating that such taxes cause a significant disruption in the interstate transport of natural gas or that they cannot be assessed in a fair and non-discriminatory manner. Under the present circumstances, however, review by this Court is not warranted.

C. Petitioner's Due Process Challenge Does Not Warrant Further Review

The relevant question for due process purposes is whether the property has "tax situs" in the taxing State. *E.g.*, *Braniff Airways, Inc.* v. *Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 598-599 (1954). As the Oklahoma Supreme Court noted, the nexus required to establish "tax situs" is "minimal" and less than that required under the dormant Commerce Clause. Pet. App. 19a; see *Quill Corp.*, 504 U.S. at 324 (due process requires only "some minimum connection" between a state and the property it taxes) (citation omitted). Because the nexus between Oklahoma and the "large volumes of gas" stored there "for a substantial part of the year" (Pet. App. 19a) is sufficient to satisfy prong one of the *Complete Auto* test (see pp. 13-17, *supra*), it is *a fortiori* sufficient to satisfy due process. And petitioner's as-applied due process challenge to the allocation formula (Pet. 24-27)—*i.e.*, its contention that Oklahoma is taxing petitioner for gas not actually stored in Oklahoma—fails for the same reasons as does its as-applied dormant Commerce Clause challenge to the formula (see pp. 17-20, *supra*). In any event, petitioner does not allege that the Oklahoma Supreme Court's disposition of the Due Process Clause issue conflicts with any decision of another state court of last resort or a federal court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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