Nos. 12-1221 and 12-1224

# In The
# Supreme Court of the United States

RICK SNYDER, GOVERNOR OF MICHIGAN, *ET AL.*,
Petitioners,

v.

AMERICAN BEVERAGE ASSOCIATION

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

AMERICAN BEVERAGE ASSOCIATION.

*On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## BRIEF IN OPPOSITION

Hyland Hunt
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1700 Pacific Ave.
Suite 4100
Dallas, TX 75201
(214) 969-2800
hhunt@akingump.com

Patricia A. Millett
*Counsel of Record*
Ruthanne M. Deutsch
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

## QUESTION PRESENTED

Whether the Sixth Circuit correctly held that Michigan's criminal prohibition on the sale in other States of the same beverage products sold in Michigan impermissibly regulates commerce occurring wholly outside the State in violation of the Commerce Clause.

## RULE 29.6 DISCLOSURE

The American Beverage Association has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

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**STATEMENT**

Michigan stands alone among all 50 States in passing legislation that, on its face and as its avowed purpose, reaches across the State's borders to proscribe, on pain of imprisonment, the sale in every other State of the same packaged beverages Michigan allows to be sold in-state. Michigan's law goes on to say that it will permit sales of Michigan-compliant beverages in a small subset of other States if, and only if, Michigan approves of those States' recycling laws. But that litmus testing of other States' laws as a precondition to allowing a product to be sold in that State as well as Michigan simply compounds the law's extraterritorial overreach. The foundational purpose of the Commerce Clause, as well as the elemental structure of a federalist system, forbid one State from "project[ing] its legislation into" other States and thereby imposing "regional and even national regulation *** [that] is reserved by the Commerce Clause to the Federal Government." *Healy v. Beer Inst.*, 491 U.S. 324, 334, 340 (1989) (internal quotation marks and citation omitted) (first alteration in original). If the Commerce Clause means anything, it means that Michigan cannot make it a crime to engage in commerce just because it is interstate.

The Sixth Circuit properly and quite straightforwardly applied settled precedent from this Court in ruling that Michigan's law runs headlong into the Commerce Clause. There is no point in this Court granting review to simply say again what it has said five times before, particularly given Michigan's recognition that its jurisprudential objection "'would not change outcomes.'" Pet. 16 (quoting Pet. App. 34a (Sutton, J., concurring)).

**1.** The Commerce Clause of the United States Constitution authorizes Congress "[t]o regulate

Commerce with foreign Nations, and among the several States[.]" U.S. CONST., Art. I, § 8, cl. 3. That Clause's "overriding requirement" is that there be a "national 'common market.'" *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977). Indeed, the foundational purpose for the Clause's enactment was to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (internal quotation marks omitted). Thus, at its most basic level, the Clause prohibits the States from "'retreating into *** economic isolation.'" *Department of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996)).

For that reason, "since the early days" of the Constitution, *Davis*, 553 U.S. at 337, the Commerce Clause has not just empowered Congress to enact national legislation, but has also enforced "a negative implication," *id.*, that operates as a "restriction on permissible state regulation," *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). Specifically, the Commerce Clause "significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce." *Maine v. Taylor*, 477 U.S. 131, 151 (1986).

To further "the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce," the Commerce Clause forbids a state law that "directly controls commerce occurring wholly outside the boundaries of a State" and thus that operates extraterritorially.

*Healy*, 491 U.S. at 335-336; *see also Southern Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945) (invalidating regulation where its "practical effect *** is to control train operations beyond the boundaries of the state exacting it"). Interstate commerce "would be thoroughly stifled" by such extraterritorial laws because, if one State may impose "a direct restraint on interstate commerce" with "sweeping extraterritorial effect," then "so may other States," *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality), resulting in "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude," *Healy*, 491 U.S. at 337.

**2.** Michigan's beverage container deposit law, known as the "Bottle Bill," requires that specified beverages, including soft drinks, be sold to consumers only in "returnable" containers for which a ten-cent deposit has been paid. M.C.L. §§ 445.571(a), (d), 445.572(1). Consumers may obtain a refund of the deposit by returning the empty bottle or can to a retailer manually or through a reverse vending machine. A reverse vending machine, as the name suggests, refunds a deposit when an individual feeds a container into it. *See* M.C.L. § 445.572a(12)(j). Retailers must accept empty containers for rebate, and then return the empty containers to beverage distributors, from whom they collect the ten-cent refund value. *See* M.C.L. §§ 445.572(2), 445.572(6).

When a distributor collects more deposits than it refunds over the course of a year, the unclaimed deposits are deemed abandoned property and escheat to the State. *See* M.C.L. §§ 445.573b, 445.573d.

Statewide, beverage containers are chronically underredeemed so that more deposits are collected from consumers in the aggregate than refunds are made. *See* Michigan Dep't of Env'tl Quality, *Michigan Bottle Deposit Law Frequently Asked Questions*, at 1 (2010).[1] Between 1990 and 2008, unclaimed deposits produced approximately $215,900,000 in revenue for the State treasury. *See id*. at 1. The State Treasurer gives 25% of that unclaimed deposit revenue to in-state beverage retailers and 75% to finance a Michigan cleanup and redevelopment trust fund. *See id*. § 445.573c; *see also* Pet. App. 5a.

**3.** Sometimes the value of deposits collected by an individual distributor is less than the total value of refunds it pays out in a given year. When such overredemption occurs, the distributor with a deficit in deposit revenue can remediate the problem by transferring its excess empty containers to an underredeemed distributor in exchange for rebates of the deposit amount. M.C.L. § 445.573b(6). A distributor also may credit any overredemption amount against a future year's escheat to the State. *Id*. § 445.573b(3). While those mechanisms mitigate the costs to distributors caused by overredeemption, any overredemption of containers still reduces the amount of revenue flowing to the State.

**4.** One potential cause of overredemption is individuals or retailers redeeming containers in

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[1] Available at http://www.michigan.gov/documents/deq/dnre-whmd-sw-mibottledepositlawFAQ_318782_7.pdf.

Michigan that were purchased out of State and thus for which no deposit was paid in Michigan. Pet. App. 5a.[2] Local retailers, however, are often complicit in bulk or large-scale improper redemptions. *See* Press Release, Mich. Attorney Gen., Can Scam (Sept. 27, 2007) (indictments issued where out-of-state cans were crushed, bagged and sold by weight at a discount to complicit retail stores in Michigan that redeemed the containers).[3]

Prior to 2008, the State did little to protect unclaimed deposit revenues. In 1998, the Michigan Legislature enacted misdemeanor penalties for a consumer's redemption of containers on which no deposit was paid, capped at 93 days' imprisonment and a fine of $500 for second and subsequent offenses. *See* M.C.L. § 445.574a (1999). But the law did not then criminalize the knowing acceptance of out-of-state containers by retailers and distributors. *Id.* Only in 2008 did the Michigan Legislature for the first time address improper redemptions by retailers and distributors, and for the first time provide for felony penalties for improper redemptions by consumers. *See* M.C.L. § 445.574a.

Before that criminal prohibition on retailers took effect, Michigan amended the Bottle Bill as part of a legislative package designed to increase revenue to the State. The amendment required specified

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[2] Throughout this brief, "Pet. App." refers to the petition appendix filed in No. 12-1221.

[3] Available at http://www.michigan.gov/ag/0,4534,7-164-46849_47203-176827--,00.html.

beverage manufacturers to sell their beverages in "designated" glass, metal, or plastic containers. *See* M.C.L. § 445.572a; Pet. App. 6a. The covered brands include major national brands like Coca-Cola, Pepsi, and Dr Pepper, *id.* at 7a nn.3-4. This amendment was "fervently opposed" by members of the local trade association for the soft drink industry. Pet. App. 97a.

A "designated" container is a beverage package that bears "[a] symbol, mark, or other distinguishing characteristic that is placed *** by a manufacturer to allow a reverse vending machine to determine if th[e] container is a returnable container[.]" M.C.L. § 445.572a(10). A "returnable container" is a container for which "a deposit of at least 10 cents has been paid, *** and for which a refund of at least 10 cents in cash is payable." *Id.* § 445.571(d). Thus, the law requires beverage packages to include a "distinguishing characteristic" that designates the can or bottle as "returnable" for ten cents, and is meant to prove that the can or bottle was purchased in Michigan. The law is directed only to making the packaging readable by reverse vending machines.

The Michigan-specific 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). On the face of the statute, no state law qualifies as "substantially similar" because "returnable container" is defined as a container for which a ten-cent deposit has been paid, *id.* § 445.571(d), and the statute mandates that the unique packaging must identify the can or bottle as "a returnable container," *id*. § 445.572a(10). No other State charges a ten-cent deposit for the size containers covered under the unique-mark mandate. Pet. App. 23a n.6. Nonetheless, counsel for Michigan has voiced in this litigation its view that the exception could cover nine States. *See* Mich. Pet. 9-10.

The Michigan-exclusive packaging requirement applies only to high-volume beverage manufacturers meeting certain sales thresholds. *See* M.C.L. § 445.572a(1), (3), & (5). As a result of those statutory terms, the statute's application extends, in practical effect, only to out-of-state companies engaged in interstate commerce. *See* Pet. App. 7a nn.3-4.

The law's plain terms and purpose obligate those targeted beverage manufacturers doing business in Michigan and more than one State to produce and distribute a Michigan-specific product for a Michigan-exclusive beverage market. *See* M.C.L. § 445.572a(10). Under the statute, interstate beverage companies are criminally barred from selling those Michigan-exclusive beverages in every other State because those products, by definition, are not packaged with "unique" markings that demonstrate they are "returnable" in Michigan, M.C.L. §§ 445.572a(10), 445.571(d); *see* Pet. App. 24a. The companies likewise are proscribed from selling in Michigan the same packaged beverages that they sell in every (or almost every) other State solely because that product is sold in another State. *See id*. Failure to comply subjects companies to up to six months of imprisonment and a $2,000 fine for each individual beverage sale in violation of the Act. M.C.L. § 445.572a(11).

**5.** The American Beverage Association is a non-profit association of manufacturers, marketers, distributors, and bottlers of virtually every nonalcoholic beverage sold in the United States, including the companies that sell products subject to Michigan's unique-mark packaging mandate. Pet. App. 7a. Under the law, member companies can no longer meet sudden shifts in demand or address unexpected reductions in production by shifting inventory from Michigan into other States for sale, or vice versa. Cross-Pet. App. 179a-180a ¶ 24, *American Beverage Ass'n v. Snyder* (No. 12-1344).

**6.** The day after the unique-mark mandate went into effect for plastic bottles, the Association challenged the law on the ground that the unique-mark mandate violates the dormant Commerce Clause by (i) discriminating against interstate commerce, (ii) unconstitutionally regulating beverage sales extraterritorially by criminalizing sales occurring entirely outside of Michigan, and (iii) imposing a burden on interstate commerce that far exceeds the putative local benefits, *see Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Pet. App. 7a-8a.[4]

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[4] Although enacted in 2008, the effective date of the unique-mark mandate was contingent upon the Michigan Legislature appropriating at least $1 million to retrofit reverse vending machines to read the new unique marks on cans, which did not occur until late 2009. Pet. App. 93a. The law provided for staggered effective dates for different types of containers,

The Association and Michigan both sought summary judgment. Pet. App. 8a. The Michigan Beer and Wine Wholesalers Association ("Michigan Wholesalers") intervened in support of Michigan. *Id.* at 8a. The district court granted summary judgment to Michigan with respect to the Association's claims that the unique-mark mandate is discriminatory and extraterritorial, but denied summary judgment for either party on the unconstitutional burden claim. *Id.* at 121a-122a. Accordingly, there has been no ruling regarding the magnitude of the burden imposed by Michigan's extraterritorial sales regulation on interstate commerce. *See id.*

The district court subsequently certified its summary judgment order for interlocutory appeal under 28 U.S.C. §1292(b), Pet. App. 88a, and the Sixth Circuit granted permission for interlocutory appeal, *id.* at 125a-126a.

**7.** On interlocutory review, the Sixth Circuit affirmed in part and reversed in part. That court reversed the district court's judgment on extraterritoriality, holding that the unique-mark mandate "allows Michigan to dictate where the product can be sold" outside of Michigan, and therefore it "is extraterritorial in violation of the dormant Commerce Clause because it impermissibly regulates interstate commerce by controlling conduct beyond the State of Michigan." Pet. App. 24a, 25a. Michigan's argument that "no conflict exists between

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with the unique-mark mandate for plastic containers going into effect on February 24, 2011. *Id.* at 6a-7a.

the states since Michigan is the only state with a unique-mark requirement," was deemed "flawed" *id.* at 21a-22a, because of the "potential destruction of the national common market through the adoption of state-exclusive product laws," *id.* at 23a. The court of appeals reasoned that "the reach of this statute and the criminal penalty for violations" rendered it invalid. *Id.* at 24a.

Given the law's extraterritorial operation, the court clarified in its amended opinion that there was "no need to consider whether the state had some legitimate local purpose or whether there is a reasonable nondiscriminatory alternative," Pet. App. 23a-24a. The court ruled that, in any event, "no other efforts were made by [Michigan] that could potentially satisfy the state's purported legitimate purpose in a non-extraterritorial fashion." *Id.* at 22a. The court listed several alternatives that Michigan failed to consider, including, *inter alia*, limiting the number of beverage containers that could be redeemed at a time, requiring proof of purchase in Michigan, and enforcing the recently enacted law prohibiting retailer fraud. *Id.*

The Sixth Circuit separately affirmed the district court's holding that the unique-mark mandate did not discriminate against interstate commerce, reasoning that "the Michigan provision does not favor in-state beverage manufacturers and distributors over out-of-state." Pet. App. 17a.[5]

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[5] The Association has filed a conditional cross-petition from that aspect of the court of appeals' ruling. *See American*

Judge Sutton (Pet. App. 26a-36a) and Judge Rice (Pet. App. 36a-38a) filed concurring opinions. Judge Sutton suggested that the extraterritorial doctrine served no independent purpose, noting that it has generally been an alternative holding in this Court's decisions because unconstitutional discrimination against interstate commerce commonly goes hand in hand with impermissible extraterritorial overreach by States. *See id.* at 34a (noting that, in finding impermissible extraterritorial regulation in *Healy v. Beer Institute*, 491 U.S. 324 (1989), this Court also held the statute at issue discriminatory because it imposed no restrictions on wholly intrastate beverage companies "'so long as that manufacturer or shipper does not sell its beer in a border State'").

In his concurring opinion, Pet. App. 36a-38a, Judge Rice specifically rejected the district court's view that the law was not extraterritorial just "because no other State has enacted a 'unique mark' requirement." Pet. App. 37a. In Judge Rice's view, "Michigan does not get a 'free pass' to enact extraterritorial legislation just because it is the first State to do so," *id.*, noting that, unlike an ordinary state labeling requirement, beverage manufacturers have no "option of using the State-compliant label nationwide," *id.* Judge Rice also stressed that, "because we have found the statute to be

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*Beverage Ass'n v. Snyder*, No. 12-1344. *See Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 364 (1994) (A cross-petition is required "when the respondent seeks to alter the judgment below.").

extraterritorial, it must be struck down, and that is the end of the inquiry." *Id*. at 37a-38a.

The Sixth Circuit denied rehearing, but granted Michigan's request to stay its mandate pending the filing of a petition for certiorari. Pet. App. 142a.

## ARGUMENT

Michigan's criminalization of the mere act of selling a safe and lawful product in *other* States, and its mandate that the price of doing business in Michigan is the creation of a unique-to-Michigan product that cannot be sold in other States, are unprecedented and anomalous intrusions on interstate commerce that the court of appeals properly held unconstitutional. Settled law "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders," *Healy*, 491 U.S. at 336 (internal quotation marks and citation omitted), just as it prohibits States from "retreating into *** economic isolation," *Davis*, 553 U.S. at 338. The court of appeals' decision fully comports with precedent and the law of other circuits. In fact, no circuit has precedent that would sustain a law that "dictate[s] where [a] product can be sold" outside the State. Pet. App. 24a.

Instead, petitioners invite this Court to straitjacket precedent in an entirely artificial manner that ignores the real-world consequences of their position. Quite simply, the "national 'common market'" prescribed by the Framers as the "Commerce Clause's overriding requirement," *Hunt*, 432 U.S. at 350, cannot coexist with Michigan's desire to wall off its economy from interstate commerce in beverages. For if Michigan can outlaw interstate commerce in a product—if it can send people to jail for selling in California the same safe and lawful product sold in Michigan—so can every other State for every other product.

## I. THE SIXTH CIRCUIT'S CORRECT APPLICATION OF THE WELL-SETTLED LAW OF EXTRATERRITORIALITY DOES NOT WARRANT THIS COURT'S REVIEW

### A. The Sixth Circuit's Decision Hewed To This Court's Precedent

#### *1. State laws may not police conduct wholly within another State*

In holding that Michigan's regulation of the sale of packaged beverage products in 49 other States impermissibly superintended commerce extraterritorially, the court of appeals faithfully followed this Court's settled precedent.

This Court has long recognized that "the projection of one state regulatory regime into the jurisdiction of another State," *Healy*, 491 U.S. at 337, can cause a "serious impediment to the free flow of commerce," *Southern Pac.*, 325 U.S. at 775. That impediment exists even when one State regulates conduct that another State chooses not to regulate. *See Healy*, 491 U.S. at 343 (invalidating laws that tied in-state prices to past out-of-state prices, even though they pose no risk of inconsistent obligations). Because constitutional federalism makes the States co-equals, the impact of such laws on interstate commerce is evaluated with the knowledge that, if one State "may impose such regulations, so may other States; and interstate commerce *** would be thoroughly stifled." *Edgar*, 457 U.S. at 642.

Michigan's law transgresses those fundamental principles. On its face, the law dictates where, outside the State, certain packaged beverage products may be sold in sales transactions having no connection to Michigan and that occur entirely within the boundaries of other States. Pet. App. 24a. By making it unlawful for an interstate manufacturer to sell the same packaged product that is sold in Michigan in every other State, Michigan has projected its bottle bill regulation into other States.

And Michigan's text-defying litigation position that the beverages could perhaps be sold in nine other States because Michigan approves of their recycling laws, Pet. 10, simply proves the point: the Commerce Clause does not let Michigan condition commerce occurring wholly within another State on its blessing of the content of that State's laws or programs. *Cf. Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976) ("To allow Mississippi to insist that a sister State either sign a reciprocal agreement acceptable to Mississippi or else be absolutely foreclosed from exporting its products to Mississippi would plainly invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.") (internal quotation marks omitted); *New Energy Co. v. Limbach*, 486 U.S. 269, 275 (1988) ("The present law *** imposes an economic disadvantage upon out-of-state sellers; and the promise to remove that if reciprocity is accepted no more justifies disparity of treatment than it would justify categorical exclusion.").

The "effect [that] would arise if not one, but many or every, State adopted similar legislation," *Healy*, 491 U.S. at 336, would be to shatter interstate commerce and to rend the very fabric of federalism that depends upon each State remaining within its own realm.

### *2. Petitioners cannot escape precedent or principle*

Petitioners' efforts to disentangle themselves from precedent simply make things worse by highlighting how idiosyncratically unconstitutional this law is.

#### a. Protectionism is not required

Petitioners first contend that the Commerce Clause's prohibition on extraterritorial economic regulation is applicable only when there is protectionist discrimination. Mich. Pet. 20-22; Mich. Wholesalers Pet. 21. That is wrong. Worse still for petitioners, the argument simply highlights that the court of appeals' decision can be upheld on an alternative ground, obviating any need for this Court to decide petitioners' questions presented. *See Bennett v. Spear,* 520 U.S. 154, 166 (1997) ("A respondent is entitled *** to defend the judgment on any ground supported by the record[.]").

Petitioners' insistence that protectionism is required simply misreads precedent. While Michigan notes that extraterritoriality was an alternative holding in *Healy*, Mich. Pet. 20, that was not because this Court also found impermissible protection of in-state competitors. To the contrary, this Court held that the Connecticut pricing law at issue there "'discriminated against brewers who engaged in interstate commerce,'" Mich. Pet. 20 (quoting Pet. App. 34a), whether those who engaged in such commerce were in-state or out-of-state "interstate brewers or shippers of beer," *Healy*, 491 U.S. at 341. What triggered the Commerce Clause's concern was that the law discriminated against companies who sell both in Connecticut and in at least one border State (as is the case here). *Id.* at 340. And this Court found discrimination notwithstanding the absence of any intrastate brewers to be protected. *Id.* at 344 n.* (Scalia, J., concurring).

Nor was protectionist motive a factor in *Edgar*, in which the plurality noted that the state statute at issue impermissibly regulated extraterritorial commerce "regardless of the purpose with which it was enacted." 457 U.S. at 642 (internal quotation marks omitted). The concern was not for state protection of in-state competitors against out-of-state ones, but state regulation that would "thoroughly stifle[]" interstate commerce, meaning cross-border transactions or operations, in the regulated industry. *Id.*

Michigan is wrong then to argue (Pet. 20) that this Court has "effectively cabined" the extraterritoriality doctrine to price affirmation and anti-takeover statutes with protectionist motives. This Court has also invalidated a law as impermissibly extraterritorial when there was the same discriminatory imposition of burdens "exclusively upon those who sell [products] not only in [one State] but also in the surrounding States," *Healy*, 491 U.S. at 344 (Scalia, J., concurring), that Michigan has put in place here.

Specifically, in *Healy*, this Court held that a statute that purported to apply to "*every* holder of a manufacturer or out-of-state shipper's permit," 491 U.S. at 328 n.5 (emphasis added), discriminated "[o]n its face" against interstate commerce because, "[b]y its plain terms," it "applies solely to interstate [manufacturers] or shippers of [beverages]" in that only companies that sold in Connecticut *and* a bordering State were affected by the law, *id.* at 340-341. So too here. Only those beverage manufacturers that sell in other States fall subject to Michigan's prohibition that they not "use[]" the Michigan-unique packaging in any other state except those "that have laws substantially similar to this act," if there are any. M.C.L. § 445.572a(10).

*Healy* thus both exposes petitioners' protectionism-only argument as wrong and simultaneously highlights that this law is unconstitutional not just because it is extraterritorial, but also because it discriminates against interstate commerce. *See also* Cross-Pet. 16-24, *American Beverage Ass'n v. Snyder* (No. 12-1344).

If more were needed, petitioners overlook that the Michigan law *does* discriminatorily protect local interests by shifting to the shoulders of interstate bottling companies the entire burden of an in-state *retail* fraud problem and of maximizing funding for a special subsidy paid exclusively to in-state retailers, M.C.L. § 445.573c(2)(b).

### b. Michigan's desire to propagate its own legislation makes things worse

Petitioners (Mich. Pet. 22; Mich. Wholesalers Pet. 24) also insist that the regulatory conflicts and gridlock highlighted in this Court's extraterritoriality cases are of no concern here because the only consequence of more state laws like Michigan's would be more uniformity, *i.e.*, Michigan-packaged beverages could then be sold in additional States with "substantially similar" laws. Putting aside that petitioners' uniformity argument depends on a contra-textual reading of "substantially similar," the notion that the Commerce Clause would smile upon Michigan's use of its criminal law to balkanize the national economy into trade zones based on which States share Michigan's view of container recycling gets the Constitution exactly backwards. In this Court's judgment, "a multiplication of preferential trade areas" is "destructive of the very purpose of the Commerce Clause." *Heald*, 544 U.S. at 473 (internal quotation marks omitted); *see also Great Atl. & Pac. Tea Co.*, 424 U.S. at 380**;** *New Energy Co.*, 486 U.S. at 275.

In any event, petitioners forget that their theory of the Commerce Clause would not open the door just to laws that precisely mimic Michigan's, but would empower every State to stake out its own exclusive-product regimes, whether for beverages or automobiles or any other product.

Nor can Michigan's law be saved under a one-free-bite view of the Commerce Clause as permitting extraterritorial regulation unless and until another State adopts a conflicting regulation. Pet. App. 37a (Rice, J., concurring) ("Michigan does not get a 'free pass' to enact extraterritorial legislation just because it is the first State to do so."). This Court has specifically instructed that the extraterritoriality analysis must consider "what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336.

Finally, the suggestion that no other State has countered with a corresponding extraterritorial overreach—indeed, the absence of a single State supporting Michigan as amicus—underscores that this unprecedented criminalization of interstate commerce is readily policed by existing precedent and there is no practical need for this Court to say again what it has said before.[6]

#### c. Michigan cannot prohibit national products

The Michigan Wholesalers argue for error correction because, in their view, this law leaves

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[6] New York enacted a state-specific UPC requirement in 2009, but that law did not criminalize violations or impose an impermissible reciprocity exception. *See* N.Y. ENVTL. CONSERV. LAW § 27-1012(12) (McKinney 2009). In any event, it was enjoined before it took effect and the State declined to defend it on the merits. Orders, *International Bottled Water Ass'n v. Paterson*, No. 09-cv-4672 (S.D.N.Y. May 29, 2009 & Oct. 23, 2009), ECF Nos. 30 & 68 (Exhibits G & H to the Association's Motion for Summary Judgment).

manufacturers "free to label their products however they see fit in other states,'" so long as they "'label their bottles differently for sale in Michigan.'" Mich. Wholesalers Pet. 20 n.15 (quoting Pet. App. 114a). But it is the mandate of "differen[ce]" that gives up the game. This Court has repeatedly held that a statute nominally directed to in-state conduct regulates extraterritorially when it directly and inextricably links out-of-state conduct to what is permissible in-state. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583 (1986) (invalidating law "addressed only to sales of liquor in New York" because out-of-state prices were determined by prices in New York); *Healy*, 491 U.S. at 328, 329 n.7 (invalidating law nominally directed only to shipping, transporting or delivery "within this state" because linkage between in-state prices and out-of-state prices effectively controlled prices out-of-state).

Michigan simply has no authority under the Commerce Clause to insist that beverages sold in Florida or Alaska be labeled differently or the same, or any way at all. Nor can it punish companies doing business in Michigan with prison and fines solely because of the packaging they use in other States. Any way the law is sliced, interstate companies *cannot* label beverages outside Michigan as "they see fit." Michigan has flatly outlawed the companies from having a single national packaged beverage product or even a regional product, because it is a crime to sell Michigan-labeled beverages in other States. To suggest that such a law does not regulate product sales in other States simply blinks reality.

### B. Petitioners' Invitation To Overrule Or Artificially Limit At Least Five Cases Does Not Warrant Review

Unable to distinguish this Court's extraterritoriality cases, petitioners ask this Court to arbitrarily limit the prohibition on extraterritorial regulation of commerce to price-affirmation and corporate-anti-takeover laws. Mich. Pet. 18-21; Mich. Wholesalers Pet. 21. That makes no sense.

*First*, the whole argument stumbles out of the starting gate because the extraterritoriality cases include not just price-affirmation and anti-takeover laws, but also non-affirmation milk pricing statutes and railroad regulation. *See, e.g.*, *Southern Pac.*, 325 U.S. at 775 (train length); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (out-of-state milk prices). Nowhere do petitioners explain what rule of constitutional reason would forbid a State from "directly control[ling] commerce occurring wholly outside [its] boundaries," *Healy*, 491 U.S. at 336, if the subject matter is drink pricing, but permit it if the subject is drink labeling.

*Second*, there is no point to granting certiorari when every *stare decisis* criteria weighs heavily against petitioners' request to overturn nearly a half-dozen precedents. This Court is particularly hesitant to uproot dormant Commerce Clause precedent because "the underlying issue is *** one that Congress has the ultimate power to resolve." *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992); *cf. John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (*stare decisis* holds "special force" when "Congress remains free to alter what [the Court] ha[s] done") (internal quotation marks and citation omitted).

The 75-year antiquity of the extraterritoriality doctrine, *see Baldwin*, *supra*, also counsels against gutting the rule. *See Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent[.]").

So do the extensive reliance interests in an area of such acute importance to business. The ability to supply the same product across state lines regionally or nationally and to not be punished simply for engaging in interstate commerce in a single product is "part of the basic framework of a sizable industry." *Quill*, 504 U.S. at 317.

*Third*, there is nothing "unworkable," *Montejo*, 556 U.S. at 792, about the rule against extraterritorial economic regulation. Neither the Sixth Circuit nor any other court of appeals has had any trouble distinguishing between an impermissible extraterritorial regulation and an ordinary state requirement—like the emissions standards for vehicles sold in California that Michigan cites (Pet. 25). Such laws are permissible because they are indifferent to what a manufacturer does in other States. States may reasonably dictate what labels or products within their States look like; Michigan's law dictates what labels and products in every other State can look like. That is the extraterritorial difference, and it is an easily administrable line in the unlikely event the issue ever arises again.[7]

It in fact confesses much that the only evidence of "confusion" Michigan asserts is a purported dispute between two district courts and the Washington Court of Appeals over state regulation of the internet. *See* Mich. Pet. 24-25 (citing *Cyberspace Commc'ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 751-752 (E.D. Mich. 1999); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997); *Rousso v. Washington*, 204 P.3d 243, 357 (Wash. Ct. App. 2009)). But what the petition omits is that the

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[7] *See, e.g., International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 647 (6th Cir. 2010) (labeling disclosure required on milk containers in Ohio not extraterritorial because it "ha[d] no direct effect on the [milk producers'] out-of-state labeling conduct *** how the [milk producers] label their products in Ohio has no bearing on how they are required to label their products in other states (or vice versa)"); *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001) (rejecting extraterritorial challenge to state label requirement because the "statute, by its terms, is 'indifferent' to whether lamps sold anywhere else in the United States are labeled or not"); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) (rejecting extraterritoriality challenge where state statute "is indifferent to sales occurring out-of-state"); *K-S Pharmacies, Inc. v. American Home Prods. Corp.*, 962 F.2d 728, 730 (7th Cir. 1992) (rejecting extraterritoriality challenge to state pricing law under which, "[s]o long as a seller charges the same price to all pharmacies in Wisconsin, it may do as it pleases in Minnesota or Micronesia"); *contrast* Pet. App. 24a (Michigan law "not only requires beverage companies to package a product unique to Michigan but also allows Michigan to dictate where the product can be sold" outside the State.).

Supreme Court of Washington distinguished the statute before it as not "export[ing] [Washington's] considerable regulations [of gambling] to the world." *Rousso v. Washington*, 239 P.3d 1084, 1092 (Wash. 2010).

In any event, the ongoing development of the law governing regulation of internet websites expressed in three lower court decisions in the almost quarter-century since *Healy* evidences stability in the law, not a need for this Court's immediate intervention.[8]

*Finally*, petitioners' criticism of territorial limits on States' economic regulation (Mich. Pet. 19, 28-29; Mich. Wholesalers Pet. 18-20) was already answered by this Court. In *Quill*, *supra*, this Court considered and rejected the same invitation to overrule a long-standing Commerce Clause doctrine on the theory that the modern economy had rendered it "'obsolete,'" 504 U.S. at 310, and it had been undermined by the evolution of the role of territorial authority under the Due Process Clause, *id.* at 312. This Court noted that territorial authority served different roles under the Due Process and Commerce Clauses, with the

[8] In the Eastern District of Michigan case that Michigan presses, Pet. 24, the Sixth Circuit's unpublished decision simply ruled that the district court did not "abuse[] its discretion" in issuing a preliminary injunction, and otherwise "assume[d] that the district court was speaking tentatively only" with respect to the merits. *Cyberspace Commc'ns, Inc. v. Engler*, No. 99-2064, 2000 WL 1769592, at *1 (6th Cir. Nov. 15, 2000).

latter "informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Id.* Those same "structural concerns" about maintaining a "national economy" are in the crosshairs of Michigan's law. And Michigan's reference (Pet. 28) to the international economy is beside the point. There is no international Commerce Clause policing nation-to-nation economic interactions.

### C. The Decision Has No Recurring Or Far-Reaching Impact On Traditional State Regulation

Michigan claims (Pet. 24-27) that the extraterritoriality doctrine threatens a wide variety of state statutes. But it cannot cite one law anywhere, either now or in the past, where a State imposed prison sentences and fines on companies based entirely on the design or content of lawful products lawfully sold in other States. The specter of courts using the extraterritoriality doctrine to prevent States from protecting their citizens with respect to "gun control, healthcare, regulation of the Internet, and fraud," Mich. Pet. 20, is just that: a specter. It has not happened.

The argument also whistles away the reality that 99.99% of the covered beverages sold in the other 49 States—the design of which Michigan's law dictates—never touch the State of Michigan in any way. As the court of appeals explained, not one of the nine other States with bottle deposit laws has found it necessary to enforce a similar burden on interstate commerce. Pet. App. 22a. Even if Michigan were losing state revenue to improper redemption, moreover, Michigan has other tools at hand to prevent that loss, including "the only recently enacted law against retailer fraud," *id.* (internal quotation marks omitted), not to mention the myriad other alternatives that Michigan "failed to consider." *Id.* at 23a. The court's decision invalidating a one-off statute with sweeping extraterritorial effect and no corollary operating in any other State is far different from a decision that "brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico." *New York v. O'Neill*, 359 U.S. 1, 3 (1959).

Michigan's parade of hypotheticals marches right around any legal reality. California's emissions standards are indifferent to compliance in other States, while the whole point of Michigan's law is to forbid the sale of Michigan-compliant beverages in all the other States (unless Michigan says it is okay).

Nor does Michigan's imagined fraud advance the ball. On its face, the hypothesized transaction is *not* wholly outside the State, but involves "a Florida company that sells a widget to a Michigan company." Pet. 25. To the extent that conduct outside the state makes that hypothetical transaction fraudulent, (i) the out-of-state location is happenstance, and not the product of state regulation specifically directed at out-of-state conduct, and (ii) the transaction as a whole is not wholly outside the State. Not so for the sale of a beverage in New Mexico that was produced in Texas, and yet must satisfy Michigan's unique-packaging law. The "degree of local autonomy" that the Commerce Clause favors stops when state exclusivity, product-specific isolationism, and "economic Balkanization" start, *Davis*, 553 U.S. at 338.

## II. THE COURT OF APPEALS' INVALIDITY RULING IS CONSISTENT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

Michigan alone contends (Pet. 29-31) that this Court should grant certiorari to resolve a purported disagreement among the courts of appeals regarding whether a state statute that impermissibly regulates extraterritorially is invalid without need for a separate balancing of local benefit against the interstate burden, *see Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). There is no circuit split on that question and, in any event, Michigan would lose in every circuit because the court of appeals found that Michigan had ample non-extraterritorial regulatory means at hand. Pet. App. 23a-24a.

As Michigan acknowledges (Pet. 30), the Sixth Circuit is joined by the First Circuit in holding that a law directly controlling extraterritorial commerce violates the Commerce Clause without resort to an independent balancing test. *See* Pet. App. 23a-24a & n.7; *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 35 (1st Cir. 2005) ("A state statute that purports to regulate commerce occurring wholly beyond the boundaries of the enacting state *** is per se invalid."). But Michigan neglects to mention that this view is also shared by the Second, Eighth, Tenth, and Eleventh Circuits. *See KT & G Corp. v. Attorney Gen. of Okla.*, 535 F.3d 1114, 1143 (10th Cir. 2008) ("[A] statute will be invalid *per se* if it has the practical effect of extraterritorial control of commerce."); *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 168 (2d Cir. 2005) (same); *Bainbridge v. Turner*, 311 F.3d 1104, 1112 (11th Cir. 2002) ("[L]aws that directly regulate commerce occurring in other states are invalid[.]"); *Cotto Waxo*, 46 F.3d at 793 ("Under the Commerce Clause, a state regulation is per se invalid when it has an 'extraterritorial reach.'").

The Seventh Circuit's decision in *Alliant Energy Corp. v. Bie*, 336 F.3d 545 (7th Cir. 2003), on which Michigan relies in claiming a conflict (Pet. 30), actually mirrors the court's decision here. *Alliant Energy* held that "a *direct or facial* regulation of wholly extraterritorial transactions is *per se* invalid." *Id.* at 547. "[I]ncidental or indirect effects on extraterritorial transactions are subject to the *Pike* balancing test" *only* when there is no direct or facial extraterritorial regulation. *Id.* If there were any doubt, the Seventh Circuit has since made plain that, "where states actually attempt to regulate activities in other states" such legislation "is invalidated without a balancing of local benefit against out-of-state burden." *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 665 (7th Cir. 2010).[9]

[9] The Third and Fourth Circuits have suggested, in *dicta*, that although *Pike* balancing is inapplicable, an extraterritorial law may be subject to strict scrutiny rather than per se

Michigan's circuit split argument is also a thinly disguised plea for error correction because, whether or not there should be any balancing, Michigan would lose. The statute's purpose is "to increase revenue to the State," Pet. App. 6a, but revenue "is not a local interest that can justify discrimination against interstate commerce" under any circumstances, *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 393 (1994). Furthermore, "no other efforts were made by [Michigan] that could potentially satisfy the state's purported legitimate purpose in a non-extraterritorial fashion," Pet. App. 22a (listing alternatives Michigan failed to consider), and thus Michigan cannot show that alternative measures have "prove[n] unworkable," *Heald*, 544 U.S. at 493.

At bottom, Michigan's law "thoroughly stifle[s]" interstate transactions, *Edgar*, 457 U.S. at 642, and

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invalidity. *See Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 492 (4th Cir. 2007) (classifying laws "with forbidden extraterritorial reach" among those that are "virtually per se invalid under the Commerce Clause") (internal quotation marks and citation omitted); *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Mktg. Bd.,* 462 F.3d 249, 261 (3d Cir. 2006) (classifying "extraterritorial effects" as a "type[] of discrimination that a plaintiff may show to trigger heightened scrutiny"). Neither court had reason to resolve the question. *Carolina Trucks*, 492 F.3d at 492 (reading statute to "avoid[] what would otherwise be serious constitutional difficulties"); *Cloverland-Green*, 462 F.3d at 270 (no "facts calling for heightened scrutiny"). Michigan understandably does not suggest that the comments in these cases support review, presumably because Michigan knows its law cannot survive strict scrutiny.

creates "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude," *Healy*, 491 U.S. at 337. No State to the Association's knowledge has ever thought it necessary to criminalize interstate commerce in this manner or to assert the raw authority to punish businesses in Michigan solely because they sold a safe and lawful product in another State.

## CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

Patricia A. Millett
*Counsel of Record*
Ruthanne M. Deutsch
Hyland Hunt
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP

*Counsel for the American Beverage Association*

June 14, 2013

**APPENDIX TO THE BRIEF IN OPPOSITION**

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**Chapter 445. Trade and Commerce**

**Beverage Containers**

**445.571 Definitions.**

Sec. 1.

As used in this act:

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

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

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

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

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

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

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

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

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

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

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

(l) “Commission” means the Michigan liquor control commission.

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

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

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

(i) Nonalcoholic beverages.

(ii) Flavoring.

(iii) Coloring materials.

(iv) Fruit juices.

(v) Fruit adjuncts.

(vi) Sugar.

(vii) Carbon dioxide.

(viii) Preservatives.

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

**Michigan Compiled Laws Annotated**

**Chapter 445. Trade and Commerce**

**Beverage Containers**

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

Sec. 2a.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ounce glass beverage container that is not a designated glass container if either of the following is met:

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

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

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

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

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

600,000 containers in the preceding calendar year, as determined by the department of treasury.

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

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

(12) As used in this section:

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

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

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

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

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

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

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

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

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

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

**Michigan Compiled Laws Annotated**

**Chapter 445. Trade and Commerce**

**Beverage Containers**

**445.574a. Returns or attempted returns of particular containers for refunds, penalties; acceptance of and payment of deposit for or delivery for refund of nonreturnable containers, penalties; restitution for violations; civil fines for violations**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Michigan Compiled Laws Annotated (1999)**

**Chapter 445. Trade and Commerce**

**Beverage Containers**

**445.574a. Returns for refunds, prohibitions; violations**

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

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

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

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

(a) If the person returns 25 or more but not more than 100 nonreturnable containers, the person is guilty of a misdemeanor punishable by a fine of not more than $100.00.

(b) If the person returns more than 100 nonreturnable containers or violates subdivision (a) for a second or subsequent time, the person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

(c) A person found guilty under this subsection shall be ordered by the court to pay restitution equal to the amount of loss caused by the violation.