No. _____

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 Writ Of Certiorari To The Kansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state may, consistent with the dormant Commerce Clause, impose an *ad valorem* tax on natural gas that is being transported through interstate commerce but temporarily stored in the state by a common carrier, even though the taxpayer has no control over where the gas is stored and no other connection with the state.

PARTIES TO THE PROCEEDING

Petitioners in this case, who were taxpayers and appellants below, are Missouri Gas Energy, an operating unit of Laclede Gas Company; MidAmerican Energy; Northern States Power of Minnesota; Public Service Company of Colorado; Northern States Power of Wisconsin; Illinois Power Company dba Ameren IP; Central Illinois Light Co dba Ameren CILCO; Union Electric Company dba Ameren UE; Central Illinois Public Service Co dba Ameren CIPS; The Empire District Gas Company; Minnesota Energy Resources Corporation; and Superior Water, Light & Power Company.

Respondent, who was the appellee below, is the State of Kansas, Division of Property Valuation.

Other entities were also taxpayers and appellants below, but are not named as Petitioners here. They include BP Canada Energy Marketing Corp.; Northern States Power Company of Minnesota—Generation; U.S. Energy Services, Inc.; ProLiance Energy, L.L.C.; Oklahoma Natural Gas Company; ONEOK Energy Services Company, L.P.; Tenaska Gas Storage, L.L.C.; Interstate Power & Light Company; Wisconsin Power & Light Company; Colorado Springs Utilities; Great River Energy; Eastern Colorado Utility Company; City of Fort Morgan, Colorado; City of Trinidad, Colorado; National Public Gas Agency; Metropolitan Utilities District; Nexen Marketing U.S.A., Inc.; City Utilities of Springfield, Missouri; Jo-Carroll Energy, Inc.; NextEra Energy Power Marketing, L.L.C.; Chevron U.S.A., Inc.; Shell Energy Northern America (US), L.P.; Sioux Center Municipal Utilities; Circle Pines Utilities dba Centennial

Utilities; Clayton Energy Corp.; CCP Coast to Coast Partners, L.L.C.; DB Energy Trading, L.L.C.; and Cheyenne Light Fuel & Power Company.

CORPORATE DISCLOSURE STATEMENT

Petitioner Missouri Gas Energy is an operating unit of Laclede Gas Company, a wholly owned subsidiary of The Laclede Group, a publicly traded company.

Petitioner MidAmerican Energy Company is a wholly owned subsidiary of MHC Inc., a privately held corporation. MHC Inc. is a wholly owned subsidiary of MidAmerican Funding, LLC, a privately held limited liability company. MidAmerican Funding, LLC is a wholly owned subsidiary of MidAmerican Energy Holdings Company, a privately held corporation. MidAmerican Energy Holdings Company is a consolidated subsidiary of Berkshire Hathaway Inc., a publicly held company, which owns approximately 89.8% of the voting equity of MidAmerican Energy Holdings Company.

Petitioners Northern States Power of Minnesota, Public Service Company of Colorado, and Northern States Power of Wisconsin, are operating company subsidiaries of Xcel Energy, Inc., a publicly held company, which owns 100% of their stock.

Petitioners Illinois Power Company dba Ameren IP; Central Illinois Light Co dba Ameren CILCO; Union Electric Company dba Ameren UE; Central Illinois Public Service Co dba Ameren CIPS, are 100% owned subsidiaries of Ameren Corporation, a publicly held company.

Petitioner The Empire District Gas Company is a 100% owned subsidiary of The Empire District Electric Company, a publicly held company.

Petitioner Minnesota Energy Resources Corporation (MERC) is a 100% owned subsidiary of Integrys Energy Group, Inc., a publicly held company.

Petitioner Superior Water, Light & Power Company is a wholly owned subsidiary of ALLETE, Inc., a publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Kansas Supreme Court.

OPINIONS BELOW

The decision of the Kansas Supreme Court (Pet.App. 1a) is reported at 313 P.3d 789. The decision of the Court of Tax Appeals of the State of Kansas (Pet.App. 44a) is unreported.

JURISDICTION

The Kansas Supreme Court entered judgment on December 6, 2013. Pet.App. 1a. On February 27, 2014, Justice Sotomayor granted Petitioners' application for an extension of time to file a petition for writ of certiorari until April 7, 2014. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part: "The Congress shall have power . . . [t]o regulate commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3.

STATEMENT

The Kansas Supreme Court held that the *ad valorem* tax levied on Petitioners' natural gas was consistent with the dormant Commerce Clause because it was "a personal property tax on stored natural gas that was located in Kansas on the assessment date." Pet.App. 21a. That flawed reasoning exacerbated a division in authority among state courts, and would allow states to impose *ad valorem* taxes against any personal property physically present in the state, even for a fleeting moment. Left unreviewed, this re-

sult would unduly burden the interstate marketplace for natural gas—a burden made more untenable by the split in judicial authority that protects the same gas from tax when it passes through the state of Texas but subjects it to state taxes when passing through Oklahoma and Kansas.

The Kansas Supreme Court refused to consider factors that have informed this Court's Commerce Clause jurisprudence throughout history. In particular, its analysis ignored the crucial fact that Petitioners do nothing but tender their gas to interstate pipelines—common carriers that transport the gas through interstate commerce to designated points of delivery. These pipelines pass through and have underground facilities in Kansas and other states, so some portion of the gas delivered to Petitioners *may* transiently appear under Kansas soil at some time. But Petitioners have no claim to specific molecules of gas transported through or stored in Kansas, and it is impossible to determine whether they own any portion of the gas there. Moreover, the decision regarding where the gas travels belongs solely to the interstate pipelines. Petitioners have no control over—nor any knowledge of—the routing or location of their gas. Nor did the court account for Petitioners' lack of any other connections with Kansas, such as owning facilities in Kansas for the transmission, distribution, or storage of natural gas. It relied solely on the temporary physical presence of the natural gas that was mathematically attributed to Petitioners.

This decision departs from this Court's precedents, burdens the interstate natural-gas market with overreaching and inconsistent tax obligations, and deepens the direct conflict among state courts on the con-

stitutionality of *ad valorem* taxes on stored natural gas.

A. The Shipment And Storage Of Natural Gas Through Interstate Pipelines

Petitioners are investor-owned utilities that contract with interstate pipelines to move gas through interstate commerce. They purchase natural gas from producers and marketers and tender that gas to the interstate pipelines for transportation. Pet.App. 6a. The interstate pipelines then deliver an equivalent amount of gas to Petitioners at a designated point of delivery. *Id.* Petitioners do not receive the same molecules of gas they put into the pipelines. *Id.* at 7a. Rather, the pipelines commingle all of their customers' gas. *Id.* Petitioners simply have a contractual right to withdraw the same *amount* of gas that they tendered to the pipelines. *Id.*

Between the time that natural gas is tendered to the interstate pipelines and delivered to Petitioners, the pipelines transport and store the gas "somewhere in the pipeline's storage or transportation systems." *Id.* at 6a. Four interstate pipelines transport and store the natural gas at issue in this case: Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Colorado Interstate Gas Company, and Southern Star Central Gas Pipeline. *Id.* at 7a. As interstate pipelines, these companies are regulated by the Federal Energy Regulatory Commission ("FERC"). *Id.* Each interstate pipeline owns and operates pipelines and underground storage facilities in multiple jurisdictions, including Kansas. *Id.* Petitioners cannot designate a particular location for transportation or storage; the gas may be stored in Kansas or in another state. *Id.* at 6a, 48a. In fact,

Petitioners "have no knowledge regarding the specific nature and location of such storage." *Id.* at 48a. Instead, the pipelines maintain complete possession and control of the natural gas throughout their systems. *Id.* at 7a, 48a. Under FERC-approved tariffs, these pipelines bear all risk of loss and liability while in control and possession of the gas. *Id.* at 7a, 47a.

Storage "is integral to the pipelines' operations." *Id.* at 6a.[1] The interstate pipelines "continually" move natural gas "to and . . . from storage to satisfy essential pipeline pressure and balancing requirements." *Id.* at 49a; *see also id.* at 6a. In addition, storage allows the interstate pipelines to simultaneously receive and deliver natural gas at distant locations. *Id.* at 6a, 49a. No effort is (or could be) made to ensure that the same molecules of gas a Petitioner tenders to the pipeline system are placed into storage for, or ultimately delivered to, that same Petitioner. *Id.* at 7a, 48a. The identity of the gas transported, stored, and delivered to Petitioners "is under the complete control of the pipeline." *Id.* at 48a.

B. Petitioners Lack Any Substantial Connection With The State Of Kansas

Petitioners own no facilities in Kansas for the transmission, distribution, or storage of natural gas. *Id.* at 7a. All of the gas transported by the pipelines for Petitioners is intended for ultimate use or sale *outside* of Kansas. *Id.* at 48a. Petitioners are regu-

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[1] FERC regulations treat "storage" as part of the transportation services provided by interstate pipelines. *See* 18 C.F.R. § 284.1(a) (defining "[t]ransportation" to include "storage").

lated as public utilities in other states, but not in Kansas. *Id.* at 7a, 46a.

For example, Petitioner Missouri Gas Energy is regulated as a public utility operating in Missouri, and it "is a merchant of natural gas within the state of Missouri only." *Id.* at 126a-27a. Any gas is intended for ultimate sale within the state of Missouri. *Id.* at 130a. Missouri Gas Energy does not serve any customers in Kansas and is not regulated as a public utility in Kansas. *Id.* at 126a. Similarly, Petitioner MidAmerican Energy Company is an Iowa corporation that is regulated as a natural-gas public utility operating in the state of Iowa. *Id.* at 105a-06a. MidAmerican Energy Company engages primarily in the business of selling natural gas to retail consumers in Iowa, South Dakota, Nebraska, and Illinois; it does not serve any customers in Kansas. *Id.* at 106a-07a. The record is replete with similar facts, such as the absence of customers or other contacts in Kansas, regarding the other Petitioners in this case. *See id.* at 73a-179a.

C. The Taxes Assessed Against Petitioners

In 2009, Respondent Kansas Division of Property Valuation (the "Division") undertook to assess *ad valorem* taxes against Petitioners and other taxpayers, including out-of-state natural-gas marketing companies and out-of-state municipalities, for natural gas held in Kansas storage facilities. The Division determined that Petitioners (and the other taxpayers) were "public utilities" within the new statutory definition of that term, which subjected them to *ad valorem* taxes. *See* K.S.A. § 79-5a01; *see also* K.S.A. § 79-201f(a) ("public utilities" do not qualify for exemption); K.S.A. § 79-201m(b) (same).

Gas is commingled within the pipeline systems, so the Division could not and did not determine which Petitioners actually owned the gas located in Kansas. Pet.App. 7a. Instead, the Division based the tax assessment on a fictional attribution of ownership. Using an allocation formula adopted from a FERC-approved tariff, the Division arbitrarily attributed a quantity of gas to each Petitioner. *Id.* at 4a-5a. This formula divided an interstate pipeline's total Kansas inventories by the pipeline's total inventories in all states; then, it multiplied that ratio by the Petitioners' total volume present in the pipeline. *Id.* at 5a. This formula yielded the amount of gas in Kansas that Petitioners allegedly "owned."

The Division attributed this fictional ownership regardless of whether it was physically possible for Petitioners' gas to move through—much less be stored in—Kansas. For example, 70 percent of Northern Natural Gas Company customers' gas is tendered to the pipeline in Iowa, and half of its customers' gas is delivered in Minnesota. *Id.* at 7a. It is thus "'highly likely'" that a customer's gas will be received by the pipeline in Iowa and delivered in Minnesota—and never flow through Kansas. *Id.* at 7a-8a (describing the undisputed testimony of Northern Natural Gas vice president). But under the Division's allocation formula, those customers "would be taxed in Kansas even though [their gas] never physically entered the state." *Id.* at 8a. The Division did not reconcile these facts when assessing the amount of stored gas that a customer theoretically "owned" in Kansas.

The taxable values attributed to Petitioners were substantial. For Petitioner Missouri Gas Energy, the

assessed value was $10,689,469, *id.* at 132a; Petitioner Northern States Power Company of Minnesota was assessed at $8,029,347, *id.* at 144a. In total, the assessed value for all 12 Petitioners' natural gas in Kansas was over $41 million.[2]

D. Petitioners' Challenge To The Tax

Petitioners, along with other taxpayers, appealed the Division's appraisals and filed requests for tax exemption. They claimed that the gas at issue was exempt under state law and that the tax was unconstitutional. *Id.* at 3a. After an evidentiary hearing, the Court of Tax Appeals denied the exemption requests. *Id.* at 64a. The Court of Tax Appeals did not consider the validity of the tax under the U.S. Constitution, because that court is not "vested with authority to address the constitutionality of statutes." *Id.* at 56a; *see also id.* at 10a.

Petitioners and the other taxpayers appealed. Both sides requested transfer of the appeal to the Kansas Supreme Court, which was granted. *Id.* at 10a. Before the Kansas Supreme Court, Petitioners argued that the gas was exempt from taxation under state law and that the tax violated the dormant Commerce Clause and the Due Process Clause of the U.S. Constitution. *Id.* at 10a-11a.

With respect to the dormant Commerce Clause, Petitioners argued that the natural-gas tax failed the four-part test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), as informed by this Court's precedents. In *Complete Auto*, this Court

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[2] *See* Pet.App. 79a, 81a, 83a, 91a, 100a, 111a, 121a, 132a, 144a, 154a, 164a, 176a.

held that a tax is consistent with the dormant Commerce Clause only if (1) there is a substantial nexus between the taxpayer's activity and the taxing State; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the services provided by the state. *Id.* at 279. Petitioners placed particular emphasis on the first and fourth prongs.

Arguing that their activity lacked a substantial nexus with Kansas, Petitioners emphasized that they do business primarily outside of the state of Kansas, and they do not own property or facilities in Kansas for the transmission, distribution, or storage of natural gas. Pet.App. 17a. Rather, they contract with common carriers—the interstate pipelines—to transport natural gas through interstate commerce; these common carriers are Petitioners' only connection with Kansas. *See id.* at 14a, 17a. Petitioners relied on this Court's bright-line rule for "common carriers," which holds that taxpayers "whose only connection with customers in the [taxing] state is by common carrier" cannot be taxed. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 758 (1967); *see also Quill Corp. v. North Dakota*, 504 U.S. 298, 317-18 (1992) (reaffirming this rule).

Petitioners' nexus argument also relied on the longstanding "goods-in-transit" doctrine, which holds that if property found temporarily in a taxing state is in continuous transit, it cannot be taxed by the state. *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 101 (1929). To determine whether there is a break in the continuity of transit, such that the property becomes taxable, this Court considers "the various factors of the situation." *Champlain Realty Co. v. Town of*

Brattleboro, 260 U.S. 366, 377 (1922). Petitioners argued that they did not control or possess the gas, and they did not purposefully direct their business activities to Kansas in any way. *See* Pet.App. 17a; *see also Champlain*, 260 U.S. at 377 (noting factors such as the intention of the owner and whether the taxpayer had control over the property). Petitioners simply tendered their gas to a common carrier which, by coincidence, has facilities in Kansas. *See* Pet.App. 17a; *see also* 14a.

Invoking the fourth prong, Petitioners also argued that the tax was not fairly related to services provided by the state. *See id.* at 16a. They argued that Kansas provided services to the pipeline companies themselves, but not to the theoretical "owners" of natural gas in Kansas, who have no specific claim to any gas in Kansas and no control over the gas located there.

E. The Kansas Supreme Court Upheld The Tax Under The Dormant Commerce Clause

The Kansas Supreme Court disagreed with Petitioners, holding that the natural-gas tax was consistent with the dormant Commerce Clause. Assessing the first prong of *Complete Auto*, the court concluded that there was "axiomatically" a "substantial nexus between Kansas and the gas stored in this state," simply because some portion of gas was physically present in Kansas. Pet.App. 21a. Refusing to consider the factors relevant to the "goods-in-transit" doctrine, the court concluded 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." *Id.* In addition, it rejected the

"common carrier" rule from *National Bellas Hess* and *Quill*, holding that these decisions are limited to sales and use taxes. *Id.* at 16a.

The court also held that the fourth prong of *Complete Auto* was satisfied because "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." *Id.* at 21a. It reasoned that "[a]ll property in Kansas is subject to ad valorem taxation," and Petitioners' gas was taxed at the same rate as other property. *Id.*

Finally, the Kansas Supreme Court addressed the state-law exemption arguments, separately analyzing three categories of taxpayers: local distribution companies certified as public utilities in other states, marketers and brokers of natural gas, and out-of-state municipal utilities. The Kansas Supreme Court held that the local distribution companies were subject to *ad valorem* taxes because they qualified as "public utilities" under Kansas law, even though they are not regulated as public utilities in Kansas. Pet.App. 40a-41a. But marketers and brokers of natural gas, as well as out-of-state municipal utilities, did not qualify as "public utilities" under Kansas law, and thus were exempt from taxation on their calculated shares of gas stored within Kansas. *See id.* at 37a-40a, 41a-43a. The court remanded to the Court of Tax Appeals to determine which taxpayers fell within each of these categories. *Id.* at 43a. The 12 Petitioners here stipulated that they are "public utilities" under the Kansas Supreme Court decision. *Id.*

at 188a-189a.[3] Petitioners now seek review of the Kansas Supreme Court's dormant Commerce Clause ruling.[4]

REASONS FOR GRANTING THE PETITION

A California company fills a tanker with oil and hires a common carrier to transport that tanker to New Jersey. The trucking company has its driver take I-80, leaving California and driving through the states of Nevada, Utah, Wyoming, Nebraska, Iowa, Illinois, Indiana, Ohio, and Pennsylvania, before arriving in New Jersey. May each of those states, consistent with the Commerce Clause, impose an *ad valorem* tax on the value of the oil simply because the cargo passed through the state, or the driver made

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[3] This stipulation was filed with the Court of Tax Appeals. Pet.App. 180a. The stipulation also categorizes the remaining parties, with one exception. *See id.* at 186a-190a.

[4] The Kansas Supreme Court's decision is final under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Where "the highest court of a State has finally determined the federal issue," but "there are further proceedings in the lower courts to come," this Court may grant review where, as here, "the federal issue is conclusive or the outcome of further proceedings preordained," or the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 477, 479-80. Both circumstances are present here. There is nothing left to be determined as to these 12 Petitioners, all of whom stipulated that they are non-exempt "public utilities" under the Kansas Supreme Court's decision. Thus, the outcome of any further state-court proceedings is preordained as to these Petitioners. *Id.* at 479. Indeed, any further state-court proceedings will determine the status of only one taxpayer. *See* Pet.App. 190a. Regardless of how that taxpayer is categorized, the dormant Commerce Clause issue "will survive and require decision." *Cox Broadcasting*, 420 U.S. at 480.

brief stops to rest or refuel along the way? The answer is "no." *See, e.g.*, *Quill*, 504 U.S. at 315 n.8, 317-18; *Carson*, 279 U.S. at 108-09; *Champlain*, 260 U.S. at 373-74.

This case presents the same issue, except that the taxed property is natural gas and the common carrier is a series of interstate pipelines. Yet the answer given by the Kansas Supreme Court was "yes." This is now the third time that the constitutionality of *ad valorem* taxes on natural gas moving in interstate commerce has reached this Court, and the question has divided state courts in Kansas, Texas, and Oklahoma. The result has been a patchwork of state-tax liability for entities that ship our Nation's natural gas through interstate pipelines across the country. This Court should grant certiorari to resolve this split in authority, which has created great uncertainty in the interstate natural-gas market.

I. As the Kansas Supreme Court acknowledged, state courts "have split on whether similar ad valorem taxes on natural gas stored in an interstate pipeline violate[] the Commerce Clause." Pet.App. 17a. Since 2010, when the Solicitor General previously recommended against review of this question, two key developments altered the legal landscape: (1) the Texas Court of Appeals decision became the last word on this issue in Texas, and (2) the Kansas Supreme Court entered the debate. These developments have created a 2-1 split among state courts, underscoring the strong need for this Court's review.

II. The decision of the Kansas Supreme Court departs dramatically from this Court's dormant Commerce Clause precedents. The Kansas Supreme Court upheld the tax on the sole basis that Petition-

ers theoretically owned natural gas physically present in Kansas on the assessment date. In applying this stark "physical presence" rule, the Kansas Supreme Court refused to consider factors that have informed this Court's dormant Commerce Clause opinions for many years. For example, it failed to consider the role of interstate pipelines as common carriers in transporting the gas, as well as Petitioners' inability to control where the gas is transported or stored, their lack of knowledge concerning the location of gas, and the absence of any meaningful connections between Petitioners and Kansas. This Court should grant certiorari to resolve the irreconcilable conflict between the decision below and this Court's directly applicable precedents.

III. The division among state courts has resulted in a patchwork of state tax liability, leading to confusion and uncertainty in the interstate market for natural gas, which is critical to our national economy. Now that Kansas has become the second state to endorse *ad valorem* taxes on natural gas moving in interstate pipelines, other states are likely to impose similar taxes on transient natural gas passing through their borders. Without this Court's guidance, diverging state court opinions will subject shippers to taxes in some states but not others. This Court should grant certiorari to ensure stability and predictability in the interstate natural-gas market.

I. STATE COURTS ARE SHARPLY DIVIDED OVER THE CONSTITUTIONALITY OF *AD VALOREM* TAXES ON NATURAL GAS IN INTERSTATE PIPELINES

The Kansas Supreme Court expressly recognized that state courts "have split on whether similar ad

valorem taxes on natural gas stored in an interstate pipeline violate[] the Commerce Clause." Pet.App. 17a. In the decision below, Kansas joined Oklahoma in upholding the constitutionality of such taxes, thereby paving the way for other states to assess similar taxes. There is now an even greater need to address this issue than when this Court called for the views of the Solicitor General in the Oklahoma case. *See Missouri Gas Energy v. Schmidt*, 558 U.S. 811 (2009). This Court should grant certiorari to resolve the division among state courts.

A. In Texas, *Ad Valorem* Taxes On Natural Gas In Interstate Pipelines Are Barred As Unconstitutional

Squarely addressing this issue, the Texas Court of Appeals held that the Commerce Clause prohibits *ad valorem* taxes on natural gas in interstate pipelines. *See Peoples Gas, Light & Coke Co. v. Harrison Cent. Appraisal Dist.*, 270 S.W.3d 208, 217-19 (Tex. Ct. App. 2008). After requesting full briefing on the merits, the Texas Supreme Court denied review.

In *Peoples*, The Peoples Gas, Light, and Coke Company ("Peoples"), a natural gas distribution company similar to Petitioners, appealed an *ad valorem* tax on natural gas that was temporarily held in an interstate pipeline's Texas storage facility while being shipped in interstate commerce. *Id.* at 211. The pipeline had many storage facilities, including one in Harrison County, Texas. *Id.* The Texas Court of Appeals concluded that Peoples owned the gas in storage. *Id.* at 214. Nevertheless, the court held that the tax violated the Commerce Clause, applying two separate tests. *Id.* at 215-19.

First, the court applied the long-established "goods-in-transit" doctrine, which determines whether property is in continuous transit in interstate commerce, such that it lacks a sufficient nexus with the taxing state. *See id.* at 215-16. The Texas court cited several factors relevant to the "goods-in-transit" analysis, including "the owner's intention, the owner's ability to change destination, the agency or method of transportation, the actual continuity of the journey, and the purpose of the interruption." *Id.* at 216 (citing *Champlain*, 260 U.S. at 377).

Based on these factors, the court held that the stored gas was in continuous transit, and lacked sufficient connections with Texas for purposes of taxation. *Id.* at 215-16. It reasoned that Peoples "ha[d] no control over where [the] natural gas is stored and how much is stored at any given location," and thus did not "ma[k]e the decision to store gas in [Texas] in order to serve its business purpose." *Id.* at 216. "Simply put," the court continued, "[Peoples] made no decision at all regarding the physical location of the stored natural gas." *Id.* The court deemed it irrelevant that Peoples may have incurred some benefit by storing gas at the facility, given that Peoples "ma[de] no decision to store the natural gas [in Texas] specifically." *Id.* at 216-17.

Second, the court applied the four-factor test from *Complete Auto*. The Texas Court of Appeals concluded that Peoples lacked a substantial nexus with Texas because it had no office, employees, representatives, or physical facilities in Texas. 270 S.W.3d at 218. Nor was there any evidence that Peoples delivered natural gas to Texas customers. *Id.* The court further noted that the pipeline owned the facility,

and the pipeline alone decided whether to use the Texas facility. *Id.* Therefore, the tax failed the first prong of the *Complete Auto* test.

The court also concluded that the fourth prong was not satisfied because the tax did not reasonably relate to the services provided by the state. *Id.* at 219. Fire and police services provided by the state, while valuable, protected the facility itself, which belonged to the pipeline. *Id.*

The appraisal district filed a petition for review with the Supreme Court of Texas, and Peoples filed a conditional cross-petition on the underlying question of whether Peoples owned the gas at issue. *See* Docket, Case No. 09-0053 (Tex.). The Texas Supreme Court requested responses to these petitions, and then ordered briefing on the merits. *See id.* Ultimately, the court denied the petitions for review. 2010 Tex. LEXIS 227 (Tex. Mar. 12, 2010). The Texas Supreme Court also requested a response to the appraisal district's motion for rehearing, which it later denied. *See* Docket, Case No. 09-0053 (Tex.). This Court denied certiorari. *Harrison Cent. Appraisal Dist. v. Peoples Gas, Light & Coke Co.*, 131 S. Ct. 2097 (2011).

One of the Solicitor General's principal reasons for opposing review in the Oklahoma case was the then-unsettled nature of the Texas ruling: "The Texas Supreme Court . . . is in the process of deciding whether to grant further review and has ordered full merits briefing." Br. for United States as *Amicus Curiae* 7-8, *Missouri Gas Energy v. Schmidt* (No. 08-1458) [hereinafter "SG Okla. Br."]. That uncertainty is gone. The Texas Supreme Court ultimately denied review in *Peoples*. As a result, the Texas Court of

Appeals decision is the last word on this issue in Texas: *Ad valorem* taxes on stored natural gas are unconstitutional.

Indeed, the Texas Court of Appeals subsequently relied on *Peoples* to strike down a tax on crude oil passing through tank farms that were operated by a pipeline system. *See Midland Cent. Appraisal Dist. v. BP Am. Prod. Co.*, 282 S.W.3d 215, 223-24 (Tex. Ct. App. 2009). After requesting responses and briefing on the merits, the Texas Supreme Court denied review of *Midland Central Appraisal District* on the very same day it denied review of *Peoples*. 2010 Tex. LEXIS 234 (Tex. Mar. 12, 2010), *cert. denied* 131 S. Ct. 2097 (2011).

Further delay in addressing the constitutional question will not alleviate the conflict. The Texas Supreme Court in *Peoples* received multiple rounds of briefing, including merits briefing, on this issue. Yet it chose to deny review, notwithstanding the obvious conflict between the Texas and Oklahoma rulings, and the Texas Court of Appeals' subsequent reliance on *Peoples*. Only this Court's review will clarify the confusion among state courts on this constitutional question of national importance.

B. In Oklahoma, The Same *Ad Valorem* Taxes Are Allowed As Constitutional

Barely a month after the Texas Court of Appeals decided *Peoples*, the Oklahoma Supreme Court reached the opposite result, creating a clear conflict among state courts regarding the constitutionality of these natural-gas taxes. *In re Assessment of Pers. Prop. Taxes Against Missouri Gas Energy*, 234 P.3d 938, 959 (Okla. 2008).

The Oklahoma case began when Missouri Gas Energy ("Missouri Gas") protested an *ad valorem* tax assessed on natural gas stored in Woods County, Oklahoma, on an interstate pipeline owned by the Panhandle Eastern Pipe Line, LP ("Panhandle"). *Id.* at 943. Panhandle offered a storage service to its shippers at one of two storage facilities—one in Kansas and one in Oklahoma—but shippers could not specify which storage facility would receive the gas. *Id.* at 944-45. Missouri Gas shipped and stored gas with Panhandle, and all of the stored gas originated in Oklahoma. *See id.* at 943, 949. But Missouri Gas did not sell gas in Oklahoma, nor did it maintain facilities or employees there. *Id.* at 943. Nevertheless, a portion of its gas was taxed by Oklahoma. *Id.*

Unlike the Texas Court of Appeals in *Peoples*, the Oklahoma Supreme Court upheld the *ad valorem* tax, concluding that it satisfied all four prongs of *Complete Auto*. *See id.* at 954-59. Addressing the first prong, the court held that there was a substantial nexus between the taxed property and Oklahoma, simply because "[l]arge volumes of gas are stored in Wood County for a substantial part of the year." *Id.* at 954. Despite recognizing that state courts must "follow directly applicable precedents," the Oklahoma Supreme Court expressly refused to apply the "traditional rule" set forth in the "goods-in-transit" cases. *Id.* (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). It further held that "[t]o the extent that the subjective factors [from the 'goods-in-transit'] analysis retain a role under the [*Complete Auto*] test," those factors were "inconclusive," and the case was "better decided on the basis of the objective fact" that the gas was stored in Oklahoma. *Id.* at 955.

Addressing the fourth prong of the *Complete Auto* test, the Oklahoma Supreme Court held that the tax was reasonably related to services provided by Oklahoma because "[t]he tax . . . operate[d] on the presence of personal property in Woods County," which was "taxed to the same extent as all other personal property in the county." *Id.* at 959. The court concluded that Missouri Gas "[wa]s therefore being asked to shoulder no more than its fair share." *Id.* (quotation omitted).

This decision, like that of the Kansas Supreme Court, is contrary to the Texas Court of Appeals' decision in *Peoples* and creates a direct conflict between state courts.

C. The Kansas Supreme Court Decision Deepened The Split, Joining Oklahoma

In the decision below, the Kansas Supreme Court expressly acknowledged the split in authority between Texas and Oklahoma, and it deepened this split by siding with Oklahoma.

Unlike the Texas Court of Appeals in *Peoples*, the Kansas Supreme Court held that the tax satisfied the first and fourth prongs of the *Complete Auto* analysis. Addressing the first prong, the court "agree[d] 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.App. 21a. Without further explanation, the court concluded that "[t]here is axiomatically a substantial nexus between Kansas and the gas stored in this state." *Id.* The court focused solely on the relationship between the stored gas and Kansas; it never addressed the absence of any other

connection between *Petitioners* and Kansas, and it never considered the "goods-in-transit" factors. *See id.* This approach differed markedly from that of the Texas Court of Appeals, which examined Peoples' relationship with Texas and the "goods-in-transit" factors, including the purpose of storage in Texas and the taxpayer's lack of control over the storage location. *See Peoples*, 270 S.W.3d at 216.

With respect to the fourth prong, the court concluded that "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." Pet.App. 21a. Much like the Oklahoma Supreme Court, the Kansas Supreme Court reasoned that because "[a]ll property in Kansas is subject to ad valorem taxation," and Petitioners' gas was taxed at the same rate as other property, the tax must satisfy *Complete Auto*'s fourth prong. *Id.* But the Kansas Supreme Court failed to identify any state services or benefits that related to Petitioners or to the stored gas. *See id.* Again, this approach conflicted with the Texas Court of Appeals' analysis, which inquired into the specific benefits that the state of Texas conferred on Peoples.

The conflict is not going away. This Court should grant certiorari to resolve it.

II. THE DECISION OF THE KANSAS SUPREME COURT DRAMATICALLY DEPARTS FROM THIS COURT'S PRECEDENTS

The Kansas Supreme Court's holding cannot be squared with this Court's longstanding Commerce Clause precedents, which continue to inform the first prong of the *Complete Auto* test. For decades before *Complete Auto*, this Court decided numerous cases

that provided clear rules concerning the constitutionality of state taxes on goods in interstate commerce. *See, e.g.*, *Nat'l Bellas Hess*, 386 U.S. at 758; *Champlain*, 260 U.S. at 376-77; *Carson*, 279 U.S. at 108-09. *Complete Auto* did not overrule these cases, but instead articulated a four-factor test that distills and draws upon their principles. Indeed, as the Solicitor General argued in the Oklahoma case, this Court's pre-*Complete Auto* cases "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.

Rather than considering this Court's directly applicable pre-*Complete Auto* precedents, the Kansas Supreme Court applied *Complete Auto* in a vacuum. It refused to follow this Court's bright-line "common carrier" rule from *National Bellas Hess* and *Quill*, and it failed to even consider the factors underlying the well-established "goods-in-transit" doctrine. Instead, it applied *Complete Auto* in a crabbed and incompletely informed manner, commenting that "[t]h[is] Court's Commerce Clause jurisprudence has evolved substantially over time—particularly as to states' taxing powers" (Pet.App. 13a), as though all other precedent from this Court was irrelevant. The Kansas Supreme Court's failure to consider this Court's precedents provides yet another ground for review: When the "precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484.

A. This Court's Pre-*Complete Auto* Precedents Evaluate The Nexus Between A Taxpayer's Activities And The Taxing State

Well before this Court articulated the "substantial nexus" requirement in *Complete Auto*, it developed principles that effectively determined whether a substantial nexus existed between a taxpayer's activity and a taxing state. The cases setting forth these principles fall within two related categories.

1. In *National Bellas Hess*, this Court applied a bright-line rule to assess the strength of the nexus between the taxpayer's activities and a taxing state. *National Bellas Hess* distinguished between "mail order sellers with retail outlets, solicitors, or property within a State," on the one hand, and "those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business," on the other. 386 U.S. at 758. This Court adopted a bright-line rule that "a seller whose only connection with customers in the State is by common carrier or the United States mail" may not be taxed. *Id.*; *see also Quill*, 504 U.S. at 317-18 (reaffirming the continuing viability of *National Bellas Hess* after *Complete Auto*). The Court's holding mirrored its earlier statements, in the context of determining whether goods were in transit, that "[w]hen [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. *Champlain*, 260 U.S. at 376; *see also Coe v. Errol*, 116 U.S. 517, 525 (1886) (observing that goods "delivered to a carrier for . . . transportation" are not taxable). In such cases, a taxpayer "lack[s] the requi-

site minimum contacts with the State." *Quill*, 504 U.S. at 301 (describing *National Bellas Hess*).

2. A closely related line of cases also evaluates the sufficiency of the connection between a taxpayer's activities and a taxing state. The longstanding "goods-in-transit" doctrine establishes that if property found temporarily in a taxing state retains its "continuity of transit," it cannot be taxed by the state. *Carson*, 279 U.S. at 101 ("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."). To determine whether there is a break in the continuity of transit, such that the property becomes taxable, this Court considers "the various factors of the situation," among them the extent of and reason for the interruption of the interstate journey, the intention of the owner, the means of transit, and whether the taxpayer had control over the property. *Champlain*, 260 U.S. at 377; *see also, e.g.*, *Carson*, 279 U.S. at 108-09 (storage of oil in tanks awaiting arrival of ships to complete transportation could not be taxed); *Champlain*, 260 U.S. at 373-74 (logs floating on a river were in transit even though they were temporarily detained to allow high water to subside); *Kelley v. Rhoads*, 188 U.S. 1, 5-9 (1903) (sheep herded across Wyoming were in transit even though they stopped to graze along the way). Like the bright-line "common carrier" rule, these factors help determine whether there is real substance (now referred to as "substantial nexus") to the relationship between the taxpayer's activities and the taxing state.

B. This Court's Earlier Precedents Remain Viable After *Complete Auto*

In *Complete Auto*, this Court synthesized its prior case law and articulated a four-pronged test for assessing the constitutionality of state taxes. *See* 430 U.S. at 277-78 & n.6, 279 & n.8 (citing cases). Eschewing formalistic distinctions, the Court held that courts should examine the practical effect of a tax by considering whether there is substantial nexus with the state and whether the tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the state. *Id.* at 279. This Court later characterized *Complete Auto*'s approach as "a case-by-case evaluation of the actual burdens imposed [on interstate commerce] by particular regulations or taxes." *Quill*, 504 U.S. at 315; *see also id.* at 313 ("The first and fourth prongs, which require a substantial nexus and a relationship between the tax and state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce.").

After *Complete Auto*, this Court granted certiorari in *Quill* to determine whether the "common carrier" rule from *National Bellas Hess* should be overruled as inconsistent with *Complete Auto*. *Quill*, 504 U.S. at 301-02. Recognizing that *Complete Auto* renounced formalistic rules in favor of a practical, "case-by-case evaluation," the *Quill* Court nonetheless confirmed the validity of the "common carrier" rule. *Id.* at 317-18. It explained that "the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law." *Id.* at 317. In

Quill, the taxpayer's only connection with North Dakota was via a common carrier and "a few floppy diskettes" present in the state. *See id.* at 315 n.8. This Court held that neither a common-carrier connection nor the physical presence of floppy disks was sufficient to establish a substantial nexus. *See id.* at 315 n.8, 317-18. *Quill* thus confirms that even after *Complete Auto*, there is still a 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.

Just as the rule from *National Bellas Hess* remains good law after *Complete Auto*, so too does the longstanding "goods-in-transit" doctrine. This doctrine, which determines the constitutionality of a state tax based on an evaluation of the "various factors" demonstrating substance of the state's relationship with the taxpayer, *Champlain*, 260 U.S. at 377, is wholly consistent with the "case-by-case evaluation" of *Complete Auto*, *see Quill*, 504 U.S. at 315. Specifically, the "goods-in-transit" test informs the first prong of the *Complete Auto* analysis, which asks whether "the tax is applied to an activity with a substantial nexus with the taxing State." *Complete Auto*, 430 U.S. at 279. Factors such as the taxpayer's control over the property, the purpose and extent of the property's physical presence in the state, and the intention of the taxpayer bear directly on the relationship between the taxed activity and the taxing state. *See Champlain*, 260 U.S. at 377; *see also Carson*, 279 U.S. at 108-09. Moreover, principles of *stare decisis* justify adherence to this constitutional doctrine. *See Quill*, 504 U.S. at 320 (Scalia, J., concurring in part and concurring in the judgment).

This Court in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30-31 (1988), did not nullify the "goods-in-transit" doctrine. There, this Court stated that "*Complete Auto* abandoned the abstract notion that interstate commerce 'itself' cannot be taxed by the State," and thus "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." *Id.* But while this Court has renounced formalistic distinctions between "interstate" and "intrastate" commerce, the factors underlying the "goods-in-transit" doctrine transcend artificial labels and go to the very heart of whether there is a "substantial nexus" under *Complete Auto*.[5] As the Solicitor General has recognized,

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[5] Chief Justice Taft's opinion for the Court in *Champlain* emphasized that the continuity-of-transit analysis was not a formalistic exemption to taxation for goods traveling in interstate commerce, but, like the "evolved" jurisprudence identified by the Kansas Supreme Court below, was instead designed to allow states to tax goods in interstate commerce except when the goods' only connection with the state was the act of traveling in interstate commerce itself:

> The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative, unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one State to another, in the course of such an uninterrupted journey it is clearly immune. The doubt arises when there are interruptions in the journey and when the property in its transportation is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or

even after *Complete Auto* and *D.H. Holmes*, "the 'continuity of transit' cases remain potentially relevant to the constitutional analysis." SG Okla. Br. at 12. Specifically, "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." *Id.* This Court's pre-*Complete Auto* cases, including the "goods-in-transit" line of cases, are directly applicable today. This case now gives the Court the opportunity to clarify and confirm the relationship between these important strands of constitutional doctrine.

C. The Kansas Supreme Court Departed From This Court's Directly Applicable Precedents

Rather than allowing this Court's earlier precedents to inform its analysis, the Kansas Supreme Court applied *Complete Auto* in a vacuum, as though this Court's state-tax jurisprudence began with that decision. When assessing the nexus between Petitioners' activities and Kansas, the Kansas Supreme Court refused to apply the "common carrier" rule from *National Bellas Hess* and failed to even consider the factors underlying the "goods-in-transit" cases. Pet.App. 16a, 21a. Instead, it crafted a simplistic, "axiomati[c]" *per se* rule: "There is axiomatically a substantial nexus between Kansas and the gas stored in this state" because the gas "was located in Kansas on the assessment date." *Id.* at 21a. It never consid-

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> convenient transit, then the continuity of the interstate trip is not broken.

260 U.S. at 376.

ered factors such as the reason the gas was in Kansas, the inability of Petitioners to control where a common carrier sent the gas, Petitioners' intentions regarding shipment and storage of gas, or the absence of any other connections—such as facilities for transmitting natural gas—in the state. *See id.* Rather, under the Kansas Supreme Court's rationale, any property physically present in a state for even a fleeting moment on assessment day is subject to *ad valorem* taxation. This analysis is directly contrary to the fact-specific inquiry of *Complete Auto*, the well-established factors underlying the "goods-in-transit" cases, and the clear "common carrier" rule. It also flatly contradicts *Quill*, which held that the mere physical presence of property in a state is an insufficient nexus, *see* 504 U.S. at 315 n.8, and that pre-*Complete Auto* precedents continue to inform the dormant Commerce Clause analysis, *see id.* at 314.

Had the Kansas Supreme Court properly applied this Court's precedents, it would have reached a different result. There was no substantial nexus between Petitioners and Kansas. Petitioners do not own facilities in Kansas for the transmission, distribution, or storage of natural gas; do not direct their business activities to Kansas; and all of their gas is intended for ultimate use or sale *outside* of Kansas. Pet.App. 7a. Moreover, the property's location in Kansas is insufficient. Petitioners have no control over the transportation or storage location, and "*no knowledge* regarding the specific nature and location of such storage." *Id.* at 48a (emphasis added); *see also Quill*, 504 U.S. 315 n.8. Instead, the interstate pipelines—which are common carriers under *National Bellas Hess* and *Quill*—maintain complete possession and control of the natural gas in their systems.

Pet.App. 7a, 48a. Any incidental benefit Petitioners might enjoy from the temporary presence of gas in Kansas is overshadowed by the inability of Petitioners to control where the gas is transported or stored, as well as the pipelines' need to store gas for their own purposes, such as pressure and balancing requirements and the timely receipt and delivery of gas. *See id.* at 6a, 49a. Whether analyzed in light of the "goods-in-transit" factors or the bright-line rule from *National Bellas Hess*, it is clear that there is an insufficient nexus between Petitioners' activities and Kansas. Indeed, Petitioners' lack of any "purposeful[] avail[ment] of the benefits of an economic market in the forum State" of Kansas makes it doubtful that the tax could survive even the more generous Due Process Clause "minimum contacts" nexus requirement. *Quill*, 504 U.S. at 307-08; *see also J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) (plurality op.)

The Kansas Supreme Court justified its failure to consider the "common carrier" rule by reading that rule as confined to sales and use taxes. Pet.App. 16a. This unduly restrictive reading of *National Bellas Hess* and *Quill* has itself divided state courts. *Compare, e.g.*, *Lanco, Inc. v. Director, Div. of Taxation*, 908 A.2d 176, 177 (N.J. 2006) (per curiam) (limiting *National Bellas Hess* and *Quill* to sales and use taxes); *A & F Trademark, Inc. v. Tolson*, 605 S.E.2d 187, 194-95 (N.C. Ct. App. 2004) (same), *with Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296, 299-300 (Tex. Ct. App. 2000) (applying *National Bellas Hess* and *Quill* to franchise tax); *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831, 839 (Tenn. Ct. App. 1999) (applying these cases to franchise and excise tax).

Even assuming, for the sake of argument, that *National Bellas Hess* and *Quill* are so limited, the Kansas Supreme Court should have at least considered the underlying principle of the rule—which recognizes the role of a common carrier in controlling goods shipped through interstate commerce—when applying the first factor of *Complete Auto*. Indeed, this "common carrier" principle has animated this Court's dormant Commerce Clause jurisprudence for over a century. *See, e.g.*, *Champlain*, 260 U.S. at 376 (property "shipped by a common carrier from one State to another" in continuous transit is immune from taxation); *Coe*, 116 U.S. at 525 (goods "delivered to a carrier for . . . transportation" are not taxable). In any event, this Court need not decide whether the Kansas Supreme Court correctly limited *National Bellas Hess* and *Quill* to sales and use taxes. It need only address whether *ad valorem* taxes on natural gas are constitutional in the common situation presented by this case and others—that is, when a taxpayer ships natural gas through pipelines with storage facilities located in the taxing state, but the taxpayer has no control over the transportation or storage location and no other connection with the state. That is the question that has divided state courts. It is also the question squarely presented by this case, and this Court should grant review to address it.

D. Lower Courts Are Confused About The Proper Analytical Framework

This Court's review would lend much-needed clarity to this area of dormant Commerce Clause jurisprudence. In addition to being sharply divided over the constitutionality of *ad valorem* taxes on natural gas, state courts are obviously confused about the

proper analytical framework for addressing this issue.

Despite the Solicitor General's recommendation that pre-*Complete Auto* precedents may inform the first prong of the *Complete Auto* test, no state court has clearly adopted that approach. The Oklahoma Supreme Court expressly declined to apply the "traditional rule" set forth in the "goods-in-transit" cases. *See In re Missouri Gas Energy*, 234 P.3d at 954. It briefly acknowledged that the "goods-in-transit" factors could potentially "retain a role under the [*Complete Auto*] test," but it ultimately disregarded these factors because they "cut both ways on the question of nexus" and thus were "inconclusive." *Id.* at 955. The court instead rested its holding on the notion that there was some stored gas deemed to be physically located in Oklahoma, explaining that "the nexus issue is better decided on the basis of th[is] objective fact." *Id.*

By contrast, the Texas Court of Appeals applied pre-*Complete Auto* cases when faced with this same issue. But not even the Texas court fully embraced the Solicitor General's recommended approach. While the Texas Court of Appeals implicitly considered some of the "goods-in-transit" factors in its "substantial nexus" analysis, *see Peoples*, 270 S.W.3d at 218, it explicitly treated the "goods-in-transit" cases as an inquiry separate and apart from *Complete Auto*, *see id.* at 215-18.

The decision of the Kansas Supreme Court perpetuates this confusion. It declined to apply any of this Court's pre-*Complete Auto* precedents and went further than the Oklahoma Supreme Court by failing to even address the "goods-in-transit" factors. *See*

Pet.App. 21a. Courts are in need of direction, and this case provides an opportunity for the Court to clear up the substantial confusion on this important constitutional issue.

III. THE CONSTITUTIONALITY OF STATE TAXATION OF NATURAL GAS IS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE

"[T]he importance of the issues in the functioning of the interstate market in natural gas" has long been acknowledged by this Court. *Transcont'l Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 411 (1986). The constitutionality of *ad valorem* taxes on such gas is a significant and recurring question with enormous practical consequences for the interstate natural-gas market—and for our Nation. The present patchwork of tax liability undermines the proper functioning of this marketplace and creates uncertainty and confusion for companies and states alike.[6]

As demonstrated by the trio of cases from Oklahoma, Kansas, and Texas, the constitutionality of *ad valorem* taxes on natural gas repeatedly arises in state courts. Now that Kansas has joined Oklahoma, becoming the second state to endorse this form of taxation, other states are likely to follow suit. Interstate pipelines sprawl across the nation, *see* EIA, *Interstate Natural Gas Supply Dependency* (2007) (illustrating map of pipelines),[7] and no fewer than 25

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[6] As this case demonstrates, state law may compound the confusion by imposing taxes on some shippers while exempting others. *See* Pet.App. 37a-43a.

[7] *Available at* http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/dependstates_map.html.

states have FERC-regulated storage facilities, *see* FERC, *Jurisdictional Storage Fields in the United States by Location* (May 23, 2013).[8] Without this Court's guidance, diverging state-court opinions will subject shippers to multiple, inconsistent taxing schemes. This patchwork will create strong incentives for shippers to utilize pipelines with storage facilities in tax-friendly states, while avoiding those through which taxes may be levied.

Consistency and predictability in the interstate natural-gas market—and, more specifically, in the fields of interstate pipelines and storage facilities—is imperative. Interstate natural-gas pipelines move nearly a quarter of the Nation's energy resources long distances to markets in the 48 contiguous states, and they are "vital to the economy." FERC, *An Interstate Natural Gas Facility on My Land? What Do I Need to Know?* 4 (2013).[9] The Kansas Supreme Court recognized that storage facilities are "integral to the pipelines' operations." Pet.App. 6a. Storage facilities allow interstate pipelines to achieve proper pipeline pressure and balancing, and to efficiently receive and deliver gas at distant locations. *Id.* They are an indispensable component of the interstate natural-gas market.

The taxation of stored natural gas has enormous practical impact. The value of stored gas inventories in this case alone is staggering. The gas that the Di-

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[8] *Available at* http://www.ferc.gov/industries/gas/indus-act/storage/fields-by-location.pdf.

[9] *Available at* https://www.ferc.gov/for-citizens/citizen-guides/citz-guide-gas.pdf.

vision allocated to the 12 Petitioners in 2009 had a fair market value of $125 million; far more was at stake in the proceedings below. *Supra* n.2. The assessed value of Petitioners' gas, for purposes of levying *ad valorem* taxes, was over $41 million. *Id.* And the stored gas inventories in this case only scratch the surface. Nationally, FERC-regulated facilities have the capacity to store over 5 trillion cubic feet of natural gas. *See* FERC, *Jurisdictional Storage Fields in the United States by Location*.[10] That number is growing. Since 2000, FERC has approved the construction and operation of over 100 new underground storage fields, adding 1.25 trillion cubic feet of storage capacity. *See* FERC, *Certificated Storage Projects Since 2000 for Expansion of or New Capacity* (Mar. 5, 2013).[11] Additional projects are pending. *See* FERC*, Pending Storage Projects* (Mar. 5, 2013).[12] These numbers confirm that the taxation of stored natural gas carries significant real-world import, both to taxpayers and to taxing authorities. Such taxes impact a broad range of actors, including the interstate pipelines with storage facilities, as well as the consumers who ultimately bear the burden of additional taxes.

Unless and until this Court addresses this issue, the constitutionality of *ad valorem* taxes on stored natural gas will subject market participants to taxes

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10 *Supra* n.8.

11 *Available at* https://www.ferc.gov/industries/gas/indus-act/storage/certificated.pdf.

12 *Available at* https://www.ferc.gov/industries/gas/indus-act/storage/pending.pdf.

in some states but not others, depending on where a given pipeline has storage facilities and whether the tax is constitutional in each state. This Court should grant certiorari to provide certainty and predictability in this important area of the law, thereby promoting the stability of our nation's interstate natural-gas market.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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