No. 11-2097

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN BEVERAGE ASSOCIATION,
Plaintiff-Appellant,

v.

RICK SNYDER, BILL SCHUETTE, and ANDREW DILLON,
Defendants-Appellees,

&

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Intervenor.

On Appeal from the United States District Court
for the Western District of Michigan
District Court No. 1:11-CV-195

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, the American Beverage Association states as follows:

1. The Association has no parent corporation. No publicly held corporation owns any portion of the Association.

2. The Association is neither a subsidiary nor an affiliate of any publicly owned corporation. Pursuant to Sixth Circuit Rule 26.1(b)(2), no publicly owned corporation has a financial interest in the outcome of this appeal by reason of insurance, a franchise agreement, or indemnity agreement.

TABLE OF CONTENTS

STATEMENT IN SUPPORT OF ORAL ARGUMENT x

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 4

A. Constitutional And Statutory Framework 4

1. The Commerce Clause 4

2. Michigan's Beverage Container Deposit Law 6

3. Redemption of Out-of-State Containers 7

4. The Uniquely Marked Packaging Mandate 9

B. Factual Background 12

C. District Court Proceedings 15

SUMMARY OF ARGUMENT 17

ARGUMENT 19

I. STANDARD OF REVIEW 19

II. MICHIGAN'S STATE-EXCLUSIVE PACKAGING MANDATE UNCONSTITUTIONALLY WITHDRAWS MICHIGAN FROM THE NATIONAL BEVERAGE MARKET, REGULATES EXTRATERRITORIALLY, AND DISCRIMINATES AGAINST INTERSTATE COMMERCE 19

A. The Commerce Clause's Foundational Command Precludes Michigan's Effort To Wall Itself Off From Interstate Commerce 21

B. The Unique-Packaging Mandate Unconstitutionally Regulates Extraterritorially By Criminalizing Sales In Other States 25

1. *The Unique-Packaging Mandate Directly Prohibits the Sale of Michigan-Compliant Beverages Outside Michigan* 26

2. *That Extraterritorial Prohibition on Sales Violates the Commerce Clause* 32

C. The Unique-Packaging Mandate Discriminates Against Interstate Commerce......36

1. *The Commerce Clause Forbids Discrimination Against Interstate Commerce on the Basis of its Interstate Character* 36

2. *The Mandate of Uniquely Marked Packages Discriminates Against Interstate Commerce Facially, Purposefully, and in Effect* 39

a. *The requirement of uniqueness applies only to manufacturers operating in more than one State* 40

b. *The discrimination against interstate commerce is purposeful* 42

c. *The unique-packaging mandate discriminates against interstate commerce in practical effect* 42

D. No Local Interest Justifies The Law's Exceptional Burden On Interstate Commerce......49

1. *Michigan's Financial Interest can be Adequately Served by Reasonable, Nondiscriminatory Measures* 49

2. *The Burden on Interstate Commerce Outweighs any Local Benefit as a Matter of Law* 56

CONCLUSION 60

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS 63

ADDENDUM:

Commerce Clause, U.S. Const., Art. I, § 8, cl. 3 ......Add. 1

M.C.L. § 445.571 *et seq*. ......Add. 2

TABLE OF AUTHORITIES

Page(s)

CASES:

American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n,
545 U.S. 429 (2005) ... 37

American Trucking Ass'ns v. Scheiner,
483 U.S. 266 (1987) ... 37, 39, 46

Associated Indus. of Mo. v. Lohman,
511 U.S. 641 (1994) ... 4

Baldwin v. G.A.F. Seelig, Inc.,
294 U.S. 511 (1935) ... 34

Barber v. Thomas,
130 S. Ct. 2499 (2010) ... 30

Bibb v. Navajo Freight Lines,
359 U.S. 520 (1959) ... 57

Boston Stock Exch. v. State Tax Comm'n,
429 U.S. 318 (1977) ... 38

Brown-Forman Distillers Corp. v. New York State Liquor Auth.,
476 U.S. 573 (1986) ... *passim*

C & A Carbone, Inc. v. Clarkstown,
511 U.S. 383 (1994) ... 38, 49, 54

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564 (1997) ... 21

Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. America, Inc.,
492 F.3d 484 (4th Cir. 2007) ... 26, 32, 33, 34

Dean Milk Co. v. City of Madison,
340 U.S. 349 (1951) ... 47

Department of Revenue v. Davis,
553 U.S. 328 (2008) ... *passim*

Doe v. Sundquist,
106 F.3d 702 (6th Cir. 1997) 49

Ferndale Labs., Inc. v. Cavendish,
79 F.3d 488 (6th Cir. 1996) 59

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824)...22

Granholm v. Heald,
544 U.S. 460 (2005)..*passim*

Great Atl. & Pac. Tea Co. v. Cottrell,
424 U.S. 366 (1976)..31

H.P. Hood & Sons v. Du Mond,
336 U.S. 525 (1949)..32, 35

Hardage v. Atkins,
619 F.2d 871 (10th Cir. 1980) 31

Healy v. Beer Inst.,
491 U.S. 324 (1989)..*passim*

Hughes v. Oklahoma,
441 U.S. 322 (1979)..4, 21, 47, 54

Hunt v. Washington State Apple Adver. Comm'n,
432 U.S. 333 (1977)..*passim*

International Dairy Foods Ass'n v. Boggs,
622 F.3d 628 (6th Cir. 2010) ....*passim*

Jalapeno Property Mgmt. v. Dukas,
265 F.3d 506 (6th Cir. 2001) 19

Jelovsek v. Bredesen,
545 F.3d 431 (6th Cir. 2008) 51

K-S Pharmacies, Inc. v. American Home Prods. Corp.,
962 F.2d 728 (7th Cir. 1992) 26, 27

Michigan Soft Drink Ass'n v. Department of Treasury,
522 N.W.2d 643 (Mich. Ct. App. 1994) 50

Midwest Title Loans, Inc. v. Mills,
593 F.3d 660 (7th Cir. 2010) 33

Minnesota v. Barber,
136 U.S. 313 (1890)...35

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981)...23

National Elec. Mfrs. Ass'n v. Sorrell,
272 F.3d 104 (2d Cir. 2001) 23

National Solid Wastes Mgmt. Ass'n v. Meyer,
63 F.3d 652 (7th Cir. 1995) 30

New Energy Co. v. Limbach,
486 U.S. 269 (1988)...31

Philadelpha v. New Jersey,
437 U.S. 617 (1978)...38, 51

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970)...*passim*

Southern Pac. Co. v. Arizona,
325 U.S. 761 (1945)..25, 33, 59

Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga,
403 F.3d 392 (6th Cir. 2005) 19

Turner Broadcasting Sys., Inc. v. FCC,
512 U.S. 622 (1994)...52

Tyson Foods, Inc. v. McReynolds,
865 F.2d 99 (6th Cir. 1989) 58

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.,
550 U.S. 330 (2007)...59
438 F.3d 150 (2d Cir. 2006) 58

Walker v. Bain,
257 F.3d 660 (6th Cir. 2001) 30

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994).....38

Yamaha Motor Corp. v. Calhoun,
516 U.S. 199 (1996).....57

CONSTITUTION AND STATUTES:

U.S. CONST., Article I, § 8, cl. 3 .....*passim*

28 U.S.C.
§ 1292(b).....1, 4, 17
§ 1331.....1
§ 1343(a)(3) 1

42 U.S.C.
§ 1983.....1, 3

1998 Mich. Pub. Act 473 51

CAL. PUB. RES. CODE
§ 14500 *et seq.* 6
§ 14561 (West 2010).....9

CONN. GEN. STAT.
§ 22a-243 *et seq.* 6
§ 22a-244 (2011).....9

HAW. REV. STAT.
§ 342G-101 *et seq.* 6
§ 342G-112 (2010).....9

IOWA CODE
§ 455C.1 *et seq*.....6
§ 455C.5 (2009) 9

MICH. COMP. LAWS
§ 445.571 *et seq.* 6
§ 445.571(a) 6
§ 445.571(d) 6, 10, 11, 29
§ 445.572(1) 6
§ 445.572(2) 6
§ 445.572(4) 51
§ 445.572(6) 7
§ 445.572(7) 9, 23
§ 445.572(10) 55
§ 445.572a 10
§ 445.572a(1) 11
§ 445.572a(2) 11
§ 445.572a(3) 11
§ 445.572a(4) 11
§ 445.572a(5) 11
§ 445.572a(6) 11
§ 445.572a(7) 11
§ 445.572a(8) 11
§ 445.572a(9) 11
§ 445.572a(10) .... *passim*
§ 445.572a(11) 12, 20
§ 445.572a(12) 7
§ 445.573(3) 51
§ 445.573(6) 51
§ 445.573b 7
§ 445.573b(1) 50
§ 445.573b(2) 50
§ 445.573b(3) 8
§ 445.573b(6) 8, 51
§ 445.573c 7
§ 445.573c(2) 50, 56
§ 445.573d 7, 51
§ 445.574a 8, 9

MASS. GEN. LAWS Chapter 94
§ 321 *et seq.* 6
§ 325 (2010) 9

ME. REV. STAT. ANN. Title 32
§ 1861 *et seq.* 6
§ 1865 (2010) 9

N.Y. ENVTL. CONSERV. LAW
§ 27-1001 *et seq.* 6
§ 27-1011 (McKinney 2011) 9

OR. REV. STAT.
§ 459A.700 *et seq.* 6
§ 459A.720 (2009) 9

VT. STAT. ANN. Title 10
§ 1521 *et seq.* 6
§ 1524 (West 2010)..9
§ 1525(c) (West 2010) 36

RULES:

Fed. R. App. P. 26.1 i

Fed. R. Civ. P. 56(f) 3

Sixth Cir. R. 26.1 i

Sixth Cir. R. 34(a) x

OTHER AUTHORITIES:

Madison, James, *Preface to Debates in the Convention of 1787*, 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Ferrand ed., 1911) 21

Regan, Donald, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) 37, 42, 48

The Federalist No. 7 (Alexander Hamilton) 21

The Federalist No. 11 (Alexander Hamilton) 47

The Federalist No. 42 (James Madison) 25

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case involves an important question of constitutional law with significant implications for the ability of national companies to engage in interstate commerce across state lines. Because the issue has divided federal district courts and is a matter of first impression in this Circuit, the decisional process would be significantly aided by oral argument. Accordingly, pursuant to Sixth Circuit Rule 34(a), the Association respectfully requests that this Court hear oral argument in this matter.

JURISDICTIONAL STATEMENT

The Association sued for declaratory and injunctive relief under 42 U.S.C. § 1983. The district court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). The court granted summary judgment to Defendants with respect to two of the Association's claims but denied summary judgment to either party on a third claim. R. No. 43, Summary Judgment Order. On July 20, 2011, the district court certified that the summary judgment order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see* R. No. 51, Certification Opinion, pp. 5-7. The Association timely petitioned this Court for permission to appeal on July 29, 2011. *See* 28 U.S.C. § 1292(b).

On September 6, 2011, this Court granted permission to appeal. *In re American Beverage Association*, No. 11-105 (Sept. 6, 2011). This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES

I. Whether a Michigan law criminalizing the sale of beverages in almost every other State of the Union based on the beverages' packaging amounts to the extraterritorial regulation of commerce in violation of the Commerce Clause of the United States Constitution.

II. Whether a Michigan law mandating, on pain of criminal penalty, that companies engaged in interstate commerce manufacture a Michigan-specific product for sale exclusively in Michigan and forbidding the sale of that Michigan-packaged product in all or almost all other States constitutes discrimination against interstate commerce, in violation of the Commerce Clause of the United States Constitution.

III. Whether a Michigan law that completely walls the State off from the national economy in beverages by criminalizing the sale outside Michigan of the same packaged beverages sold in Michigan and criminalizing the sale in Michigan of packaged beverages sold in other States unconstitutionally burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

STATEMENT OF THE CASE

Michigan law requires that interstate beverage companies distributing specified high-volume brands of popular products (such as Coca-Cola, Pepsi, and Dr. Pepper) sell within the State only Michigan-exclusive packaged beverages, and it criminalizes the sale of those Michigan-packaged beverages in all or virtually all other States, including in every State within 200 miles of Michigan. *See* M.C.L. § 445.572a(10).

The Association sued the State for declaratory and injunctive relief under 42 U.S.C. § 1983 on the ground that the unique-label requirement violates the Commerce Clause because it regulates extraterritorially, discriminates against interstate commerce, and unconstitutionally burdens interstate commerce. The Association and the State both sought summary judgment. R. No. 7, Association's Summary Judgment Br.; R. No. 16, State's Summary Judgment Br., pp. 12-20 (requesting entry of summary judgment under Fed. R. Civ. P. 56(f)). The Michigan Beer and Wine Wholesalers Association (MBWWA) intervened in support of Defendants.

The district court granted summary judgment to the State with respect to the Association's claims that the law is discriminatory and extraterritorial, but denied summary judgment for either party on the unconstitutional burden claim. R. No. 43, Summary Judgment Order. The court subsequently certified its summary

judgment order for interlocutory appeal under 28 U.S.C. §1292(b), on the grounds that (i) the questions whether the criminally enforced packaging mandate and sales prohibition unconstitutionally regulate extraterritorially or discriminate against interstate commerce are controlling questions of law for which there are substantial grounds for disagreement, and that (ii) this Court's review would expedite the efficient disposition of the case. R. No. 51, Certification Opinion, pp. 5-7. This Court granted permission to appeal. *In re American Beverage Ass'n*, No. 11-105 (Sept. 6, 2011).

STATEMENT OF THE FACTS

A. Constitutional And Statutory Framework

1. The Commerce Clause

The Commerce Clause of the United States Constitution authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST., Art I, §8, cl. 3. In addition to empowering Congress to enact national legislation, the Commerce Clause "embodies a negative command forbidding the States to discriminate against interstate trade." *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 646 (1994). That longstanding "restriction on permissible state regulation" is commonly referred to as the dormant Commerce Clause. *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *see Department of Revenue v. Davis*, 553 U.S. 328, 337 (2008) ("[W]e have sensed a negative implication in the provision since the early days.").

The "Commerce Clause's overriding requirement" is that there be a "national common market," *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977). The Clause's foundational purpose was to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation," *Granholm v. Heald*, 544 U.S. 460, 472 (2005), and thus, at its most basic level, the Clause prohibits the States from "retreating into * * * economic isolation," *Davis*, 553 U.S. at 338.

Under the dormant Commerce Clause, a law is virtually per se invalid if it "directly regulates or discriminates against interstate commerce." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). The Clause also forbids "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders" and thus operates extraterritorially. *Healy v. Beer Inst.*, 491 U.S. 324, 332 (1989); *see International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 645 (6th Cir. 2010). Finally, even if a law "has only indirect effects on interstate commerce and regulates evenhandedly," *Brown-Forman*, 476 U.S. at 579, it is nonetheless constitutionally proscribed if the burden imposed on interstate commerce exceeds "the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In all cases, the "critical consideration is the overall effect of the statute on both local and interstate

activity." *Brown-Forman*, 476 U.S. at 579.

2. Michigan's Beverage Container Deposit Law

Michigan is one of only ten States that requires consumers to pay a deposit when purchasing specified beverages sold in cans, plastic bottles, or glass bottles. M.C.L. § 445.571 *et seq.*[1] Michigan's Beverage Container Deposit Law, known as the "Bottle Bill," prohibits the sale of "beverages"—soft drinks, soda water, carbonated natural or mineral water, other nonalcoholic carbonated drinks, beer, other malt drinks, and mixed wine or mixed spirit drinks—to consumers in "nonreturnable" containers. *Id.* §§ 445.571(a), 445.572(1). Beverages instead must be sold in "returnable" containers for which a ten-cent deposit has been paid. *Id.* § 445.571(d). In addition, a business that sells beverages to consumers is required to accept for rebate an empty container "of any kind, size, and brand" of beverage that the retailer (referred to in the statute as a "dealer") sells, and to provide the person redeeming the empty container a refund of the ten-cent deposit paid on that container. *Id.* § 445.572(2).

Consumers may obtain a refund of the deposit by returning the empty container to a retailer or to a reverse vending machine. A reverse vending

[1] The other States are: California, Connecticut, Hawaii, Iowa, Maine, Massachusetts, New York, Oregon, and Vermont. *See* CAL. PUB. RES. CODE § 14500 *et seq.*; CONN. GEN. STAT. § 22a-243 *et seq.*; HAW. REV. STAT. § 342G-101 *et seq.*; IOWA CODE § 455C.1 *et seq.*; ME. REV. STAT. ANN. tit. 32, § 1861 *et seq.*; MASS. GEN. LAWS ch. 94, § 321 *et seq.*; N.Y. ENVTL. CONSERV. LAW § 27-1001 *et seq.*; OR. REV. STAT. § 459A.700 *et seq.*; VT. STAT. ANN. tit. 10, § 1521 *et seq.*

machine, as the name suggests, refunds a deposit when an individual feeds a container into it. *See* M.C.L. § 445.572a(12)(j). The retailers then return the empty containers to beverage distributors and collect the ten-cent refund value from them. M.C.L. § 445.572(6).

When a distributor collects more deposits than it refunds over the course of a year, the unclaimed deposits are deemed abandoned property and escheat to the State. *See* M.C.L. §§ 445.573b, 445.573d. The State Treasurer then gives 25% of the unclaimed deposit revenue to in-state beverage retailers and 75% to finance a Michigan cleanup and redevelopment trust fund. *See id.* § 445.573c. Statewide, beverage containers are chronically underredeemed so that more deposits are collected from consumers in the aggregate than refunds are made. Michigan Dep't of Envtl. Quality, *Michigan Bottle Deposit Law Frequently Asked Questions*, at 1 ("*Bottle Law FAQ*") (R. No. 7, Association's Summary Judgment Br., Exhibit D). Between 1990 and 2008, unclaimed deposits produced approximately $215,900,000 in revenue for the State treasury. *See Bottle Law FAQ*, at 1.

3. Redemption of Out-of-State Containers

Sometimes the value of deposits collected by a distributor is less than the total value of refunds paid in a given year. One potential cause of such overredemptions is individuals redeeming containers in Michigan that were purchased out of State and thus for which no deposit was paid in Michigan.

Because no deposit was paid in Michigan, the container's redemption reduces the revenue stream to the State from escheats. Since 1990, containers were overredeemed in the aggregate across the State in only one year (1992). *Bottle Law FAQ*, at 1. .

When overredemption occurs, a distributor can remediate the problem by transferring the empty containers to an underredeemed distributor in exchange for rebates of the deposit amount. M.C.L. § 445.573b(6). A distributor also may credit any overredemption amount against a future year's escheat to the State. *Id.* § 445.573b(3). While those mechanisms mitigate the costs to distributors caused by overredeemption, any overredemption of containers still reduces the amount of revenue flowing to the State.

Prior to 2008, the State did little to protect unclaimed deposit revenues. In 1998, the Michigan Legislature criminalized the redemption of containers by an individual who knows or should have known that no deposit was paid on them. *See* M.C.L. § 445.574a. The law did not address improper redemptions by retailers or distributors, however, even though the redemption of out-of-state containers on a scale that could materially impact the State's revenue is more likely to occur through bulk or large-scale redemptions at retailers. *See* Declaration of Kevin S. Dietly ¶ 5 (R. No. 7, Association's Summary Judgment Br., Exhibit B). That is because, when consumers redeem beverages manually and in bulk, retailers

commonly do not examine each individual container. *Id.* ¶ 17. Often, such review is not feasible because customers redeem the containers in boxes or bags and self-report the number of containers within. *Id.* Additionally, retailers are often complicit in improper redemption schemes. *See* Press Release, Mich. Attorney Gen., Can Scam (Sept. 27, 2007) (indictments issued where out-of-state cans were crushed, bagged and sold by weight at a discount to complicit retail stores) (R. No. 7, Association's Summary Judgment Br., Exhibit E). In 2008, as part of a legislative package that included the unique-packaging amendment at issue in this case, the Legislature for the first time criminalized the knowing acceptance of out-of-state containers by retailers and distributors. *See* M.C.L. § 445.574a.

4. The Uniquely Marked Packaging Mandate

Michigan, like the other bottle bill States, has long required the inclusion of information identifying the rebate program as part of the product's label or container markings. M.C.L. § 445.572(7).[2] That information for Michigan appears as "MI 10¢" on beverage cans and labels, and it is commonly accompanied by similar information concerning some or all of the other rebate States (*i.e.*, "ME MA VT NY CT CA 5¢"). Until 2008, nothing in Michigan law or the law of any

[2] *See* CAL. PUB. RES. CODE § 14561 (West 2010); CONN. GEN. STAT. § 22a-244 (2011); HAW. REV. STAT. § 342G-112 (2010); IOWA CODE § 455C.5 (2009); ME. REV. STAT. ANN. tit. 32, § 1865 (2010); MASS. GEN. LAWS ch. 94, § 325 (2010); N.Y. ENVTL. CONSERV. LAW § 27-1011 (McKinney 2011); OR. REV. STAT. § 459A.720 (2009); VT. STAT. ANN. tit. 10, § 1524 (West 2010).

other State forbade the use of such a universal label or container inscription and thus the Bottle bills did not impair the ability of national companies to produce a single packaged product for national distribution or to use multistate production, warehousing, and distribution systems.

Because overredemption reduces the State's revenue stream, the Michigan Legislature amended the Bottle Bill in 2008 to require certain manufacturers, all of which are out-of-state companies engaged in interstate commerce, to sell their beverages in "designated" glass, metal, or plastic containers. *See* M.C.L. § 445.572a. A "designated" container is a beverage package that bears "[a] symbol, mark, or other distinguishing characteristic that is placed * * * by a manufacturer to allow a reverse vending machine to determine if th[e] container is a returnable container." *Id.* § 445.572a(10). A "returnable container" is a container for which "a deposit of at least 10 cents has been paid, * * * and for which a refund of at least 10 cents in cash is payable." *Id.* § 445.571(d). Thus, the law requires beverage package to include a "distinguishing characteristic" that can be read specifically by a reverse vending machine to determine if the container is one for which a deposit of at least ten cents has been paid, which is meant to prove that the container was sold in Michigan. The law is directed only to machine-readable marked packaging.

The marked beverage packaging "must be unique to this state," and can be

"used only in this state and 1 or more other states that have laws substantially similar to this act." M.C.L. § 445.572a(10). The statute does not define "substantially similar," and the State has issued no regulatory guidance interpreting the term. The State has taken the litigating position that the term includes all other States with bottle bills. R. No. 16, State's Summary Judgment Br., p. 4. No other State has a unique-packaging requirement, however, nor does any other State charge a ten-cent deposit and thus no States' containers are "returnable" in Michigan. M.C.L. § 445.571(d).

The requirement of uniquely marked packaging applies only to high-volume beverage manufacturers. Specifically, it applies to sales of brands of nonalcoholic beverages in 12-ounce metal, 12-ounce glass, or 20-ounce plastic containers if at least 500,000 cases of that brand in that container were sold in Michigan, or if that brand was overredeemed by more than 600,000 containers, in the preceding calendar year. See M.C.L. § 445.572a(1), (3), & (5). All of the covered manufacturers are national companies, based outside Michigan, and engaged in interstate commerce. *See* R. No. 16, State's Summary Judgment Br., Exhibits 8 & 10.[3]

[3] Nonalcoholic sales in the Upper Peninsula are covered only if Upper Peninsula sales meet the statutory sales thresholds. M.C.L. § 445.572a(2), (4), & (6). The Association is aware of no qualifying brands. Alcoholic beverages are covered statewide. *Id.* § 445.572a(7)–(9). Accordingly, references in the brief to "Michigan" refer to the Lower Peninsula.

Michigan's law broadly forbids the sale of those Michigan-packaged beverages in other States. That is because, if the containers are sold outside of Michigan, the container markings cease to be "unique" to Michigan and "used only" in Michigan (or a "substantially similar" State) as Section 445.572a(10) requires. Likewise, companies cannot import products marketed in most (if not all) other States into Michigan because those products, by definition, are not packaged with markings "unique" to Michigan. The law thus obligates beverage manufacturers doing business in Michigan and more than one State to produce and distribute a Michigan-specific product for a Michigan-exclusive beverage market. Failure to comply subjects them to up to six months' imprisonment and a $2,000 fine for each beverage sale in violation of the Act. M.C.L. § 445.572a(11).

B. Factual Background

The American Beverage Association is a non-profit association of the manufacturers, marketers, distributors, and bottlers of virtually every nonalcoholic beverage sold in the United States. The Association's purpose is to protect its members' legal rights and the interests of the industry and beverage consumers. Declaration of Michael T. Redman ¶ 3 (R. No. 7, Association's Summary Judgment Br., Exhibit C). Its members include manufacturers who sell products subject to Michigan's unique-packaging requirement and its attendant interstate sales prohibition. *Id.* ¶ 14. The brands subject to the unique-mark requirement

include Coca-Cola Classic, Diet Coke, Caffeine Free Diet Coke, Sprite, Coke Zero, Cherry Coke, Pepsi, Diet Pepsi, Mountain Dew, Diet Mountain Dew, Caffeine Free Diet Pepsi, Dr. Pepper, Vernors, and A&W. *See* R. No. 16, State's Summary Judgment Br., Exhibits 8 & 10.

The member companies commonly manufacture beverages through production processes that generate packaged beverages in volumes large enough to supply geographical regions comprising part or all of multiple States. The Association's members utilize direct-to-store delivery and warehouse delivery systems to distribute their products nationwide. Under the warehouse system, beverage products are shipped from a manufacturing site to a warehouse, where the beverages are stored until their distribution to individual retail outlets. Redman Decl. ¶ 4 (R. No. 7, Association's Summary Judgment Br., Exhibit C). Those warehouses commonly receive packaged products from manufacturing sites in different States and distribute that product to multiple States. *Id.* Items stored in warehouses are generally not segregated by State. *Id.* Segregating products by State requires the development and tracking of dual inventory systems for the same product, and necessitates the use of additional warehouse space. *Id.* ¶ 13.

Because warehouse space is costly, and beverage freshness is vital to the product, the member companies use a "just-in-time" system that stores products for as short a time as possible prior to distribution. Redman Decl. ¶ 13 (R. No. 7,

Association's Summary Judgment Br., Exhibit C). To ensure product freshness, member companies design their production, warehousing, and transportation systems so that they can respond rapidly to frequently occurring changes in demand by increasing production or moving inventory from another location, rather than by stockpiling reserves of product. *Id.* ¶¶ 22–24.

As inventory can no longer be moved from bordering States into Michigan, and vice versa, if production in Michigan is insufficient to meet demand, member companies must halt their production lines for all other States, clear those lines of all product, and change over to producing Michigan-exclusive beverages with a downtime of approximately 30 minutes and thousands of cans for each changeover. *See* Redman Decl. ¶ 24 (Association's Summary Judgment Br., Exhibit C). Moreover, for plastic bottles, for which there is no technological capability that allows manufacturers to add a machine-readable Michigan-specific mark to the label during the bottling process, plants outside of Michigan are able to meet Michigan demand only if they maintain a current supply of Michigan-specific labels in stock. *Id.* ¶¶ 18, 24. It is undisputed that lines must be shut down for a period of time to switch production from Michigan production to rest-of-the-Nation production. *See* R. No. 31, MBWWA Summary Judgment Br., Exhibit 1 ¶¶ 14, 16.

C. District Court Proceedings

The Association sued for injunctive and declaratory relief on the ground that Michigan's uniquely marked packaging mandate violates the dormant Commerce Clause by (i) discriminating against interstate commerce, (ii) unconstitutionally regulating beverage sales extraterritorially by criminalizing sales occurring entirely outside of Michigan, and (iii) imposing a burden on interstate commerce that far exceeds the putative local benefits, *see Pike*, *supra*. R. No. 1, Complaint, pp. 18-20.

The district court entered summary judgment for the State on the Association's discrimination and extraterritoriality claims. R. No. 42, Summary Judgment Opinion, pp. 9-22. The district court concluded the law did not discriminate against interstate commerce for two reasons. First, the court reasoned that the "unique" packaging mandate applied to wholly intrastate manufacturers because the court interpreted the law as requiring even wholly intrastate manufacturers to add a Michigan-identifying mark to their packages. *Id.* at pp. 12-13. Second, the district court reasoned that invalidating this state-exclusive packaging requirement would "mean that every state labeling restriction is unconstitutional." *Id.* at 13. The district court then concluded that, because in its view in-state and out-of-state manufacturers were not treated differently, either on the face of the unique-mark requirement, *id.*, or in practical effect, *id.* at 13-15, the

statute did not discriminate against interstate commerce.

With respect to extraterritoriality, the district court recognized that "Michigan law would dictate what the label in a non-bottle state could not contain" but nonetheless held that the unique-packaging mandate "does not directly control conduct occurring wholly outside the State's borders" because "manufacturers are free to label their products however they see fit in other states." R. No. 42, Summary Judgment Opinion, p. 19. Moreover, the district court refused to consider the implications for interstate commerce if every State adopted a unique-packaging mandate because, the court noted, at the present time Michigan is the only State with such a law. The court also reasoned that, if every State adopted a bottle bill in lieu of curbside recycling, the burden on commerce would actually decrease. *Id.* at 20-21.

Finally, the district court concluded that "a genuine issue of material fact exists as to the extent of the burden" that the unique-packaging mandate imposes on interstate commerce precluding summary judgment on the Association's claim under *Pike*. R. No. 42, Summary Judgment Opinion, p. 25.

2. On the Association's motion for certification of the order for interlocutory appeal, the district court determined that the question "whether M.C.L. § 445.572a(10) is either discriminatory or extraterritorial in violation of the dormant Commerce Clause" satisfies the requirements for interlocutory appeal

because, *inter alia*, there were "'substantial grounds for difference of opinion'" on those rulings and they presented "difficult issue[s] of first impression." R. No. 51, Certification Opinion, p. 6. This Court agreed and granted permission to appeal. *See* 28 U.S.C. § 1292(b).

SUMMARY OF ARGUMENT

If the Commerce Clause means anything, it means that one State cannot secede from the national commerce stream or wall its economy off, in whole or in part, from every other State. The foundational purpose of the Commerce Clause—indeed, one of the foundational purposes of the Constitution—was to prevent economic Balkanization. But economic division and segregation is precisely what the unique-packaging mandate and its criminal prohibition on sales outside of Michigan accomplishes. Indeed, that is the law's announced *raison d'etre*. Regulation to secure an exclusive, single product for a single-state market is not permissible state regulation under the Commerce Clause, which establishes a national common market.

The Michigan-exclusive beverage economy and sales prohibition fails every test the Supreme Court has articulated to assess when a State law violates the Commerce Clause. By going beyond prescribing the labeling of beverages in Michigan, and dictating what packaging can be used in the 49 other States,

Michigan's law constitutes extraterritorial regulation in its most basic form, which the Commerce Clause does not tolerate.

In addition, the mandate discriminates facially, purposefully, and in practical effect against interstate commerce because it imposes burdens on any business choosing to do business in Michigan and in one or more other States that businesses doing business solely within Michigan do not bear. Unlike an ordinary state-law labeling requirement, Michigan does not leave interstate manufacturers the option of selling the state-law-compliant product in other States, rather than setting up burdensome and costly state-specific production processes. The Michigan law forbids selling Michigan-compliant products in any other State and thus demands the creation of Michigan-only production, warehousing, transportation, and distribution processes on pain of criminal penalty. That wholesale economic decampment by Michigan unconstitutionally penalizes companies for choosing to do business across state lines and mandates that beverage companies treat Michigan as its own, exclusive market that is strictly closed off from the rest of the Union.

Finally, there is no sound reason for permitting such extraterritorial overreaching and outright discrimination against interstate commerce—indeed, against the very concept of a unified national economy. Michigan admits that it has no evidence, let alone the concrete evidence that the Constitution demands,

documenting the scope of the improper redemption problem it seeks to address. Nor has the State made any showing that this exceptional burden on interstate commerce will substantially remediate its unknown problem. Much less has Michigan shown that nondiscriminatory alternatives have proved unworkable. It cannot do so because it did not bother to try those options first.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] de novo a district court's grant of summary judgment." *International Dairy*, 622 F.3d at 635. "Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Id.* When reviewing the district court's denial of summary judgment, this Court reviews de novo a denial "on purely legal grounds." *Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga*, 403 F.3d 392, 395 (6th Cir. 2005). A denial "based on the finding of a genuine issue of material fact is reviewed for an abuse of discretion," *id.* at 396, but "an error of law constitutes an abuse of discretion," *Jalapeno Property Mgmt. v. Dukas*, 265 F.3d 506, 510 n.5 (6th Cir. 2001).

II. MICHIGAN'S STATE-EXCLUSIVE PACKAGING MANDATE UNCONSTITUTIONALLY WITHDRAWS MICHIGAN FROM THE NATIONAL BEVERAGE MARKET, REGULATES EXTRATERRITORIALLY, AND DISCRIMINATES AGAINST INTERSTATE COMMERCE

Michigan law has made it a crime for covered beverage manufacturers to

sell in Michigan the same packaged beverages that they sell everywhere else across the United States. M.C.L. §§ 445.572a(10)-(11).

Michigan law also makes it a crime for covered beverage manufacturers to sell Michigan-compliant packaged beverages in Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming, the District of Columbia, Puerto Rico, American Samoa, Northern Marianas, or the U.S. Virgin Islands. M.C.L. §§ 445.572a(10)-(11); R. No. 16, State's Summary Judgment Br., p. 4. And sales in the nine remaining States are conditioned on Michigan granting permission on a state-by-state basis. M.C.L. § 445.572a(10).

That effort to withdraw from the national commerce stream, to require the creation of a state-specific commodity for a state-exclusive market, and to directly regulate—to criminalize—the sales of packaged beverages in other States strikes at the very heart of the Commerce Clause, and to uphold the law would require this Court to cast aside more than two centuries of precedent.

A. The Commerce Clause's Foundational Command Precludes Michigan's Effort To Wall Itself Off From Interstate Commerce

At its most fundamental level, the Commerce Clause forbids the States from splintering the Nation's commerce into the disparate and disunited economies that existed under the Articles of Confederation. *See* James Madison, *Preface to Debates in the Convention of 1787*, 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, 547 (Max Farrand ed., 1911) ("[W]ant of a general power over Commerce led to an exercise of this power separately, by the States, w[hi]ch not only proved abortive, but engendered rival, conflicting and angry regulations."). The Framers were concerned that "[e]ach State, or separate confederacy, would pursue a system of commercial policy peculiar to itself," which "would occasion distinctions, preferences, and exclusions, which would beget discontent." THE FEDERALIST NO. 7 (Alexander Hamilton).

Indeed, the "central concern of the Framers"—the concern that "was an immediate reason for calling the Constitutional Convention"—was that, "in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations * * * among the States under the Articles of Confederation." *Hughes,* 441 U.S. at 325. "'If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997)

(quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 91 (1824) (Johnson, J., concurring in judgment)). Thus, although the Supreme Court has outlined different doctrinal tests for whether a law is invalid under the Commerce Clause, "'the critical consideration' in any dormant Commerce Clause analysis 'is the overall effect of the statute on both local and interstate activity.'" *International Dairy*, 622 F.3d at 646 (quoting *Brown-Forman*, 476 U.S. at 579).

The effect of Michigan's law on interstate activity is to destroy it by outlawing commerce across state lines in packaged beverages, while leaving entirely state-internal activity unaffected. In so doing, the law replicates the very state-centric fracturing of national commerce that occurred under the Articles of Confederation and that was the very reason for the Commerce Clause's enactment. By express design, the mandate of uniquely marked packaging halts interstate commerce in covered beverages in its tracks at Michigan's borders. No covered product sold in the Michigan market may be sold in the rest of the Nation, and no product sold in the rest of the Nation may be sold in Michigan. The "Commerce Clause's overriding requirement," however, is a "national 'common market,'" *Hunt*, 432 U.S. at 350, and preventing "a proliferation of trade zones," *Heald*, 544 U.S. at 472.

The Constitution, of course, allows ample room for State regulatory preferences to flourish. *See Davis*, 553 U.S. at 338 ("[T]he Framers' distrust of

economic Balkanization was limited by their federalism favoring a degree of local autonomy."). Michigan may reasonably require particular information on the labels of products sold on its shelves. *See International Dairy*, 622 F.3d at 632 (rejecting Commerce Clause challenge to in-state milk labels); *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (same for in-state light bulb labels). Indeed, the Michigan bottle bill has long imposed a labeling requirement requiring designation of Michigan's refund value, which the Association does not challenge. M.C.L. § 445.572(7). State labeling or packaging requirements (if devoid of discriminatory effect or intent) are not per se invalid under the Commerce Clause. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-472 (1981).

What is different here is that the labeling requirement is state-exclusive and paired with a prohibition on selling products with the Michigan-compliant label in all or virtually all other States. The law, by its very content and design, forbids interstate commerce in the packaged product. As a result, unlike every other labeling or packaging requirement ever addressed under the dormant Commerce Clause, Michigan's law not only dictates how beverages sold in Michigan must be packaged, but also expressly outlaws the sale of those properly packaged beverages in almost every other State in the Union. To criminalize the sale in *other*

States of beverages based on their packaging is something different altogether from the routine regulation of in-state packaging or sales.

Here, Michigan has forbidden companies engaged in interstate commerce from making a product that can both comply with Michigan law and can still be sold in the national economy. Indeed, by design the only way to comply with Michigan's law is to make a product that will not and cannot be sold in almost any other State.

That is not just a trade regulation that tends to result in economic Balkanization; it is economic Balkanization by fiat. It is just as pernicious a restraint on trade as a restraint based on a product's state of origin. Although Michigan-specific beverages can be created outside the State, they are locked into Michigan once produced. And rest-of-the-Nation beverages are locked outside of Michigan. When the swift, unanticipated changes in demand common in the beverage industry occur, beverage manufacturers are unable to shift products across the Michigan border to meet the change in demand. *See* Redman Decl. ¶¶ 22-23 (R. No. 7, Association's Summary Judgment Br., Exhibit C). Products cannot move across Michigan's borders for sale unless they are repackaged—which for beverages is essentially the same as destroying the product and starting over again. To say the least, such a law "impede[s] or control[s] the flow of [beverage] products across the country," *International Dairy*, 622 F.3d at 647, as it

creates a "serious impediment to the free flow of commerce," *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945).

The national economic Union cannot tolerate Michigan's regulatory preference for state exclusivity and product-specific isolationism. When it comes to forming a Union, it is both a political and "a mathematical axiom" that one cannot "tak[e] away a part and let[] the whole remain." THE FEDERALIST NO. 42 (James Madison). By the same token, States cannot unilaterally carve themselves out of the national economy and yet leave a system of interstate commerce intact. Michigan's effort to do so fails every dormant Commerce Clause test prescribed by the Supreme Court.

B. The Unique-Packaging Mandate Unconstitutionally Regulates Extraterritorially By Criminalizing Sales In Other States

The "Commerce Clause * * * precludes the application of a state statute to commerce that takes place wholly outside of the State's borders," *Healy*, 491 U.S. at 336, and a law that regulates extraterritorial commerce is "virtually per se invalid," *International Dairy*, 622 F.3d at 645. That is so even if "the commerce has effects within the State." *Healy*, 491 U.S. at 336. That constitutional constraint "reflect[s] the Constitution's special concern * * * with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce." *Id.* at 335-336. The "critical inquiry" is not the legislature's intent, but "whether the practical effect of the regulation is to control conduct beyond the

boundaries of the State." *Id.* at 336. Moreover, that practical effect must be evaluated "by considering * * * what effect would arise if not one, but many or every, State adopted similar legislation." *Id.*

1. The Unique-Packaging Mandate Directly Prohibits the Sale of Michigan-Compliant Beverages Outside Michigan

a. The unique-packaging mandate directly governs the labeling of beverage products not just in Michigan, but in every other State. The statute's command to sell in Michigan only products packaged "unique[ly]" for Michigan, M.C.L. § 445.572a(10), necessarily contains the "implied (but inseparable) command" to sell outside the State only products different from those sold in Michigan, *K-S Pharmacies, Inc. v. American Home Prods. Corp.*, 962 F.2d 728, 730 (7th Cir. 1992). That is what "unique" means. That the statute only expressly mentions sales in Michigan is immaterial. *Brown-Forman*, 476 U.S. at 573 ("That the * * * law is addressed only to sales of liquor in New York is irrelevant if the practical effect of the law is to control liquor prices in other States."). A statute commanding "use in this state of a different label from what you use outside it" necessarily imposes the concomitant command to "use outside this state a different label from what you use inside it." *See K-S Pharmacies, Inc.*, 962 F.2d at 730 ("Any statute of the form 'charge in this state the same price you charge outside it' carries the implied command: 'Charge outside this state the same price you charge inside it.'"); *see also Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. America,*

Inc., 492 F.3d 484, 491 (4th Cir. 2007) (The Supreme Court has "deemed extraterritorial statutes that seize upon a company's in-state commercial activities * * * to regulate the companies' out-of-state conduct."). Indeed, by its plain terms, the only way a company can violate Michigan law is by selling Michigan-compliant packaged beverages outside of Michigan. That specified out-of-state activity is the defining element of the crime.

And that inseparable out-of-state command "is a forbidden attempt to exercise extraterritorial power." *K-S Pharmacies, Inc.*, 962 F.2d at 730. The Michigan-exclusive packaging mandate exerts control over out-of-state commerce that is just as "direct" as the control exerted by the "price affirmation" statute struck down by the Supreme Court in *Healy*. That statute required beer distributors to affirm, when posting the month's prices for Connecticut, that their Connecticut prices were "no higher than the prices being charged in the border States as of the moment of affirmation." 491 U.S. at 335. But the law imposed no restriction on the beer distributors' ability to raise or lower their out-of-state prices after that moment. *Id.* at 330. Like the Michigan-exclusive packaging mandate, the *Healy* statute on its face imposed an obligation only on the pricing of in-state sales. But it nonetheless regulated out-of-state sales because it "directly tied [its] pricing requirements to the prices charged by the distillers in other states." *International Dairy*, 622 F.3d at 647.

Likewise, Michigan law "directly tie[s]" its packaging requirements to the packaging used by manufacturers in other States. *International Dairy*, 622 F.3d at 647. Unlike an ordinary label requirement, which regulates only how in-state products must be packaged, but does not address packaging in the other 49 States, Michigan's command of state-exclusive uniqueness "ha[s] [a] direct effect on the [manufacturers'] out-of-state labeling conduct." *International Dairy,* 622 F.3d at 647. To be sure, the price affirmation statutes allowed out-of-state sales only on the *same* terms as in-state sales. The Michigan statute mandates that out-of-state sales must be on *different* terms. But the constitutionally proscribed effect is the same. It is just as extraterritorially controlling to command difference as to command sameness.

Furthermore, the transactions regulated by Michigan occur wholly outside the State. A sale that would trigger criminal penalties need have no connection to Michigan for the law to apply. A can of Coca-Cola bottled in Ohio and sold in Illinois is subject to Michigan's sales prohibition, as is a can of Pepsi or Dr. Pepper bottled in Arizona and sold in New Mexico. Wherever the sale occurs, Michigan criminalizes it unless the beverage packaging satisfies Michigan requirements.

b. Michigan's representation in litigation that it will allow Michigan-exclusive beverages to be sold in potentially nine other States whose laws it has

unilaterally deputized as "substantially similar" (M.C.L. § 445.572a(10)) compounds rather than ameliorates the constitutional problem.

First, the State's litigation position is hard to reconcile with the plain statutory text. "[S]ubstantially similar" is not defined in the law or by regulation. Worse still, the statute dictates that the required unique mark on packaging must allow a reverse vending machine to determine if a container is "returnable." M.C.L. § 445.571(d). But "returnable" is statutorily defined and it means the package must be marked in a way that identifies that "a deposit of at least 10 cents has been paid" on that container. M.C.L. § 445.571(d). Because no other State requires "a deposit of at least 10 cents" on like beverages, it is unclear why or on what basis the State assumes that any form of marked packaging could satisfy the substantially similar requirement. Otherwise, if the mark were used in other bottle bill States, it would allow the improper redemption of bottles in Michigan for ten cents when only a five-cent deposit was paid, leaving Michigan just as much out of pocket as if a container from a non-bottle-bill State were redeemed in Michigan. Leaving interstate companies betwixt and between the text of state law and the representations of State officials—subject to criminal punishment if they guess

wrong—simply compounds the unreasonableness and burdensomeness of this law on interstate commerce.[4]

Second, even that authorization is a one-way street. Beverages that comply with the laws of those nine States still may not enter Michigan unless the packaging is specifically Michigan-compliant—that is, exclusive to those States and Michigan.

Third, that exception at its best still leaves the 80% of the Nation whose State laws prefer curbside recycling to bottle redemption quarantined off from the Michigan beverage economy. Michigan may not, however "force [its] judgment with respect to solid waste recycling on communities in its sister states at the pain of an absolute ban on the flow of interstate commerce." *National Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 660–661 (7th Cir. 1995).

Fourth, Michigan's "substantially similar" exception is no different from an unconstitutional reciprocity law by which a State treats equally intrastate commerce and interstate commerce involving its counterparty States, but

[4] Yet another problem is that the State fails to explain why those nine other, geographically remote States' laws are "substantially" similar, as opposed to just "similar." R. No. 16, State's Br., p. 4. While Michigan might now prefer to read "substantially" out of the statute, this Court cannot. *See Barber v. Thomas*, 130 S. Ct. 2499, 2509 (2010) (interpretation of a statutory phrase that "would require us to read words out of the statute * * * cannot be used"); *Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001) ("Every word in the statute is presumed to have meaning, and we must give effect to all the words to avoid an interpretation which would render words superfluous or redundant.").

discriminates against all other interstate commerce. *See Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976) (Mississippi law allowing sales of safe, out-of-state milk only from States that reciprocally accepted Mississippi milk violated the Commerce Clause because "[t]o allow Mississippi to insist that a sister State either sign a reciprocal agreement acceptable to Mississippi or else be absolutely foreclosed from exporting its products to Mississippi would plainly invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause"). State laws that impose a commercial disadvantage absent reciprocity violate the Commerce Clause. *See New Energy Co. v. Limbach*, 486 U.S. 269, 275 (1988) ("The present law * * * imposes an economic disadvantage upon out-of-state sellers; and the promise to remove that if reciprocity is accepted no more justifies disparity of treatment than it would justify categorical exclusion.").

Michigan's law barring the importation of a good unless the State has enacted "substantially similar standards" regarding that good is "not different from [a] required reciprocity agreement." *Hardage v. Atkins*, 619 F.2d 871, 872, 873 (10th Cir. 1980). *National Solid Wastes* and *Hardage* involved trade restrictions based on the State from which a product originates; this case involves a trade restriction based on the State where a product is sold. What is constitutionally relevant, though, is that in all three situations, the import ban is location-based, and

it includes or excludes products based on the concurrence of State laws and policies.

More to the point, Michigan's assumption of the power to approve or disapprove the packaging of beverages sold in those nine other States (not one of which is situated within 200 miles of Michigan) is an overt manifestation of its extraterritorial overreaching. The Constitution reserves to the individual States and to the federal government the power to dictate what products may be sold or not sold within each State's own boundaries. Michigan has no more capacity to tell New York or Connecticut what packaged beverages are authorized in its State than those States could authorize the sale in Michigan of beverages meeting their dictates. "When one state reaches into another state's affairs * * * 'the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.'" *Carolina Trucks*, 492 F.3d at 490 (quoting *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 532 (1949)).

2. That Extraterritorial Prohibition on Sales Violates the Commerce Clause

Because the unique-packaging mandate directly controls sales of packaged beverages wholly outside of Michigan, it is unconstitutionally extraterritorial. *International Dairy*, 622 F.3d at 645 ("[A] second category of regulation that is also virtually per se invalid * * * [is] a regulation that has the practical effect of controlling commerce that occurs entirely outside of the state in question.").

Indeed, both by its terms and operative effect, Michigan's "unique" packaging mandate embodies the constitutional problems within a federalist system of one State's projection of its own law into the territory of another.

First, the rule against extraterritoriality protects the Constitution's concern with "the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 336. A State may not achieve its goals by "project[ing] its legislation into [other States]." *Brown-Forman*, 476 U.S. at 583 (first alteration added). By directly regulating through criminal penalties the packaging that interstate beverage companies may use in other States, Michigan has projected its legislation nationwide and arrogated to itself the power to police beverage sales in the 49 other States.

Second, extraterritorial regulation is prohibited because "the projection of one state regulatory regime into the jurisdiction of another State," *Healy*, 491 U.S. at 337, can cause a "serious impediment to the free flow of commerce," *Southern Pac.*, 325 U.S. at 775. The "compliance costs that such laws impose undermine the Commerce Clause's objective of a 'national common market.'" *Carolina Trucks*, 492 F.3d at 490 (quoting *Hunt*, 432 U.S. at 350). Importantly, that concern is broader than just those laws that might "plac[e] a firm under inconsistent obligations," and also includes one State's regulation of conduct that another State chooses not to regulate. *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 667 (7th

Cir. 2010); *see also Healy*, 491 U.S. at 343 (invalidating retrospective price affirmation laws that tie in-state prices to past out-of-state prices, even though they pose no risk of inconsistent obligations). "[E]xtraterritorial laws disrupt our national economic union just as surely as 'customs duties.'" *Carolina Trucks*, 492 F.3d at 490 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)).

Michigan law standing alone creates a substantial risk of inconsistent regulation because it makes it unlawful for an interstate manufacturer to sell the same packaged product in Michigan that is sold in every other State. And it permits the sale outside Michigan of packaged beverages only if they are different, or, perhaps, if the State is a member of Michigan's preferred bottle bill trade bloc. And even then, sale of a single packaged product is permitted only if the State accepts Michigan's state-specific packaging, regardless of the potential impact on its own bottle redemption process or technology.

The fact that "every other State in the Nation" could enact statutes "essentially identical" to Michigan's unique-packaging mandate and its flat prohibition on sales in other States brings the constitutional problem into "even starker relief." *Healy*, 491 U.S. at 339. When the "effect [that] would arise if not one, but many or every, State adopted similar legislation" is considered, *id.* at 336, the danger to the national economic union is patent. That is because, if Michigan can excise itself from the national commerce stream in packaged beverages, it can

do the same thing for every other product. And "so may every other State in the Nation." *Id.* at 339. That would shatter the interstate economy into 50 isolated economic units—precisely the result the Commerce Clause was designed to prevent. "This principle that our economic unit is the Nation * * * has as its corollary that the states are not separable economic units," and "[w]hat is ultimate is the principle that one state * * * may not place itself in a position of economic isolation." *H.P. Hood*, 336 U.S. at 537-538; *see Minnesota v. Barber*, 136 U.S. 313, 321 (1890) ("[T]he enactment of a similar [in-state meat inspection] statute by each one of the states composing the Union would result in the destruction of commerce among the several states.").[5]

That is no idle threat. In the context of beverage markets alone, New York and Vermont have already attempted to enact similar state-specific packaging requirements, but have failed.[6] There would be no more "national common

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[5] This effect is to be evaluated by considering what would happen if every State adopted a provision like the challenged provision, *see Healy*, 491 U.S. at 339, not, as the district court thought, by evaluating what would happen if every State adopted the entire bottle bill and then also extended to every other State its reciprocity exception. *See* R. No. 42, Summary Judgment Opinion, p. 21. Even under the district court's scenario, moreover, the universal spread of such legislation would mean that every State would have to accede to Michigan-specific packaging and Michigan's prescribed approach to both recycling and improper redemption. Such petrification of commerce exemplifies, rather than avoids, the Commerce Clause problem.

[6] New York imposed a state-specific mark requirement in 2009, but it was promptly and permanently enjoined as violating the Commerce Clause. Orders, *International Bottled Water Ass'n v. Paterson*, No. 09-cv-4672 (S.D.N.Y. May 29,

market" for the Commerce Clause to preserve, *Hunt*, 432 U.S. at 350, if every State were able to demand and enforce the production and sale of state-specific products limited to state-exclusive markets, much like they did with economically catastrophic results under the Articles of Confederation.

C. The Unique-Packaging Mandate Discriminates Against Interstate Commerce

1. The Commerce Clause Forbids Discrimination Against Interstate Commerce on the Basis of its Interstate Character

If a state law "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," then it is virtually per se unconstitutional. *Brown-Forman*, 476 U.S. at 579. Although this inquiry often focuses on economic protectionism—that is, "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," *Davis*, 553 U.S. at 338, neither such parochial favoritism nor a differential burden on in-state and out-of-state actors is a necessary component of discrimination under the dormant Commerce Clause. The Commerce Clause also protects interstate commerce from disadvantages being

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2009 & Oct. 23, 2009) (R. No. 7, Association's Summary Judgment Br., Exhibits G & H). Vermont enacted an attempted restriction of the sale of deposit-labeled beverages in adjacent States, but due to an apparent typographical error in the statute, its operation does not actually restrict the labeling of beverages or do anything at all. *See* VT. STAT. ANN. tit. 10 § 1525(c) (West 2010) (prohibiting sales of a beverage in Vermont "labeled as provided in subsection (a)" if that labeled beverage is sold in an adjacent state "that does not have a deposit-redemption system"; but subsection (a) does not regulate beverage labels).

imposed because of its interstate character. It therefore precludes States from "'plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'" *American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005).

In particular, a State may not discriminatorily burden businesses *because* they engage in commerce in more than one State: that is "either [Michigan manufacturers] who sell both in [Michigan] *and* in at least one [other] State or out-of-state [manufacturers] who sell both in [Michigan] and in at least one [other] State." *Healy*, 491 U.S. at 341. A state law that imposes a differential burden upon interstate businesses than it imposes on purely intrastate businesses violates that cardinal principle. *See American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 285 & n.20 (1987) (Flat taxes "can obviously divide and disrupt the market for interstate transportation services" because "'if adopted by many cities and states, [they] bear much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical * * * that sells in only one place.'") (quoting Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1188 (1986)).

It is no answer to such discrimination to claim that a statute treats in-state and out-of-state businesses the same. *See Healy*, 491 U.S. at 326 n.2 (no in-state competitors existed that could benefit from the state law). The discrimination is

against the act of engaging in multistate commerce itself, regardless of who engages in it, through the imposition of burdens "exclusively upon those who sell [products] not only in [one State] but also in the surrounding States." *Id.* at 344 (Scalia, J., concurring). To be sure, more cases address protectionism than overt discrimination against those engaged in interstate commerce. But that does not change the text, purpose, or meaning of the Commerce Clause. It just means that laws like Michigan's that quarantine interstate products and mandate a state-exclusive economy "are so patently unconstitutional" that few States have ever even attempted such legislation. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994); *see Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335 (1977) (Commerce Clause assures the "freedom to trade with any State, to engage in commerce across all state boundaries").

In any event, the Michigan-exclusive product mandate does further purely local interests at the expense of interstate businesses. The constitutional inquiry is whether the law benefits local "interests," not just local businesses. *International Dairy*, 622 F.3d at 648; *see also Philadelpha v. New Jersey*, 437 U.S. 617, 628 (1978) (invalidating law that "impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space"); *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 393 (1994) ("The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local

interests."). The law is openly designed to protect local interests by shifting to interstate companies (all of whom are also out of state) the full burden and expense of raising revenue for local programs. Even assuming the unique-packaging mandate could reduce improper redemptions, that would simply protect the financial interests of entirely local and in-state retailers in maximizing their 25% share of the State's deposit revenue and the financial interests of beer wholesalers situated along the Michigan border in reducing overredemptions.

In addition, the law creates substantial disincentives for manufacturers to move production for Michigan out of Michigan because of the inability to manufacture and distribute in other States a common regional product. Because the state-exclusive packaging requirement brings with it the practical necessity of having state-exclusive production runs, state-exclusive distribution systems, state-exclusive warehousing, and state-exclusive transportation systems, Michigan's law "exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted [a] measure rather than 'among the several States.'" *Scheiner*, 483 U.S. at 286-287. That, however, is "a forbidden impact on interstate commerce." *Id*. at 286.

2. *The Mandate of Uniquely Marked Packages Discriminates Against Interstate Commerce Facially, Purposefully, and in Effect*

A state law is virtually per se invalid if it discriminates "(a) facially, (b) purposefully, or (c) in practical effect." *International Dairy*, 622 F.3d at 648.

Michigan's law does all three because its express design, purpose, and operative effect is to "penaliz[e] [Michigan manufacturers] if they seek border-state markets and out-of-state [manufacturers] if they choose to sell both in [Michigan] and in a border State." *Healy*, 491 U.S. at 341.

a. The requirement of uniqueness applies only to manufacturers operating in more than one State

By its terms, the unique-packaging mandate applies only to companies that operate in multistate commerce—that is, those who engage in commerce in Michigan plus one other State—and not to beverage manufacturers that operate solely within Michigan.

First, not a single solely intrastate company or Michigan-based company meets the sales volume thresholds. *See* R. No. 16, State's Summary Judgment Br., Exhibits 8 & 10; R. No. 32, Additional Exhibits to MBWWA Summary Judgment Br., Exhibit 6. Michigan enacted operative thresholds that are sufficiently high that they are only met by companies who have a very high volume of business—that is, national brands.

But if even if a hypothetical company with purely in-state operations were to meet the law's sales threshold, the unique-packaging mandate still would not have any effect on it. When Michigan law says that the mark on the packaging must be "unique," it means that it must be used only in Michigan or "used only in this state and 1 or more other states that have laws substantially similar to this act." M.C.L.

§ 445.572a(10). A manufacturer that operates solely intrastate cannot, by definition, "use" a mark in any other State and thus its unaltered, ordinary packaging automatically satisfies the mandate of state-specific uniqueness. Nothing need be done to comply.

Contrary to the district court's supposition, R. No. 42, Summary Judgment Opinion, pp. 12-13, the plain terms of the statute do *not* dictate that every manufacturer meeting the threshold must put a second or added mark on its containers. Instead, to be "unique," the label need only "allow a reverse vending machine to determine if th[e] container is a returnable container." M.C.L. § 445.572a(10). For products that are never sold out of State, simply identifying the product—which is what the ordinary UPC already does—also automatically identifies the container as "a returnable container" lawfully redeemed in Michigan. *Id.*

Accordingly, because, "[b]y its plain terms, the [Michigan] statute applies solely to interstate [manufacturers] or shippers of [beverages]," it discriminates on its face against interstate commerce. *Healy*, 491 U.S. at 341; *see also id.* at 328 n.5, 340 (law that applied to "*every* holder of a manufacturer or out-of-state shipper's permit" discriminated "[o]n its face" against interstate commerce) (emphasis added). And that discrimination based on the interstate character of the company's activities is precisely what the Commerce Clause forbids. *See Healy*,

491 U.S. at 340-341; *see also* Regan, 84 MICH. L. REV. at 1192 ("Genuine national interests for dormant commerce clause purposes" include "the interest in protecting interstate commerce from special disadvantage that flows just from its being organized across state lines.").

b. The discrimination against interstate commerce is purposeful

That discriminatory burdening of companies who engage in commerce in Michigan and more than one State is purposeful. Indeed, the very *raison d'etre* of the law—the central purpose of "uniqueness"—is to outlaw the sale in other States of the same packaged beverages that companies sell in Michigan, and to prevent the sale in Michigan of the same packaged beverages sold in other States. Having identified a revenue stream arising from its rebate program, Michigan's aim is to maximize the flow of revenue into the State's coffers, and the way it has chosen to do that is to outlaw not just the redemption of out-of-state beverages in Michigan, but also the very presence of those beverages in Michigan and of Michigan beverages in almost any other State in the Union.

c. The unique-packaging mandate discriminates against interstate commerce in practical effect

The Michigan law has at least three different discriminatory effects on interstate commerce, each of which is flatly forbidden by Supreme Court precedent: (1) the law requires the creation and maintenance of special state-exclusive production and distribution operations in order to do business in

Michigan; (2) it eliminates the competitive advantages otherwise enjoyed by interstate companies; and (3) it impedes the free movement of commerce by imposing an economic and practical toll on interstate companies only. Those differential burdens on interstate commerce bear no resemblance to the routine burdens imposed by a normal state labeling requirement, which are shared alike by interstate and intrastate companies.

First, the law forces interstate companies to develop and maintain costly and inefficient parallel business operations—the Michigan production, warehousing, transportation, and distribution system and the rest-of-the-United-States production, warehousing, transportation, and distribution system. Companies not engaged in interstate commerce bear no such burden. That disparate treatment is what the Commerce Clause forbids.

In *Granholm v. Heald*, 544 U.S. 460 (2005), the Supreme Court invalidated under the dormant Commerce Clause a law that required out-of-state wineries "to establish a distribution operation in New York in order to gain the privilege" of selling directly to New York consumers, *id*. at 474. The Michigan-exclusive packaging mandate similarly requires interstate beverage companies to establish a Michigan-only production, warehousing, transportation, and distribution operation to gain the privilege of selling to Michigan consumers. Here, as in *Heald*, the single-state competitor bears no such burden, which confirms the discrimination.

See id. at 475 ("New York's in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm to become a resident in order to compete on equal terms"). Just as New York wineries had physical New York distribution operations by definition, in-state companies already operate production and distribution systems limited to Michigan by default. Still worse, the Michigan law requires those companies engaged in multistate commerce to manufacture a Michigan-exclusive product that cannot be sold anywhere else in the Nation (except perhaps in the geographically remote bottle bill bloc). The unique-mark mandate thus imposes even greater "additional steps that drive up the cost" for interstate beverage companies than did the statute invalidated in *Heald*. *Id.* at 474.

Second, the unique-packaging mandate "rais[es] the costs of doing business in the [Michigan] market" only for businesses engaged in interstate commerce, and it strips away the "competitive and economic advantages" earned through interstate economies of scale. *See Hunt*, 432 U.S. at 351. Where interstate companies might otherwise have enjoyed the competitive advantage of consolidating production for Michigan with a nearby Ohio or Indiana facility, Michigan law now saddles any such multi-state operation with the additional resource costs and production losses entailed in running and turning on and off alternating production lines, maintaining dual inventories of raw materials and filled containers, and separately

warehousing, transporting, and distributing Michigan-exclusive and everywhere-else product. *See* Redman Decl. ¶ 15 (R. No. 7, Association's Summary Judgment Br., Exhibit C).

The Supreme Court has struck down as discriminatory other laws that similarly required state-specific containers and similarly stripped interstate companies of competitive advantages. In *Hunt*, the Supreme Court invalidated a North Carolina law that barred apple growers from including on their containers the grade of the apples under the state-of-origin's grading system. 432 U.S. at 337. Under the law, Washington State apple growers had to incur costs to change their containers to comply with North Carolina's law. *Id.* at 351. The statute also "stripp[ed] away from the Washington apple industry the competitive and economic advantages it ha[d] earned" through Washington's superior state grading system for apples. *Id.* It was the imposition of those additional costs and the loss of competitive advantage for out-of-state producers that the Supreme Court held violated the dormant Commerce Clause. *Id.* at 350.

Michigan's unique-packaging requirement is far worse. It forbids both out-of-state containers from coming into Michigan and, unlike *Hunt,* it also forbids Michigan containers from being used in all or almost all other States. And only companies engaged in interstate commerce suffer. Michigan beverage companies that sell only in-state are already, by default, producing a Michigan-unique product

in Michigan-unique containers. Compliance with the law costs them nothing, nor does it cause them to forgo any competitive advantage. Quite simply, what renders Michigan's law unconstitutionally discriminatory is that it makes those who choose to engage in commerce in Michigan plus one more State bear burdens that those who engage in commerce only in Michigan do not have to bear.

Third, Michigan has closed its border to packaged beverages produced for the rest of the Nation, refusing to let other State products in and refusing to let Michigan products out. The law therefore demands that beverage manufacturers bear an extra and distinctive cost for every beverage imported into the State for sale. That burden of repackaging at the border stultifies the flow of commerce. When there are short-term changes in demand, interstate beverage companies can no longer shift products into or out of Michigan without incurring the economic toll of repackaging. They must either (1) stop and repackage every single can or bottle of a beverage at the border, or (2) they must incur the increased costs of running additional, Michigan-exclusive production while unused non-Michigan product goes to waste. *See* Redman Decl. ¶¶ 22–24 (R. No. 7, Association's Summary Judgment Br., Exhibit C). The law accordingly impedes "the free movement of commerce by placing a financial barrier around the State." *Scheiner*, 483 U.S. at 284; *see id.* ("If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that

commerce among the States would be deterred.").

Even if the law gave a free pass to packaged beverages sold in States (if there are any) with "laws substantially similar to this act," M.C.L. § 445.572a(10), that would do nothing to abate the dormant Commerce Clause problem. A law creating a regional or multi-state trade zone still results in the "economic Balkanization" that the Commerce Clause was designed to eliminate. *See Hughes*, 441 U.S. at 325–326. Whether a State discriminates against out-of-state or out-of-zone commerce, the effect is still "a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (city ordinance prohibiting the sale of milk not pasteurized within five miles of the city violates the dormant Commerce Clause); THE FEDERALIST NO. 11 (Alexander Hamilton) (federal Constitution favors "unity of commercial" trade over "partial unions").

Finally, the district court concluded that it could not hold that Michigan's law was discriminatory without invalidating all state labeling requirements. R. No. 42, Summary Judgment Opinion, p. 13. But that is simply not the case. With an ordinary labeling requirement, every manufacturer selling a product in the State bears the cost of conforming its packaging to the State's labeling law. Interstate manufacturers then have the choice of incurring additional costs to create different packaging in other States, or simply using that State's label as the default

nationwide label. Because the choice of a nationwide label meeting multiple state requirements remains available, ordinary state labeling laws do not distinctively burden companies engaged in multistate commerce.

Not so here—Michigan foists only on those companies engaged in multistate commerce the mandatory obligations both to use a state-specific label in Michigan and to use a different label in all or almost all other States. And that nationwide impact and nationwide regulation of beverage packaging arises entirely from one single State's unilateral dictate, which is calculatedly imposed precisely because those companies engage in multistate commerce because Michigan's parochial revenue interests are deemed to be better advanced by outlawing multistate commerce.[7]

Supreme Court precedent could not be clearer: a law that, in its practical effect and operation, imposes "a substantial disincentive for companies doing business in [a State] to engage in interstate commerce" and "essentially penaliz[es]" those companies that "choose to sell both in [Michigan] and in a border State" is "patent discrimination" and unconstitutional. *Healy*, 491 U.S. at 341.

[7] "The firm that sells in more than one state may have to comply with divergent packaging regulations," but those "disadvantages do not arise *just because* the firm is interstate," Regan, 84 MICH. L. REV. at 1187 (emphasis added), nor are they the product of a single State's law.

D. No Local Interest Justifies The Law's Exceptional Burden On Interstate Commerce

1. *Michigan's Financial Interest can be Adequately Served by Reasonable, Nondiscriminatory Measures*

Because the unique-container requirement discriminates against interstate commerce and regulates extraterritorial commerce, it is "virtually *per se* invalid." *International Dairy*, 622 F.3d at 646. Such a law is "generally struck down * * * without further inquiry." *Brown-Forman*, 476 U.S. at 579. Michigan has not met its high burden to show that the law advances "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Davis,* 553 U.S. at 338.[8]

First, the government interests underlying the unique-packaging mandate all collapse into revenue generation, but such "revenue generation is not a local interest that can justify discrimination against interstate commerce." *C & A Carbone*, 511 U.S. at 393. A straightforward reading of the amendment's text and the legislative record establish that the purpose of adding the uniquely marked

[8] Although the district court, having determined that the law was neither discriminatory nor extraterritorial, did not pass upon whether it could survive the strict scrutiny applied to a discriminatory law, there is no need to remand because this Court can decide that purely legal question. *Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir. 1997) ("If an issue unaddressed by the district court is presented with sufficient clarity and completeness and its resolution will materially advance the progress of the litigation, we have often chosen to consider that issue."), and the State requested summary judgment in part on the ground that "Section 572a(10) * * * survives heightened scrutiny and does not violate the dormant Commerce Clause," R. No. 16, State's Summary Judgment Br., p. 22.

packaging mandate was to maximize the amount of unclaimed deposits escheated into the State's coffers. *See* M.C.L. § 445.573b(2) (unclaimed deposits go directly into the state treasury); M.C.L. § 445.573b(1) (law enforced "in the same manner as revenues"); House Legislative Analysis Section, Unclaimed Deposits, at 1 (May 15, 1989) (R. No. 26, Association's Reply Br., Exhibit A) (estimating the "revenue going to the state" and debating how to spend it); Gov. James J. Blanchard, *Report to the People of Michigan and the Legislature*, at 58 (Jan. 1988) ("revenues from unredeemed deposits from bottles and cans" are a "funding source" that "can provide $10 million or more per year") (R. No. 26, Association's Reply Br., Exhibit B).

Michigan's interest in providing funding to local retailers or local government programs out of that revenue stream changes nothing. M.C.L. § 445.573c(2). Whether worthy or not, those are just revenue interests by another name.

Similarly, there is little daylight between any state interest in "preventing criminal fraud" and the interest in increasing revenue in this context. The "fraud" at issue is the mistaken or improper redemption of containers, which actually increases the recycling done in the State. The only sense in which it harms the State is that it reduces the unclaimed deposit revenue going to the Treasury. *See Michigan Soft Drink Ass'n v. Department of Treasury*, 522 N.W.2d 643, 646

(Mich. Ct. App. 1994). After all, the deposits are the property of the individual customers, not the State, M.C.L. § 445.573d, and since individual customers always receive a rebate regardless of whether deposit funds remain, *see* M.C.L. §§ 445.572(4), 445.573b(6)**,** the act of improper redemption does not defraud the property owners of their property. Indeed, it is telling that improper redemption was not made a specific crime until after the escheat provision was enacted. 1998 Mich. Pub. Act No. 473. Nor do nonalcoholic beverage distributors, like the Association's members, need or want the State's so-called protection from overredemption, because it almost never occurs and, in any event, distributors have a number of ways to mitigate such redemption without paralyzing interstate commerce, *see* M.C.L. § 445.573(3), (6). What the State labels as "fraud" is thus just the State's interest in maximizing escheat revenues, not in preventing the loss of any state property interest or the property interest of customers in their rebates.[9]

Second*,* Michigan must establish in the record that there is an actual

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[9] The State might contend that the law protects a handful of in-state beer wholesalers operating at the State's border from overredemption, *see* R. No. 32, Additional Exhibits to MBWWA Summary Judgment Br., Exhibit 4, p. 2. But that makes things worse not better. It confesses that the law throws the entire burden of protecting local business interests on the shoulders of interstate companies rather than in-state law enforcement. That is precisely the type of discriminatory burden that the Commerce Clause forbids. *See Philadelphia*, 437 U.S. at 627 ("This Court has consistently found parochial legislation * * * to be constitutionally invalid" when "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy."); *Jelovsek v. Bredesen*, 545 F.3d 431, 438 (6th Cir. 2008) (invalidating discriminatory provisions that "impermissibly favor Tennessee interests at the expense of interstate commerce").

problem with out-of-state redemptions *by reverse vending machines* in order to justify this extraordinarily burdensome response. The unique-packaging mandate addresses only redemptions by reverse vending machine; the law requires a *machine-readable* mark, M.C.L. § 445.572a(10), and imposes no requirement that *retailers* verify a mark's existence during manual redemptions.

The Constitution requires "concrete record evidence" of a serious problem and the ability of the adopted measure to redress it before the State may discriminate against interstate commerce. *Heald*, 544 U.S. at 493. Interstate commerce, in other words, is not meant to be the guinea pig for untested experiments in solving problems of uncertain scope or cause. *See id*. at 490, 492 ("Our Commerce Clause cases demand more than mere speculation" or "unsupported assertions" to "support discrimination."); *cf. Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality) (To satisfy intermediate scrutiny, government must show "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.").

But nothing in the statute, the legislative record, or anything cited by the State establishes that the problem of overredemption at reverse vending machines even exists. Quite the opposite, the State's answer admits that "the State currently does not know and does not employ any mechanism for calculating how many

beverage containers are fraudulently redeemed each year," R. No. 14, Answer ¶ 33, let alone how many are falsely redeemed at reverse vending machines, where individuals must stand in a public area feeding containers into a machine one at a time. That is hardly a medium for the large-scale misredemptions of concern to the State. The legislative record, too, is agnostic with respect to the amount of out-of-state redemptions that occur—and more to the point, the amount of those redemptions made through reverse vending machines. *See* House Fiscal Agency, Legislative Analysis: Bottle Bill Revisions and RVM Antifraud Act, p. 3 (R. No. 7, Association's Summary Judgment Br., Exhibit K) (concluding there is "no reliable and current information about how much revenue the state is deprived of each year as a result of bottle redemption fraud" and discounting study submitted as evidence by the State); Michigan Dep't of Envtl. Quality Report, p. 6 (R. No. 16, State's Summary Judgment Br., Exhibit 1B) (criticizing study submitted as State's Exhibit 1C as extrapolating estimate from only certain types of redemptions in limited area). And the State's own evidence focuses on large-scale operations that involve bulk returns to complicit retailers, *not* at reverse vending machines. *See* R. No. 16, State's Summary Judgment Br., Exhibit 4. Returns to retailers—even innocent ones—can and commonly do occur in bulk based on self-reported numbers. Dietly Decl. ¶ 17 (R. No. 7, Association's Summary Judgment Br., Exhibit B). Because those containers are almost never examined or counted individually—and

Michigan law requires no such examination—the presence of a Michigan-specific mark is irrelevant. *Id.*

Michigan thus has not met its burden of justifying with "concrete record evidence," *Heald*, 544 U.S. at 493, either the need for its extraordinarily burdensome law or the ability of a machine-readable, state-exclusive marking requirement to redress it. *See Hughes,* 441 U.S. at 337 ("At a minimum * * * facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.").

Finally, the State has also failed to make the "clearest showing," *C & A Carbone*, 511 U.S. at 393, with "concrete" evidence in the legislative record or elsewhere, that nondiscriminatory alternatives have "*prove[n]* unworkable," *Heald*, 544 U.S. at 493 (emphasis added).

The most obvious nondiscriminatory alternative measure for dealing with improper redemptions is, of course, law enforcement. The problem for the State is that it is impossible for it to show that law enforcement attention to this problem (of admittedly unknown scope) would be an inadequate response because it was not until 2008—at the same time Michigan adopted the unique-packaging mandate—that Michigan first bothered to criminalize retailer and distributor malfeasance. *See* R. No. 26, Association's Reply Br., Exhibit C. At the same time, Michigan increased the penalties for individuals who return out-of-state

containers, and made some violations enforceable by the less burdensome route of civil fines. *Id.* Yet Michigan did not take any time to evaluate the effectiveness of those new provisions before moving to discriminatory measures. To be sure, law enforcement requires the devotion of some state resources. But that, again, is just another way for the State to say that it would prefer to make interstate commerce bear its resource costs than to bear them itself or to impose them on in-state businesses.

Furthermore, at the same time that it adopted the discriminatory unique-packaging mandate, the Michigan Legislature rejected other nondiscriminatory alternatives that would have addressed out-of-state redemptions. The Michigan Legislature rejected a measure that would have allowed retailers to cap manual redemptions at $5 per day, eliminating the pressure on innocent retailers to take large bulk returns. *See* R. No. 26, Association's Reply Br., Exhibit D. It also did not consider making the current optional $25 daily cap on redemptions mandatory, which would also assist innocent retailers wary of offending customers by voluntarily capping returns. *See* M.C.L. 445.572(10).

Indeed if, as the evidence indicates, retailer redemption is the primary source of high-volume out-of-state redemptions, the State could also provide incentives to retailers to assist in combating such redemptions. For example, rather than distribute unclaimed deposits to retailers based on their proportional share of

containers redeemed, M.C.L. § 445.573c(2)(b)—which *increases* the retailers' interest in maximizing improper redemptions—the State could allocate unclaimed deposits proportionally in a manner that rewards the retailers' success in reducing out-of-state redemptions.

There thus is a litany of alternative, nondiscriminatory measures that the State either did not consider, did not adopt, or did not give time to evaluate prior to jumping to discrimination against interstate commerce and decamping from the national beverage economy. Given those untested alternatives and the lack of any concrete evidence of either a reverse-vending-machine-redemption problem or that state-exclusive packaging works remedially, the State has not met its burden of showing a legitimate state interest that could not be adequately served by nondiscriminatory alternatives.

2. The Burden on Interstate Commerce Outweighs any Local Benefit as a Matter of Law

Because the evidence of a reverse-vending-machine problem is so diaphanous, the putative local benefits so insubstantial, and the availability of less burdensome measures so abundant, the unique-packaging mandate fails as a matter of law under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The burden that the law imposes on interstate commerce is "clearly excessive in

relation to the putative local benefits," and there are ample alternative measures that would have "a lesser impact on interstate activities." *Id.* at 142.a[10]

The unique-mark mandate is the paradigmatic example of a law falling afoul of the Commerce Clause under the *Pike* test. If almost every other State had a law requiring beverage labels to include "X," and Michigan enacted a law prohibiting beverage labels from including "X," without clear and concrete proof of a substantial need to do so, the outcome under *Pike* would be foreordained—the law would fail.[11]

In *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959), the Supreme Court struck down an Illinois statute that required use of a unique mudguard on trucks and trailers operated on state highways and prohibited the use of conventional mudguards that were legal in at least forty-five other States. The practical effect of the statute was to condition entry into Illinois commerce on stopping at the border and either switching mudguards or changing delivery vehicles, thereby causing significant delay. *See id.* at 526-528. Requiring those engaged in interstate commerce to "shift [their] cargo to differently designed vehicles" at the state line, *id.* at 526, with all the expense and "significant delay" that entailed, *id.* at 527,

[10] Although the district court did not identify its *Pike* ruling as a controlling question of law, this Court's jurisdiction extends to the entire order. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996).

[11] That Michigan achieves exactly this result by its law alone only demonstrates how vast the extraterritorial reach of the unique-packaging mandate is.

"severely burden[ed]" interstate commerce, *id.* at 528.

The unique-packaging requirement does exactly what the invalidated law in *Bibb* did—and worse. The requirement of a Michigan-only container is, by definition and express design, irreconcilable with the beverage packaging allowed by every other State. Every time a manufacturer must switch between production for Michigan and production for the rest of the Nation, it must shut down its manufacturing line for 30 minutes or more, losing the production of tens of thousands of packaged beverages. Redman Decl. ¶ 17 (R. No. 7, Association's Summary Judgment Br., Exhibit C). Even worse than the law in *Bibb,* Michigan makes it a *crime* for companies to produce a beverage container that complies with both Michigan law and the laws of most if not all other States.

This is the archetypical violation of *Pike*'s balancing test—a law that "imposes a regulatory requirement inconsistent with those of other states." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 156–157 (2d Cir. 2006); *see Tyson Foods*, *Inc. v. McReynolds,* 865 F.2d 99, 102 (6th Cir. 1989) (Tennessee antitakeover statutes imposed an excessive burden on interstate commerce in part because of the possibility of inconsistent regulation). Michigan's law unilaterally *mandates* nationwide inconsistency; the whole point of the law is to impose a container requirement that is inconsistent with and cannot be used in any (or almost any) other State, on pain of criminal penalty.

But the burdens do not stop there. The economic rigidity prescribed by the law means Michigan-exclusive operations must sit fallow while demand in Ohio, Indiana, or any other State goes unmet. Like "requiring business operations to be performed in the home State that could more efficiently be performed elsewhere," *Pike*, 397 U.S. at 145, Michigan's law requires that business operations that could be performed more efficiently elsewhere be performed instead by Michigan-exclusive production and distribution operations. Those are precisely the types of constitutionally significant burdens that trigger *Pike*'s protection for interstate commerce. *See Southern Pac.*, 325 U.S. at 767 ("[E]ver since *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state."); *cf. Ferndale Labs., Inc. v. Cavendish*, 79 F.3d 488, 496 (6th Cir. 1996) (no unconstitutional burden where state law "does not require the applicant to change its business practices in any way").

Although revenue enhancement may, in some circumstances, be "a cognizable benefit" under *Pike*, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (plurality), its weight is vanishingly slight compared to these burdens. Just as importantly, that revenue goal can easily be served by alternative measures that would have "a lesser impact on interstate activities," *Pike*, 397 U.S. at 142. *See* Section II.D.1, *supra*. The burden imposed

on interstate commerce by effectively ending the common market for packaged beverages and by Michigan extraterritorially reaching into all of the 49 other States to dictate what packaging may be used in their States far outweighs the unknown benefits of Michigan's unproven solution to an entirely unknown reverse-vending-machine problem, particularly when that problem can be addressed by a variety of measures that burden interstate commerce not at all.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and summary judgment entered for the Association.

December 2, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 13,789 words, and thus complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

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I hereby certify that, on December 2, 2011, I served the foregoing brief upon the following counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

R. No.	Description	Date
1	Complaint	Feb. 25, 2011
7	Association's Summary Judgment Brief	Mar. 10, 2011
14	Answer	Mar. 30, 2011
16	State's Summary Judgment Brief	Apr. 7, 2011
17	Additional Exhibits to State's Summary Judgment Brief	Apr. 7, 2011
26	Association's Reply Brief	Apr. 21, 2011
31	MBWWA Summary Judgment Brief	May 10, 2011
32	Additional Exhibits to MBWWA Summary Judgment Brief	May 10, 2011
42	Summary Judgment Opinion	May 31, 2011
43	Summary Judgment Order	May 31, 2011
51	Certification Opinion	July 20, 2011
52	Certification Order	July 20, 2011

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Commerce Clause, U.S. Const., Art. I, § 8, cl. 3 .... Add. 1

M.C.L. § 445.571 *et seq*.. Add. 2

Commerce Clause, U.S. Const., Art. I, § 8, cl. 3

Article I, Section. 8. The Congress shall have Power

***

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

***

BEVERAGE CONTAINERS
Initiated Law 1 of 1976

A petition to initiate legislation to provide for the use of returnable containers for soft drinks, soda water, carbonated natural or mineral water, other nonalcoholic carbonated drink, and for beer, ale, or other malt drink of whatever alcoholic content, and for certain other beverage containers; to provide for the use of unredeemed bottle deposits; to prescribe the powers and duties of certain state agencies and officials; and to prescribe penalties and provide remedies.

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978;—Am. 1996, Act 384, Imd. Eff. July 24, 1996.

Compiler's note: This initiated law was submitted to and approved by the people at the general election held on November 2, 1976, and took effect on December 3, 1976, pursuant to Mich. Const., Art. 2, § 9. But see MCL 445.576.
The petition to initiate this legislation was headed by the following statement:
"A petition to initiate legislation to provide for the use of returnable containers for soft drinks, soda water, carbonated natural or mineral water or other non-alcoholic carbonated drink; beer, ale or other malt drink of whatever alcoholic content." See Newsome v Board of State Canvassers, 69 Mich App 725 (1976).

Popular name: Bottle Bill

The People of the State of Michigan enact:

445.571 Definitions.

Sec. 1. As used in this act:

(a) "Beverage" means a soft drink, soda water, carbonated natural or mineral water, or other nonalcoholic carbonated drink; beer, ale, or other malt drink of whatever alcoholic content; or a mixed wine drink or a mixed spirit drink.

(b) "Beverage container" means an airtight metal, glass, paper, or plastic container, or a container composed of a combination of these materials, which, at the time of sale, contains 1 gallon or less of a beverage.

(c) "Empty returnable container" means a beverage container which contains nothing except the residue of its original contents.

(d) "Returnable container" means a beverage container upon which a deposit of at least 10 cents has been paid, or is required to be paid upon the removal of the container from the sale or consumption area, and for which a refund of at least 10 cents in cash is payable by every dealer or distributor in this state of that beverage in beverage containers, as further provided in section 2.

(e) "Nonreturnable container" means a beverage container upon which no deposit or a deposit of less than 10 cents has been paid, or is required to be paid upon the removal of the container from the sale or consumption area, or for which no cash refund or a refund of less than 10 cents is payable by a dealer or distributor in this state of that beverage in beverage containers, as further provided in section 2.

(f) "Person" means an individual, partnership, corporation, association, or other legal entity.

(g) "Dealer" means a person who sells or offers for sale to consumers within this state a beverage in a beverage container, including an operator of a vending machine containing a beverage in a beverage container.

(h) "Operator of a vending machine" means equally its owner, the person who refills it, and the owner or lessee of the property upon which it is located.

(i) "Distributor" means a person who sells beverages in beverage containers to a dealer within this state, and includes a manufacturer who engages in such sales.

(j) "Manufacturer" means a person who bottles, cans, or otherwise places beverages in beverage containers for sale to distributors, dealers, or consumers.

(k) "Within this state" means within the exterior limits of the state of Michigan, and includes the territory within these limits owned by or ceded to the United States of America.

(*l*) "Commission" means the Michigan liquor control commission.

(m) "Sale or consumption area" means the premises within the property of the dealer or of the dealer's lessor where the sale is made, within which beverages in returnable containers may be consumed without payment of a deposit, and, upon removing a beverage container from which, the customer is required by the dealer to pay the deposit.

(n) "Nonrefillable container" means a returnable container which is not intended to be refilled for sale by a manufacturer.

(o) "Mixed wine drink" means a drink or similar product marketed as a wine cooler and containing less than 7% alcohol by volume, consisting of wine and plain, sparkling, or carbonated water and containing any 1

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or more of the following:

(*i*) Nonalcoholic beverages.

(*ii*) Flavoring.

(*iii*) Coloring materials.

(*iv*) Fruit juices.

(*v*) Fruit adjuncts.

(*vi*) Sugar.

(*vii*) Carbon dioxide.

(*viii*) Preservatives.

(p) "Mixed spirit drink" means a drink containing 10% or less alcohol by volume consisting of distilled spirits mixed with nonalcoholic beverages or flavoring or coloring materials and which may also contain water, fruit juices, fruit adjuncts, sugar, carbon dioxide, or preservatives; or any spirits based beverage, regardless of the percent of alcohol by volume, that is manufactured for sale in a metal container.

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978;—Am. 1982, Act 39, Imd. Eff. Mar. 16, 1982;—Am. 1982, Act 266, Imd. Eff. Oct. 5, 1982;—Am. 1986, Act 235, Eff. June 1, 1989;—Am. 1989, Act 93, Imd. Eff. June 20, 1989.

Popular name: Bottle Bill

445.572 Nonreturnable containers; prohibitions; means for return and refund; regional redemption centers; acceptance of containers and payment of refunds; indicating refund value and name of state on container; exception; metal containers with detachable parts prohibited; deposit previously refunded; refund upon reuse; maximum daily refund; agreement on deposit; refund by manufacturer.

Sec. 2. (1) A dealer within this state shall not sell, offer for sale, or give to a consumer a nonreturnable container or a beverage in a nonreturnable container.

(2) A dealer who regularly sells beverages for consumption off the dealer's premises shall provide on the premises, or within 100 yards of the premises on which the dealer sells or offers for sale a beverage in a returnable container, a convenient means whereby the containers of any kind, size, and brand sold or offered for sale by the dealer may be returned by, and the deposit refunded in cash to, a person whether or not the person is the original customer of that dealer, and whether or not the container was sold by that dealer.

(3) Regional centers for the redemption of returnable containers may be established, in addition to but not as substitutes for, the means established for refunds of deposits prescribed in subsection (2).

(4) Except as provided in subsections (5) and (7), a dealer shall accept from a person an empty returnable container of any kind, size, and brand sold or offered for sale by that dealer and pay to that person its full refund value in cash.

(5) A dealer who does not require a deposit on a returnable container when the contents are consumed in the dealer's sale or consumption area is not required to pay a refund for accepting that empty container.

(6) Except as provided in subsection (7), a distributor shall accept from a dealer an empty returnable container of any kind, size, and brand sold or offered for sale by that distributor and pay to the dealer its full refund value in cash.

(7) Each beverage container sold or offered for sale by a dealer within this state shall clearly indicate by embossing or by a stamp, a label, or other method securely affixed to the beverage container, the refund value of the container and the name of this state. A dealer or distributor may, but is not required to, refuse to accept from a person an empty returnable container which does not state on the container the refund value of the container and the name of this state. This subsection does not apply to a refillable container having a refund value of not less than 10 cents, having a brand name permanently marked on it, and having a securely affixed method of indicating that it is a returnable container.

(8) A dealer within this state shall not sell, offer for sale, or give to consumers a metal beverage container, any part of which becomes detached when opened.

(9) A person, dealer, distributor, or manufacturer shall not return an empty container to a dealer for a refund of the deposit if a dealer has already refunded the deposit on that returnable container. This subsection does not prohibit a dealer from refunding the deposit on an empty returnable container each time the returnable container is sanitized by the manufacturer and reused as a beverage container.

(10) A dealer may accept, but is not required to accept, from a person, empty returnable containers for a refund in excess of $25.00 on any given day.

(11) A manufacturer licensed by the commission shall not require a distributor licensed by the commission to pay a deposit to the manufacturer on a nonrefillable container. However, a manufacturer licensed by the commission and a distributor licensed by the commission may enter into an agreement providing that either or

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both may originate a deposit or any portion of a deposit on a nonrefillable container if the agreement is entered into freely and without coercion.

(12) A manufacturer shall refund the deposit paid on any container returned by a distributor for which a deposit has been paid by a distributor to the manufacturer.

(13) Subsections (4), (6), and (7) apply only to a returnable container that was originally sold in this state as a filled returnable container.

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978;—Am. 1977, Act 270, Eff. Mar. 30, 1978;—Am. 1982, Act 39, Imd. Eff. Mar. 16, 1982;—Am. 1982, Act 266, Imd. Eff. Oct. 5, 1982;—Am. 1986, Act 235, Eff. June 1, 1989;—Am. 1998, Act 473, Eff. Apr. 1, 1999.

Popular name: Bottle Bill

445.572a Designated metal, glass, or plastic containers; sale or offer of sale of certain beverages; requirements; violations; definitions.

Sec. 2a. (1) Except as provided in subsection (2), beginning 90 days after the effective date of the amendatory act that added this section, a manufacturer of nonalcoholic beverages shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in this state in a 12-ounce metal beverage container that is not a designated metal container if either of the following is met:

(a) Sales of that brand of beverage in 12-ounce metal beverage containers in this state in the preceding calendar year were at least 500,000 cases, as determined by the department of treasury.

(b) Sales of that brand of beverage in 12-ounce metal beverage containers in this state in the preceding calendar year were fewer than 500,000 cases, and 12-ounce metal beverage containers of that brand of beverage were overredeemed by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(2) Beginning 90 days after the effective date of the amendatory act that added this section, a manufacturer of nonalcoholic beverages shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in the Upper Peninsula in a 12-ounce metal beverage container that is not a designated metal container if either of the following is met:

(a) Sales of that brand of beverage in 12-ounce metal beverage containers in the Upper Peninsula were at least 500,000 cases, as determined by the department of treasury.

(b) Sales of that brand of beverage in 12-ounce metal beverage containers in the Upper Peninsula in the preceding calendar year were fewer than 500,000 cases, and 12-ounce metal beverage containers of that brand of beverage were overredeemed in the Upper Peninsula by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(3) Except as provided in subsection (4), beginning 450 days after the effective date of the amendatory act that added this section, a manufacturer of nonalcoholic beverages shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in this state in a 12-ounce glass beverage container that is not a designated glass container if either of the following is met:

(a) Sales of that brand of beverage in 12-ounce glass beverage containers in this state in the preceding calendar year were at least 500,000 cases, as determined by the department of treasury.

(b) Sales of that brand of beverage in 12-ounce glass beverage containers in this state in the preceding calendar year were fewer than 500,000 cases, and 12-ounce glass beverage containers of that brand of beverage were overredeemed by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(4) Beginning 450 days after the effective date of the amendatory act that added this section, a manufacturer of nonalcoholic beverages shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in the Upper Peninsula in a 12-ounce glass beverage container that is not a designated glass container if either of the following is met:

(a) Sales of that brand of beverage in 12-ounce glass beverage containers in the Upper Peninsula were at least 500,000 cases, as determined by the department of treasury.

(b) Sales of that brand of beverage in 12-ounce glass beverage containers in the Upper Peninsula in the preceding calendar year were fewer than 500,000 cases, and 12-ounce glass beverage containers of that brand of beverage were overredeemed in the Upper Peninsula by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(5) Except as provided in subsection (6), beginning 450 days after the effective date of the amendatory act that added this section, a manufacturer of nonalcoholic beverages shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in this state in a 20-ounce plastic beverage container that is not a designated plastic container if either of the following is met:

(a) Sales of that brand of beverage in 20-ounce plastic beverage containers in this state in the preceding calendar year were at least 500,000 cases, as determined by the department of treasury.

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(b) Sales of that brand of beverage in 20-ounce plastic beverage containers in this state in the preceding calendar year were fewer than 500,000 cases, and 20-ounce plastic beverage containers of that brand of beverage were overredeemed by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(6) Beginning 450 days after the effective date of the amendatory act that added this section, a manufacturer of nonalcoholic beverages shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in the Upper Peninsula in a 20-ounce plastic beverage container that is not a designated plastic container if either of the following is met:

(a) Sales of that brand of beverage in 20-ounce plastic beverage containers in the Upper Peninsula were at least 500,000 cases, as determined by the department of treasury.

(b) Sales of that brand of beverage in 20-ounce plastic beverage containers in the Upper Peninsula in the preceding calendar year were fewer than 500,000 cases, and 20-ounce plastic beverage containers of that brand of beverage were overredeemed in the Upper Peninsula by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(7) Beginning 90 days after the effective date of the amendatory act that added this section, a manufacturer of alcoholic beverages shall not sell, offer for sale, or give an alcoholic beverage to a consumer, dealer, or distributor in this state in a 12-ounce metal beverage container that is not a designated metal container if either of the following is met:

(a) Sales of that brand of beverage in this state in the preceding calendar year were at least 500,000 case equivalents, as determined by the department of treasury.

(b) Sales of that brand of beverage in this state in the preceding calendar year were fewer than 500,000 case equivalents, and beverage containers of that brand of beverage were overredeemed by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(8) Beginning 450 days after the effective date of the amendatory act that added this section, a manufacturer of alcoholic beverages shall not sell, offer for sale, or give an alcoholic beverage to a consumer, dealer, or distributor in this state in a 12-ounce glass beverage container that is not a designated glass container if either of the following is met:

(a) Sales of that brand of beverage in this state in the preceding calendar year were at least 500,000 case equivalents, as determined by the department of treasury.

(b) Sales of that brand of beverage in this state in the preceding calendar year were fewer than 500,000 case equivalents, and beverage containers of that brand of beverage were overredeemed by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(9) Beginning 450 days after the effective date of the amendatory act that added this section, a manufacturer of alcoholic beverages shall not sell, offer for sale, or give an alcoholic beverage to a consumer, dealer, or distributor in this state in a 20-ounce plastic beverage container that is not a designated plastic container if either of the following is met:

(a) Sales of that brand of beverage in this state in the preceding calendar year were at least 500,000 case equivalents, as determined by the department of treasury.

(b) Sales of that brand of beverage in this state in the preceding calendar year were fewer than 500,000 case equivalents, and beverage containers of that brand of beverage were overredeemed by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(10) A symbol, mark, or other distinguishing characteristic that is placed on a designated metal container, designated glass container, or designated plastic container by a manufacturer to allow a reverse vending machine to determine if that container is a returnable container must be unique to this state, or used only in this state and 1 or more other states that have laws substantially similar to this act.

(11) A person that violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 180 days or a fine of not more than $2,000.00, or both. Section 4 does not apply to a violation described in this subsection.

(12) As used in this section:

(a) "Alcoholic beverage" means beer, ale, any other malt drink of whatever alcoholic content, a mixed wine drink, or a mixed spirit drink.

(b) "Brand" means any word, name, group of letters, symbol, or trademark, or any combination of them, adopted and used by a manufacturer to identify a specific flavor or type of beverage and to distinguish that flavor or type of beverage from another beverage produced or marketed by that manufacturer or another manufacturer.

(c) "Designated glass container" means a 12-ounce glass beverage container that contains a symbol, mark, or other distinguishing characteristic that allows a reverse vending machine to determine if the beverage container is or is not a returnable container.

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(d) "Designated metal container" means a 12-ounce metal beverage container that contains a symbol, mark, or other distinguishing characteristic that allows a reverse vending machine to determine if the beverage container is or is not a returnable container.

(e) "Designated plastic container" means a 20-ounce plastic beverage container that contains a symbol, mark, or other distinguishing characteristic that allows a reverse vending machine to determine if the beverage container is or is not a returnable container.

(f) "Glass beverage container" means a beverage container composed primarily of glass.

(g) "Metal beverage container" means a beverage container composed primarily of metal.

(h) "Nonalcoholic beverage" means a soft drink, soda water, carbonated natural or mineral water, or other nonalcoholic carbonated drink.

(i) "Plastic beverage container" means a beverage container composed primarily of plastic.

(j) "Reverse vending machine" means a device designed to properly identify and process empty beverage containers and provide a means for a deposit refund on returnable containers.

History: Add. 2008, Act 389, Eff. Dec. 1, 2009.

Compiler's note: Enacting section 1 of Act 389 of 2008 provides:
"Enacting section 1. This amendatory act takes effect on the date that deposits into the beverage container redemption antifraud fund created in the beverage container redemption antifraud act from money appropriated by the legislature equal or exceed $1,000,000.00."

445.573 Certification of beverage containers.

Sec. 3. (1) To promote the use in this state of reusable beverage containers of uniform design, and to facilitate the return of containers to manufacturers for reuse as a beverage container, the commission shall certify beverage containers which satisfy the requirements of this section.

(2) A beverage container shall be certified if:

(a) It is reusable as a beverage container by more than 1 manufacturer in the ordinary course of business.

(b) More than 1 manufacturer will in the ordinary course of business accept the beverage container for reuse as a beverage container and pay the refund value of the container.

(3) The commission shall not certify more than 1 beverage container of a particular manufacturer in each size classification. The commission shall by rule establish appropriate size classifications in accordance with the purposes set forth in subsection (1), each of which shall include a size range of at least 3 liquid ounces.

(4) A beverage container shall not be certified under this section:

(a) If by reason of its shape or design, or by reason of words or symbols permanently inscribed thereon, whether by engraving, embossing, painting, or other permanent method, it is reusable as a beverage container in the ordinary course of business only by a manufacturer of a beverage sold under a specific brand name.

(b) If the commission finds that its use by more than 1 manufacturer is not of sufficient volume to promote the purposes set forth in subsection (1).

(5) Unless an application for certification under this section is denied by the commission within 60 days after the application is filed, the beverage container shall be deemed certified.

(6) The commission may at any time review certification of a beverage container. If, upon the review, after written notice and hearing afforded to the person who filed the original application for certification of the beverage container under this section, the commission determines that the beverage container is no longer qualified for certification, it shall withdraw certification. Withdrawal of certification shall be effective on a date specified by the commission, but not less than 30 days after written notice to the person who filed the original application for certification of the beverage container under this section, and to the manufacturer referred to in subsection (2).

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978.

Popular name: Bottle Bill

Administrative rules: R 445.1 et seq. of the Michigan Administrative Code.

445.573a Report; filing; form and contents.

Sec. 3a. (1) Not later than March 1, 1991 and not later than March 1 of each year thereafter, a distributor or manufacturer who originates a deposit on a beverage container shall file a report with the department of treasury containing the information required by subsection (2).

(2) The report required to be filed pursuant to subsection (1) shall indicate for the period of January 1, 1990 to December 31, 1990, and for the time period of January 1 to December 31 of each year thereafter, the dollar value of both the total deposits collected by the distributor or manufacturer on beverage containers sold within this state and total refunds made upon beverage containers redeemed by the distributor or manufacturer within this state.

(3) The reports required to be filed pursuant to subsection (1) shall be similar to the following and contain

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the following information:

```
                              REPORT
                DEPOSITS ORIGINATED AND REFUNDS GRANTED
                          ON BEVERAGE CONTAINERS
                                Reporting Period: ____________
Company Name: _________________________________
Company Address: ______________________________
                      Number and Street

                 ______________________________
                      City, State, Zip
$__________________ - $_______________________ =  $____________
 (Value of Deposits    (Value of Refunds Made)     (Difference)
     Originated)
$______________ - $_______________________ = $_________________
  (Difference)     (Overredemption Credit,    (Amount Owed to
                        if Applicable)          Department of
                                                  Treasury)
The undersigned states that the above information is true and
accurate.

                             _________________________________
                             Signature - Owner or President

                             _________________________________
                             Date
```

History: Add. 1989, Act 148, Eff. July 27, 1989.

Popular name: Bottle Bill

445.573b Unclaimed bottle deposits; audit, assessment, and collection by department of treasury; payment by underredeemer; overredemption credit; applying credit against prior years; definitions; report.

Sec. 3b. (1) The department of treasury may audit, assess, and collect the amount of money reflecting unclaimed bottle deposits owed to this state, and enforce the obligation to pay the amount of money reflecting unclaimed bottle deposits owed to this state, in the same manner as revenues and according to the provisions of 1941 PA 122, MCL 205.1 to 205.31.

(2) Not later than March 1, 1991 and not later than March 1 of each year thereafter, an underredeemer shall pay to the department of treasury that amount of money by which its annual total value of deposits exceeds its annual total value of refunds made on redeemed beverage containers, subject to the overredemption credit contained in this section.

(3) After March 1, 1991, an underredeemer who becomes an overredeemer in a subsequent year may credit the value of the overredemption in order to reduce the amount of money owed to the department of treasury under this section in 1 or more subsequent years as a result of that person again becoming an underredeemer. The value of the overredemption may be carried forward for not more than 3 years or until the credit granted in this section is completely depleted, whichever occurs first.

(4) A manufacturer who no longer originates deposits may carry the value of an overredemption back for prior years in order to utilize its credit, and reduce the amount of underredemption owed to the department of treasury under this section on a 1-time basis only. Utilization of this 1-time credit may be applied against underredemption amounts owed for reporting years commencing in 1990.

(5) As used in this section:

(a) “Overredeemer” means a distributor or manufacturer whose annual total value of deposits collected on beverage containers sold within this state is less than the annual total value of refunds made upon beverage containers redeemed within this state.

(b) “Underredeemer” means a distributor or manufacturer whose annual total value of deposits collected on beverage containers sold within this state exceeds annual total value of refunds made upon beverage containers redeemed within this state.

(6) In addition to the report prescribed in section 3a, if an underredeemer purchases empty returnable containers from an overredeemer, that purchase shall be reported by the underredeemer as a “refund made” and shall be reported by the overredeemer as a “deposit originated” in the report prescribed by section 3a. The report made by an underredeemer shall include the name and address of each overredeemer and the refund value of the empty returnable beverage containers purchased from each overredeemer. The report made by an overredeemer shall include the name and address of each underredeemer who purchased the returnable

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containers from that overredeemer and the refund value of the empty returnable beverage containers sold. The total consideration paid by an underredeemer to an overredeemer as authorized by this subsection shall equal the redemption value of the container.

(7) A purchase or sale made under subsection (6) during January of each year shall be included in the report for the previous calendar year only.

History: Add. 1989, Act 148, Eff. July 27, 1989;—Am. 1996, Act 384, Imd. Eff. July 24, 1996;—Am. 1998, Act 473, Eff. Apr. 1, 1999.

Popular name: Bottle Bill

445.573c Bottle deposit fund; creation; administration; deposits; annual disbursement; report of information; rules.

Sec. 3c. (1) There is created in the department of treasury a bottle deposit fund which is a revolving fund administered by the department of treasury. The money in the bottle deposit fund shall not revert to the general fund.

(2) The amount paid to the department of treasury by underredeemers shall be deposited by the department of treasury in the bottle deposit fund created in subsection (1) for annual disbursement by the department of treasury in the following manner:

(a) Seventy-five percent to the cleanup and redevelopment trust fund created in section 3e.

(b) Twenty-five percent to dealers to be apportioned to each dealer on the basis of the number of empty returnable containers handled by a dealer as determined by the department of treasury.

(3) Not later than June 1 of each year, the department of treasury shall publish and make available to the public information related to section 3b(1) and send a report of that information to the legislature.

(4) The department of treasury may promulgate rules to implement sections 3a to 3d pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws, if the department of treasury determines that rules are needed to properly implement and administer sections 3a to 3d.

History: Add. 1989, Act 148, Eff. July 27, 1989;—Am. 1996, Act 73, Imd. Eff. Feb. 26, 1996;—Am. 1996, Act 384, Imd. Eff. July 24, 1996.

Popular name: Bottle Bill

445.573d Unclaimed deposits.

Sec. 3d. Unclaimed deposits on returnable containers are considered to be the property of the person purchasing the returnable container and are not the property of the distributor or manufacturer who originated the deposit.

History: Add. 1989, Act 148, Eff. July 27, 1989.

Popular name: Bottle Bill

445.573e Cleanup and redevelopment trust fund.

Sec. 3e. (1) The cleanup and redevelopment trust fund is created within the state treasury.

(2) The state treasurer may receive money or other assets from any source for deposit into the trust fund. The state treasurer shall direct the investment of the trust fund. The state treasur er shall credit to the trust fund interest and earnings from fund investments.

(3) Money in the trust fund at the close of the fiscal year shall remain in the trust fund and shall not lapse to the general fund.

(4) The state treasurer shall annually disburse the following amounts from the trust fund:

(a) For each of the state fiscal years 1996-1997, 1997-1998, and 1998-1999, up to $15,000,000.00 each year of money in the trust fund to the cleanup and redevelopment fund created in section 20108 of part 201 (environmental remediation) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being section 324.20108 of the Michigan Compiled Laws.

(b) In addition to the disbursements under subdivision (a), each state fiscal year, 80% of the revenues received by the trust fund from disbursements under section 3c to the cleanup and redevelopment fund and 10% to the community pollution prevention fund created in section 3f.

(5) All money in the trust fund that is not disbursed pursuant to subsection (4) shall remain in the trust fund until the trust fund reaches an accumulated principal of $200,000,000.00. After the trust fund reaches an accumulated principal of $200,000,000.00, interest and earnings of the trust fund only shall be expended, upon appropriation, for the purposes specified in section 20113(4) of part 201 (environmental remediation) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being section 324.20113 of the Michigan Compiled Laws.

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(6) As used in this section, "trust fund" means the cleanup and redevelopment trust fund created in subsection (1).

History: Add. 1996, Act 384, Imd. Eff. July 24, 1996.

Popular name: Bottle Bill

445.573f Community pollution prevention fund.

Sec. 3f. (1) The community pollution prevention fund is created within the state treasury.

(2) The state treasurer may receive money or other assets from any source for deposit into the community pollution prevention fund. The state treasurer shall direct the investment of the community pollution prevention fund. The state treasurer shall credit to the community pollution prevention fund interest and earnings from fund investments.

(3) Money in the community pollution prevention fund at the close of the fiscal year shall remain in the community pollution prevention fund and shall not lapse to the general fund.

(4) The department of environmental quality shall expend interest and earnings of the community pollution prevention fund only, upon appropriation, for grants for the purpose of preventing pollution, with an emphasis on the prevention of groundwater contamination and resulting risks to the public health, ecological risks, and public and private cleanup costs. The department of environmental quality shall enter into contractual agreements with grant recipients, who shall include county governments, local health departments, municipalities, and regional planning agencies. Activities to be performed by grant recipients and program objectives and deliverables shall be specified in the contractual agreements. Grant recipients shall provide a financial match of not less than 25% nor more than 50%. Not more than $100,000.00 may be granted in any fiscal year to a single recipient. Eligible pollution prevention activities include all of the following:

(a) Drinking water wellhead protection, including the delineation of wellhead protection areas and implementation of wellhead protection plans pursuant to the safe drinking water act, Act No. 399 of the Public Acts of 1976, being sections 325.1001 to 325.1023 of the Michigan Compiled Laws.

(b) The review of pollution incident prevention plans prepared by, and the inspection of, facilities whose storage or handling of hazardous materials may pose a risk to the groundwater.

(c) The identification and plugging of abandoned wells other than oil and gas wells.

(d) Programs to educate the general public and businesses that use or handle hazardous materials on pollution prevention methods, technologies, and processes, with an emphasis on the direct reduction of toxic material releases or disposal at the source.

(5) The department of environmental quality shall annually prepare a report summarizing the grants made under this section, contractual commitments made and achieved, and a preliminary evaluation of the effectiveness of this section not later than September 30, 1997, and September 30 of each year thereafter, and shall provide a copy of this report to the chairs of the house and senate appropriations subcommittees for the department of environmental quality.

History: Add. 1996, Act 384, Imd. Eff. July 24, 1996.

Popular name: Bottle Bill

445.574 Violation; penalty; separate offense.

Sec. 4. Except as provided in sections 4a and 4b, a person, dealer, distributor, or manufacturer who violates this act is subject to a fine of not less than $100.00 or more than $1,000.00 and is liable for the costs of prosecution. Each day a violation occurs, a separate offense is committed.

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978;—Am. 1982, Act 39, Imd. Eff. Mar. 16, 1982;—Am. 1998, Act 473, Eff. Apr. 1, 1999.

Popular name: Bottle Bill

445.574a Prohibited return to dealer, distributor, or manufacturer; violation; penalty; exceptions; restitution; action brought by attorney general or county prosecutor.

Sec. 4a. (1) A person shall not return or attempt to return to a dealer for a refund 1 or more of the following:

(a) A beverage container that the person knows or should know was not purchased in this state as a filled returnable container.

(b) A beverage container that the person knows or should know did not have a deposit paid for it at the time of purchase.

(2) A person who violates subsection (1) is subject to 1 of the following:

(a) If the person returns 25 or more but not more than 100 nonreturnable containers, the person may be ordered to pay a civil fine of not more than $100.00.

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(b) If the person returns more than 100 but fewer than 10,000 nonreturnable containers, or violates subdivision (a) for a second or subsequent time, the person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both.

(c) If the person returns more than 100 but fewer than 10,000 nonreturnable containers for a second or subsequent time, the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both.

(d) If the person returns 10,000 or more nonreturnable containers, the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both.

(3) A dealer shall not knowingly accept from and pay a deposit to a person for a nonreturnable container or knowingly deliver a nonreturnable container to a distributor for a refund. A dealer that violates this subsection is subject to 1 of the following:

(a) If the dealer knowingly accepts from and pays a deposit on 25 or more but not more than 100 nonreturnable containers to a person, or knowingly delivers 25 or more but not more than 100 nonreturnable containers to a distributor for a refund, the dealer may be ordered to pay a civil fine of not more than $100.00.

(b) If the dealer knowingly accepts from and pays a deposit on more than 100 but fewer than 10,000 nonreturnable containers to a person, or knowingly delivers more than 100 but fewer than 10,000 nonreturnable containers to a distributor for a refund, the dealer is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both.

(c) If the dealer knowingly accepts from and pays a deposit on more than 100 but fewer than 10,000 nonreturnable containers to a person, or knowingly delivers more than 100 but fewer than 10,000 nonreturnable containers to a distributor for a refund, for a second or subsequent time, the dealer is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both.

(d) If the dealer knowingly accepts from and pays a deposit on 10,000 or more nonreturnable containers to a person, or knowingly delivers 10,000 or more nonreturnable containers to a distributor for a refund, the dealer is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both.

(4) A distributor shall not knowingly accept from and pay a deposit to a dealer for a nonreturnable container or knowingly deliver a nonreturnable container to a manufacturer for a refund. A distributor that violates this subsection is subject to 1 of the following:

(a) If the distributor knowingly accepts from and pays a deposit on 25 or more but not more than 100 nonreturnable containers to a dealer, or knowingly delivers 25 or more but not more than 100 nonreturnable containers to a manufacturer for a refund, the distributor may be ordered to pay a civil fine of not more than $100.00.

(b) If the distributor knowingly accepts from and pays a deposit on more than 100 but fewer than 10,000 nonreturnable containers to a dealer, or knowingly delivers more than 100 but fewer than 10,000 nonreturnable containers to a manufacturer for a refund, the distributor is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both.

(c) If the distributor knowingly accepts from and pays a deposit on more than 100 but fewer than 10,000 nonreturnable containers to a dealer, or knowingly delivers more than 100 but fewer than 10,000 nonreturnable containers to a manufacturer for a refund, for a second or subsequent time, the distributor is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both.

(d) If the distributor knowingly accepts from and pays a deposit on 10,000 or more nonreturnable containers to a dealer, or knowingly delivers 10,000 or more nonreturnable containers to a manufacturer for a refund, the distributor is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both.

(5) A dealer or distributor does not violate subsection (3) or (4) if all of the following conditions are met:

(a) An employee of the dealer or distributor commits an act that violates subsection (3) or (4).

(b) At the time the employee commits the act that violates subsection (3) or (4), the dealer or distributor had in force a written policy prohibiting its employees from knowingly redeeming nonreturnable containers.

(c) The dealer or distributor did not or should not have known of the employee's act in violation of subsection (3) or (4).

(6) In addition to the penalty described in this section, the court shall order a person found guilty of a misdemeanor or felony under this section to pay restitution equal to the amount of loss caused by the violation.

(7) The attorney general or a county prosecutor may bring an action to recover a civil fine under this section. A civil fine imposed under this section is payable to this state and shall be credited to the general

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fund.

History: Add. 1998, Act 473, Eff. Apr. 1, 1999;—Am. 2008, Act 384, Eff. Mar. 31, 2009.

Popular name: Bottle Bill

445.574b Posting notice on dealer's premises; failure to comply; penalty.

Sec. 4b. (1) In that portion of the dealer's premises where returnable containers are redeemed, a dealer shall post a notice that says substantially the following: "A person who returns out-of-state nonreturnable containers for a refund is subject to penalties of up to 5 years in jail, a fine of $5,000.00, and restitution.".

(2) A dealer who fails to comply with this section is subject to a civil fine of not more than $50.00.

History: Add. 1998, Act 473, Eff. Apr. 1, 1999;—Am. 2008, Act 385, Eff. Mar. 31, 2009.

Popular name: Bottle Bill

445.575 Repeal of MCL 445.191.

Sec. 5. Act No. 142 of the Public Acts of 1971, being section 445.191 of the Compiled Laws of 1970, is repealed.

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978.

Popular name: Bottle Bill

445.576 Effective date.

Sec. 6. This act shall take effect two years after it becomes law.

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978.

Popular name: Bottle Bill

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