No. 13-657

IN THE
Supreme Court of the United States

MCLANE SOUTHERN, INC.,

Petitioner,

v.

CYNTHIA BRIDGES, SECRETARY OF THE DEPARTMENT OF REVENUE, STATE OF LOUISIANA,

Respondent.

On Petition for Writ of Certiorari
to the Louisiana Court of Appeal, First Circuit

BRIEF OF *AMICI CURIAE* TOP TOBACCO, L.P. AND REPUBLIC TOBACCO, L.P. IN SUPPORT OF PETITIONER

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Amici Curiae Top Tobacco, L.P. and Republic Tobacco, L.P. (collectively, "Top and Republic") respectfully submit this *amici curiae* brief in support of the petition of McLane Southern Inc. (Petitioner) for writ of certiorari.[1]

INTEREST OF *AMICI CURIAE*

Top and Republic do not sell smokeless tobacco, the product directly addressed by Petitioner's challenge and the Louisiana State court opinion below. However, Top is the largest manufacturer and Republic is the largest distributor in the United States of tobacco for pipe smokers and for smokers who roll their own cigarettes ("smoking tobacco"). The smoking tobacco sold by Top and Republic is subject to the same taxation statute as smokeless tobacco in Louisiana. The Louisiana appellate court's application of this taxation regime thus also applies to smoking tobacco manufactured by Top and distributed by Republic.

Top Tobacco, L.P. is based in Lake Waccamaw, North Carolina. Top buys leaf tobacco and processes, blends and packages it into pouches, canisters and bags bearing the leading U.S. brands.

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[1] Pursuant to Supreme Court Rule 37, the *amici curiae* notified counsel of record for all parties of its intention to file this brief at least 10 days prior to the due date. All parties have consented to the filing of this briefs. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

Republic Tobacco, L.P., an affiliate of Top based in Glenview, Illinois, buys smoking tobacco from Top, and markets and distributes these products to wholesalers (including Petitioner McLane Southern, Inc.) throughout the United States.

Under the Louisiana court's decision, smoking tobacco sold by Top and Republic will bear a heavier tax burden when distributed in Louisiana by an out-of-state wholesaler than competitive products distributed by a Louisiana-based distributor or wholesaler. The effect will be higher prices and fewer choices for buyers of smoking tobacco in Louisiana. But the deleterious market effects will not be limited to Louisiana. Top and Republic's smoking tobacco would also bear a higher tax burden than in-state manufactured and/or distributed smoking tobacco in many states adopting discriminatory taxation schemes like the one at issue here.

Top and Republic rely on multi-state distributors and wholesalers, like McLane, and cannot fully compete in the market unless a state's taxes on the products sold by Republic apply equally to all its competitors. If the decision below stands, Top and Republic are concerned that other states will interpret their statutes in a similarly discriminatory manner. Top and Republic support a fair application of state tax laws that does not favor in-state distributors over out-of-state distributors, or single-state distribution chains over interstate distribution chains.

SUMMARY OF THE ARGUMENT

The decision of the Louisiana Court of Appeals condones a tax that concededly imposes a discriminatory tax burden on products distributed by out-of-state distributors, in direct conflict with the anti-discrimination principle of the Commerce Clause. Allowing the decision to stand would have significant negative effects nationwide. This brief focuses on five key aspects of the Louisiana tax.

First, in addition to its effect on the smokeless tobacco market, the Louisiana court's decision would also apply to smoking tobacco. Smoking tobacco would be subject to the same discriminatory taxation regime in Louisiana. The Louisiana court's decision, if not reversed, would distort and diminish competition in the smoking tobacco market—just as it does in the smokeless tobacco market—disadvantaging consumers who will be saddled with higher prices and fewer choices, as well as competitors who engage in interstate commerce, their stockholders, employees, and the communities in which they are located.

Second, the Louisiana decision requires manufacturers and distributors such as Top and Republic to change their business practices to avoid disproportionate taxation. The Louisiana decision creates tax penalties for sales to out-of-state wholesalers. This creates artificial market distortions, pressuring manufacturers to select in-state versus interstate distribution of their products.

Third, by interfering in interstate distribution chains, the Louisiana decision harms consumers and manufacturers who benefit from efficient distribution in the form of lower prices and greater product choice. Discriminatory taxes impose higher prices and fewer choices for consumers.

Fourth, if left undisturbed, the Louisiana decision might encourage other states to impose similar discriminatory tobacco tax regimes. It might also encourage states to pass discriminatory statutes for other products subject to excise taxes (such as fuel, alcohol and cigarettes) or to interpret existing laws to favor in-state businesses at the expense of interstate commerce.

Finally, a discriminatory tax regime is not necessary for smokeless or smoking tobacco. Many states tax tobacco and other products using non-discriminatory standards such as the weight of the product or the price as sold to distributors or retailers. Louisiana could, for example, simply have used the manufacturer's price for the tax base (as McLane argued below) regardless of the step within the distribution chain at which the tobacco enters Louisiana.

ARGUMENT

I. THE LOUISIANA COURT'S RULING WILL DISTORT THE TOBACCO MARKET

The effect of the Louisiana decision below is not limited to smokeless tobacco; it also affects smoking tobacco and other products. Smoking tobacco is a

multi-million dollar market, and it is subject to a tax regime similar to that for smokeless tobacco in Louisiana. The Louisiana tobacco statute defines "invoice price" as "the *manufacturer[']s net invoiced price* as invoiced to the Louisiana tobacco dealer, by the manufacturer, jobber, or other persons engaged in selling tobacco products … ." La. Rev. Stat. Ann. § 47:842 (emphasis added). In Louisiana, smoking tobacco is taxed at a rate of 33% "of the invoice price." *Id.* § 47:841(C). The entity subject to this tax is "the dealer who first sells, uses, consumes, handles or distributes" tobacco into the state. *Id.* § 47:854.

For smokeless tobacco, the Louisiana Department of Revenue and the Louisiana State court below interpreted the statutory language "manufacturer[']s net invoiced price," *Id.* § 47:842, to mean the price invoiced by the distributor who first sends smokeless tobacco into the state, *see* App. 6-8a, rather than the actual manufacturer's price. This interpretation reads the word "manufacturer" out of the statute and applies the tax (20% for smokeless tobacco; 33% for smoking tobacco) to the price invoiced to the entity that first brings tobacco into the state.

Because smokeless tobacco and smoking tobacco taxation are governed by the same statute, the Louisiana court's interpretation applies to smoking tobacco as well. As a result, smoking tobacco that enters Louisiana further along the distribution chain is taxed more highly than smoking tobacco distributed from Louisiana. While the tax rate remains the same (33%), the tax base is larger when

the distribution chain includes an out-of-state wholesaler (tax base will be the distributor's price to wholesaler) rather than an in-state wholesaler (tax base will be manufacturer's price to distributor). *See* Pet. Br. at 11-14. This penalizes interstate distribution and distorts choice and competition in the smoking tobacco market.

The Louisiana court asserts that this is not discriminatory because the rate remains the same. Pet. App. at 14a. But this ignores the discriminatory treatment of the tax *base* and defies common sense and fundamental principles of tax law. *See* Pet. Br. at 15. A larger tax base can raise taxes just as much as a higher tax rate. As this Court has held, "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963).

II. THE LOUISIANA DECISION CREATES PERVERSE INCENTIVES FOR SUPPLIERS TO CHANGE BUSINESS PRACTICES TO AVOID TAX DISCRIMINATION

The Louisiana court's decision requires out-of-state suppliers, such as Top and Republic, to either change their business practices or face competitive harm when wholesalers are overtaxed further down the distribution chain. The Louisiana court asserted that McLane's "increased tax obligation in the instant case is 'not the result of a tax that discriminates against out-of-state products or favors in-state products,' but rather due to the change in

pricing by McLane's supplier, UST-Sales." Pet. App. at 15a (quoting *McLane Minnesota Inc. v. Commissioner of Revenue*, 773 N.W.2d 289, 300 (Minn. 2009)). The court suggests that McLane faced higher taxes because its distributor, U.S. Smokeless Tobacco Brands, Inc. (UST-Sales) charged a price for its products that reflected the costs of distribution, as well as the price at which it bought the products from U.S. Smokeless Tobacco Manufacturing Company (UST-Manufacturing). *Id.*; *see also* Resp. Br. at 16 ("The ultimate increase in taxes due is not caused by any action of the State of Louisiana; it is due to the change in pricing by McLane's Supplier (UST Sales)."). The fundamental fact is that "the price of a good increases as it moves through each successive link in a distribution chain." Pet. Br. at 11 (citing Vincent DiLorenzo & Clifford R. Ennico, *Basic Legal Transaction* §19A:3 (2011)). The costs of distribution are part of the product cost, whether incurred within Louisiana's borders or elsewhere.

From the perspective of Top and Republic, or other companies with manufacturing and distribution affiliates, the Louisiana court's decision suggests that these companies must change their business model to avoid discriminatory taxation. To avoid Louisiana's inflated tax base, Top must sell to a distributor located in Louisiana. Indeed, Respondent argues that McLane's competitive disadvantage is "a product of McLane's decision to purchase smokeless tobacco through a distribution supply chain" and that McLane could avoid the discriminatory tax by purchasing tobacco directly

from the manufacturer. Resp. Br. at 10-11. This artificial constraint offers no benefit to either sellers or buyers, and impairs companies' ability to distribute their products most efficiently. It artificially narrows the stream of commerce.

Despite the fact that Petitioner has been able to efficiently distribute products, including Top's smoking tobacco, to Louisiana from its distribution center in Brookhaven, Mississippi, the Top tobacco products it sells will be more expensive than if Top and Republic sold to some other distribution center located in Louisiana. Pet. Br. at 1-2. As a result, the increased tax base means that the goods will become artificially more expensive for Louisiana consumers. This distortion interferes with interstate commerce. *See Granholm v. Heald*, 544 U.S. 460, 474-75 (2005) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)) (This Court has "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere."). Indeed, a restriction on commerce that results in "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," is virtually *per se* invalid. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994) (citations omitted); *see also Halliburton*, 373 U.S. at 72 (a state may not impose a tax which is discriminatory in favor of a local merchant and "encourages an out-

of-state operator to become a resident in order to compete on equal terms.").[2]

This Court has long acknowledged that "the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202-03 (1994) (citing *Brown v. Maryland*, 6 L.Ed. 678 (1827); *I.M. Darnell & Son Co. v. Memphis*, 208 U.S. 113 (1908) (differential burden on intermediate stage manufacturer); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (differential burden on wholesaler); *Webber v. Virginia*, 103 U.S. 344, 350 (1881) (differential burden on sales agent); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988) (differential burden on retailer)).

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[2] The Court has consistently held that differential taxation, such as the taxation at issue here, where the difference amounts to a heavier tax burden on interstate activity, violates the Commerce Clause. *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (invalidating statute exempting charities from real estate and personal property taxes unless conducted or operated principally for the benefit of out-of-state residents); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) (striking down tax on corporate stock held by state residents, where rate of tax was inversely proportional to the corporation's exposure to the state's income tax); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (holding excise tax on sale of liquor at wholesale unconstitutional because it exempted some locally produced alcoholic beverages).

The Louisiana court frankly acknowledged that the taxation scheme puts out-of-state wholesalers at a competitive disadvantage with respect to their Louisiana competitors. Pet. App. 11a-12a (quoting *McLane Western, Inc. v. Dep't of Revenue*, 126 P.3d 211, 216 (Colo. App. 2005), *cert denied* 549 U.S. 810 (2006) and *McLane Minnesota Inc. v. Commissioner of Revenue*, 773 N.W.2d 289, 299-300 (Minn. 2009)).

The Louisiana court and Respondent essentially suggest that to avoid discrimination against interstate commerce, a manufacturer, such as Top, and a distributor, such as Republic, should engage in fewer out-of-state transactions. But this suggested remedy contradicts established law. That it may be possible to restructure interstate commerce to avoid discrimination does not eliminate the existence of discrimination or minimize its damage.

III. CONSUMERS AS WELL AS MANUFACTURERS WILL BE HARMED IF THE COURT ALLOWS THE RULING BELOW TO STAND

Consumers benefit from efficient multi-state distribution chains. Multi-state distribution prevents local monopolies and enhances competition. The benefits to consumers are evident. Americans, even in remote areas, have access to a wide array of consumer products at competitive prices.

Manufacturers such as Top and distributors such as Republic also benefit from efficient distribution. Top produces smoking tobacco in North Carolina and Republic distributes these products throughout the

country to a variety of retailers including grocery stores, drug stores, convenience stores, cash and carry outlets, and gas stations. The national distribution network enables Top to reach consumers efficiently and at the lowest possible cost. In the absence of discriminatory taxation, the Respondent's suggestion that the "fewer middlemen in the chain, the lower the price the retailer charges its customers," Rep. Br. at 11, is demonstrably not true for many companies, including Top and Republic, that use multi-state distribution to reach consumers throughout the country.

Although the framers may not have contemplated the exact nature of modern retail distribution, "[t]he object of creating free trade throughout a single nation, without protectionist state laws, was a dominant theme of the convention at Philadelphia and during the ratification debates that followed." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 364 (2008) (Kennedy, J., dissenting). The Constitution, through the Commerce Clause, protects a national market for products. U.S. Const., Art. I § 8, cl. 3.

The consumer benefits of efficient distribution are threatened by state laws that benefit in-state manufacturers and distributors and burden their out-of-state competitors. If the decision below stands, the same product would be taxed (and therefore priced) differently in different states depending on the location of points in the distribution chain that delivered the product. Republic's products would be more expensive in most states with discriminatory taxation. Companies

would not be able to compete fairly with companies that distribute products through in-state wholesalers. The gains from efficient national distribution networks would be lost. Competition would be distorted or eliminated; commerce would be Balkanized.

As a result, consumer prices would rise and fewer companies would be able to compete, creating "a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Granholm*, 544 U.S. at 473 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

IV. ALLOWING THE LOUISIANA RULING TO STAND WOULD ENCOURAGE A RACE TO THE BOTTOM

Allowing the Louisiana court's decision to stand would have national effects for the smoking tobacco market. No fewer than twenty states, in addition to Louisiana, tax the first entity in a state that buys or sells smoking tobacco, based on the price invoiced to that entity.[3] *See also* Pet. Br. at 17 (twenty other

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[3] *See* Ark. Code Ann. §§ 26-57-203, 26-57-208 (as amended by 2013 Arkansas Laws Act 631 (S.B. 540)); Cal. Rev & Tax Code §§ 30011, 30017, 30123; Colo. Rev. Stat. §§ 39-28.5-101, 39-28.5-102 (as construed by *McLane Western*, 126 P.3d at 213-14); Conn. Gen. Stat. §§ 12-330a, 12-330c; Ga. Code Ann. § 48-11-2; Idaho Code Ann. §§ 63-2551, 63-2552, 63-2552A (as amended by 2011 Idaho Laws Ch. 2 (H.B. 7)); Md. Code Ann., Tax-General §§ 12-101, 12-102, 12-105, 12-302; Mass. Gen. Laws ch. 64C, § 7B; Minn. Stat. Ann. §§ 297F.01, 297F.05 (as construed by *McLane Minn.*, 773 N.W.2d at 294); Neb. Rev. Stat. §§ 77-4004, 77-4008; Nev. Rev. Stat. §§ 370.440, 370.450

states apply smokeless tobacco tax to the entity that first buys or sells the product in the state, based on the price invoiced to that entity).

If the ruling below stands, even more states may implement discriminatory laws because "[p]rotectionist trade laws and policies, pursued to favor local interests within a larger trading area, invite prompt retaliatory response." *Dep't of Revenue*, 553 U.S. at 363 (Kennedy, J., dissenting); *see Halliburton*, 373 U.S. at 72.

State legislatures and courts are subject to political pressure to help local manufacturers. Businesses in states that do not currently have discriminatory statutes will find it advantageous to encourage legislators (and judges) to tilt the playing field in their favor. Discriminatory tax regimes might also be applied to any other product subject to excise taxes, such as fuel, spirits or cigarettes. This would further distort and damage interstate markets.

(as amended by 2013 Nev. Legis. 47); N.H. Rev. Stat. Ann. §§ 78:1, 78:7-c; N.M. Stat. Ann. §§ 7-12A-2, 7-12A-3; N.C. Gen. Stat. §§ 105-113.4, 105-113.35; Ohio Rev. Code Ann. §§ 5743.01, 5743.51; Or. Rev. Stat. §§ 323.500, 323.505; R.I. Gen. Laws § 44-20-13.2; Tenn. Code Ann. §§ 67-4-1001, 67-4-1005; Va. Code Ann. §§ 58.1-1021.01, 58.1-1021.02; Wash. Rev. Code §§ 82.26.010, 82.26.020, 82.26.030; W. Va. Code §§ 11-17-2 ,11-17-3.

V. THE DISCRIMINATORY TAX IS NOT NECESSARY

A discriminatory tax regime is not necessary for smokeless tobacco, smoking tobacco, or any product subject to an excise tax. Taxes imposed without regard to the point of origin are used by many states for other products subject to excise taxes (*i.e.*, cigarette taxes per pack, fuel taxes per gallon). *See* Pet Br. at 20 (citing examples of states that impose excise taxes on fuel, alcohol, and cigarettes based on an origin-neutral standard). Nondiscriminatory tax regimes are also used by many states for smoking tobacco. For example, three states, as well as the United States and the District of Columbia, calculate their excise taxes on smoking tobacco based on the product's weight.[4] *See also* Pet. Br. at 18-19 (five states tax smokeless tobacco based on weight). Twenty-one other states, some with statutes employing language nearly identical to that used in Louisiana, calculate their excise taxes on smoking tobacco based on the price at which the manufacturer first sells the product to its distributor.[5] *See also* Pet. Br. at 19 (nineteen states

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[4] Ala. Code § 40-25-2; Ariz. Rev. Stat. Ann. §§ 42-3251, 42-3251.01, 42-3052; Tex. Tax Code Ann. § 155.0211; *see also* 26 U.S.C. § 5701(e) and D.C. Code §§ 47-2002; 47-2402.01.

[5] Alaska Stat. §§ 43.50.300, 43.50.390; Del. Code Ann. tit. 30 § 5305; Fla. Stat. §§ 210.25, 210.30, 210.76; 35 Ill. Comp. Stat. §§ 143/10-5, 143/10-10; Ind. Code §§ 6-7-2-6, 6-7-2-7; Iowa Code §§ 453A.42, 453A.43; Kan. Stat. Ann. §§ 79-3301, 79-3371; Me. Rev. Stat. tit. 36, §§ 4401, 4403; Mich. Comp. Laws §§ 205.422, 205.427; Miss. Code Ann. §§ 27-69-3, 27-69-13; Mo. Rev. Stat.

tax smokeless tobacco on manufacturer's price). Three other states calculate their excise taxes on smoking tobacco based on the price of the products as sold to retailers.[6] *See also* Pet. Br. at 19-20 (three states tax smokeless tobacco on price as sold to retailers). Smoking tobacco could also be taxed by package or container. *See* La. Rev. Stat. Ann. § 47:841(B) (taxing cigarettes at rate of 36 cents per pack).

Thus, there are other ways that Louisiana could apply its tax statute in a non-discriminatory manner. It could simply use the manufacturer's price as the tax base regardless of the step in the distribution chain at which it enters Louisiana. This clear reading of the Louisiana statute would provide a fair and efficient way to apply the tax in a manner that does not inhibit interstate commerce. Any "legitimate local purpose" could be adequately served by a non-discriminatory alternative that is neutral as to product origin. *See Granholm*, 544 U.S. at 489 (citing *New Energy Co.*, 486 U.S. at 278).

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§§ 149.011, 149.160; Mont. Code Ann. §§ 16-11-102, 16-11-111; N.J. Stat. Ann. §§ 54:40B-2, 54:40B-3; N.Y. Tax Law §§ 470, 471-b; N.D. Cent. Code § 57-36-25; Okla. Stat. Ann. tit. 68 §§ 401, 402, 402-1, 402-3; S.C. Code Ann. § 12-21-620; S.D. Codified Laws § 10-50-61; Utah Code Ann. § 59-14-302; Wis. Stat. §§ 139.75, 139.76; Wyo. Stat. Ann. §§ 39-18-101, 39-18-104.

[6] Haw. Rev. Stat. §§ 245-1, 245-3; Ky. Rev. Stat. Ann. § 138.140; Vt. Stat. Ann. tit. 32 §§ 7702, 7811, 7812.

CONCLUSION

The Court should grant McLane's petition. The decision below distorts and diminishes the national market for smokeless and smoking tobacco and plainly violates the anti-discrimination principle of the Commerce Clause.

January 2, 2014

Respectfully submitted,

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