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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-0997

In the Supreme Court of Texas

CITGO PETROLEUM CORPORATION

Petitioner,

v.

GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS, AND
KEN PAXTON, ATTORNEY GENERAL OF THE STATE OF TEXAS

Respondents.

On Petition for Review from the Third Court of Appeals,
Austin, Texas Cause No. 03-21-00011-CV

PETITIONER'S MOTION FOR REHEARING

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INTRODUCTION

WHY THE COURT SHOULD GRANT THIS MOTION

TO THE HONORABLE SUPREME COURT OF TEXAS:

On September 30, 2022, this Court denied CITGO's petition for review without requesting briefs on the merits from the parties. CITGO respectfully requests that the Court reconsider its decision, grant this motion for rehearing, request briefing from the parties, and grant CITGO's petition for review.

The Court's denial of CITGO's petition for review is in error for the following reasons:

1. The underlying appellate opinion ignores this Court's longstanding practice – over 100 years of precedent – to give effect to the plain language of the statute.[1] The appellate court effectively replaced words in the statute and created an additional requirement not enacted by the legislature. Texas taxpayers should be able to depend on the statutory language as written.
2. Indeed, the underlying appellate opinion directly conflicts with recent tax decisions issued by this Court, most notably *Hallmark* and *Sirius*

[1] *See Fire Ass'n of Philadelphia v. Love*, 108 S.W. 158, 160 (Tex. 1908); citing *Chambers v. Hill*, 26 Tex. 472 "Where language is plain and unambiguous, there is no room for construction. It is never admissible to resort to subtle and forced constructions to limit or extend the meaning of language. And, where words or expressions have acquired a definite meaning in law, they must be so expounded."

XM, wherein the Court reiterated that the tax statutes, like any other statutes, must be read and interpreted according to their plain and ordinary meaning.

3. The Court should not give any deference to the Comptroller's litigation position in this case. Allowing the appellate opinion to stand without any analysis or clarification from this Court will result in unintended consequences, i.e., an expansion of agency deference. The appellate opinion results in an unjustified shift of power from the legislature to the executive branch. The Comptroller could use the appellate opinion (and this Court's denial of review) to expand their interpretative power over unambiguous tax statutes, even in the context of litigating an issue.
4. The Court's denial of review erroneously dismisses the concerns of Texas Taxpayers and Research Association (TTARA) and The Council on State Taxation (COST) both of which filed amici briefs in this case. These organizations represent many multistate taxpayers. Clearly, this issue is not limited to CITGO or the oil and gas industry. It affects hundreds of multistate businesses that rely on the plain statutory language to plan and comply with their many tax responsibilities. Moreover, this case has garnered widespread attention from those in the

state and local tax community so this Court should make certain that the appellate opinion is thoroughly review and corrected.

5. There is another case pending before this Court (*Conagra Brands, Inc. v. Hegar*, 22-0790) involving the same tax statute, Tex. Tax Code § 171.106(f). The Court should grant the petition of both taxpayers, and review and analyze the statutory interpretation issue congruently.
6. The appellate opinion mischaracterized the underlying facts and disregarded evidence important to the ultimate issue. In applying its extra-statutory test, the appellate court wrongly assumed that CITGO's hedging activity was not integral to its business when the record proved otherwise.

On rehearing, the Court should reverse the appellate court and issue its own opinion in keeping with plain language principles and recent precedent.

GROUNDS FOR REHEARING

I. The Court should follow the plain language of Section 171.106(f).

For well over a hundred years, this Court has followed the plain language of the statute:

> It is not permissible for a court, no matter what its opinion might be of the policy of the enactment or of the justice of its effect, to substitute its own opinions with regard to such matters for the plain and clearly stated intention of the legislative department.[2]

The Court's goal is to ascertain and give effect to the legislature's intent as expressed by the language of the statute.[3] The Court presumes the legislature chose a statute's language with care, including each word chosen for a purpose while purposely omitting words not chosen.[4] The text is the determinative expression of legislative intent unless a different meaning is supplied or is apparent from the context, or if the plain meaning leads to an absurd result.[5]

The court of appeals opinion does just the opposite. It ignores the plain language, replaces statutory words, and creates an additional requirement on taxpayers that is unsupported by the text.

Section 171.106(f) is plain and unambiguous:

> Notwithstanding Section 171.1055, if a loan or security is **treated as inventory of the seller for federal income tax purposes**, the gross

[2] *Fire Ass'n of Philadelphia v. Love*, 108 S.W. 158, 160 (Tex. 1908).
[3] *Hallmark Marketing Company, LLC v. Hegar*, 488 S.W.3d 795, 797-8 (Tex.2016)
[4] *Id.*
[5] *Tex. Lottery Comm'n v First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010).

> proceeds of the sale of that loan or security are considered gross receipts. [emphasis added]

CITGO Trading made an election under IRC Code § 475(e) and (f) to ensure that the federal tax treatment of its securities transactions would be the same as the federal tax treatment of CITGO's sale of petroleum products (i.e., physical inventory). Based on this election, CITGO Trading's securities received the exact same federal income tax treatment as inventory securities sold by a securities dealer (i.e., the character, timing, and amount of the income is the same).[6] Even the Comptroller's own expert, Professor Weisbach, agreed that the federal income tax treatment is the same.[7]

The court of appeals decision ignores the plain language of the statute and the agreement that the federal income tax treatment is the same. Instead, the appellate opinion creates two categories of securities, inventory securities and non-inventory securities. Then, the court of appeals determines that just because the two types of securities receive the exact same federal tax treatment does not mean that the non-inventory securities were "treated as" inventory securities for federal tax purposes. The court of appeals further stretches credulity by determining that

[6] RR Vol. II, page 155, line 19 through page 156, line 13 and page 157, line 16 through page 158, line 13, page 208 line 3 through page 201, line 6 (Weisbach) and page 132, line 16 through page 134, line 20 (Connors).
[7] *Id.*

Section 171.106(f) only applies to securities bought from or sold to customers in the "ordinary course of business." Op. 13-14.

Essentially, the court of appeals determined that the words "treated as" in Section 171.106(f) are not necessary. If you delete the words "treated as" from Section 171.106(f), then you get the same result as the court of appeals opinion – that the statute only applies to securities inventory. According to the court of appeals, a security must be labeled "inventory" to be included in gross receipts for apportionment purposes. The court of appeals logic is beyond circular. It is a circle within a circle.

The court of appeals analysis and opinion utterly fail in applying the longstanding plain language principles adopted by this Court. It deletes the words "treated as" from the statute instead of giving effect to the words chosen by the legislature. Moreover, the court of appeals refuses to address the eleven (11) other instances in which the words "treated as" appear in Texas Tax Code, Chapter 171 (Franchise Tax).[8] It is clear that these other references support a plain language interpretation.

II. Recent Supreme Court precedent favors CITGO.

[8] *See* Tax Code § 171.0003(a-1); Tex. Tax Code § 171.1011(c)(1)(B)(iii); Tex. Tax Code § 171.1011(c)(2)(B)(iii); Tex. Tax Code § 171.1012 (c)(13); See Tex. Tax Code § 171.1012(i); Tex. Tax Code § 171.1012(n); Tex. Tax Code § 171.1013(a)(1); Tex. Tax Code §171.1013(a)(2); Tex. Tax Code § 171.1013(a)(4); Tex. Tax Code § 171.1015; and Tex. Tax Code § 171.106(f).

By denying the petition for review in this case, the Court breaks from its recent decisions in *Hallmark Marketing* and *Sirius XM*.

In *Hallmark Marketing*, the Comptroller attempted to argue that the taxpayer's **net losses** should have been included in the apportionment-factor denominator even though the relevant statute specifically provided that "only the **net gain** from the sale" of investments should be included in the denominator.[9] This Court ruled for the taxpayer, holding that the statute "means just what it says."[10] The same should be true for CITGO. The words "treated as" mean just what they say.

Both the plain and ordinary meaning of the statutory language and the use of that language in other sections of Texas Tax Code Chapter 171 support CITGO's construction of Section 171.106(f). The court of appeals failed to apply established rules of statutory construction and thus erred in its conclusion.

Sirius XM provides similar guidance. In that case, the Comptroller attempted to interpret the words "service performed in this state" to mean the decryption of signals in subscribers' cars as they drove in Texas. However, the Court disagreed recognizing that the plain language supports the finding that "service performed in this state" means the labor performed for the benefit of another must take place in Texas.[11]

[9] 488 S.W.3d at 801.
[10] *Id.*
[11] *Sirius XM Radio, Inc. v. Hegar*, 643 S.W.3d 402, 407 (Tex. 2022).

These cases both support granting CITGO's motion for rehearing. More specifically, both cases solidify the longstanding legal principle that Texas courts should consider the plain meaning of the words chosen by the legislature. The court of appeals opinion in this case is incongruent with this Court's recent interpretations of the Texas Tax Code.

III. The appellate opinion gives too much deference to the Comptroller.

The court of appeals strained interpretation of Section 171.106(f) is, in essence, an adoption of the Comptroller's litigation position in this case – that the specified apportionment treatment only applies to securities sold by a securities dealer. The plain language of Section 171.106(f) provides otherwise. Consequently, the court of appeals opinion erroneously overextends the principle of agency deference beyond Texas law.[12]

In 2016, the Texas Attorney General issued an opinion addressing agency interpretations of statutes.[13] The AG opined that *Railroad Commission of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011) "consolidated Texas agency deference law."[14]

[12] *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006).
[13] Attorney General Opinion No. KP-0115 (10/3/2016).
[14] *Railroad Commission of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011).

Texas Citizens, citing the U.S. Supreme Court's holding in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*,[15] slightly modified the federal approach and laid out an analysis that Texas courts should use to evaluate agency deference. Based on *Texas Citizens,* agency deference is not appropriate in this case.

i. The Comptroller's interpretation of Section 171.106(f) is not formal or entitled to deference.

In *Fiess v. State Farm Lloyds,* this Court held that deference to agency statutory interpretation "applies to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions in documents."[16] In a footnote, the Court cited the U.S. Supreme Court decision in *Christensen v. Harris County*,[17] where the Court (invoking *Chevron*) did not defer to an agency's opinion letter. Likewise, the Comptroller's litigation position in this case is not a formal opinion supportive of agency deference.

Texas Citizens followed the analysis in *Fiess* and found that the examiners' opinion and the Commission's final order were formal, and thus the Court was able to do agency deference analysis. The order in *Texas Citizens* was a ruling by the Texas Railroad Commission after a formal, adjudicated hearing. A formally adopted regulation after notice and an opportunity for public comment is also allowed

[15] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[16] *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006). Note that the word "documents" referred to an amicus brief filed in support of one of the litigants.
[17] *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

deference.[18] However, *Fiess* and *Texas Citizens* do not support agency deference in this case. The only fully adjudicated administrative hearings addressing the Section 171.106(f) issue now before this court are pending litigation in district court or on appeal.[19] Pursuant to Tex. Tax Code §§ 112.054 and 112.154, tax cases are reviewed de novo. That is, CITGO's underlying administrative case that led to this appeal is not precedent for this Court, nor is the agency's litigation position in this case a formal opinion requiring deference.[20]

The only applicable statements of policy or analysis issued by the Comptroller prior to CITGO's case are informal and do not trigger deference.[21] The Comptroller only recently adopted a formal agency rule addressing apportionment.[22] It is not evidence of formal agency policy entitled to deference in this case (Report Years 2008 and 2009). To the contrary, the recently amended rule is actually evidence that the Comptroller had no such formal policy during the years in question.

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[18] See *Tex. Dep't of Ins. v. Am. Nat' Ins. Co.,* 410 S.W.3d 843, 855 (Tex. 2012) (deferring to a formally promulgated Department rule).

[19] STAR No. 201803032H (CITGO is the taxpayer in STAR No. 201803032H, the precursor to this appeal); STAR No. 201806022H; STAR No. 201908004H; and STAR No. 202006024H.

[20] See *AEP Texas Commercial & Industrial Retail Limited Partnership v. Public Utility Commission of Texas et. al*., 436 S.W.3d 890, 926 (Tex.App.—Austin 2014, no pet.) (Scott K. Field, Justice, dissenting).

[21] See STAR No. 200809240L (An internal memorandum akin to the opinion letter referenced in *Christensen* and the Texas Supreme Court referred to in *Fiess*); see also STAR No. 201311792L (An internal agency memo that addresses Section 171.106(f) for non-bank taxpayers. The document does not evidence a long-standing policy in support of the Comptroller' position.).

[22] 34 Tex. Admin. Code § 3.591 (January 24, 2021), 46 TexReg 460.

ii. The Comptroller's interpretation of Section 171.106(f) is not longstanding, and therefore, is not entitled to deference.

Texas Citizens agreed "with the Commission that an agency's long-standing construction of a statute, especially in light of subsequent legislative amendments, is particularly worthy of our deference."[23] However, there is no such long-standing Comptroller policy involving Section 171.106(f). The statute was enacted in 2007, making the 2007 calendar year (i.e., the 2008 franchise tax return) the first year to which the statute applied.[24] This case involves CITGO's 2008 and 2009 Texas franchise tax returns—its first filings under the revised franchise tax. There was no time to establish a longstanding policy for this case. Although it is true that the dispute between the Comptroller and CITGO took over a decade to make its way to the court system, that time lag does not evidence long-standing agency policy. Accordingly, the Court should give no deference to the Comptroller in this matter.

iii. The Comptroller's interpretation of Section 171.106(f) conflicts with the plain meaning of the statue, and therefore, is not entitled to deference.

Although Texas courts allow consideration of an agency's construction of a statute as a guide to its interpretation, deferring to an agency's construction is

[23] *Texas Citizens*, 336 S.W. 3d at 632.
[24] Ch. 1 (H.B. 3), Laws 2006, 3rd Called Sess., effective January 1, 2008, and applicable to reports originally due on or after January 1, 2008.

appropriate only when the statutory language is ambiguous.[25] Section 171.106(f) is simply not ambiguous. The Comptroller acknowledges this in his pre-trial brief. Footnote 3 of the brief provides as follows: "As set forth in Sections II, A and B, the Comptroller does not believe that the statute is ambiguous.[26] As discussed above, the phrase "treated as" has meaning and purpose in Section 171.106(f) that the Comptroller and the court of appeals simply ignore.

"Agency deference has no place when statutes are unambiguous—the law means what it says—meaning we will not credit a contrary agency interpretation that departs from the clear meaning of the statutory language."[27] "[D]eferring to an agency's construction is appropriate only when the statutory language is ambiguous."[28] "It is true that courts grant deference to an agency's reasonable interpretation of a statute, but a precondition to agency deference is ambiguity; 'an agency's opinion cannot change plain language.' There is no ambiguity about the ambiguity requirement, nor with the unassailable rule that agency interpretations cannot contradict statutory text."[29] There is no ambiguity about the words "treated

[25] *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex.2001).
[26] CR 136, Defendants' Trial Brief, page 8, footnote 3.
[27] *Tracfone Wireless, Inc. v. Comm'n on State Emergency Commc'ns* (397 S.W.3d 173, 182 (Tex.2013).
[28] *Hallmark Mktg. Co. v. Hegar*, 488 S.W.3d 795, 799 (Tex. 2016) (explaining that "statutory ambiguity is the quickest path to administrative deference").
[29] *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013) (quoting *Fiess*, 202 S.W.3d at 747).

as." The Legislature chose those words for a reason. "[A]n agency's opinion cannot change plain language."[30]

iv. The Comptroller's interpretation of Section 171.106(f) is unreasonable, and therefore, is not entitled to deference.

Even if the "treated as" language were ambiguous, there should be no deference given to the Comptroller's interpretation because it is unreasonable.[31] The Comptroller's interpretation (and the court of appeals' opinion) effectively removes the words "treated as" from the statute. That is, the Comptroller interprets Section 171.106(f) to have the same meaning as if the words "treated as" were not there. On its face, this is unreasonable.

IV. This issue reaches beyond CITGO and the oil and gas industry.

There were two amici briefs filed in this case. Texas Taxpayers and Research Association (TTARA), an organization dedicated to Texas tax policy for over 50 years, succinctly addresses the flaws in the court of appeals opinion. TTARA discredits the appellate opinion and explains the resulting impact of the erroneous opinion on Texas taxpayers, especially those that produce and sell commodities. In so doing, TTARA echoes many of the concerns raised by CITGO; that the court of appeals opinion rejects the plain language of Section 171.106(f), creates a new requirement unsupported by the statute, and erases existing words from the statute

[30] *Fiess*, 202 S.W.3d at 747.
[31] *Tex. Citizens*.

to force a contrived interpretation. TTARA is a well-respected organization with a broad membership of taxpayers, professionals, and policy experts. TTARA was involved in the legislative hearings and discussions that preceded the enactment of Section 171.106(f). Its brief should be given significant weight in analyzing the issues pending before this Court.

The Council on State Taxation (COST) filed the second amici brief. COST is a well-known and trusted nonprofit trade organization that represents over 500 of the largest multistate taxpayers in the country. COST focuses on promoting equitable state and local taxation for multijurisdictional businesses. COST's unique perspective allows it to weigh and measure the impact of the appellate opinion in this case. The COST amici emphasizes that taxpayers should be able to rely on the words chosen by the legislature. The court of appeals effectively deletes the words "treated as" from Section 171.106(f) and adds to the uncertainty that those words may be read out of the statute in other provisions, if it helps the Comptroller achieve a desired result. The Court should not dismiss the TTARA and COST amici briefs. These organizations bring to bear many years of thoughtful and equitable tax policy expertise.

Moreover, this case has generated a significant amount of interest across the country, including many tax articles and podcasts.[32] CITGO's case represents important statutory interpretation principles affecting many taxpayers doing business in Texas. Accordingly, CITGO urges this Court to reconsider its position, grant CITGO's motion for rehearing, and analyze these important issues for the numerous multistate taxpayers impacted by this case.

V. It is imperative that CITGO, Conagra, and the other pending cases involving Section 171.106(f) receive a thorough and congruent review.

In addition to CITGO, there are several other active cases involving Section 171.106(f). Conagra filed a petition for review with this Court on October 28, 2022. *Equistar Chemicals v. Hegar*, Cause No. D-1-GN-18-004006 and *Calpine Corporation v. Hegar*, Cause No. D-1-GN-22-001910 are currently pending in Travis County District Court. There are other cases pending at the administrative review level at the Comptroller's office. All of these cases involve the proper apportionment of securities transactions "treated as" inventory of the seller for federal income tax purposes.

[32] *See e.g., Texas rules on sale of non-inventory securities* (Grant Thornton SALT Insights), December 7, 2021; Meera Gajjar, *Texas appeals court rejects Citgo's franchise tax calculation*, Westlaw Journal Derivatives, October 28, 2021; *Citgo Loses Appeal in $2M Texas Franchise Tax Fight* (Law360 Tax Authority), October 18, 2021; and *Texas: Non-Inventory Securities Not Treated as Inventory Due to Federal Election* (KPMG Tax Podcast), October 18, 2021.

To provide clarity to these taxpayers, and in the interest of judicial efficiency, CITGO respectfully requests that the Court grant its motion for rehearing and take up this case to guarantee Texas taxpayers, including Conagra, a thorough review of the issue. Again, Section 171.106(f) is an important statute that affects many taxpayers, especially those producing everyday commodities. It is in the interest of the State and all Texas taxpayers that the Court provide clear guidance on Section 171.106(f) in keeping with longstanding principles of statutory interpretation.

VI. The court of appeals "ordinary course of business" test is in error as construed and applied to CITGO's undisputed facts.

The court of appeals erroneously concludes that Tex. Tax Code § 171.106(f) only applies to securities classified as inventory of the seller. Op. 13. The court of appeals further errs in holding Tex. Tax Code § 171.106(f) applies only to securities that are bought and sold to customers in the ordinary course of the taxpayer's business. Op. 14. As explained above, neither of these holdings are supported by the plain language of the statute.

The court of appeals cites the appropriate rules of statutory construction, but then fails to apply them. Op. 8-9. The court provides no discussion or analysis of the phrase "treated as" within the context of Section 171.106(f). The court simply creates an "ordinary course of business" test out of thin air. There is no statutory basis or support for the opinion. However, even if the test were proper, the court of appeals erred in applying the test to CITGO.

The record is clear that CITGO's purchase and sale of securities was integral to its business operations. These securities were necessary to mitigate the risk in price fluctuations of both feedstock and finished products during the production process. This same principle applies to all multistate manufacturing companies doing business in Texas, not just oil and gas companies. With record inflation and volatility in global markets, it is imperative that producers of goods and their customers use securities to mitigate price fluctuations to ensure business stability and lessen customer impacts. Many multistate companies, like CITGO, necessarily use securities in this way. It is an integral part of their businesses. The court of appeals' ad hoc test is misguided and ignores the realities of business.

CONCLUSION AND PRAYER

CITGO respectfully requests that this Court reconsider its denial of the petition for review. CITGO prays that this Court grant this motion for rehearing, reverse the court of appeals' judgment, and render judgment that CITGO Trading's securities meet the requirements of Tex. Tax Code § 171.106(f) such that the gross proceeds from the sales of those securities are includable in CITGO's Texas franchise tax apportionment factor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Motion for Rehearing complies with the type-volume limitations of Rule 9.4 because it was written in 14-point Times New Roman font, and contains 3789 words, excluding the parts of the petition exempted by Rule 9.4(i).

/s/ Kevin C. Oldham
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CERTIFICATE OF SERVICE

On Wednesday, November 16, 2022, a copy of Petitioner's Motion for Rehearing was served via efile.txcourts.gov and/or email on:

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