No. 17-422

In the Supreme Court of the United States

ETC MARKETING, LTD., PETITIONER

v.

HARRIS COUNTY APPRAISAL DISTRICT

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

BRIEF FOR PLAINS MARKETING, L.P. AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—continued: **Page(s)**

Statutes, Regulations, and Orders:

Other Authorities: **Page(s)**

Other Authorities—continued: **Page(s)**

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Plains Marketing, L.P. is a marketing subsidiary of Plains All American Pipeline, L.P. Plains Marketing buys and resells crude oil and related products. Its parent Plains All American engages in the transportation, storage, terminalling, and marketing of crude oil and refined products, as well as the storage of natural gas and the processing, transportation, fractionation, storage, and marketing of natural gas liquids. Plains All American has extensive expertise in supply, logistics, and distribution of energy products, and a strong interest in the safe, efficient, and cost-effective transportation of oil and gas around the country.

Amicus curiae National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community and the leading advo-

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from the *amici curiae* and their counsel, made any monetary contribution for the preparation or submission of this brief. Counsel for the parties received timely notice and consented to this filing.

cate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

In the decision below, the Supreme Court of Texas—the highest court of the leading energy-producing State in the nation—subjected vast quantities of temporarily stored natural gas to burdensome taxation while in interstate transit. This decision clears the way for new state and local taxes on natural gas and other energy products, which will harm not just the energy industry, but millions of consumers who bear the burden of these unconstitutional taxes in the form of higher heating and electricity bills. Such taxes will also impose additional burdens on countless industrial and commercial users of natural gas.

Plains Marketing has had to challenge aggressive imposition of ad valorem taxes on oil temporarily located in gathering tanks. See *Midland Cent. Appraisal Dist.* v. *Plains Mktg., L.P.*, 202 S.W.3d 469 (Tex. App.—Eastland 2006). Thus, it knows firsthand the onerous burdens such taxes can impose. For its part, the NAM recognizes that unfair local taxation of an essential primary energy source will impose unfair burdens across almost every sector of the U.S. economy, including manufacturing. Both Plains Marketing and the NAM have a strong interest in the review of the decision below, and in this Court's broader clarification that the Commerce Clause forbids States and localities from taxing products, including oil and gas, that are temporarily stored during interstate transit.

SUMMARY OF ARGUMENT

This case is of great practical and doctrinal importance. Practically speaking, natural gas represents

one of the largest and most rapidly growing energy sources in the nation. And temporary storage of natural gas is essential to the safe, efficient operation of the pipeline system that brings that gas from its sources to end users. Thus, it is common for trillions of cubic feet of working natural gas to be temporarily stored, to ensure that end users have the continuous and stable supply of gas they need for basic industrial, commercial, and residential needs. State and local taxation of such gas poses the risk of substantial financial burdens.

But the practical importance of the question presented goes beyond the money at stake. Particular features of the natural gas market make end users uniquely vulnerable to heavy tax burdens imposed by distant States and localities. Natural gas frequently crosses numerous jurisdictions between wellhead and burner tip; if the decision below was correct, that means that gas could be taxed by numerous jurisdictions on its journey to its destination, wherever the gas is temporarily stored. Natural gas is a necessity in today's world, so customers often have no practical choice but to buy it, even if prices are inflated by unfair and unconstitutional taxation. Due to these special features of the natural gas market, it is especially important in this context for the federal judiciary to ensure that taxes are compliant with the Commerce Clause.

This case is also important as a matter of legal doctrine. The Supreme Court of Texas's decision solidified a split of authority among state courts on the continuing vitality of this Court's "in-transit" precedents in light of its more recent Commerce Clause jurispru-

dence. This Court should grant the petition and reaffirm that the rule laid out in its older precedents—that goods are immune from taxation so long as they remain in interstate transit—remains valid. Unless it does so, there will be disuniformity in an area of law with a compelling need for uniformity, governing the national market for natural gas. Moreover, this is an issue that has implications far beyond the taxation of natural gas. This Court's in-transit cases dealt with products of all kinds. For example, this Court has been asked within the last decade to clarify the role its in-transit test should play in evaluating the constitutionality of ad valorem taxes on crude oil, underscoring the broader relevance of this doctrinal issue.

By deciding (correctly) that the in-transit cases are still relevant today, the Supreme Court of Texas made it clear that this doctrinal divide will not simply resolve itself. The persistence of the split on that basic issue is no surprise, given the lack of guidance from this Court, and given the difficult and sensitive nature of the enterprise for state and lower federal courts to decide whether this Court has tacitly overruled its past decisions.

Finally, the decision below was wrong. The Supreme Court of Texas's most important mistake, and the one that led it to reach the wrong outcome, was its failure to account for the unique features of the pipeline system through which natural gas is transported in interstate commerce. The factual and physical realities of that system, combined with a proper reading of this Court's in-transit cases, dictate the conclusion that temporarily stored gas is beyond the power of States and localities to tax.

ARGUMENT

I. AD VALOREM TAXES ON TEMPORARILY STORED GAS HAVE THE POTENTIAL TO SEVERELY BURDEN THE INTERSTATE NATURAL GAS MARKET

A. Natural Gas Is A Crucial Energy Resource

Natural gas is one of the nation's most important primary sources of energy. In 2016, it was the source for approximately 29% of energy consumption in the United States—a far greater share than coal, nuclear, or renewables, and nearly as much as all of those sources combined.[2] It is the largest fuel source for utility-scale electricity generation in the United States.[3] "In 2016, natural gas provided 34% of total electricity generation, surpassing coal to become the leading generation source"; almost every State has one or more natural-gas-fired power plants.[4] An abundant resource, natural gas is also attractive for environmental

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[2] See U.S. Energy Info. Admin., *U.S. Energy Facts Explained*, https://www.eia.gov/energyexplained/?page=us_energy_home (last visited Oct. 16, 2017). Petroleum is the only primary energy source that accounts for a greater portion of overall energy consumption in the United States.

[3] See U.S. Energy Info. Admin., *Frequently Asked Questions: What is U.S. electricity generation by energy source?*, https://www.eia.gov/tools/faqs/faq.php?id=427&t=2 (last visited Oct. 16, 2017).

[4] U.S. Energy Info. Admin., *Today in Energy, June 16, 2017*, https://www.eia.gov/todayinenergy/detail.php?id=31672 (last visited Oct. 16, 2017).

reasons: notably, it is much cleaner than coal and releases dramatically less carbon dioxide per unit of energy produced.[5]

The importance of natural gas to the U.S. economy can hardly be overstated. In addition to its crucial role in electricity generation from coast to coast, natural gas is heavily used in industry and commerce. It is also used in residences for heating, cooking, and drying clothes. About half the homes in the United States use gas for such purposes.[6]

Thus, natural gas is not merely important: As a practical matter, it is a necessity. See Federal Energy Regulatory Comm'n, *Energy Primer: A Handbook of Energy Market Basics* 2 (Nov. 2015), https://www.ferc.gov/market-oversight/guide/energy-primer.pdf (Energy Primer) (noting that "[u]nlike most other products, natural gas and electric service are necessities today"). It is thus fitting that Congress has "declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest," and that "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a).

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[5] U.S. Energy Info. Admin., *Natural Gas Explained: Natural Gas and the Environment*, https://www.eia.gov/energyexplained/index.cfm?page=natural_gas_environment (last visited Oct. 16, 2017).

[6] U.S. Energy Info. Admin., *Natural Gas Explained: Use of Natural Gas*, https://www.eia.gov/energyexplained/index.cfm?page=natural_gas_use (last visited Oct. 16, 2017).

B. Temporary Storage Is A Necessary Part Of The Highly Integrated Interstate Natural Gas Transportation System

Despite its many advantages and crucial role at every level of the economy, there are significant logistical hurdles involved in getting natural gas where it needs to go. Although most natural gas used in the United States is produced domestically,[7] a small number of states account for the lion's share of production, with Texas by far in the lead.[8] Thus, natural gas often has to travel hundreds of miles or more to get from its source to the place where it will ultimately be used to generate electricity, heat buildings, or otherwise be consumed. But at ordinary temperatures its gaseous form makes it unrealistic to carry by the familiar modes of transit—for example, freight trains—often used to transport solid goods. As a result, a massive natural gas pipeline network has been built over time. This "highly integrated network" includes over 300,000 miles of mainline interstate and intrastate natural gas transmission pipelines.[9]

Demand for natural gas is affected by many factors, notably the sharp rise in heating needs during winter

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[7] U.S. Energy Info. Admin., *Natural Gas Explained: Natural Gas Imports and Exports*, https://www.eia.gov/energyexplained/index.cfm?page=natural_gas_imports (last visited Oct. 16, 2017).

[8] U.S. Energy Info. Admin., *Natural Gas Explained: Where Our Natural Gas Comes From*, https://www.eia.gov/energyexplained/index.cfm?page=natural_gas_where (last visited Oct. 16, 2017).

[9] U.S. Energy Info. Admin., *Natural Gas Explained: Natural Gas Pipelines*, https://www.eia.gov/energyexplained/index.cfm?page=natural_gas_pipelines (last visited Oct. 16, 2017).

months.[10] But despite the considerable season-to-season fluctuations in demand, production and imports are relatively constant from season to season.[11] This logistical problem cannot be solved simply by allowing gas to accumulate indefinitely in the pipelines themselves, which would eventually cause them to rupture from excess pressure.

The solution is temporary storage. The total working gas in storage fluctuates seasonally, but there can be as much as four trillion cubic feet of working gas in storage at a given time.[12] The continuous movement of natural gas into and out of temporary storage is thus a central aspect of the transportation infrastructure used to reliably get this essential resource where it needs to be despite ever-changing and often unpredictable demand. Hence, this Court has noted that underground gas storage is "a necessary and integral part" of the interstate pipeline network's operation. *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 295 n.1 (1988) (quoting *ANR Pipeline Co.* v. *Schneidewind*, 801 F.2d 228, 230 n.3 (6th Cir. 1986)). The Federal Energy Regulatory Commission (FERC) has also confirmed as much. See 71 Fed. Reg. 36,612, 36,613 (June 27, 2006).

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[10] U.S. Energy Info. Admin., *Natural Gas Explained: Factors Affecting Natural Gas Prices*, https://www.eia.gov/energyexplained/index.cfm?page=natural_gas_factors_affecting_prices (last visited Oct. 16, 2017).

[11] U.S. Energy Info. Admin., *Natural Gas Explained: Delivery and Storage of Natural Gas*, https://www.eia.gov/energyexplained/index.cfm?page=natural_gas_delivery (last visited Oct. 16, 2017).

[12] U.S. Energy Info. Admin., *Weekly Natural Gas Storage Report*, http://ir.eia.gov/ngs/ngs.html (last visited Oct. 16, 2017).

C. State And Local Taxation On Temporarily Stored Gas Will Severely Burden The Interstate Natural Gas Market

In the decision below, the Supreme Court of Texas upheld an ad valorem tax on about 33 billion cubic feet of natural gas allocated to petitioner and held in a storage facility owned and operated by Houston Pipe Line Company (HPL). Pet. App. 1a-4a. HPL already paid ad valorem taxes on the permanent supply of "cushion gas" in its storage facility. *Id.* at 3a. The difference in this case is that a tax was imposed on "working gas" allocated to petitioner, most of it destined to be delivered out of state. *Id.* at 4a.

This "relatively new form of taxation" (Pet. 4) is spreading to new jurisdictions, and has recently become the subject of intense and widespread constitutional litigation. As taxation becomes more commonplace for the vast quantities of stored natural gas that are a necessary component of gas pipelines, consumers will increasingly face the prospect of utility bills driven higher by decisions of far-off regulators and taxing authorities unaccountable to them at the ballot box. While that is true to some extent whenever consumers buy products made out of state, the risks are far greater when taxes are levied on goods in transit, because the taxing authorities well know that the impact of the taxes will be felt outside their jurisdiction. In addition, natural gas is not just any product. As FERC has explained, "retail use of natural gas * * * exhibits some unique characteristics." Energy Primer at 2. Retail users have "few substitutes" for natural gas, especially in the short term: if prices rise, consumers "cannot quickly switch to a different product" for such essential tasks as heating and cooking. *Ibid.* Such users

cannot simply "vote with their feet" either by using a different product to serve the same uses or by simply doing without. The same is also true for major commercial and industrial users, which often cannot readily convert to alternative fuels.

Thus, the usual means of accountability that keep taxing authorities in check—both political and market-based—do not apply to the usual extent when state or local authorities impose taxes on natural gas destined for use by out-of-state consumers. Congress has long understood the need for federal oversight to ensure that consumers have ready access to natural gas at reasonable and fair prices. See, *e.g.*, 15 U.S.C. § 717c(a); Energy Primer at 24-25. This Court should likewise intervene to ensure that States and localities do not impose unconstitutional taxes "that interfere with interstate commerce," *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 309 (1992), in this unusually important, nationally integrated, and heavily regulated sector of the economy. If nothing else, this Court can ensure certainty on a recurring question that will otherwise be left for ongoing litigation in state courts, virtually assuring a patchwork of varying outcomes across the numerous jurisdictions along pipeline routes.

II. THIS COURT SHOULD USE THIS CASE TO REAFFIRM THE VITALITY OF ITS TRADITIONAL "IN-TRANSIT" RULE

In addition to its practical importance, this case implicates a doctrinal divide on the continuing relevance of this Court's traditional "in-transit" cases after *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). This divide has important implications not only for the

validity of ad valorem taxes on temporarily stored natural gas, but also for taxes on a wide variety of other goods and commodities.

A. State Courts Are Divided On The Proper Analysis Of Ad Valorem Taxes On Goods In Interstate Commerce, Such As Temporarily Stored Gas

In addition to the Supreme Court of Texas, two other state supreme courts have spoken to the specific question presented in this case, i.e., whether the Commerce Clause bars state or local taxation of natural gas temporarily in storage during interstate transit. See *In re Assessment of Pers. Prop. Taxes Against Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008) (*Missouri Gas*), cert. denied, 559 U.S. 970 (2010); *In re Appeals of Various Applicants from a Decision of the Div. of Prop. Valuation for Tax Year 2009*, 313 P.3d 789 (Kan. 2013) (*Kansas Gas*), cert. denied, 135 S. Ct. 51 (2014). But the three courts' bare agreement on outcome exposed irreconcilable disagreement on basic, recurring issues.

All three courts agreed that the analysis this Court laid out in *Complete Auto* governs. See Pet. App. 9a-10a; *Missouri Gas*, 234 P.3d at 953; *Kansas Gas*, 313 P.3d at 796-799. That analysis requires that a state tax meet four requirements in order to withstand scrutiny under the dormant Commerce Clause. *Complete Auto*, 430 U.S. at 279. Most relevantly for present purposes, there must be a "substantial nexus" between the State and the activity being taxed. *Ibid.*

But neither *Complete Auto* nor any subsequent case overruled a previous line of cases in which this Court applied the rule that goods in continuity of interstate transit cannot be taxed. See *Minnesota* v. *Blasius*, 290

U.S. 1, 9-10 (1933) (summarizing continuity-of-transit analysis). The Supreme Court of Texas accordingly reconciled the *Complete Auto* framework with the earlier in-transit cases, treating the rule against taxing goods in continuity of transit as a particular application of *Complete Auto*'s substantial-nexus requirement. Pet. App. 10a-11a. But the Supreme Court of Oklahoma and the Supreme Court of Kansas did not follow that course. Instead, the Oklahoma court explicitly found that in-transit analysis was not dispositive. *Missouri Gas*, 234 P.3d at 955. And the Kansas court held in no uncertain terms that *Complete Auto*'s substantial-nexus requirement was satisfied by the simple fact that the gas was stored within the State. *Kansas Gas*, 313 P.3d at 799.

B. The Disagreement Among Courts Is Important

This doctrinal divide is far from academic. Because every prong of the *Complete Auto* test must be satisfied for a tax to pass muster under dormant Commerce Clause analysis, failure to meet the substantial-nexus requirement is itself dispositive. And under the analytic framework the Supreme Court of Texas adopted, the in-transit test in turn represents a particular application of the substantial-nexus requirement. Pet. App. 12a, 16a-17a. In Texas—the nation's largest energy producer—this Court's in-transit test remains dispositive: Ad valorem taxes on goods in the course of interstate transit are invalid under the Commerce Clause for lack of a substantial nexus between the State and the property taxed. In Oklahoma and Kansas, that is not so.

This has the potential to produce inconsistent outcomes. This Court's in-transit cases looked to the specific facts surrounding a temporary stoppage in determining whether goods on their way to an out-of-state destination were taxable. See *Blasius*, 290 U.S. at 10 ("[I]n each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied."); *Champlain Realty Co.* v. *Town of Brattleboro*, 260 U.S. 366, 377 (1922) ("[I]nterstate continuity of transit is to be determined by a consideration of the various factors of the situation."). Thus, under those cases, the mere fact that the goods are located within a given jurisdiction for a significant period of time does not end the continuity-of-transit inquiry. As the Supreme Court of Texas recognized, a continuity-of-transit analysis therefore results in "a more nuanced approach for determining whether property is sufficiently connected to the state" than the "presence-plus-time approach" the Oklahoma and Kansas courts apparently embraced. Pet. App. 17a; *see id.* at 19a (noting that it is necessary under the in-transit analysis to "examine why the stoppage takes place").

As petitioner notes, Pet. 32, this doctrinal divide has the potential to produce different outcomes even *within* the context of courts that generally accept ad valorem taxes on temporarily stored natural gas. For example, Texas's more nuanced rule would likely forbid taxation of gas stuck in storage due to pipeline damage, whereas the "presence-plus-time" approach of Oklahoma and Kansas would probably allow taxation under such circumstances. But the disagreement over the status of the in-transit cases has practical implications extending well beyond that specific context. The

factual diversity of this Court's in-transit cases themselves illustrates the breadth of the implications. See, *e.g.*, *Federal Compress & Warehouse Co.* v. *McLean*, 291 U.S. 17, 21 (1934) (cotton); *Blasius,* 290 U.S. at 5 (cattle); *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95, 98 (1929) (oil); *Champlain Realty*, 260 U.S. at 373 (logs); *Bacon* v. *Illinois*, 227 U.S. 504, 511 (1913) (grain); *Kelley* v. *Rhoads*, 188 U.S. 1, 5 (1903) (sheep).

Nor does this doctrinal question arise only in the context of natural gas today. Indeed, the Supreme Court of Texas noted in the decision below that it had previously found the in-transit analysis relevant to the substantial-nexus determination in a case dealing with taxation of oil, not gas. Pet App. 10a-11a (citing *Diamond Shamrock Ref. & Mktg. Co.* v. *Nueces Cty. Appraisal Dist.*, 876 S.W.2d 298, 302 (Tex. 1994)).

Consider also one of the past cases in which this Court was asked to address the continuing role of its in-transit precedents. In *Midland Central Appraisal District* v. *BP America Production Co.*, an intermediate Texas appellate court found that an ad valorem tax on crude oil that spent six to seventy-two hours in a "tank farm"—a portion of an interstate pipeline system—violated the Commerce Clause. 282 S.W.3d 215, 219, 223-224 (Tex. App.—Eastland 2009), cert. denied, 563 U.S. 936 (2011). Consistent with the Supreme Court of Texas's subsequent decision in this case, the court in *Midland Central* gave weight to the fact that the oil was "in transit in the stream of interstate commerce" in conducting its substantial-nexus determination. *Id.* at 224.

C. The Doctrinal Divide Implicates Basic *Stare Decisis* Principles

This case offers an opportunity for the Court to reinforce important principles about the precedential force of its decisions. It is true, of course, that the Court's in-transit cases are the product of an earlier time, and that the Court's "interpretation of the 'negative' or 'dormant' Commerce Clause has evolved substantially over the years, particularly as that Clause concerns limitations on state taxation powers." *Quill Corp.*, 504 U.S. at 309. But that does not mean the in-transit cases are no longer relevant or that *Complete Auto* made a clean break with the past.

The four-part test articulated in *Complete Auto* itself was, after all, a synthesis of earlier case law. 430 U.S. at 279. And just as the rule articulated in *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), is consistent with *Complete Auto*, see *Quill Corp.*, 504 U.S. at 311, so too is the rule developed in the Court's in-transit cases and summarized in *Blasius*, 290 U.S. at 9-10. Indeed, the Supreme Court of Texas demonstrated as much in its opinion below. *See* Pet. App. 10a-11a, 16a-30a.

This Court has repeatedly held that its "decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn* v. *United States*, 524 U.S. 236, 252-253 (1998). In spite of that, a doctrinal split has arisen "over the continuing relevance of the question whether the goods at issue were 'in transit'" for purposes of evaluating state or local taxes under the dormant Commerce Clause. Walter Hellerstein & John A. Swain, *State Taxation* 4.13[3][a] (3d ed. 2017, Westlaw). This

divide was not just "preserved" by the decision below, *id.*; that decision solidified it. Plainly the issue will not resolve itself. And it is for this Court to decide whether its in-transit cases may still be relied upon, or whether they should be overruled. See *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

III. THE DECISION BELOW ERRED BY FAILING TO ACCOUNT FOR THE UNIQUE FEATURES OF THE NATURAL GAS TRANSPORTATION SYSTEM

The Supreme Court of Texas held that this Court's in-transit precedents remain relevant. It was correct about that much. But it was wrong to analogize this case to past decisions that found a break in the continuity of transit. In doing so, it downplayed both the unique aspects of the system by which natural gas is transported in interstate commerce, as well as the "necessary and integral part" temporary storage plays in the operation of that system, *Schneidewind*, 485 U.S. at 295 n.1.

As the Court explained in *Blasius*, the application of the in-transit rule is fact-sensitive: "in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied." 290 U.S. at 10. Here, that requires due attention to the actual nature of the interstate natural gas transportation system and how it functions in practice.

The most factually analogous case from this Court's line of in-transit precedents is *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95 (1929). There, oil purchased from out of state was unloaded from railroad tank cars and

pumped into storage tanks, where it was held "until a ship arrive[d], or until a sufficient quantity of oil [was] accumulated to make up a cargo." *Id.* at 100. At that point the oil would be moved onto a ship for transport overseas. *Id.* at 99. The Court held that there was no break in continuity of transit despite the fact that the oil was temporarily stored along the way. *Id.* at 108-109. As petitioner notes, the basic problem faced by the oil company in *Carson Petroleum* was the same as the one that makes storage of natural gas so integral to its transportation: a temporary imbalance between supply and demand. Pet. 27.

The Supreme Court of Texas nonetheless found *Carson Petroleum* distinguishable. Curiously, it placed weight on the fact that *Carson Petroleum* involved "a disjointed system of transit." Pet. App. 19a. This is counterintuitive, since the fact that petitioner's gas has already been entrusted to HPL, whose "storage facility and pipeline are, at all times, connected to an interstate pipeline system," *ibid.*, would seem to weigh in favor of finding that the gas was in continuous transit—certainly more so than if the storage facility at issue were not physically connected to the wider pipeline network.

Even so, the Supreme Court of Texas reasoned that in *Carson Petroleum*, the "disjointed" nature of the transit system "ma[de] the accumulation of oil at Point A an inevitability of the continuous (albeit delayed) journey to Point B." Pet. App. 19a. In other words, the rail-to-ship transit method left the oil company with no choice but to employ temporary storage. By contrast, the court below reasoned, petitioner's gas "awaits ETC's *decision* to order shipment via an already-available mode of transportation." *Id.* at 20a.

But because pipelines themselves can only hold so much gas at a time, it is not physically practical (or safe) to continuously force gas into a pipeline in the absence of corresponding demand. In support of its claim that this physical constraint "does not require the gas to remain sedentary for months at a time," the Supreme Court of Texas resorted to speculation about what would happen if the pipeline system were radically different than it really is. Pet App. 28a. It reasoned that "[e]ven if the pipeline's diameter was miles wide and could accommodate all of the reservoir's gas at once, ETC would continue to store its gas until the profitable winter season." *Ibid.*

In fact, it is unclear that the storage facility at issue would even *exist* if the pipeline were "miles wide," in which case all the physically commingled gas entrusted to HPL could go into the pipeline, where it would continuously move physically—depending on the level of demand. But in any event, this Court did not contemplate similarly exotic hypothetical scenarios in *Carson Petroleum*. It focused on the actual facts of the case, noting that the logistical realities of the situation made it impractical to transport the oil without placing it in temporary storage. And as Chief Justice Hecht observed in his dissent below, "[g]as storage is integral to interstate transportation *as a matter of fact*." Pet. App. 47a. This is the result of physics, not marketing strategy. *See id.* at 51a. The in-transit analysis does not and should not hinge on how participants in the interstate natural gas market would behave if the transportation system were profoundly different.

The unique nature of the natural gas transportation system also distinguishes this case from various

other cases where the Court found a break in continuity of transit. Here, petitioner's gas was taxed after being entrusted to a pipeline company in the business of transporting natural gas. This distinguishes cases like *Bacon* v. *Illinois*, 227 U.S. 504 (1913), *Federal Compress & Warehouse Co.* v. *McLean*, 291 U.S. 17 (1934), *Coe* v. *Town of Errol*, 116 U.S. 517 (1886), and *Blasius* itself, none of which involved a situation in which temporary storage was a built-in part of a fully and physically integrated transportation system. Indeed, in this important respect, there is an even stronger basis for finding continuity of transit here than there was in *Carson Petroleum*. To be sure, temporary storage was an *economic* necessity in *Carson Petroleum*, but the shipper in that case had not placed its oil into a physically integrated transportation system that, by its very nature, had to be connected to storage facilities.

Petitioner entrusted its gas to HPL, and the physical limitations of the pipeline system made storage of gas allocated to petitioner a practical necessity. Thus, as provided by FERC regulations, "[t]ransportation includes storage." 18 C.F.R. § 284.1(a). The Supreme Court of Texas dismissed this regulatory provision, relying on the unremarkable fact that FERC did not have either the in-transit test or the validity of state taxation in mind when it promulgated the rule. Pet. App. 28a-30a. But FERC's regulatory definition of transportation confirms a higher-level point: namely, that the kind of temporary storage involved in this case simply is *not separable*, as a practical matter, from transportation of natural gas. This Court already expressed its agreement on that point in *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. at 295 n.1, and it

should reaffirm its stance by reversing the decision below.

* * * * *

"[T]he Commerce Clause and its nexus requirement are informed * * * by structural concerns about the effects of state regulation on the national economy." *Quill Corp.*, 504 U.S. at 312. Today, energy is at the bedrock of the national economy. Natural gas, in turn, is one of the nation's most important energy sources. Ad valorem taxes on temporarily stored gas threaten to burden the national market in natural gas, particularly if they continue to spread to additional jurisdictions. This case presents a clean, straightforward opportunity to eliminate the confusion in this important area of the law and confirm that such taxation violates both the Commerce Clause itself and the principles it was meant to vindicate.

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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