No. 11-2097

**IN THE**
# United States Court of Appeals
**FOR THE SIXTH CIRCUIT**

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AMERICAN BEVERAGE ASSOCIATION,
*Plaintiff-Appellant*,
v.

RICK SNYDER, BILL SCHUETTE, AND ANDREW DILLON,
*Defendants-Appellees*,
&

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION (MBWWA),
*Intervenor*.

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

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## BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, the Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code; it has no parent company, issues no stock, and no publicly held company holds a 10% or greater ownership interest.

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## INTERESTS OF *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a public interest, law and policy center with supporters in all 50 states, including many in Michigan. WLF devotes a substantial portion of its resources to defending and promoting economic liberty, free enterprise, and a limited and accountable government. To that end, WLF has appeared before numerous federal and state courts in cases raising issues under the dormant Commerce Clause. *See, e.g., Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd*, 530 U.S. 363 (2000).

WLF is concerned that the analysis adopted by the district court in this case directly threatens core principles that the Commerce Clause exists to protect. The district court unaccountably upheld a controversial Michigan law that, on its face, purports to regulate the permissible markings on beverage containers in all 50 states and discriminates against interstate beverage manufacturers. In doing so, the court drastically departed from settled Supreme Court precedent. WLF strongly opposes the Michigan legislature's attempt to "wall off" the State from the rest of the national marketplace for beverages.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c), *amicus* Washington Legal Foundation states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief.

## STATEMENT OF THE CASE

In response to a perceived loss of revenue attributable to the redemption (in Michigan) of ten-cent deposits from beverage containers sold outside the State, the Michigan legislature amended the Michigan Beverage Container Deposit Law, M.C.L. § 445.571, *et seq.*, to require those beverage manufacturers engaged in interstate commerce to sell beverages in designated containers that bear "[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." *See* M.C.L. § 445.572a. In short, the law requires machine-readable marked packaging to include a distinguishing characteristic that can be read by a reverse vending machine in order to verify that the container was sold in Michigan.

The law provides that 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). No other State has a unique-packaging requirement, however, and because no other State charges a comparable ten-cent deposit, no other State's beverage containers are returnable in Michigan. *See* M.C.L. § 445.571(d). The uniquely marked packaging mandate applies only to high-volume beverage manufacturers, all of which are national companies based outside Michigan but engaged in interstate commerce. As a

result, the law forces those beverage manufacturers doing business both inside and outside of Michigan to manufacture and distribute a Michigan-only beverage product for a Michigan-only market.

By virtue of Section 445.572a(10), the law prohibits the sale of the uniquely marked containers outside the State of Michigan. Failure to comply is a criminal violation punishable by up to six months in prison and a $2,000 fine per beverage sold in violation of the statute. *See* M.C.L. § 445.572a(11).

The American Beverage Association (the Association), a trade association of manufacturers, marketers, distributers, and bottlers of nonalcoholic beverages, brought suit in the U.S. District Court for the Western District of Michigan, seeking injunctive and declaratory relief on the grounds that Michigan's beverage container law violates the dormant Commerce Clause. Specifically, the Association argued that the Michigan regulation runs afoul of the dormant Commerce Clause because it (1) discriminates against interstate commerce, (2) impermissibly criminalizes beverage sales outside of Michigan, and (3) imposes a burden on interstate commerce that outweighs any putative local benefit. R. No. 1, Complaint at 18-20.

The district court granted summary judgment for the State of Michigan on both the discrimination and extraterritoriality claims. R. No. 42, Summary Judgment Opinion at 9-22. As to the Association's claim that the law

discriminated against interstate commerce, the court concluded that because the Michigan-only packaging requirement applied equally to all intrastate Michigan beverage manufacturers, no discrimination occurred—either facially or in practical effect. *Id.* at 12-15. The court went on to suggest that a contrary result would "mean that every state labeling restriction is unconstitutional." *Id.* at 13.

As to the extraterritoriality claim, although the court conceded that "Michigan law would dictate what the label in a non-bottle state could not contain," the court nevertheless reasoned that the law did not "directly" control extraterritorial conduct because "manufacturers are free to label their products however they see fit in other states." *Id.* at 42. Because Michigan is the only State with such a law in place, the court declined further to evaluate the law's implications on interstate commerce as a whole. *Id.* at 20-21.

Finally, because the court concluded that a genuine issue of material fact remained as to the extent of the burden the law imposes on interstate commerce, it denied summary judgment on that particular claim. *Id.* at 25.

Pursuant to 28 U.S.C. §1292(b), the Association moved to certify the district court's order for interlocutory appeal, which motion was granted. *See* R. No. 51, Certification Opinion at 6. In granting the motion, the district court conceded that "substantial grounds for difference of opinion" existed on such "difficult issue[s] of first impression." *Id.*

## SUMMARY OF ARGUMENT

This case is a clear reminder of the principle that our constitutional system was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). By removing the power to regulate interstate commerce from the states and giving that power exclusively to Congress, the Framers sought to create "a national free market." *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992). The Commerce Clause thus embodies the profound insight that every merchant and manufacturer "shall be encouraged to produce by the certainty that he will have free access to every market in the Nation." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). The Supreme Court has emphasized that, even where Congress has chosen not to act, the Commerce Clause operates to prevent the kind of economic Balkanization that results from even a single State's discrimination against interstate commerce.

But Michigan's statutory scheme regulating beverage packaging is discriminatory. Unlike other state-specific labeling requirements, Michigan refuses to allow interstate manufacturers to sell their Michigan-compliant products in other States. Indeed, Michigan purports to criminalize certain beverage sales occurring outside of Michigan. As a result, interstate manufacturers desiring to

distribute and sell their beverages to customers located in Michigan must create an entirely separate but elaborate system of production. By coupling a Michigan-only labeling requirement with a prohibition on selling Michigan-only-labeled beverages in the rest of the country, the law impermissibly "walls off" the State of Michigan from the rest of the national marketplace for beverages, in violation of the dormant Commerce Clause.

Finally, in assessing the Michigan statute's motivation and effects, this Court should not defer to the Michigan legislature's claimed purpose. Rather, the Supreme Court has consistently required lower courts to engage in meaningful scrutiny of a state's justification for an economic regulation challenged as an impermissible restriction on interstate commerce. In any event, the Supreme Court has long held that even the absence of a protectionist motive cannot excuse discrimination where it otherwise exists.

For the reasons given below, as well as those made by the Appellant, the district court's order granting summary judgment in favor of the State of Michigan should be reversed.

## ARGUMENT

### I. THE COMMERCE CLAUSE WAS INTENDED TO PROTECT INTERSTATE COMMERCE FROM REGULATORY INTERFERENCE BY THE STATES.

The Commerce Clause gives Congress the power to "regulate Commerce

with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. But the Commerce Clause also "embodies a negative command forbidding the States to discriminate against interstate trade." *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 646 (1994). By removing the power to regulate interstate commerce from the states and giving that power exclusively to Congress, the Framers sought to create "a national free market." *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992); s*ee Dennis v. Higgins*, 498 U.S. 439, 454 (1991) ("[T]he Framers of the Commerce Clause had economic union as their goal."). The Commerce Clause thus embodies the profound insight that "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). The Framers intended that every citizen would enjoy "free access to every market in the Nation," with the assurance "that no home embargoes will withhold his export, and that no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." *Id.* at 539.

While Congress certainly may, and occasionally does, exercise its affirmative Commerce Clause powers to prevent discriminatory regulation by the States, it cannot possibly keep track of or respond to every instance of

anticompetitive state legislation. For this reason, the dormant Commerce Clause serves as the structural bulwark and guardian of a national marketplace against the self-interested tendencies of local interests to use State governments to their own advantage at the expense of distant, far-flung interests.

The Supreme Court has emphasized that, even where Congress has chosen not to act, the Commerce Clause operates to prevent the kind of economic Balkanization that results from even a single State's discrimination against interstate commerce. *See, e.g., Camps Newfoundland/Owatonna v. Town of Harrison*, 520 U.S. 564, 595 (1997) ("The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union."). By refusing to countenance local protectionism, the Commerce Clause checks the very natural tendency toward parochialism among State and local policymakers and forces State legislators to consider broader national concerns.

For this reason, "the 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from 'advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the State." *Ft. Gratiot Sanitary Landfill v. Mi. Dep't of Natural Res.*, 504 U.S. 353, 359 (1992) (internal citations omitted). By reinforcing the structural integrity of the Union envisioned by the Constitution, the Commerce Clause helps to accomplish the "object riding

over every other in the adoption of the constitution." *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824) (Johnson, J., concurring).

This case is a clear reminder of the principle that our constitutional system was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). Michigan requires interstate beverage manufacturers to produce and distribute a Michigan-only product for a Michigan-only market, but Michigan prohibits manufacturers from selling that same product anywhere else. Michigan may believe that to protect its unclaimed bottle deposit revenues it is both appropriate and necessary to regulate the permissible markings on beverage containers in all 50 states. But one State's protection of its own interests does not take into account the commercial interests of other States or of the nation as a whole. While it is only natural that any given State may behave in this manner, it is the triumph of such parochialism in arenas where no one State's interests should govern that the Commerce Clause proscribes. *See id.* (explaining that the Commerce Clause power is necessary to prevent a State from applying "parochial" laws that can result in "a speedy end of our national solidarity").

## II. MICHIGAN'S DISCRIMINATORY BEVERAGE CONTAINER LAW VIOLATES THE DORMANT COMMERCE CLAUSE.

Michigan's discrimination against out-of-state beverage manufacturers

offends deeply rooted Commerce Clause principles. Indeed, the dormant Commerce Clause has always imposed a more meaningful limit on state restrictions of interstate commerce than the district court recognized below. "The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987). Accordingly, the Supreme Court "has consistently found parochial legislation of this kind to be constitutionally invalid," no matter how "legitimate" the ultimate aim of the legislation may be. *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

The Supreme Court has held that "a state statute that directly regulates *or* discriminates against interstate commerce" is "virtually per se invalid." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (emphasis added). The per se proscription of state laws or regulations that discriminate against interstate commerce specifically "reflects the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 335-36 (1989).

If a state regulation treats in-state and out-of-state actors differently in a way that favors in-state interests (and disfavors out-of-state interests), that regulation is

per se discriminatory for dormant Commerce Clause purposes. *See Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.* 511 U.S. 93, 99 (1994). Here, Michigan's scheme affords Michigan-only beverage manufacturers a unique advantage in that they are wholly insulated from the kind of economically burdensome production process that Michigan imposes on interstate beverage manufactures. This differential treatment ensures that out-of-state beverage manufacturers must either create an entirely separate Michigan infrastructure for producing, warehousing, transporting, and distributing their goods, or else suffer severely reduced access to Michigan consumers.

Unlike other States that impose state-specific labeling requirements, Michigan refuses to allow interstate manufacturers to sell their Michigan-compliant products in other States. Indeed, Michigan actually criminalizes certain beverage sales occurring outside of Michigan. As a result, interstate manufacturers desiring to distribute and sell their beverages to customers located in Michigan must create an entirely separate but elaborate system of production. But the extra burden does not stop there. Because of the nature of their production process and to safeguard product freshness, interstate beverage manufacturers must also maintain separate Michigan-only warehousing, transportation, and distribution systems. Such a parochial walling off of Michigan from the rest of the nation operates as an unconstitutional encumbrance on interstate commerce.

Nor does Michigan's "substantially similar" exception salvage the law. Where, as here, a state law imposes a commercial disadvantage on outside sellers without reciprocity, the Commerce Clause will not permit such disparity of treatment. *See New Energy Co. v. Limbach*, 486 U.S. 269, 275 (1988) (striking down as unconstitutional a reciprocity law treating intrastate and interstate commerce equally in reciprocal states, but discriminating against all others). Michigan's promise to remove an economic disadvantage if reciprocity is accepted "no more justifies disparity of treatment than it would justify categorical exclusion." *Id.* And the presence of such discrimination requires Michigan to demonstrate the absence of nondiscriminatory means to advance the State's allegedly legitimate purpose. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). This is a showing that Michigan has not and cannot make.

In sum, Michigan's law impermissibly interferes with interstate commerce by criminalizing the delivery and sale of packaged beverages across state lines, while leaving wholly intra-state deliveries and sales alone. The inescapable clash between Michigan's discriminatory requirements on interstate beverage manufacturers and the Commerce Clause's core objective of promoting national markets could not be starker.

## III. IN ASSESSING THE STATUTE'S EFFECTS, THIS COURT SHOULD NOT DEFER TO MICHIGAN'S CLAIMED PURPOSE.

"[W]hile baseball may be the national pastime of its citizenry, dishing out

special economic benefits to certain in-state industries remains the favorite pastime of state and local governments." *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004). The dormant Commerce Clause forbids States from engaging in explicit discrimination against out-of-state businesses. But, recognizing that a State's legislature will often enact protectionist measures under the pretext of a legitimate exercise of police powers, the Supreme Court has repeatedly held that the judiciary cannot confine its constitutional analysis to a challenged statute's mere assertion of valid purpose. *See, e.g., Hughes*, 441 U.S. at 336 (emphasizing that a court is not bound by "'[t]he name, description or characterization given [a statute] by the legislature or the courts of the State,' but will determine for itself the practical impact of the law"); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) ("The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effect.").

Rather, the Supreme Court has consistently required lower courts to engage in meaningful scrutiny of a State's justification for an economic regulation challenged as an impermissible restriction on interstate commerce. *See, e.g., Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940) ("In each case, it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."). This level of scrutiny is not light; courts may not accept uncritically a State's claim that the

law advances an important state interest. Rather, because of the ingenuity of state legislatures in erecting barriers against interstate competition, and because legislatures themselves may not be fully aware of the anticompetitive consequences of their own legislation, the Supreme Court requires a realistic assessment both of the intent and effects of all statutes that burden interstate commerce.

The Supreme Court has long recognized that where "the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally averted when interests within the state are affected." *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767-68 n.2 (1945). Since non-residents are unrepresented in state legislatures, state lawmakers are more susceptible to persuasion by in-state interests to enact legislation that conveniently creates a barrier against trade across state lines. Such a possibility has led the Court to "eschew [] formalism for a sensitive, case-by-case analysis of purposes and effects." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. U.S. 186, 201 (1994). Because "the result" in a dormant Commerce Clause challenge "turns on the unique characteristics of the statute at issue and the particular circumstances in each case," *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977), lower federal courts cannot satisfy their duty by applying a deferential level of scrutiny.

Unfortunately, the district court below deferred almost without question to Michigan's assertions that its statute regulating the permissible markings on beverage containers in all 50 states benefits the general public. The court was satisfied by the defendants' bare assertions that the statute serves a valid, non-discriminatory purpose—matters for which no actual evidence was adduced. But "[w]hat is ultimate is the principle that one state . . . may not place itself in a position of economic isolation." *H.P. Hood & Sons, Inc.*, 336 U.S. at 538.

In any event, the Supreme Court has long held that even the absence of a protectionist motive cannot excuse discrimination where it otherwise exists. Indeed, in *West Lynn Creamery*, the court overturned the Massachusetts Department of Food and Agriculture's pricing order on raw milk while acknowledging the absence of any in-state producers. *W. Lynn Creamery, Inc.*, 491 U.S. at 326-27 n.2. As the Supreme Court recognized in *Philadelphia v. New Jersey*, "the evil of protectionism can reside in legislative means as well as legislative ends." 437 U.S. at 626 ("But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."). For that reason, even "a presumably illegitimate goal" cannot be "achieved by the illegitimate means of isolating the State from the national economy." *Id.*

## CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court reverse the judgment below.

Respectfully submitted,

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December 9. 2011

## CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Times New Roman font. According to the word processing software used to prepare this brief (Microsoft Word), the word count of the brief is exactly 3,439 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Cory L. Andrews
Cory L. Andrews

## CERTIFICATE OF SERVICE

I certify that on December 9, 2011, I transmitted a true and correct copy of the foregoing brief to the Clerk of the Court, who filed the document with the Court's electronic docketing system, which will send electronic notice to the following counsel of record:

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