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,

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervenor.

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

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT AMERICAN BEVERAGE ASSOCIATION URGING REVERSAL

Robin S. Conrad
Kathryn Comerford Todd
Sheldon Gilbert
NATIONAL CHAMBER LITIGATION CENTER, INC.
1516 H Street, N.W.
Washington, D.C. 20036
Telephone: 202.463.5337
Facsimile: 202.463.5346

Bert W. Rein
Helgi C. Walker*
John E. Barry
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
Telephone: 202.719.7000
Facsimile: 202.719.7049
Email: hwalker@wileyrein.com

* *Counsel of Record*

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, *Amicus Curiae* Chamber of Commerce of the United States of America (the "Chamber") makes the following disclosures:

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

2. The Chamber is neither a subsidiary nor an affiliate of any publicly owned corporation. Pursuant to Sixth Circuit Rule 26.1(b)(2), the Chamber is not aware of any publicly owned corporation that has a financial interest in the outcome of this appeal by reason of insurance, a franchise agreement, or an indemnity agreement.

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INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29, the Chamber of Commerce of the United States of America (the "Chamber") submits this brief *amicus curiae* in support of Appellant, the American Beverage Association. The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts.

The members of the Chamber routinely transact business in interstate commerce and have a fundamental interest in the enforcement of federal constitutional principles that facilitate the conduct of economic transactions over state lines and prevent one State from imposing its public policy agenda on the rest of the Nation. The Chamber regularly files *amicus* briefs in important cases that implicate the conduct of interstate commerce and the orderly administration of justice in our federal system. This is such a case.

A recent amendment to the Michigan Bottle Bill, MICH. COMP. LAWS § 445.572a (West 2011), requires interstate beverage manufacturers to produce, distribute, and sell covered beverages in containers that are uniquely branded for

sale in Michigan, and criminalizes the distribution or sale of Michigan-branded containers in any other States unless they have adopted a "substantially similar" bottle bill law. Plaintiff, the American Beverage Association, brought this suit to invalidate Section 445.572a, arguing in part that the Michigan law is invalid *per se* under the Commerce Clause because the statute: (1) regulates conduct outside the State of Michigan by criminalizing the sale of uniquely marked beverage containers in at least 40 non-bottle bill States; and (2) discriminates between local and interstate commerce both on its face and in effect. Notwithstanding the manifest, extraterritorial impact of the statute and its profoundly disruptive effects on interstate beverage distribution and sales, the district court erroneously rejected these arguments.

Because the members of the Chamber often market products in multiple states or nationwide, and because their operations would be seriously impeded if they were forced to reconfigure their interstate manufacturing, distribution and sales operations to comply with exclusive, state-specific branding laws that affirmatively prohibit the use of state-specific marks in other States, the Chamber submits this *amicus curiae* brief in support of the American Beverage Association to urge reversal of the decision below.

The Chamber has obtained the consent of all parties to the filing of this brief. Fed. R. App. P. 29(a). Pursuant to Fed. R. App. P. 29(c)(5), the Chamber

states that (1) no party's counsel has authored this *amicus curiae* brief in whole or in part; (2) no party or party's counsel has contributed money intended to fund the preparation or submission of this brief; and (3) no person other than the Chamber, its members and its counsel have contributed money intended to fund the preparation or submission of this brief.

PRELIMINARY STATEMENT

The State of Michigan ("Michigan" or the "State") is one of only 10 States in the Nation that currently requires covered beverages to be sold in returnable containers upon which consumers pay a deposit that is refunded at the time the container is returned. The Michigan Bottle Bill (or the "Bottle Bill") was first enacted in 1976 and provides generally that covered containers are subject to a deposit of at least ten cents. MICH. COMP. LAWS § 445.571(d) (West 2011). In 1989, the Bottle Bill was amended to provide that a manufacturer or distributor that collects more in deposits than it pays out in refunds must annually escheat to the State the value of any unredeemed deposits. *Id.* § 445.573b(2), (5)(a)-(b). The amounts available for escheat to the State, however, can be reduced by overredemption; overredemption may occur when beverage containers obtained outside of the State on which no deposit has been paid – including containers purchased in Michigan's neighboring States where no bottle bill is in effect – are redeemed through retailers or so-called "reverse vending machines," which accept containers and issue refunds by electronically reading identifying information such as universal product codes from the container labels.

To remedy the asserted problem of overredemption, the Michigan Legislature in 2008 approved two significant amendments to the Bottle Bill. First, the Legislature expanded the criminal prohibition on improper

overredemptions. *See* MICH. COMP. LAWS § 445.574a (West 2011). And second, the Legislature established that, once one of two prescribed annual thresholds related to container sales is met,[1] a manufacturer of alcoholic or nonalcoholic beverages in 12-ounce metal or glass containers or 20-ounce plastic containers "shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in [Michigan]" unless the containers are "designated." *Id.* § 445.572a(2)-(9). A "designated" container is defined as one "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," *id.* § 445.572a(12)(c), *i.e.*, a "beverage container upon which a deposit of at least 10 cents has been paid . . . ." *Id.* § 445.571(d). Importantly, Section 445.572a further provides:

> (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 . . . *must be unique to this state, or used only in this state or 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.*

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[1] The statute is triggered if sales of a potentially covered beverage in the preceding calendar year were (1) at least 500,000 cases; or (2) under 500,000 cases with overredemptions of more than 600,000 containers. *Id.* § 445.572a(1)(a)-(b).

Id. § 445.572a(10), (11) (emphases added).

To police overredemption at the manufacturer level, the statute thus requires covered manufacturers to "us[e]" containers that are marked "unique[ly]" for Michigan, and criminally prohibits covered manufacturers from "us[ing]" the same containers in at least 40 States that have no bottle legislation at all, including Michigan's immediate neighbors: Illinois, Indiana, Ohio and Wisconsin.[2]

This criminal prohibition on the extraterritorial use of Michigan-marked containers is the blunt instrument by which the Legislature sought to solve the supposed problem of overredemption through reverse vending machines. That is, without the extraterritorial prohibition, the statute would not have altered the conditions that prevailed prior to the 2008 amendment: even if a container were

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[2] A summary of current state bottle bills can be found at http://www.bottlebill.org/legislation/usa.htm. Although Section 445.572a(10) provides that the "unique" mark requirement is not violated if the mark at issue is "used . . . in . . . 1 or more other states that have laws substantially similar to this act" and Michigan has taken the position in this litigation that the bottle bills currently in force elsewhere qualify under this requirement, the statute does not define "substantially similar." Accordingly, it is an open question under Michigan law what sort of legislation is "substantially similar" to the Michigan Bottle Bill, and beverage manufacturers that hazard their own answer to this question proceed at their peril.

marked with a Michigan identifier, the mark alone would not necessarily establish that the container had been distributed and sold only in Michigan. The ban on extraterritorial use of beverage containers with a Michigan mark, then, lies at the heart of the Bottle Bill and this case.

The Chamber fully supports and concurs in Appellant's explication of the several ways in which the Michigan Bottle Bill violates the Commerce Clause. The Chamber is particularly concerned about, and thus focuses its *amicus* brief on, the extraterritorial aspects of the recent amendment to the Bottle Bill. The notion that one State can dictate how businesses conduct their affairs in other States is anathema to the most fundamental principles that animate the Commerce Clause and that are essential to the orderly conduct of business across State lines. In the Chamber's view, Michigan's attempt to regulate the marks that beverage manufacturers place on containers manufactured, distributed and sold in other States compels the conclusion that Section 445.572a violates the Commerce Clause. Failure to recognize that Michigan's action in this case has plainly breached the most basic limitations of the Commerce Clause would encourage the adoption of an amalgamation of overreaching state branding laws that could effectively bring interstate commerce to a halt, not only in the beverage industry but in other consumer product markets as well.

ARGUMENT

The Commerce Clause provides that "[t]he Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. The unencumbered area of free trade created by the Commerce Clause was one of the principal reasons why the federal Constitution was proposed and ratified in the wake of the unsuccessful experiment with the Articles of Confederation. "The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was 'to take into consideration the trade of the United States; to examine the relative situations and trade of the said states [and] to consider how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony . . . .'" *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (quoting Documents, Formation of the Union, 12 H. Docs., 69th Cong., 1st Sess., p. 38); *see also Brown v. Maryland*, 25 U.S. 419, 446 (1827) (Marshall, C.J.) ("It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great [constitutional] revolution which introduced the [modern constitutional] system, than the deep and general conviction, that commerce ought to be regulated by Congress."); Joseph Story, *Commentaries on the Constitution of the United States* § 1053 (1833) ("The want of [federal] power [to regulate commerce] was one of

the leading defects of the confederation, and probably, as much as any one cause, conduced to the establishment of the constitution.”).

It is well settled that, “while a literal reading evinces a grant of power to Congress,” the Commerce Clause also directly limits the power of the States. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). Thus, the Commerce Clause prohibits States from projecting their laws extraterritorially by purporting to regulate conduct that takes place outside their borders. *See, e.g., Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989). Moreover, even when Congress has not acted affirmatively to regulate commerce among the States, 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). Here, the extraterritorial reach of the Bottle Bill transgresses both of these prohibitions.

I. THE MICHIGAN BOTTLE BILL’S PATENT EXTRATERRITORIAL REACH CONSTITUTES A *PER SE* VIOLATION OF THE COMMERCE CLAUSE.

A. It Is Well Established That A State Has No Authority To Regulate Conduct Outside Of Its Geographic Boundaries.

It is axiomatic that the federal Commerce Clause imposes direct territorial limitations on a State’s legislative powers. Thus, in *Gibbons v. Ogden*, Chief Justice Marshall distinguished between commerce consigned to federal regulatory

authority under the Commerce Clause and "commerce, which is completely internal [to a State], which is carried on between man and man in a State, or between different parts of the same State." 22 U.S. 1, 194 (1824). As a necessary corollary to the principle that a State has authority to regulate commerce within its jurisdiction, a State has no authority consistent with the Commerce Clause to regulate commerce that occurs *outside* of its territorial borders. "Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states." *Huntington v. Attrill*, 146 U.S. 657, 669 (1892); *accord Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (a State "has no power to project its legislation into [another State] by regulating the price to be paid in that state for [products] acquired there"); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York . . . . This is so obviously the necessary result of the Constitution that it has rarely been called into question. . . .").

Modern Supreme Court Commerce Clause jurisprudence has repeatedly recognized and applied these precepts to forbid state efforts to regulate extraterritorially. Thus, in *BMW v. Gore*, 517 U.S. 559 (1996), the Court affirmed the basic proposition that "[n]o State can legislate except with reference

to its own jurisdiction. . . . Each State is independent of all the others in this particular." *Id.* at 571 (quoting *Bonaparte v. T.C.*, 104 U.S. 592, 594 (1881)); *accord Healy*, 491 U.S. at 336 ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582-583 (1986) (no State can "project its legislation into [other States]"); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."); *see generally* 1 Laurence H. Tribe, *American Constitutional Law* § 6-12 at 1098 (3d ed. 2000) (discussing "the *per se* principle against extraterritorial state regulation").

Against this constitutional backdrop, federal courts have a unique obligation to ensure that one State, regardless of the ambitions of its lawmakers, does not impose its law and public policy judgments on any of the other 49 States or on the operation of interstate commerce.

B. Section 445.572a of the Michigan Bottle Bill Is Unconstitutional *Per Se* Because It Criminalizes The Sale Of Marked Beverage Containers In Any State That Has Not Adopted A Bottle Bill "Substantially Similar" To Michigan's.

Section 445.572a purports to prevent improper overredemptions (and ultimately protects Michigan's ability to escheat unclaimed deposits to state coffers)[3] by requiring beverage manufacturers to use a unique, Michigan-specific mark on covered containers and prohibiting them from using the same mark on containers that are distributed or sold in, at a minimum, 40 non-bottle bill States.

It is plain that the Bottle Bill "directly controls commerce occurring wholly outside the boundaries of" Michigan. *Healy*, 491 U.S. at 336. The statute makes it a crime under Michigan law to distribute and sell a Michigan-marked bottle in most, if not all, of the 49 other States. Thus, under the plain language of Section 445.572a, it is a crime for an Indiana beverage manufacturer to distribute and sell beverages in Indiana with containers bearing the "unique" Michigan mark, even though that commercial activity would be entirely lawful in Indiana. Similarly, the statute forbids a Michigan beverage manufacturer from placing the "unique"

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[3] Although the Bottle Bill began in the 1970s as a recycling initiative, it now functions primarily as a source of revenue for the State, which in 1989 claimed possession of all unclaimed deposits for itself. *See* MICH. COMP. LAWS §§ 445.573b, 445.573d (West 2011). Indeed, the current legislation does not require that returned containers be recycled at all. *See* R. No. 7, Association's Summary Judgment Brief, Exhibit D, p. 4 ("[T]here is no requirement for bottlers to recycle the cans and bottles they pick up from the retailers.").

Michigan mark on cans manufactured solely for sale in other States, even if such sales would be completely legal in those States. Indeed, the extraterritorial nature of the statute in this case is not just a matter of "practical effect," the general standard for impermissible out-of-state regulation, *Healy*, 491 U.S. at 336. It is the openly *intended* operation of Section 445.572a, directly effectuated by the plain language of the statute and the essential means by which the Michigan Legislature seeks to stop alleged overredemption, rendering the law even more clearly unconstitutional. *Id.* at 336-37 (noting that "the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another"); *see supra* at 8-9.

Even if the sale of similarly marked containers in other States will undermine Michigan's regulatory objectives, "[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens" – or its public fisc – "may be affected . . . ." *Bigelow v. Virginia*, 421 U.S. 809, 823-24 (1975); *accord Baldwin*, 294 U.S. at 523-24. Thus, irrespective of impact, a State simply may not "proscribe[]" or "regulate[]" activities in another State. *Bigelow*, 421 U.S. at 822-23; *accord Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) ("The 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.").

As Federal District Court Judge Thomas Griesa succinctly put it when he preliminarily enjoined a virtually indistinguishable measure adopted by New York State:

> The problem is that the legislature, in providing that these bottles with these labels can be marketed exclusively in New York, . . . prevents . . . commerce in the[] bottles . . . outside of New York. It makes it illegal to sell these commodities outside of New York State. . . . Regardless of the purpose of the legislature in enacting this provision, the provision is a violation of the commerce clause. It prohibits a sale of a commodity on the basis of . . . state borders. This is a violation of the Commerce Clause.

R. No. 7, Association's Summary Judgment Brief, Exhibit F, pp. 54-55. Indeed, in Judge Griesa's view, the Commerce Clause violation effected by the New York law was so flagrant that plaintiffs were not only likely to succeed on the merits of that claim, but were "sure of success as a matter of law." *Id*. at 55.

The contrary conclusion drawn by the district court in this case does not withstand scrutiny. The district court acknowledged that the unique marking requirement in Section 445.572a "dictate[s] what the label in a non-bottle [bill] state could not contain, i.e. a 'unique mark' enabling [Michigan] machines to recognize containers not sold in Michigan." R. No. 42, Summary Judgment Opinion, p. 19. That finding should have ended the inquiry under the foregoing

precedents. If the statute regulates how beverage manufacturers mark their products in States other than Michigan – whether in terms of an affirmative requirement of what a label must contain or, as here, a negative prohibition on what the label cannot contain (two sides of the same regulatory coin) – then the statute impermissibly regulates extraterritorially.

The district court nonetheless refused to invalidate the statute, reasoning chiefly that: (1) "manufacturers are free to label their products however they see fit in other states" as long as they "label their bottles differently for sale in Michigan;" (2) no interstate conflict is presented because "Michigan is the only state with a unique-mark requirement;" and (3) "if . . . other states adopted similar container deposit laws, the burden of which Plaintiff complains, would only be diminished." *Id*. at 19-21.

Contrary to the district court's assumption, the extraterritoriality principle does not permit a State to adopt requirements that compel conforming conduct in a sister State – let alone in most if not all other States – under penalty of criminal prosecution. Interstate beverage companies are not "free" to label their products as they wish outside of Michigan; as explained above, it is a violation of criminal law for them to use a label that contains a "unique" Michigan mark in most if not all of the other 49 States, even though it is most efficient for companies that sell goods across state lines to distribute products that conform to the applicable

labeling requirements in all of the States in which they are marketed. Moreover, it is no answer to the constitutional objection that the Bottle Bill has yet to provoke an interstate container marking war, or that other States might someday adopt bottle bill laws "substantially similar" (whatever that means) to Michigan's law.

Section 445.572a violates the Commerce Clause because it purports to do what only Congress is empowered to do under Article I: enact legislation that criminalizes conduct nationwide. *See, e.g., United States v. Lopez*, 514 U.S. 549, 559 (1995) (Congress has authority under Article I to criminalize activity that "substantially affect[s]" interstate commerce). The very point of the rule against extraterritorial state legislation is to ensure that one State's policy choices are *not* imposed upon other States, not to encourage other States to capitulate or adopt the same strategy. Indeed, if other States followed Michigan's lead, the constitutional problem would only be exacerbated – not ameliorated – by the erection of multiple isolationist intrastate zones for trade in covered beverages, placing an even heavier burden on interstate commerce. *See infra* Section III.

II. THE MICHIGAN BOTTLE BILL DISCRIMINATES AGAINST INTERSTATE AND FOREIGN COMMERCE.

For substantially the same reasons that Section 445.572a violates the rule against extraterritorial state legislation, the statute also runs afoul of the non-

discrimination principle underlying the Commerce Clause. The Commerce Clause imposes a *per se* prohibition on state laws that impose disproportionate, discriminatory burdens on both interstate and foreign commerce. *See, e.g., Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008); *accord Lohman*, 511 U.S. at 646 (the Commerce Clause "embodies a negative command forbidding the States to discriminate against interstate trade"); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311 (1994) ("In 'the unique context of foreign commerce,' a State's power is further constrained because of 'the special need for federal uniformity.'" (citing *Wardair Canada, Inc. v. Fla. Dept. of Revenue*, 477 U.S. 1, 8 (1986)). As explained below, the criminal ban on the extraterritorial sale of "unique[ly]" marked containers imposes extraordinary burdens only on beverage manufacturers that conduct business outside of Michigan.

It is true, as the district court observed, that the Michigan statute requires beverage manufacturers to comply with the marking requirement if they meet the numerical thresholds set forth in Section 445.572a(1)(a)-(b) regardless of whether they are domiciled in Michigan or elsewhere. *See* R. No. 42, Summary Judgment Opinion, pp. 12-13; MICH. COMP. LAWS § 445.572a(10) (West 2011). But contrary to the district court's suggestion, *see* R. No. 42, Summary Judgment Opinion, p. 20, the preemptive sweep of the Commerce Clause is not confined to traditional protectionist legislation. *See, e.g., City of Philadelphia v. New Jersey*,

437 U.S. 617, 626 (1978). Moreover, the extraterritorial prohibition in the statute necessarily places substantially greater burdens on manufacturers engaged in the *interstate* distribution and sale of beverage containers, because only interstate manufacturers are required to take extra steps beyond the marking of the containers to shield themselves from criminal liability. As Appellant has demonstrated, these costs are substantial, because under the Michigan Bottle Bill interstate manufacturers must dramatically reconfigure their production and distribution activities to make sure that Michigan-marked containers do not slip into the stream of commerce in sister States, burdens that the statute does not impose on beverage manufacturers that market solely to Michigan. *See* Appellant Br. at 13-14; *see, e.g., Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001) ("A regulation may disproportionately burden interstate commerce if it has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction.").

Moreover, the district court's suggestion that Plaintiff's position "would, in effect, mean that every state labeling restriction is unconstitutional," R. No. 42, Summary Judgment Opinion, p. 13, is wholly unfounded. The core constitutional defect in Section 445.572a is not that it requires all covered beverage manufacturers to mark their products consistent with Michigan law, but that the statute uniquely burdens interstate and foreign commerce by affirmatively

prohibiting manufacturers from selling a Michigan-marked product in sister States. It is a common practice for manufacturers to affix multiple labels to their products to comply with the variable requirements of state laws. It is constitutionally impermissible, however, for a State to discriminate against interstate commerce by dictating that, once a product is labeled for use in its jurisdiction, manufacturers must take extraordinary measures to ensure that the product is not sold anywhere else, regardless of whether the sale would be perfectly lawful in other States. *See, e.g., City of Philadelphia*, 437 U.S. at 624 (the "clearest example" of discriminatory legislation that violates the Commerce Clause is "legislation . . . that overtly blocks the flow of interstate commerce at a State's borders"); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 525-28 (1959) (invalidating Illinois law that required trucks entering the State to install uniquely designed mudflaps, reasoning that the burden businesses faced of either repacking products into new trucks or modifying delivery vehicles every time they crossed the state line imposed an unconstitutional barrier on interstate commerce); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945) ("[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.").

III. THE DECISION BELOW THREATENS TO OPEN THE FLOODGATES TO PAROCHIAL BRANDING LAWS THAT WILL WREAK HAVOC ON INTERSTATE COMMERCE.

The district court's facile rejection of Appellant's meritorious constitutional challenge to Section 445.572a invites nationwide chaos. Other States, such as New York, have already attempted similar measures, *see supra* at 14, and still other States faced with "overredemption" problems, such as Maine or Vermont, may well be watching this case to see whether are free to follow Michigan's lead, *see, e.g.*, R. No. 7, Association's Summary Judgment Brief, Exhibit M (describing out-of-state bottle redemption issues in Maine); VT. STAT. ANN. tit. 10, § 1525(c) (West 2010) (purporting to prevent sale of beverages labeled for sale in Vermont if the beverages are sold in an adjacent State "that does not have a deposit-redemption system"). Moreover, the district court's legal rationale for upholding the Bottle Bill would support the deployment of similarly offensive branding requirements in other product markets to protect state revenues or advance similar state-centric commercial and policy goals.

Thus, the extraterritorial overreaching endorsed by the decision below begs the questions of what would happen if every State adopted "unique" branding rules prohibiting the distribution or sale of branded goods in other States, or if States adopted conflicting branding rules that affirmatively required the use of marks criminalized in other jurisdictions. If Michigan can erect a regime that

establishes an insular market for beverage containers to the exclusion of most if not all of the other 49 States and enforce that regime with criminal penalties, "so may every other State in the Nation." *Healy*, 491 U.S. at 339. In turn, balkanizing the national market for beverages (or any other national market) into a patchwork quilt of state-specific markets for the purpose of maximizing state revenues would "create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Id.* at 337.

As one State Supreme Court has observed, "[N]o state should impose its law in a situation when its parochial rules would unduly and without substantial reason so impinge upon another state as to interfere with the free flow of commerce or the exercise of another state's legitimate policies in such a manner that would invite retaliation from another jurisdiction." *Heath v. Zellmer*, 151 N.W.2d 664, 672 (Wis. 1967). Of course, a Commerce Clause challenge to extraterritorial or parochial state legislation cannot be defended on the basis that adversely affected manufacturers are free to stop selling their products in Michigan. The Commerce Clause prohibits state and local governments from erecting impediments to a national market that traverses all geographic boundaries, and is fundamentally incompatible with the use of onerous regulations to create isolated economic fiefdoms.

The Supreme Court has observed that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod v. J.E. Dilworth Co*., 322 U.S. 327, 330 (1944). The legislation at issue here turns that foundational principle on its head by effectively criminalizing trade in Michigan-marked products in States other than Michigan. If the decision below upholding Section 445.572a were affirmed, it could encourage the proliferation of state-centric branding regimes in other jurisdictions and product markets, all in contravention of the most elemental principles of the Commerce Clause.

CONCLUSION

For all these reasons, the Chamber of Commerce of the United States of America respectfully requests that the Court reverse the judgment of the district court.

December 9, 2011

Respectfully submitted,

s/ Helgi C. Walker

Bert W. Rein
Helgi C. Walker*
John E. Barry
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
Telephone: 202.719.7000
Facsimile: 202.719.7049
Email: hwalker@wileyrein.com

**Counsel of Record*

Robin S. Conrad
Kathryn Comerford Todd
Sheldon Gilbert
NATIONAL CHAMBER LITIGATION CENTER, INC.
1516 H Street, N.W.
Washington, D.C. 20036
Telephone: 202.463.5337
Facsimile: 202.463.5346

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

The foregoing *amicus curiae* brief is in 14-point Times New Roman proportional font and contains 5,074 words, and thus complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B). This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word) used to prepare this brief.

December 9, 2011

s/ Helgi C. Walker

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25 and Sixth Circuit Rule 25, that on December 9, 2011, the foregoing *amicus curiae* brief was timely filed and served by filing a copy of the document with the Clerk through the Court's electronic docketing system.

Margaret A. Nelson
Ann M. Sherman
Office of the Michigan Attorney General
Public Employment and Elections Division
P.O. Box 30736
Lansing, MI 48909
nelsonm9@michigan.gov
shermana@michigan.gov

Anthony S. Kogut
Curtis R. Hadley
Willingham & Cote PC
333 Albert Ave., Suite 500
East Lansing, MI 48823
akogut@willinghamcote.com
chadley@willinghamcote.com

Patricia A. Millett
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036
pmillett@akingump.com

Hyland Hunt
Akin Gump Strauss Hauer & Feld LLP
1700 Pacific Ave., Suite 4100
Dallas, TX 75201
hhunt@akingump.com

s/ Helgi C. Walker
Helgi C. Walker