No. _____

In The
Supreme Court of the United States

MICHIGAN BEER & WINE
WHOLESALERS ASSOCIATION,

Petitioner,

v.

AMERICAN BEVERAGE ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Michigan's "Bottle Bill" requires a 10-cent deposit on soft drink and beer containers. To combat fraudulent redemptions in Michigan of containers sold in non-deposit states, the Bottle Bill was amended to require that manufacturers meeting high volume thresholds containers sold in Michigan must have a mark so they can be identified as having been sold in Michigan or in another state with a deposit law. The district court and all three court of appeals judges agreed the statute does not favor Michigan consumers or businesses at the expense of out-of-state ones and furthers the legitimate goal of decreasing criminal behavior that deprives the State of funds for environmental uses. Unlike the district court, the court of appeals found the challenged law unconstitutional under this Court's extraterritoriality doctrine.

1. Whether the extraterritorial branch of the dormant Commerce Clause doctrine should be limited to the price-affirmation and anti-takeover contexts, or abolished entirely as a stand-alone test.

2. Whether the extraterritorial branch of the dormant Commerce Clause doctrine extends to a nondiscriminatory statute that is focused on in-state activity in order to prevent fraud occurring in the enacting state.

LIST OF PARTIES

Petitioner, intervening defendant-appellee below, the Michigan Beer & Wine Wholesalers Association, is a trade association of licensed Michigan beer and wine wholesalers that intervened as a defendant in the district court.

Respondent, plaintiff-appellant below, 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.

Respondent filed this action in the Unites States District Court for the Western District of Michigan, naming as defendants Michigan Governor Rick Snyder, Michigan Attorney General Bill Schuette and Michigan Treasurer Andrew Dillon. The State of Michigan parties, defendants-appellees below, have filed a separate petition for writ of certiorari.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Michigan Beer & Wine Wholesalers Association has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

The Michigan Beer & Wine Wholesalers Association (MB&WWA) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App. 1a) is reported at 700 F.3d 797. The opinion of the district court granting partial summary judgment for the State of Michigan defendants and petitioner MB&WWA (App. 89a) is reported at 793 F. Supp. 2d 1022. The opinion of the district court denying respondent's motion for reconsideration (App. 77a) is not reported.

JURISDICTION

The amended judgment of the court of appeals was entered on January 7, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause, U.S. Const. art. I, § 8, cl. 3 (App. 143a), and the 2008 amendments to Michigan's Bottle Bill, Mich. Comp.

Laws §§ 445.571, *et seq*. App. 144a. Specifically, this case involves Mich. Comp. Laws § 445.572a(10), which provides:

> (10) A symbol, mark, or other distinguishing characteristic that is placed on a designated metal container, designated glass container, or designated plastic container by a manufacturer to allow a reverse vending machine to determine if the 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.

STATEMENT

This case involves a dormant Commerce Clause challenge to a Michigan statute aimed at preventing fraudulent redemption of soft drink and beer containers.

Respondent American Beverage Association filed this action against the governor and other officials of the State of Michigan. Jurisdiction of the district court was based on 28 U.S.C. §§ 1331 and 1343. The MB&WWA was allowed to intervene as a defendant.

The fraudulent redemption of out-of-state containers on which no deposit was collected at the time of sale had become a substantial problem in Michigan, resulting, *inter alia*, in three state environmental funds being deprived of millions of dollars per year

that they would have received from unclaimed deposits (which escheat to the State) absent the criminal fraud. Michigan had tried to stop fraudulent redemptions by making it a crime to knowingly redeem containers on which no deposit had been paid, requiring retailers to post notices of criminal penalties, as well as law enforcement operations to apprehend perpetrators. Those efforts did not stop the fraudulent activity.

The 2008 Bottle Bill amendment, Mich. Comp. Laws §§ 445.571, *et seq.*, addressed this problem in a more comprehensive way. Mich. Comp. Laws § 445.572a, provides that for brands exceeding high volume thresholds of sales in Michigan, containers sold in Michigan must have a mark, such as an ink jet mark on cans, allowing them to be identified by a reverse vending machine[1] as having been sold in Michigan or in another state with a substantially similar law. Michigan interprets "substantially similar" laws to refer to all other states having a deposit law, regardless of the amount of the deposit. Thus, a mark need not be unique to Michigan; rather, the same mark can be used on containers sold in Michigan or in any other deposit state.[2] Because of the high

[1] A reverse vending machine is "a device designed to properly identify and process empty beverage containers and provide a means for a deposit refund on returnable containers." Mich. Comp. Laws § 445.572a(12)(j).

[2] District court opinion (App. 93a, 117a) and district court R. No. 17, defendants' response to motion for summary judgment, p. 4.

volume thresholds, only a few brands, such as Coca Cola, Pepsi, 7-Up, Budweiser and MillerCoors, are subject to the statute's requirements.[3] Mich. Comp. Laws § 445.572a(1) through (9).

Plaintiff moved for summary judgment arguing that Mich. Comp. Laws § 445.572a(10) is both extra-territorial and discriminatory in violation of the dormant Commerce Clause. The district court entered an opinion on May 31, 2011, denying plaintiff's motion for summary judgment and ruling as a matter of law that the statute is neither extraterritorial nor discriminatory in violation of the dormant Commerce Clause. App. 89a. As to the extraterritorial argument, the court held the Bottle Bill amendment focuses on sales of containers in Michigan and does not control economic activity occurring wholly outside of the State, unlike price affirmation cases such as *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986), and *Healy v. The Beer Institute*, 491 U.S. 324, 109 S. Ct. 2491, 105 L. Ed. 2d (1989). App. 109a-117a. The district court also found the Michigan statute does not raise a valid concern of conflicting regulatory schemes. App. 115a-116a. The district court declined to rule as a matter of law on the *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970) balancing test,[4] concluding that questions

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[3] District court opinion. App. 93a-94a.

[4] "That test upholds a state regulation unless the burden it imposes upon interstate commerce is 'clearly excessive in relation

(Continued on following page)

of fact exist as to the extent of the burden on interstate commerce. App. 121a. On July 20, 2011 the district court issued a memorandum opinion denying respondent's motion for reconsideration and granting certification of interlocutory appeal. App. 87a.

The court of appeals accepted interlocutory appeal to address the issues whether the statute discriminates against interstate commerce and whether it is extraterritorial in violation of the dormant Commerce Clause. The court of appeals considered these to be stand-alone "virtually *per se*" tests, separate from the analysis required by *Pike*.

The court of appeals issued its amended opinion on January 7, 2013. App. 1a. In three separate opinions, the judges unanimously agreed the statute is not protectionist and does not discriminate against interstate commerce either facially, in effect or in purpose. However, the court struck down the statute based on the extraterritorial doctrine, holding it impermissibly regulates conduct occurring in other states, albeit it presents a "miniscule burden" in other states, in the words of Judge Sutton's concurrence. App. 35a.

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to the putative local benefits.'" App. 117a, quoting *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 644 (6th Cir. 2010), citing *Pike*, *supra* at 142.

REASONS FOR GRANTING THE PETITION

The district judge and all three court of appeals judges agreed the statute does not favor Michigan consumers or businesses at the expense of out-of-state ones. All the judges agreed the statute does not discriminate against interstate commerce. All agreed the statute reasonably furthers Michigan's laudable goal of preventing fraud and thus increasing the amount of unclaimed deposits, funds that are dedicated by statute to primarily environmental uses.

Yet, the court of appeals struck down the statute on the basis that it is extraterritorial. According to the court, the statute directly controls conduct occurring wholly in other states because a mark that allows containers to be identified as deposit state containers impliedly requires that containers sold in non-deposit states not have the same mark as used in deposit states. App. 18a-25a. That is the sole basis for saying the statute is impermissibly extraterritorial.

Judge Sutton's concurrence captures the analytical problem, and his opinion provides a strong basis for review by this Court. In a national economy where one state's laws often have substantial effects in other states, Judge Sutton noted the illogic of applying the extraterritorial doctrine to strike down a statute that presents only a "miniscule burden" in other states, where the challenged statute is not protectionist in any sense, and where the statute is a reasonable means of remedying criminal fraud that occurs

exclusively in Michigan as a result of the multi-state distribution of beverage containers:

> A law that does not discriminate against interstate commerce, that complies with the traditional requirements of due process and that complies with these other limitations, it seems to me, *should not be invalidated solely because of an extraterritorial effect*. [Citation omitted.]
>
> * * *
>
> Nor is there anything special about the Michigan redemption law that ought to make it unconstitutional under the extraterritorial doctrine but not the traditional dormant Commerce Clause doctrine or some other constitutional guarantee. *The law does not discriminate against interstate commerce by favoring in-state bottlers at the expense of out-of-state ones. Even though the unique-mark requirement serves a vital state interest and imposes only a miniscule burden on interstate commerce, its extraterritorial effect appears to doom it. No one, the plaintiffs included, doubts that Michigan may enact a bottle-deposit law under the American Constitution. But extraterritoriality and extraterritoriality alone bars Michigan from the option it believes will best make its bottle-deposit scheme effective.*
>
> Michigan, perversely enough, could have chosen to reduce bottle-deposit fraud by enacting legislation far more hurtful to interstate commerce yet not extraterritorial.

> The State might have required beverage manufacturers to place a large "Made for Sale in Michigan" label on their products, demanded a burdensome warning label or mandated that manufacturers sell bottles in unusual shapes and sizes that fit only Michigan bottle-redemption machines. So long as those regulations survived *Pike* balancing, they would be constitutionally permissible. See, *e.g.*, *Int'l Dairy*, 622 F.3d at 648-49, *Sorrell*, 272 F.3d at 108-09. Michigan instead chose a nondiscriminatory method premised on compliance in other States, a seeming requirement of *any* innocuous unique-mark requirement. It is only the non-innocuous unique-mark requirement – the more offensive to the bottler the better – that frees Michigan from having to worry about fraudulent redemption arising from non-unique mark sales in other States. How strange." App. 33a-36a. (Emphasis added.)

Judge Sutton argued that given economic realities in which one state's laws routinely affect economic conduct in other states, the extraterritorial doctrine no longer serves a useful purpose as a freestanding branch of Commerce Clause jurisprudence; instead, a law's extraterritorial effect, including whether the law subjects persons to conflicting state regulatory schemes, should be considered as part of the balancing test under *Pike v. Bruce Church*.[5] A law's

[5] "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate

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extraterritorial effect would thus be considered along with other factors such as the actual nature of the burden imposed in other states and whether the statutory scheme is closely connected to in-state activity and in-state harms.

This Court has applied extraterritoriality only in price affirmation cases where there was economic protectionism. See *Brown-Forman*, *supra*, and *Healy*, *supra*.

MB&WWA respectfully submits this Court should grant the petition to address whether the extraterritorial doctrine of dormant Commerce Clause jurisprudence requires striking down a state statute because it has some effect in other states, without regard to the non-protectionist, non-discriminatory nature of the statute, and without regard to the nature of the burden imposed in other states or the exclusively in-state harms remedied by the statute.

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commerce are only incidental, it will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church*, *supra* at 142.

I. Michigan's Bottle Bill.

A. Brief history.

The Bottle Bill was approved by the people of Michigan in 1976, Initiated Law of 1976, Mich. Comp. Laws §§ 445.571 *et seq*. That law was the result of the "concerns of Michigan's citizens about the environmental damage and financial burdens caused by discarded beverage containers." *Michigan Soft Drink Ass'n v. Dep't of Treasury*, 522 N.W.2d 643, 645 (1994). Michigan is one of ten states that have bottle deposit laws. Court of Appeals opinion. App. 3a.

Unclaimed deposits are the property of the people of Michigan. Mich. Comp. Laws § 445.573d. See *Michigan Soft Drink Ass'n*, *supra*. Annual reports are made by manufacturers and distributors regarding the total annual value of deposits collected and refunds paid. If a manufacturer or distributor collected more deposits than were refunded, the excess is remitted to the Department of Treasury for deposit into a revolving fund. Mich. Comp. Laws §§ 445.573b and 445.573c. The Department of Treasury disburses annually 75% of the unredeemed bottle fund to the Unclaimed Bottle Fund, with the remaining amount apportioned to retailers to assist with their handling costs. Mich. Comp. Laws § 445.573c. The Unclaimed Bottle Fund disburses one-third of the proceeds to the Environmental Response Fund, one-third to the Long-Term Maintenance Trust Fund and one-third to the Clean Michigan Fund. Mich. Comp. Laws §§ 299.609, 299.609c and 299.375.

B. The problem addressed by the 2008 Bottle Bill amendments.

Millions of dollars per year have been fraudulently diverted from Michigan's environmental programs. As the district court found, the fraudulent activity has been well documented.[6]

Without a mark that distinguishes the containers as having been sold in a state having a deposit law, there is no way for a reverse vending machine (or a store employee making a visual inspection) to recognize them as deposit containers versus containers on which no deposit was paid at the time of sale.

The Bottle Bill was amended in 2008 with input from industry members, including beer manufacturers, soft drink representatives such as the Michigan Soft Drink Association, whose members include Coca Cola, Pepsi and 7-Up, and other interested parties. Michigan has also demonstrated its commitment to solving the fraud problem by making State funds available for reverse vending machine upgrades and

[6] "Plaintiff does not deny that the problem exists, and Defendants have presented sufficient evidence that estimates the scope of fraud to be, conservatively, 10 million dollars per year. . . . Finally, it is undisputed that the majority of the funds that are lost to fraudulent redemption each year would otherwise go into a cleanup and redevelopment trust fund." App. 119a-120a.

technology (and the State has appropriated $1.5 million and has spent over $1 million thus far).[7]

The challenged law had a long lead-in time for implementation (approximately 18 months) to help accommodate any technological issues that might be encountered.

C. The operation of the Bottle Bill amendments.

Consistent with arguments made by the beverage industry, the law exempts low sales volume brands (wherever manufactured) since those brands were not contributing in any major way to the fraudulent redemption of containers in Michigan. Mich. Comp. Laws § 445.572a.[8] The statute treats all manufacturers the same whether located in Michigan or outside of Michigan.[9]

It also gives manufacturers flexibility as to how they will meet the requirements. See Mich. Comp. Laws § 445.572a(10), which requires a "symbol, mark or other distinguishing characteristic." Options include use of a "UPC" code identifier, use of some other

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[7] District court R. No. 17, defendants' response to motion for summary judgment, Exhibit 5, affidavit of former Michigan Senator Ronald Jelinek, paragraph 9.

[8] District court R. No. 17, defendants' response to motion for summary judgment, Exhibit 6.

[9] Court of appeals opinion (App. 13a); district court opinion. App. 106a.

identifier put on containers sold only in Michigan or in another deposit state (*e.g.*, ink jet dot matrix), or using a distinguishing *absence* of a mark on containers sold in Michigan or other deposit states (should manufacturers choose to use a mark in non-deposit states). Flexibility is given to manufacturers in that whatever option/mark they choose, it can also be used in any other state that has a bottle deposit law, regardless of the amount of the deposit.[10]

Affected soft drink companies have been complying with the statute (by certifying they are using Michigan identifying marks) since March 2010 for cans and since March 2011 for bottles.[11] Beer manufacturers are also complying with the law by having the required mark.[12]

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[10] See footnote 2, *supra*.

[11] District court R. No. 17, defendants' response to motion for summary judgment, manufacturers' certifications, Exhibits 8 and 10.

[12] District court R. No. 32, MB&WWA's response to motion for summary judgment, Exhibit 6; R. No. 31, MB&WWA's response to motion for summary judgment, Exhibit 1, affidavit of Terry Staed, paragraph 13.

II. The Michigan statute's miniscule effect in other states should not doom it. If it does under current jurisprudence, the Court should consider whether Commerce Clause interests would be better served by addressing extraterritorial effects as part of *Pike* balancing rather than as an independent "virtually *per se*" test.

The court of appeals found the statute is extraterritorial because a mark that is unique to Michigan and other deposit law states impliedly cannot be used in non-deposit states. This, according to the court, is direct control over a transaction occurring wholly in another state, making the statute virtually *per se* invalid (App. 18a) (or *per se* invalid according to Judge Rice's concurrence. App. 38a.) See *Healy*, *supra* at 336.

But the dormant Commerce Clause does not require all statutes that "directly" regulate conduct occurring in another State be struck down without further inquiry – no matter how miniscule the burden, and no matter how close the connection to in-state activity or how needed the remedy is to alleviate in-state harm in a multi-state distribution system. In any dormant Commerce Clause analysis the "'critical consideration . . . is the overall effect of the statute on both local and interstate activity.'" *Int'l Dairy Foods Ass'n v. Boggs*, *supra* at 646, quoting *Brown-Forman*, *supra* at 579. The actual nature of the regulation's effect in the enacting State and beyond its borders must be the focus because "there is no clear line

separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman*, *supra*.

"The key point of today's Commerce Clause jurisprudence is to prevent States from discriminating against out-of-state entities in favor of in-state ones" (concurring opinion of Judge Sutton, App. 28a), something Michigan's unique mark statute undeniably does not do. See *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008) ("The dormant Commerce Clause is driven by concern about economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.")

Whether a statute implicates these concerns does not logically depend on whether its out-of-state effects are termed "direct" or "indirect." A finding of "direct" regulation of out-of-state conduct should not override all other considerations, as it apparently did in this case. This was explained in Judge Sutton's concurrence:

> "The modern reality is that States frequently regulate activities that occur entirely within one State but that have effects in many. . . . If, in the absence of preemptive federal legislation, these laws and others like them do not violate the extraterritoriality doctrine of *Healy*, why not? Their effect is no less direct than the Michigan unique-mark requirement

> we invalidate today. What divides impermissible 'direct' extraterritorial laws from permissible 'indirect' ones? I cannot tell, and I do not think *Healy*'s suggestion to look to the 'practical effect' of the regulation offers any meaningful guidance." App. 30a-31a.

As argued by Judge Sutton, extraterritoriality is better dealt with as part of balancing a statute's local benefits and its out-of-state burdens under *Pike v. Bruce Church*, an approach that would better accomplish the key purpose of the dormant Commerce Clause to prevent economic protectionism, and that would provide more consistent results as measured against that purpose. As noted in Judge Sutton's concurrence, this would not eliminate the role of territory, since territorial limits underlie many other constitutional imperatives, including the Due Process Clause. App. 32a.

This has precedent. See *National Electric Mfrs. Ass'n v. Sorrell*, 272 F.3d 10, 109-12 (2d Cir. 2001), *cert. den.*, 536 U.S. 905, 122 S. Ct. 2358, 153 L. Ed. 2d 180 (2002), where the court considered the extraterritorial doctrine as part of the *Pike* balancing inquiry and upheld a Vermont statute that dictated the label content of products containing mercury. The statute's indirect effect on labels in other states, and the possibility of inconsistent regulatory schemes arising in the future which might lead to a practical requirement of state-specific labels, were recognized by the court but were held to be a permissible consequence of multi-state distribution of products. See

also, *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*, 492 F.3d 484, 492 (4th Cir. 2007), where the court stated that considering a law's extraterritorial effect as part of *Pike* balancing is consistent with this Court's decision in *Brown-Forman*:

> "The Supreme Court has written that 'there is no clear line' separating state laws that are 'virtually *per se* invalid under the *Commerce Clause*,' *including those with forbidden extraterritorial reach*, from the state laws that are invalid because they impermissibly burden interstate commerce under a balancing approach. *Brown-Forman*, 476 U.S. at 579. 'In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.' *Id.*" (Emphasis added.)

See also, Gergen, *Territoriality and the Perils of Formalism*, 86 Mich. L. Rev. 1735 (June, 1988), stating that direct versus indirect is "ultimately a poor tool for defining the limits of state power in interstate matters" (*id.* at 1737), and arguing:

> "Perhaps worst of all, some jurists may take the principle literally and strike down good laws because they seem to regulate foreign behavior directly. If there were few hard cases, or if the distinction between direct and indirect extraterritorial regulation was relevant to any real concern, these problems

> with Regan's [13] proposal would be tolerable. But, as we have seen, many cases will be hard because there is no clear distinction between regulating foreign behavior and regulating its local effects."

If the label "direct" regulation of out-of-state conduct does not carry the day, as it should not, the challenged Michigan statute easily withstands Commerce Clause scrutiny, given that it is a needed remedy for exclusively in-state harms and that it has only a minimal effect in other states. "'[A] state's geographic territory does not mark the outer limit of its legitimate regulatory concern.'" *IMS Health Inc. v. Mills*, 616 F.3d 7, 30-31 (1st Cir. 2010), *vacated on other grounds*, *sub nom IMS Health Inc. v. Schneider*, ___ U.S. ___, 131 S. Ct. 3091, 180 L. Ed. 2d 911 (2011),[14] quoting G.E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468, 1521-22 (2007). The Court in *IMS Health* held a statute is not invalid as extraterritorial where it affects out-of-state transactions with a significant connection to the enacting state. "The Supreme Court has previously

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[13] Referring to Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (May, 1986) and Regan, *Siamese Essays (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865 (August, 1987).

[14] The First Circuit's opinion was vacated on the basis of the First Amendment, with direction to reconsider in light of *Sorrell v. IMS Health Inc.*, ___ U.S. ___, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011).

distinguished and upheld a state statute that regulated out-of-state commercial transactions with a clear in-state nexus and impact." *Id.* at 58, citing *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987). This Court in *CTS Corp.* upheld an Indiana statute that regulated hostile takeovers, holding that an Indiana corporation with a substantial number of Indiana shareholders provided a sufficient connection to the state, even though the statute significantly affected economic activity elsewhere.

"The doctrine [of extraterritoriality] has never meant that states are powerless to regulate all transactions beyond their borders." *IMS Health v. Mills*, *supra*, at 30, n.29. A statute is not invalid as extraterritorial where it regulates "transactions with a significant inherent connection to the regulating state." *Id.* at 30. This is particularly true where the statute seeks to remedy an exclusively in-state harm (*id.* at 41), such as, in this case, where the harm from fraudulent redemptions occurs entirely in Michigan but is a function of a multi-state distribution system.

See also, *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994), stating, "The Supreme Court has never suggested that the dormant *Commerce Clause* requires Balkanization, with each state's law stopping at the border," citing, Regan, *Siamese Essays*, *supra* at 1878 ("[T]he Court cannot prohibit all state laws that have extraterritorial effects, or even all state laws that have

substantial extraterritorial effects. Such a prohibition would invalidate much too much legislation.").

It is also incorrect to say the Michigan statute involved here directly regulates transactions occurring wholly outside the State. See district court opinion. App. 114a-117a.[15] Mich. Comp. Laws § 445.572a, subsections (1) through (9), dictate what is required for sales in Michigan, depending on the type of container, the type of beverage (soft drink versus alcoholic) and specific volume thresholds. Each of those subsections addresses sales in Michigan. The statutory mandate and the applicable penalty for violation (see Mich. Comp. Laws § 445.572a(11)), apply only to sales in Michigan.

If a manufacturer subject to the statute is using a particular distinguishing mark on containers sold in Michigan and chooses to sell those containers in non-deposit states, the statute does not prohibit that. A manufacturer who does so would incur costs of having to certify a different mark for use on containers it wants to thereafter sell in Michigan, but that is

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[15] [M]anufacturers are free to label their products however they see fit in other states. They simply must label their bottles differently for sale in Michigan. The Court recognizes that if a manufacturer must use a unique-mark for bottle law states, Michigan law would dictate what the label in a non-bottle state could not contain, i.e., a 'unique mark' enabling machines to recognize containers not sold in Michigan. Nonetheless, the Court believes that Defendants have the better side of the argument.

App. 114a.

part of the costs of doing business in an interstate distribution system, which can be passed on to Michigan consumers in the form of higher prices, or absorbed by the manufacturer. See *National Electrical Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 111 ("But that manufacturers must bear some of the costs of the Vermont regulation in the form of lower profits does not cause the statute to violate the *Commerce Clause*.").

There is no economic protectionism here. The challenged law focuses on sales and redemptions *in Michigan* in order to remedy a harm that occurs exclusively *in Michigan*. The statute imposes no penalty on activity in other states. The effect outside Michigan (whether labeled "direct" or "indirect") on a few multi-state manufacturers who sell containers both in Michigan and in non-deposit states is incidental to and has a close connection to the activities being directly regulated in Michigan.

This Court "has applied the extraterritorial doctrine only in the limited context of price-affirmation statutes." Court of appeals opinion, App. 18a. See *Brown-Forman*, *supra*, and *Healy*, *supra*. Price manipulation such as was at issue in *Brown-Forman* and *Healy* goes to the heart of economic protectionism. In contrast, the challenged statute bears no resemblance to the protectionist statutes involved in those cases, which effectively controlled prices charged in other states.

As noted, the district court has not yet addressed the balancing test required by *Pike v. Bruce Church*.

Rather than invalidating the statute based on the label "direct" regulation, any concerns of extraterritorial effects should be considered by the district court on remand as part of the *Pike* balancing test.

III. There are no actual inconsistent state regulatory schemes, and no realistic danger of hypothetical ones.

As noted by the district court, "Plaintiff's extraterritorial argument can be, and was, framed in terms of inconsistent regulations." App. 115a. See *Healy*, *supra* at 336 ("what effect would arise if not one, but many or every, State adopted similar legislation."). But as the district court held, the inquiry is directed to actual conflicting regulatory schemes, not hypothetical ones:

> "However, '[i]t is not enough to point to a risk of conflicting regulatory regimes in multiple states; there must be a conflict between the challenged regulation and those in place in other states.' *Sorrell*, 272 F.3d at 112; *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406-07, 114 S. Ct. 1622, 1690 (1994) (O'Conner, J., concurring (quoting the language from *Healy* that the 'practical effect' of the challenged statute 'must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the regulatory regimes of other States and what effect would arise if not one, but many or every, [jurisdiction] adopted

> similar legislation,' explaining that this is not a 'hypothetical inquiry,' and going on to discuss that because many jurisdictions were contemplating or enacting similar laws, the potential for conflict was high); *Brown-Forman*, 476 U.S. at 583-84, 106 S. Ct. at 2086-87 (explaining that proliferation of price affirmation laws made the likelihood that a seller would be subjected to inconsistent obligations in different states high). *No conflict has actually been shown here – Michigan is the only state with a unique-mark requirement. In addition, because of the 'substantially similar' language in § 572a(10), if, in fact, other states adopted similar container deposit laws, the burden of which Plaintiff complains, would only be diminished.* App. 115a-116a. (Emphasis added.)

Respondent contends there is a danger of 50 states requiring 50 unique marks, but that claim has no relation to the facts of this case. The Michigan statute does not require that containers sold in Michigan have a unique mark useable only in Michigan; rather, the same mark or distinguishing characteristic may be used in Michigan and in all other states having a deposit law. That is how the State of Michigan has interpreted and applied the phrase "other states that have laws substantially similar to this act" in Mich. Comp. Laws § 445.572a(10).[16]

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[16] The State of Michigan, charged with enforcement of the statute, has adopted the interpretation that other state deposit

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In *Brown-Forman* and in *Healy*, the potential of inconsistent price affirmation statutes among states was a real and existing concern. At the time of the decision in *Brown-Forman*, 39 states had adopted price affirmation laws. *Healy*, 491 U.S. 324, 334, n.10. See *Brown-Forman*, 476 U.S. 573, 583 ("Moreover, the proliferation of state affirmation laws following this Court's decision in [*Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 86 S. Ct. 1254, 16 L. Ed. 2d 336 (1966)] has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States.") That type of concern is nonexistent here.

In the present case, if other states "adopted similar legislation," *Healy*, *supra* at 336, the result would be that more states would be deposit law states where the same distinguishing mark could be used. The only hypothetical inconsistent regulation would be if a non-deposit state enacted a law requiring containers to have the same mark as containers sold in Michigan, an unlikely scenario given that non-deposit states have no practical interest in requiring any mark. And in any event, it should be emphasized that the challenged statute does not prohibit any

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laws are "substantially similar" without regard to deposit amounts, and federal courts, "are entitled to rely on the State's plausible interpretation of the law it is charged with enforcing." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2662. Therefore, while respondent tries to make a case for the danger of inconsistent regulations, the argument concerns a different, hypothetical regulation, not the Michigan statute before the Court.

particular mark from being used in non-deposit states. Contradictory state regulatory schemes are an imaginary concern, not a fact-based one. There is no indication in this case that any other state will impose demands on respondent's members which would require them to violate Michigan law or vice versa. See *Instructional Systems*, 35 F.3d at 826.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the judgment of the court of appeals should be vacated and district court's judgment reinstated, pursuant to Supreme Court Rule 16.1.

Respectfully submitted,

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