News Release

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COURT URGED TO BAR DISCRIMINATORY TAXATION OF OUT-OF-STATE FIRMS

(McLane Western, Inc. v. Dep't of Revenue)

The Washington Legal Foundation (WLF) yesterday urged the U.S. Supreme Court to review (and ultimately overturn) a court decision upholding a Colorado excise tax that imposes higher taxes on out-of-state companies than on Colorado companies.

In a brief filed in *McLane Western, Inc. v. Dep't of Revenue,* WLF argued that taxes, such as the Colorado tax at issue here, that discriminate against interstate commerce violate the Constitution's Commerce Clause. WLF argued that such discriminatory taxes interfere with the unrestricted flow of commerce and can cause considerable damage to the national economy.

"Unless the State court decision upholding this tax is overturned, other States will be encouraged to adopt similar tax schemes that favor in-state companies at the expense of the country as a whole," said WLF Chief Counsel Richard Samp after filing WLF's brief. "The courts must always be on guard against the tendency of States to practice this sort of home cooking," Samp said.

Petitioner McLane Western, Inc. is a Colorado company that distributes a variety of products to small convenience stores throughout Colorado. McLane is challenging a Colorado excise tax that imposes a 20% tax on certain products it distributes. McLane purchases the products in question fairly late in the distribution chain, from an out-of-state distributor. The "tax base" used in computing the excise tax is the purchase price paid by whichever distributor first brings the products into Colorado. Thus, if the products are manufactured in Colorado or are brought into the State at a fairly early stage of the distribution chain (before all distribution mark-ups have been added to the price), the excise tax would be considerably lower than the tax that McLane currently pays. McLane argues that the excise tax's favoritism toward in-state manufacturers and distributors violates the dormant Commerce Clause.

A Colorado state trial court rejected McLane's Commerce Clause challenge, and the Colorado Court of Appeals affirmed. The Colorado Supreme Court then declined to review the appeals court's decision. McLane has filed a petition, asking the U.S. Supreme Court to review the case. WLF filed a brief in support of that petition.

In its brief, WLF argued that the Supreme Court has established a hard-and-fast rule against state taxing schemes that facially discriminate against interstate commerce. Colorado concedes that States are prohibited from imposing discriminatory tax *rates* but insists that its excise tax does not discriminate because it imposes the same 20% tax rate on all affected products the moment they come into the State. WLF argued that the Colorado excise tax is discriminatory because it is imposed on an expanded tax *base* when (as here) products are brought into the State relatively late in the distribution chain. WLF noted that if the initial distributor of the products in question were located in Colorado and McLane obtained its products from that distributor, its tax bill would be cut in half -- for a savings of over $10 million for the tax years in dispute. WLF argued that the natural tendency of any such taxing scheme is to put pressure on manufacturers and/or distributors to move their facilities to Colorado in order to reap the tax benefit that comes from a reduced tax base. WLF argued that the resultant balkanization of distribution systems is precisely the type of inefficiency that the Commerce Clause was intended to avoid.

WLF is a public interest law and policy center with supporters in all 50 States, including many in Colorado. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is available on its web site, www.wlf.org.