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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INTRODUCTION

To be clear: Michigan has made it a crime to sell in Ohio or almost any other State the same Diet Coke, Pepsi, or Dr. Pepper that is sold in Michigan. Indeed, for beverages headed for sale in Michigan, Michigan's law criminalizes the diversion of those beverages to any other State for disaster relief. *See* M.C.L. § 445.572a(10) (prohibiting any "use[]" of Michigan-compliant beverages in other States). And undisputedly safe and lawful packaged beverage products sold in all or almost all other States cannot be sold in Michigan. Michigan has thrown up economic walls at its borders that force interstate commerce in beverages to stop and restart outside Michigan. Michigan beverage products cannot come out; and packaged beverages from other States cannot come in. Michigan has forbidden interstate companies to provide a national packaged beverage product. There must be Michigan Coke and rest-of-the-Nation Coke; Michigan Pepsi and rest-of-the-Nation Pepsi.

It is no surprise that, nowhere in their 96 pages of combined briefing, do Michigan or the Michigan Wholesalers cite a single case upholding a law remotely like Michigan's, which *both* prescribes what products can be sold in-state *and* outlaws the sale of that same product in the other States of the Union. That is because Michigan has done exactly what States under the Articles of Confederation did: it has made itself an economic island withdrawn from the national commerce

stream in beverages. And if Michigan can do that for beverages, it can do it for every other product. So can every other State. There are no limits to the fragmented and crumbling conception of interstate commerce that Michigan propounds in defense of its law.

Michigan, nevertheless, insists that its law is not extraterritorial because manufacturers can use any packaging they want *except* Michigan packaging (Br. 23). That "except" clause, however, gives up the ballgame. Being free to use in Ohio, Indiana, or Alaska only the packaging that Michigan *allows* the companies to use in those States is the very essence of extraterritorial regulation. The Michigan Attorney General's representation that it will permit companies to sell Michigan-compliant beverages in nine other, geographically remote Bottle Bill States makes things worse, not better. Putting aside the plain textual barriers to that reading of the law, the notion that Michigan can pick and choose what products can be sold in which other States walks smack into Michigan's own admission that the Commerce Clause prohibits "compel[ling] [States] to negotiate with each other regarding favored or disfavored status for their own citizens." MI Br. 8 (quoting *Granholm v. Heald*, 544 U.S. 460, 472 (2005)).

Michigan's effort to downplay its law's overt discrimination against interstate commerce fares no better. Michigan's primary defense is to insist that the Commerce Clause, actually, does not care about protecting interstate commerce;

it is exclusively concerned with in-state versus out-of-state parochial discrimination. Binding Supreme Court precedent says the opposite, making clear that States also cannot impose unequal burdens on businesses just because they engage in commerce in more than one State.

In any event, Michigan confesses (Br. 40) that it has imposed this exceptional burden on interstate commerce because it prefers not to impose "a costly burden [on] [Michigan] retailers" to solve a Michigan "fraud" or revenue-decrease problem. But whatever the nature of that problem, it is *not* caused by the out-of-state manufacturers of beverage products who bear all the brunt of this law, but by customers in Michigan stores redeeming empty bottles with Michigan retailers weeks or months down the road. That is precisely the type of law that "benefit[s] in-state businesses while penalizing out-of-state businesses" that Michigan admits (Br. 4) is unconstitutional. While Michigan's desire for revenue is unsurprising, its desire to reconfigure its recycling law into a money-generator for the state treasury is no sufficient excuse for withdrawing Michigan from the national commerce stream and forcing companies engaged in interstate commerce to withdraw too.

ARGUMENT

I. THE UNIQUE-PACKAGING MANDATE UNCONSTITUTIONALLY REGULATES BEVERAGE SALES EXTRATERRITORIALLY

A. The Unique-Packaging Mandate Regulates Products In Other States

The very purpose and intended design of Michigan's unique-packaging mandate is to prescribe, on pain of criminal penalty, what beverage packaging can be used and not used in the other 49 States. Indeed, Michigan expressly presumes to dictate what packaged beverages "can *** be used" in other Bottle Bill States based on its approval or not of each State's container program (MI Br. 30). The unique-packaging mandate thus has both the intended and the "practical effect" of "control[ling] conduct beyond the boundaries of the State," *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989), and therefore is "virtually per se invalid" because it regulates commerce extraterritorially, *International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 645 (6th Cir. 2010). *See Healy*, 491 U.S. at 335-340 (invalidating statute as extraterritorial without balancing burdens and benefits). Michigan's and its Wholesalers' efforts to escape that straightforward and intended extraterritorial reach of the law fail.

First, Michigan argues (Br. 23) that the law is not extraterritorial because companies are "free to label their products however they see fit in other states," except they must "label their bottles differently for sale in Michigan." But that confesses, rather than refutes, the extraterritoriality problem. Companies *cannot*

label beverages outside Michigan as "they see fit," and in particular they cannot have a single regional or national packaged beverage product, because it is a crime to use Michigan-compliant packaging or to sell Michigan-labeled beverages in other States. A statute commanding the use "in this state" of a different label from what "you [use] outside it" also "carries the implied command" to use "outside this state" a different label from what "you [use] inside it." *See K-S Pharmacies, Inc. v. American Home Prods. Corp.*, 962 F.2d 728, 730 (7th Cir. 1992) ("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.'"). That "latter, implied (but inseparable) command *** is a forbidden attempt to exercise extraterritorial power." *Id.* They are two sides of the same unique-packaging coin.

To be sure, some activity in Michigan is also a necessary element of the crime (MI Br. 23-24). The Due Process Clause requires such a Michigan nexus. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 306-307 (1992). But compliance with that Due Process Clause directive does not obviate the Commerce Clause problem. *Id.* at 305.

Michigan attempts (Br. 23, 28) to downplay the inherently extraterritorial reach of its command that labels in other States differ by insisting that Michigan packaging need only react to out-of-state packaging. But that is the same chicken-

and-egg argument that the Supreme Court flatly rejected in its price-affirmation decisions. "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." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583 (1986). Indeed, many extraterritorial laws invalidated by the Supreme Court nominally regulated only in-state conduct. *See id.* at 583 (invalidating law "addressed only to sales of liquor in New York"); *Healy*, 491 U.S. at 328 (invalidating law requiring affirmation regarding prices within Connecticut). So too here, a packaged beverage sitting on store shelves in Michigan is rendered unlawful only when the packaging ceases to be "unique"—which happens only when a Michigan-compliant beverage is sold in another State.

When a state law "directly tie[s]" in-state requirements to a manufacturer's out-of-state conduct, that law has an unconstitutional "direct effect on the [manufacturers'] out-of-state *** conduct." *International Dairy*, 622 F.3d at 647; *see Healy*, 491 U.S. at 340 (statutes "link[ing] in-state prices" to out-of-state prices represent "potential regional and even national regulation *** reserved by the Commerce Clause to the Federal Government"). It thus blinks reality to contend, as Michigan does, that making it a crime for companies to use in other States the same label that they use in Michigan is not an extraterritorial dictate of what labels may be used in other States. *See* Chamber of Commerce Amicus Br. 13 ("[T]he

extraterritorial nature of the statue in this case is not just a matter of 'practical effect,' ***. It is the openly *intended* operation of Section 445.572a.").

At bottom, Michigan's command that other States' packaging be different is a nationwide directive against the use of a national label for a national product moving in interstate commerce. Because that has "'the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State,'" the law "violate[s] the Commerce Clause." *International Dairy*, 622 F.3d at 647 (quoting *Healy*, 491 U.S. at 337).[1]

Second, Michigan invokes *National Electric Manufacturers Association v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001), to argue that, if "the statute may be said to 'require'" certain packaging outside Michigan, "'it is only because manufacturers are unwilling to modify their production and distribution systems to differentiate'" between Michigan-bound and non-Michigan-bound beverages. MI Br. 27. But this case is exactly the opposite of *National Electric*. In that case, Vermont required the disclosure of certain information about light bulbs on product labels, 272 F.3d at 107, but then left it entirely to the manufacturers whether to use that same label in the national commerce stream or to use a different label in other

[1] Michigan does not dispute that its unique-mark requirement constitutes a labeling and packaging requirement. The inkjetting of cans occurs in the packaging process and cannot feasibly be changed without complete repackaging in a new can, just as bottled drinks would have to be either rebottled or entirely relabeled.

States, *id*. at 110. That is a commonplace form of regulation fully permitted by the Commerce Clause.

Michigan's law is the very antithesis of such choice. Beverage companies have *no* choice to use the Michigan label in other States; doing so is a crime.

For that same reason, Michigan's reliance (Br. 26-27) on *International Dairy* also fails. The duty imposed by Ohio law was limited to the mandated disclosure of consumer information, and the law "ha[d] no bearing on how [producers] are required to label their products in other states (or vice versa)." 622 F.3d at 647. Under Michigan's law, by contrast, "how the [manufacturers] label their products in [Michigan]" directly controls and constrains "how they are required to label their products in other states (or vice versa)." *Id*.

Michigan simply fails to understand that what makes its law extraterritorial is not the labeling or packaging requirement by itself. It is that the law commands the manufacture and sale of a "unique[ly]" packaged product in Michigan that *Michigan law says* cannot legally be sold in any other State (at least without Michigan's approval). No case that Michigan or the Wholesalers cites bears any resemblance to that.

Finally, Michigan argues (Br. 24) that this law "differs radically" from laws the Supreme Court has found to be extraterritorial because it does not "force an out of state merchant to seek regulatory approval in one State before undertaking a

transaction in another." But that is exactly what Michigan's law does. The state-by-state bestowal of favored or disfavored trading partner status is precisely what Michigan's "substantially similar" provision dispenses, M.C.L. § 445.572a(10). Quite simply, a law can only pick and choose in which States packaged products "may *** be used" (MI Br. 14; *see id.* at 27, 30) if it exercises regulatory approval and control over those out-of-state sales.

B. No In-State Connection Or Impact Justifies The Extraterritorial Regulation

Michigan (Br. 28-29) and the Michigan Wholesalers (Br. 25, 31-32) argue that "the Supreme Court [and] other circuits" have recognized an "in-state nexus and impact" exception to extraterritoriality. That is simply wrong. "[T]he Commerce Clause *** precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy,* 491 U.S. at 336; *see International Dairy*, 622 F.3d at 645 (same).

The cases that Michigan cites are inapt. They simply identify regulations that are fundamentally territorial, notwithstanding some collateral impact outside the State's borders. In *CTS Corporation v. Dynamics Corporation*, 481 U.S. 69 (1987), for example, the Supreme Court held only that it is proper territorial regulation for a State to "regulate[] voting rights only in the corporations it has created" within the State. *Id.* at 89.

The First Circuit's vacated decision in *IMS Health, Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010), *vacated on other grounds*, 131 S. Ct. 3091 (2011) (MI Br. 29), is no help either since that case held only that a law did not regulate wholly extraterritorial transactions when its operation "affect[ed] only Maine prescribers" and it "involv[ed] [the regulating State's] own professional licensees." *Id.* at 29-30.

Michigan's law, by contrast, lacks any such close territorial connection or correlated nexus. Instead, Michigan's law regulates the initial sale (or donation) and packaging of beverages in 49 other States by out-of-state beverage companies, while the only proffered in-state problem (MI Br. 29) is improper redemptions of some tiny subset of used containers at reverse vending machines by customers and retailers within Michigan. That is a logical disconnect, not a nexus. It may well be more politically expedient for Michigan to put the burden of its redemption problem on wholly innocent, out-of-state national beverage companies rather than on in-state retailers or in-state law enforcement. *See* MI Br. 39 (defending law as allowing the State to avoid "increasing the retailers' costs"). However, the Commerce Clause was adopted to prevent precisely such "parochial legislation" from "isolating the State from the national economy." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

C. The Law Poses A Serious Problem Of Inconsistent Regulation

"[I]f [Michigan] may impose such regulations, so may other States." *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality). Accordingly, the extraterritorial effect of Michigan's law must be evaluated by considering "what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336. If multiple States adopted state-exclusive product laws like Michigan's, whether for beverages or any other products, "interstate commerce *** would be thoroughly stifled." *Edgar*, 457 U.S. at 642. By definition and design, there could be no interstate commerce if every State mandated state-exclusive products and forbade their use in other States. Such a patchwork of "competing and interlocking local economic regulation," *Healy*, 491 U.S. at 337, would destroy the national common market at least as completely as any concededly unconstitutional tariff.

Michigan's and the Michigan Wholesalers' efforts to backhand the real-world consequences of their constitutional theory do not work.

First, Michigan argues (Br. 30) that the Commerce Clause is only concerned with "inconsistent regulation[s]" if two States' laws are irreconcilable. Until a second State legislates, Michigan contends, States get a free pass on commerce-impeding legislation. The Supreme Court says otherwise. The retrospective price affirmation statutes held unconstitutional in *Healy* looked only to past out-of-state

prices and accordingly created no risk of irreconcilable obligations under multiple State laws. The Supreme Court nevertheless held that they were impermissibly extraterritorial. 491 U.S. at 343; *see Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 667 (7th Cir. 2010) (unconstitutional inconsistency includes one State's regulation of conduct that another State chooses not to regulate).

Second, Michigan and its Wholesalers are likewise wrong in arguing that the Commerce Clause requires that more than one similar, commerce-stifling state law be in effect before the possibility of a proliferation of similar state laws may even be considered. They rely on a decades-old concurring opinion in the Supreme Court that was specifically rejected by the majority opinion that binds this Court. *Compare* MI Br. 30 (quoting *C&A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 406-407 (1994) (O'Connor, J., concurring)), *with Healy*, 491 U.S. at 337 (considering the effect of the price affirmation law "in conjunction with the many other beer-pricing and affirmation laws that have been *or might be* enacted throughout the country") (emphasis added); *Edgar*, 457 U.S. at 642 (plurality) (considering the effect on interstate commerce if other States were to adopt similar laws without identifying any such laws in effect).

In any event, there is nothing "hypothetical" (MI Br. 30; Wholesalers' Br. 33) about the risk of commerce-fracturing legislation in this case. Michigan is just one of three States that have passed similar, state-exclusive packaging laws for

beverages in recent years. *See* Association Opening Br. 35 & n.6 (discussing New York and Vermont laws). New York's law would be in effect today had it not been promptly and permanently invalidated on Commerce Clause grounds. Orders, *International Bottled Water Ass'n v. Paterson*, No. 09-cv-4672 (S.D.N.Y. May 29, 2009 & Oct. 23, 2009) (R. No. 7, Association's Summary Judgment Br., Exhibits G & H); *see* Chamber of Commerce Amicus Br. 20-22.

Third, Michigan insists (Br. 27, 30) that the only consequence of more state laws would be that Michigan-packaged beverages could then be sold in additional "substantially similar" States. But the notion that the Commerce Clause would smile upon a patchwork of state laws that divided the national economy into trade zones for their state-exclusive products based on which States have reciprocal most-favored-trading partner status stands constitutional history and precedent on their head. If "[e]ach State, or separate confederacy, [c]ould pursue a system of commercial policy peculiar to itself," that "would occasion distinctions, preferences, and exclusions, which would beget discontent," THE FEDERALIST NO. 7 (Alexander Hamilton), and produce the very same "economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation," *Heald*, 544 U.S. at 472. *See id*. at 473 (noting that "a multiplication of preferential trade areas" is "destructive of the very purpose of the Commerce Clause").

In any event, what Michigan overlooks is that its theory of the Commerce Clause does not open the door solely to laws that mimic Michigan's own preferred model, but would instead empower every State to stake out its own exclusive-product and border-closing regimes, whether for beverages or automobiles or any other product. Indeed, the Michigan Wholesalers prove the point by arguing that New York's version of a state-exclusive packaging mandate differed from Michigan's. Wholesalers' Br. 35-36. That is precisely the problem.

Finally, Michigan's supposition that its law allows the use of Michigan-packaged beverages in the nine other Bottle Bill States defies the law's plain text. Michigan's law expressly requires a package marking that allows a reverse vending machine to determine if a container is "returnable." M.C.L. § 445.572a(12)(c)-(e). The law then defines "returnable" as a container for which "a deposit of at least 10 cents has been paid." M.C.L. § 445.571(d). No other Bottle Bill State requires "a deposit of at least 10 cents" on like containers. And since no other States' containers are "returnable" in Michigan, their return would reduce Michigan's deposit revenue just the same as containers from a non-Bottle Bill State and would be just as fraudulent. In short, if Michigan's law means what it says, Michigan-compliant packaged beverages cannot be sold in any other State at all.[2]

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[2] Michigan wisely claims no deference to its atextual reading of a criminal law, *see* Br. 14, and prosecutorial discretion cannot repair a constitutional flaw in a criminal law, *see United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010). The

D. The Unique-Packaging Mandate Triggers Additional Extraterritoriality Problems

Michigan's law runs into additional constitutional extraterritoriality pitfalls at every turn, for which Michigan has no answer.

First, the Constitution guarantees "the autonomy of the individual States within their respective spheres," *Healy*, 491 U.S. at 336, and forbids "the projection of one state regulatory regime into the jurisdiction of another State" that Michigan has committed here, *id*. at 337. *Cf. BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 571 (1996) ("[O]ne State's power to impose burdens on the interstate market *** is also constrained by the need to respect the interests of other States.").

Second, it is irrelevant that the national beverage market "is not uniquely subject to the need for uniformity" in regulation. MI Br. 28. Neither is the market for beer (*Healy*), liquor (*Brown-Forman*), or title loans (*Midwest Title Loans*), yet laws in those areas were invalidated as impermissibly extraterritorial.

Finally, contrary to Michigan's (Br. 25) and the Wholesalers' (Br. 31) contentions, Michigan's law is protectionist. Michigan's admitted shifting to out-of-state companies of the economic burden and cost of solving an in-state retailer and customer fraud problem (MI Br. 39-40), while attempting to maximize a

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Wholesalers argue (Br. 33-34) that deference is owed to Michigan's "plausible" litigation position, but fail to explain what is ambiguous about "10 cents."

revenue stream paid by those out-of-state companies (25% of which is then channeled to those same in-state retailers), is raw favoritism for local interests.[3]

II. THE UNIQUE-PACKAGING MANDATE DISCRIMINATES AGAINST INTERSTATE COMMERCE

A. The Commerce Clause Forbids Discrimination Against Interstate Commerce Based On Its Interstate Character

Michigan's central argument (Br. 32) is that the Commerce Clause cares only about discrimination in terms of "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." MI Br. 32. Not so. Their argument simply confuses the more common form of a violation with the scope of the Constitution's prohibition.

The Supreme Court, however, does not share that confusion, having specifically held that the dormant Commerce Clause equally proscribes discrimination against those who engage in interstate commerce—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"—even if the law treats in-state and out-of-state companies the same. *Healy*, 491 U.S. at 341. The Commerce Clause thus precludes States from "'plac[ing] burdens on the flow of commerce across its borders that commerce

[3] Protectionism, in any event, is not a necessary element of an extraterritorial law. *See International Dairy*, 622 F.3d at 645 (extraterritorial laws represent "a second category of regulation that is also virtually per se invalid" in "addition to regulations that are protectionist").

wholly within those borders would not bear.'" *American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (alteration in original). Because the unique-packaging mandate "establishes a substantial disincentive for companies doing business in [Michigan] to engage in interstate commerce, essentially penalizing [Michigan manufacturers] if they seek [other]-state markets and out-of-state shippers if they choose to sell both in [Michigan] and in [another] State," *Healy*, 491 U.S. at 341, the law unconstitutionally discriminates against interstate commerce.

In attempting to downplay the law's discrimination, neither Michigan nor its Wholesalers even acknowledges, much less answers, that Supreme Court precedent. Yet when Michigan "penaliz[es] [manufacturers] if they seek border-state markets," *Healy*, 491 U.S. at 341, it fractures the common national market just as surely as if it had enacted protectionist trade barriers. Both "divide and disrupt the market" all the same. *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 285 (1987).

Michigan, moreover, has not simply adopted incentives for companies to confine themselves to single-state operations and sales. It forces companies to do so with the heavy hammer of criminal penalties. Beverage companies wishing to do business in Michigan must either withdraw from interstate commerce completely, or they must create segregated and redundant products and production,

distribution, warehousing, transportation, and marketing processes—thereby surrendering the benefits and efficiencies that come from having a "national 'common market,'" *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977).

In any event, the unique-packaging mandate does favor local interests at the expense of out-of-state interests. Local interests need not be the economic prospects of competitors. Michigan may not, for example, favor the local environment by burdening out-of-state companies, which the unique-packaging mandate does on its face. *Compare* M.C.L. § 445.573c(2)(a), *with Philadelphia*, 437 U.S. at 628 (invalidating law that "impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space").

Nor may Michigan favor local production, which also results from the unique-packaging mandate. *See C&A Carbone,* 511 U.S. at 391-392 (collecting cases in which "local processing requirements" have been invalidated). The mandate makes it substantially more costly for manufacturers to consolidate production for Michigan in out-of-state bottling plants that also serve other markets because of the burdensome necessity of switching back and forth between Michigan-exclusive and all-the-other-States production and distribution operations, which defeats the very purpose and cost savings of consolidation.

Finally, and most certainly, States may not impose burdens exclusively on those engaged in interstate commerce to avoid "increasing the [purely in-state] retailers' costs" of combating a purported retail fraud problem in which those interstate companies play no role. MI Br. 39.

B. The Interstate-Sales Prohibition Is Not A Legitimate, Non-Discriminatory Labeling Requirement

Michigan (Br. 33) and the Michigan Wholesalers (Br. 40-41) argue that the disparate treatment of interstate commerce cannot be discrimination or else the Commerce Clause would invalidate all state labeling requirements. That makes no sense. What renders Michigan's law unconstitutionally discriminatory is not the state-law-compelled inclusion of information or markings on product labels. That is routine. Instead, what renders Michigan's law constitutionally infirm is that, having imposed a packaging requirement, Michigan goes further and also criminally prohibits and constrains the use of that same packaged product in all of the other 49 States. That is not a labeling requirement; that is an interstate-sales prohibition, affecting only companies engaged in interstate commerce precisely because they sell their products in more than one State. And that makes all the constitutional difference.

After all, an ordinary state labeling requirement by itself imposes no differential burden on interstate and single-state companies. Every manufacturer selling a product in the State bears the cost of conforming its packaging to the law,

and interstate manufacturers retain the discretion to have a single, uniform national label or packaging, as well as regional or national production, distribution, warehousing, and transportation operations for a single national or regional product. Any increased costs incurred to create separately packaged products arise as a matter of independent, private choice, not state compulsion. *See International Dairy*, 622 F.3d at 647; *Sorrell*, 272 F.3d at 110.

Not so here. Michigan forbids—criminalizes—any such choice. The mandate's requirement that companies develop state-specific production and distribution operations is direct discrimination against interstate business precisely because of its interstate character. It is not the natural (and valid) result of different State regulatory choices about the information to be included in beverage packaging by both inter- and intrastate firms. Since Michigan's law "disadvantag[es] interstate commerce just because such commerce straddles political boundaries"—the packaged beverage is banned solely because it is sold in other States—the law transgresses the "commerce clause-based national interest *** in not disadvantaging interstate commerce just because it is interstate." Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1189, 1190 (1986).

It is undoubtedly true that a "company that chooses to operate in more than one state must be prepared to conform to various regulations." Wholesalers' Br.

32. It is also irrelevant. Here, Michigan has legislatively compelled beverage companies that choose to operate in more than one State to cease and desist their engagement in interstate commerce. If that is Michigan's idea of a business "regulation," then that regulation—like New York's unique-mark requirement and other forms of state-isolating economic practices engaged in by the Confederated States under the Articles of Confederation—must take a backseat to the Commerce Clause's supervening command.

C. Michigan Has No Answer To The Law's Discriminatory Aspects

Michigan does not even dispute the three ways in which its law unconstitutionally discriminates against interstate commerce in effect.

First, the law requires companies engaged in interstate commerce to maintain and operate dual Michigan-only and rest-of-the-Nation production and distribution operations for dual Michigan-only and rest-of-the-Nation products. But a State may not mandate state-specific operations that drive up the cost of doing business only for interstate companies. *See Heald*, 544 U.S. at 474 (New York law impermissibly required out-of-state wineries "to establish a distribution operation in New York" as an "additional step[] that drive[s] up the cost" only for out-of-state companies).

Second, the law strips from interstate companies the competitive advantage they would otherwise enjoy from their interstate economies of scale, shifting that

advantage to intrastate businesses that alone can operate a single, integrated production line. *See Hunt*, 432 U.S. at 351 (invaliding law that "stripp[ed] away from the Washington apple industry the competitive and economic advantages it ha[d] earned").

Third, the law imposes only upon interstate companies the burden of engaging in costly repackaging any time they need to shift their inventory in response to changes in supply and demand. *See Scheiner*, 483 U.S. at 284 (States may not impede "the free movement of commerce by placing a financial barrier around the State.").

Singly and certainly cumulatively, those discriminatory effects on interstate companies just because they make packaged beverages available in States besides Michigan is unconstitutional discrimination forbidden by the Commerce Clause.

Finally, that discrimination is not only in effect, but also facial and purposeful. Indeed, the animating purpose of this law was to take the packaged beverages sold in Michigan completely out of the national commerce stream and to make Michigan its own, exclusive economic island. Michigan has thereby commanded, through criminal sanctions, intrastate operations at the expense of interstate ones. And Michigan has done all that for the ultimate purpose of raising local revenue that gets diverted in significant part to local retailers. *See* Association Br. 49-51.

Michigan (Br. 33-35) and its Wholesalers (Br. 46) respond that the purpose is to prevent fraud. But whether labeled revenue-raising or fraud, the purpose of the law is to solve that purported downstream disposal problem caused by retailers and consumers on the backs of upstream interstate manufacturers engaged solely in interstate commerce in beverages, not fraud. That is purposeful discrimination against the manufacturers simply because they sell their product in more than one State.

Michigan's argument (Br. 32) that the law equally burdens intrastate companies with adopting exclusive packaging simply misreads the statute. Putting aside that there are no such locally affected beverage companies—the thresholds chosen by Michigan ensure that the law applies only to companies engaged in interstate commerce—the law mandates only that companies have a mark on products that identifies their containers as "returnable" for 10¢ in Michigan, M.C.L. § 445.572a(12)(b), (c). For those engaged in commerce only in Michigan and not interstate, the ordinary UPC symbol on their product performs that function; the separate requirement that the mark be "unique," M.C.L. § 445.572a(10), has no applicability and requires no action. That is no different from *Healy*, where the Supreme Court invalidated a law as facially discriminatory. Even though the law nominally reached "every" manufacturer, by its operation it affected only those with multistate operations and, "in effect, exempt[ed]"

intrastate manufacturers from regulation. 491 U.S. at 340-341. The same problem exists here.

Lastly, the Wholesalers (Br. 42-44) contend that the law's differential burdens discriminate only between large companies that meet the sales thresholds (whether intrastate or interstate), and small companies that do not. That response might have force if the Association were claiming that the sales threshold itself was discriminatory. But it is not. Rather, the constitutional problem is with the interstate sales constraint that is embodied in the command of "unique" packaging, which directly disadvantages interstate companies that meet the threshold but not intrastate companies that also meet the threshold. *See Healy*, 491 U.S. at 344 n.* (Scalia, J., concurring) (finding discrimination even though no solely intrastate business had been identified).

III. NO LOCAL INTEREST JUSTIFIES THE LAW'S EXCEPTIONAL BURDEN ON INTERSTATE COMMERCE

A. Michigan Has Not Established That Nondiscriminatory Alternatives Have Proven Unworkable Or That The Law Addresses A Legitimate Local Purpose

A law that is extraterritorial or discriminatory is subject to the "strictest scrutiny," *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979), and is "generally struck down *** without further inquiry," *International Dairy*, 622 F.3d at 644; *see also* Washington Legal Foundation Amicus Br. 12-14. Michigan has not met its burden to show that the unique-packaging mandate "advances a legitimate local purpose

that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id*. More specifically, Michigan has not shown that (1) it has a legitimate local purpose; (2) there is "concrete record evidence" that there is a serious problem with improper redemption through *reverse vending machines*, *Heald*, 544 U.S. at 493; or (3) reasonable nondiscriminatory alternatives have "prove[n] unworkable," *id*.

First, Michigan asserts (Br. 38) a legitimate purpose in preventing the "theft" of deposit funds, but it is a strange theft indeed, as Michigan law deems unredeemed containers abandoned property, *see Michigan Soft Drink Ass'n v. Department of Treasury*, 522 N.W.2d 643, 646 (Mich. Ct. App. 1994), and the original owners of the property—consumers, M.C.L. § 445.573d—never suffer any financial loss, *see* M.C.L. § 445.572(4). The loss, if any, is to the State's coffers. And increasing the State's coffers is not a legitimate local purpose. *C&A Carbone*, 511 U.S. at 393 ("[R]evenue generation is not a local interest that can justify discrimination against interstate commerce.").

But there is an even bigger problem with Michigan's theory. Whatever "theft" or "fraud" occurs, it is committed by downstream retailers and their customers who bring empty used containers for improper redemption. It is not perpetrated by the upstream interstate manufacturers of beverages who have done nothing more than make a product that is sold in more than one State. Yet they

bear the brunt of solving Michigan's problem because Michigan prefers not to "shift a costly burden to the [in-state] retailers" (MI Br. 40). The Wholesalers' reliance (Br. 50) on *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982), is thus nothing short of ironic. Just because a State can reasonably regulate interstate products to address deceptive or fraudulent practices by the interstate companies themselves, which is all that *Allied Artists* holds, *id.* at 664, does not mean that States can discriminate against interstate commerce just because that is more politically attractive than addressing directly the improper practices of customers and in-state retailers whom the State prefers to insulate from the costs of stopping the redemptions and increasing State revenue.

Second, Michigan—like its legislature—offers nothing more than "unsupported assertions," *Heald*, 544 U.S. at 490, to try and show that improper redemptions are perpetrated through reverse vending machines, which is the only kind of improper redemption the unique-packaging mandate addresses. The State adverts to studies, sting operations, news releases, and legislative history. MI Br. 10. Out of the entire record, however, including what the Wholesalers submitted in this litigation, the *only* evidence of improper redemption through reverse vending machines after 1998 (when the State first made improper redemption unlawful) comes from one audit of containers and one sting operation, both in a two-month period at the exact same store less than three miles from the Indiana

border. Everything else involves in-person redemptions at retailers that this law does *not* address. The State's assertion of a problem with improper redemption through reverse vending machines accordingly is sheer conjecture. That will not do. "Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods." *Heald*, 544 U.S. at 492.[4]

Third, Michigan has not come close to establishing that nondiscriminatory and non-extraterritorial remedies cannot work. Certainly Michigan's preference for foisting the burden on out-of-state interstate companies rather than "shift[ing] a costly burden to the retailers" (MI Br. 40) does not count. Moreover, Michigan gave neither the criminalization of retailer and distributor malfeasance, nor the steep individual criminal penalties that Michigan trumpets (Br. 11)—five years in jail and a $5,000 fine—any time to work, since those provisions were adopted simultaneously with the unique-packaging requirement. So it literally is

[4] The audit was conducted in August 2006 at the Niles, Michigan Wal-Mart. R. No. 16, State's Summary Judgment Br., Exhibit 1A. The sting operation was conducted the next month at the same store. R. No. 31, Wholesalers' Summary Judgment Br., Exhibit 3. All of the other evidence either pre-dates the first time that redemption of out-of-state containers was made unlawful, *see* R. No. 16, State's Summary Judgment Br., Exhibits 1C (1997 count), 1B (repeating the same data), or relates to improper manual redemptions with complicit retailers, *see id.*, Exhibit 4 (sting operations, news reports). The legislative history likewise confessed that "[t]here is no reliable and current information about how much revenue the state is deprived of each year as a result of bottle redemption fraud," let alone through the reverse vending machines' one-container-at-a-time redemption process. *See* R. No. 7, Association's Summary Judgment Br., Exhibit K.

impossible for Michigan to produce concrete evidence that those alternatives—the same alternatives that other Bottle Bill States employ—are somehow distinctively unworkable in Michigan.[5]

B. On The Undisputed Facts, The Unique-Packaging Mandate's Burden on Interstate Commerce Exceeds Any Putative Benefits

It is undisputed that Coca-Cola can no longer sell the same can of Diet Coke in Michigan that it does in Ohio, Kentucky, Tennessee, or (at a minimum) 37 other States. It is undisputed that, once a pallet of cans of Pepsi produced for Michigan rolls off the production line in Detroit, those beverages cannot be sold anywhere outside of Michigan—except perhaps a handful of States at least 200 to 4,000 miles away—regardless of whether there is a spike in demand in Toledo or a dip in Detroit. Packaged beverages must sit, unused, until they can be sold in Michigan. Dr. Pepper is not allowed to pick up unused Michigan product and sell or even donate it to charities in other States, unless it simultaneously takes every single can of Dr. Pepper off the shelves in Michigan, an entirely infeasible feat. All of the evidence establishes that, unless beverage companies set up Michigan-exclusive production systems in Michigan, compliance with the law requires that beverage production lines be shut down to switch between bottling Michigan and non-

[5] Nor did the Association's members "admit" to the scope of the problem. *See* MI Br. 38-39. The local *Michigan* Soft Drink Association—not the plaintiff American Beverage Association—stated only that reverse vending machines were at best part of the problem and that addressing reverse vending machines alone would not be effective. R. No. 17, State's Summary Judgment Br., Exhibit 6.

Michigan products for multiple minutes, every time. *See* R. No. 7, Association's Summary Judgment Br., Exhibit C ¶ 17; R. No. 31, Wholesalers' Summary Judgment Br., Exhibit 1. Accordingly, on those undisputed facts, Michigan's unique-packaging law *stops* the cross-border movement of beverages in interstate commerce. Nothing can go in or out of Michigan absent the type of complete repackaging that the Supreme Court ruled unconstitutional in *Hunt*, *supra,* and *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

Those burdens on interstate commerce are unjustifiably excessive in relation to the undefined and conjectural local benefit of reducing an undetermined reverse-vending-machine problem caused by third parties, which Michigan has yet to establish exists at any significant level or will be deterred by the unique-mark requirement, rather than simply rerouted to manual redemptions at stores.

Finally, there is a litany of alternative approaches to combating fraud that would have "a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). One good starting point would be vigorous enforcement of the only recently enacted law against retailer fraud. Another would be for the State to stop paying the interstate companies' escheated funds over to retailers based on the retailers' total redemptions *whether improper or not*, and instead link those incentive payments to fraud reduction. The State's bland denial of the utility of alternatives it has not bothered to try wears particularly thin given that it boils

down to a raw preference for burdening interstate beverage companies, who play no role in the alleged fraud, with the costs Michigan refuses to impose on its in-state businesses. *See Allied Artists*, 679 F.2d at 662 ("[A] more penetrating review of the burdens imposed on commerce and the state interest served" is necessary when a law's "impact falls on out-of-state business.").

Michigan and its Wholesalers argue that the law passes muster because the beverage companies initially volunteered to attempt marking containers. But the burden of a best-efforts attempt to differentiate Michigan and non-Michigan products when feasible bears little resemblance to achieving perfect separation all the time, regardless of market conditions, on pain of criminal penalty. That voluntary effort, moreover, was confined to the attempted inkjetting of cans, a system that does not work with plastic bottles, leading to all of the excessive burdens of state-specific UPC codes that Michigan acknowledges (Br. 17). If the possibility of that voluntary industry initiative that (by the way) Michigan never permitted to go forward means anything, it means only that this was yet another, less restrictive alternative that Michigan bypassed.

Second, Michigan notes that beverage companies have been complying with the law without a "demise of the interstate beverage system." MI Br. 44; *see* Wholesalers' Br. 50 (no "collapse of the beverage container industry"). But the *Pike* test necessitates balance, not complete destruction. And the *interstate*

beverage system has been shuttered. There is certainly "apparent difficulty" with moving product between States, *contra* MI Br. 43, because the law *forbids* the companies from doing that. As a matter of law, the mandated complete cessation of interstate commerce to serve a State's interest in maximizing revenue and redressing a fraud problem of unproven dimension on the backs of interstate companies who played no role in that fraud is an unjustifiable—and thus unconstitutional—burden on interstate commerce.

CONCLUSION

For the foregoing reasons and those stated in the Association's opening brief, the judgment of the district court should be reversed, and summary judgment entered for the Association.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 6,978 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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March 9, 2012

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I hereby certify that, on March 9, 2012, 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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