No. ________

In the Supreme Court of the United States

RICK SNYDER, BILL SCHUETTE, AND ANDREW DILLON,
PETITIONERS

v.

AMERICAN BEVERAGE ASSOCIATION

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

1. Whether the extraterritorial branch of the dormant Commerce Clause doctrine should be limited to the price-affirmation and anti-takeover contexts.

2. If not, whether the extraterritorial doctrine should be abolished entirely.

3. Whether a state statute's extraterritorial effect should result in the law's *per se* invalidity.

PARTIES TO THE PROCEEDING

Petitioners are Michigan Governor Rick Snyder, Michigan Attorney General Bill Schuette, and Michigan Treasurer Andrew Dillon. Intervener-Petitioners are the Michigan Beer and Wine Wholesalers Association. Respondent is the American Beverage Association.

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JURISDICTION

The court of appeals issued its amended judgment on January 7, 2013. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, provides in relevant part:

> The Congress shall have the Power . . . To regulate commerce . . . among the several States.

Subsection 10 of Michigan's amendment to its Bottle Bill Law, Mich. Comp. Laws 445.572a(1) provides:

> A symbol, mark, or other distinguishing characteristic that is placed on a designated metal container, designated glass container, or a 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.

INTRODUCTION

This dispute involves a Michigan law that combats a multi-million-dollar problem: the fraudulent importation and redemption of out-of-state bottles and cans for the 10¢ deposit that Michigan retailers collect on beverage containers sold in-state. The NBC sitcom *Seinfeld* famously highlighted Michigan's problem in "The Bottle Deposit" episode, where Kramer and Newman schemed to redeem in Michigan thousands of cans and bottles purchased in New York.[1] But Michigan's problem is no laughing matter, costing the State and its residents up to $30 million annually.

After a decade trying to combat the fraud by criminalizing it, Michigan required that all beverage containers sold in Michigan include a unique-to-Michigan mark, a requirement that necessarily precludes the mark from being used in non-deposit states. Such an idea is nothing new to beverage manufacturers; the idea originated with the industry. But the American Beverage Association filed suit, claiming a dormant Commerce Clause violation.

The Sixth Circuit agreed that Michigan's law does not discriminate against interstate commerce or benefit in-state interests at the expense of out-of-state interests. But the court invalidated the law under the "extraterritoriality" branch of the dormant Commerce Clause tree, a branch this Court has never applied outside price-affirmation and anti-takeover contexts.

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[1] See http://www.youtube.com/watch?v=KdsU_cn8u8E.

Concurring, Judge Jeffrey Sutton described the extraterritoriality doctrine as "a relic of the old world with no useful role to play in the new." App. 28a. (Sutton, J., concurring). "The modern reality is that the States frequently regulate activities that occur entirely within one State but that have effects in many." App. 30a. Examples include California's high emission standards for cars, state product-labeling requirements, and many state business-tax regimes. App. 30a–31a. This Court's balancing test for interstate-commerce burdens, see *Pike* v. *Bruce Church*, *Inc.*, 397 U.S. 137 (1970), and other constitutional limitations on state authority are more than adequate to ensure that state regulation does not unduly interrupt the free flow of commerce. App. 31a–34a. Accordingly, there is no good reason to invalidate a law, like Michigan's, that "serves a vital state interest and imposes only a minuscule burden on interstate commerce" based on the outdated doctrine. App. 35a.

As Judge Sutton explained at length, the Sixth Circuit's decision also conflicts with the principles that animate this Court's dormant Commerce Clause jurisprudence. App. 28a–31a. And the issues presented have broad significance well beyond the specific context here. The Sixth Circuit's holding can be used to attack equally innocuous but incidentally extraterritorial laws that other states have enacted in a wide variety of contexts. And the outcome will have the perverse effect of incentivizing states to enact "regulations far more hurtful to interstate commerce yet not extraterritorial." App. 35a.

In addition to the problems inherent in the use of the extraterritorial doctrine to strike down state laws, there is a circuit split regarding the effect that a finding of extraterritoriality should have on a state law's validity. Relying on this Court's decisions in *Healy* v. *Beer Institute*, *Inc*., 491 U.S. 324 (1989), *Brown-Forman Distillers Corp*. v. *New York State Liquor Authority*, 476 U.S. 573 (1986), and *Edgar* v. *MITE Corp*., 457 U.S. 624 (1982), the First and Sixth Circuits have held that any extraterritorial effect renders a state law *per se* invalid. *Pharm*. *Research & Mfrs*. *of Am*. v. *Concannon*, 249 F.3d 66, 79 (1st Cir. 2001); App. 23a, 24a. In contrast, the Seventh Circuit has relied on this Court's language in *CTS Corp*. v. *Dynamics Corp*. *of America*, 481 US 69 (1987), to conclude that incidental extraterritoriality effect, like that here, does not result in *per se* invalidity but instead requires a careful weighing of state interests and the burden on commerce. *Alliant Energy Corp*. v. *Bie*, 336 F.3d 545, 547–50 (7th Cir. 2003).

Here, American Beverage has not come forward with record evidence that would establish that the insubstantial burdens of Michigan unique-mark law outweigh Michigan's considerable sovereign interest in preventing fraud. To the contrary, beverage manufacturers frequently tailor bottle and can packaging to local markets when it suits the manufacturers' commercial interest. The fact that this lawsuit involves a Michigan law rather than the law of a state located in the Seventh Circuit should not be outcome determinative.

The Court should grant certiorari and reverse.

STATEMENT OF THE CASE

A. Michigan's Bottle Bill

Michigan enacted its "Bottle Bill," Mich. Comp. Laws § 445.571 *et seq*., in 1976 to reduce roadside litter, clean up the environment, and conserve energy and natural resources. Michigan is one of ten Bottle Bill States, but the only one requiring a 10¢ deposit. Unsurprisingly, Michigan's 96.9% return rate is the nation's highest.

The Bottle Bill applies to beer, soft drinks, carbonated and mineral water, wine coolers, and canned cocktails sold in airtight metal, glass, paper, or plastic containers under a gallon, and requires these beverages to be sold only in returnable containers, that is, containers for which the purchaser has paid a deposit of at least 10¢. Mich. Comp. Laws § 445.571(d). Consumers may obtain a refund of the deposit by returning the empty container to a retailer or to a reverse vending machine. Mich. Comp. Laws § 445.572a(12)(j). Businesses that sell these beverages are required to accept empty containers for rebate.

If a distributor collects more deposits than are refunded in a calendar year, the excess is remitted to Michigan for deposit into a revolving fund. Mich. Comp. Laws § 445.573b. Michigan disburses 25% of the fund to retailers (based on the percentage of empty containers handled by the dealers) to assist with handling costs and 75% to several environmental funds. Mich. Comp. Laws §§ 445.573c, 299.609, 609c, 375. The Act prohibits unclaimed deposits from being dispersed to the State's general fund.

B. The fraudulent-redemption problem

Michigan's Bottle Bill has been very successful in protecting the environment, but its high deposit rate has resulted in a serious problem: fraudulent redemption. Each year, containers purchased in other states are brought to Michigan and fraudulently redeemed. This fraudulent activity has been well-documented by studies, sting operations, news releases, and the 2008 amendment's legislative history. Studies estimate this fraud at between $10 million and $30 million dollars annually.

Michigan made numerous attempts to address fraudulent redemption before adopting the unique-mark requirement. In 1998, the Legislature criminalized the knowing redemption of a non-Michigan container. Mich. Comp. Laws § 445.574a (a person who returns out-of-state containers for a refund faces up to 5 years in jail, a fine of $5,000, and restitution). The Legislature also required retailers to post notices advising would-be redeemers of these criminal penalties. Mich. Comp. Laws § 445.574b. These state enforcement efforts were in addition to private efforts. As the Michigan Soft Drink Association (a trade organization representing Beverage Association members) recognized, "Michigan's soft drink bottlers and distributors for a number of years had already taken aggressive action to stop fraudulent redemption."

After these attempts failed, MSDA members and industry members began *voluntarily* using unique-to Michigan marks and developed reverse vending machines capable of reading those marks. These efforts occurred before any legislative requirement.

C. The 2008 unique-mark amendment

Michigan amended its Bottle Bill statute in 2008. Codifying many of the industry's voluntary practices, the challenged provision requires a unique-to-Michigan mark for purposes of reverse vending:

> 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*. [Mich. Comp. Laws § 445.572a(10) (emphasis added).]

The Bill was signed into law December 2008, but the effective date was delayed: March 1, 2010, for nonalcoholic beverages in 12-ounce metal containers, Mich. Comp. Laws § 445.752a(2), and February 24, 2011, for nonalcoholic beverages in 12-ounce glass or plastic containers, Mich. Comp. Laws § 445.572a(3)–(5).

The Amendment's reach was also limited by sales-volume thresholds. See Mich. Comp. Laws § 445.572a. For 12-ounce metal containers, a limited number of products currently meet the threshold, including: seven Coca-Cola Enterprises products (Coca-Cola, Diet Coke, CF Diet Coke, Sprite, Coca-Cola Zero, Cherry Coke, Dr. Pepper), five Pepsi Bottling Group products (Pepsi, Diet Pepsi, Mountain Dew, Diet Mountain Dew, Diet

Caffeine Free Pepsi), and three Dr. Pepper/Snapple products (A & W, Dr. Pepper, Vernors).

These manufacturers already have been complying with the law's modest requirement for approximately three years, with the exception of Dr. Pepper and A & W, which met the threshold in May 2010, and Vernors, which met the threshold in July 2010. For example, the Coca-Cola manufacturers are placing a unique-to-Michigan ink mark on the bottom of 12-ounce cans consisting of two parallel lines of dots between the date and manufacturing number:

For glass and plastic containers, fewer products have met the threshold, including two Coca-Cola Refreshment products (Coca-Cola, Diet Coke) and four Pepsi Beverages Company products (Pepsi, Diet Pepsi, Mountain Dew, Diet Mountain Dew).

Despite the fact that Association members have been complying with the unique-to-Michigan mark for approximately three years now, the Association introduced in the trial court no evidence addressing the alleged discriminatory, extraterritorial, or economic impacts the Association alleged in the Complaint.

Containers with the unique-to-Michigan mark may also be used in states with substantially similar bottle bills. Although the Amendment does not define "substantially similar," Michigan interprets the phrase to include all states with Bottle Bill deposit schemes, even those where the deposit is less than Michigan's.

Finally, the challenged provision addresses industry concerns by giving manufacturers flexibility to decide how they will meet the requirement. They may use a UPC code or some other identifier placed on cans sold in Michigan and other deposit-law states, such as the inkjet dot matrix, or they can leave containers sold in other states unmarked.

D. The industry's role in the legislative process

The American Beverage Association is a trade organization of manufacturers, marketers, distributors, and bottlers of nonalcoholic beverages sold in the United States. The Association opposes mandatory container deposits as a misguided policy choice. But Association members actively participated in Michigan's legislative process that began in 2006 and culminated in the 2008 Amendment.

MSDA's president testified in detail regarding the problem of fraudulent deposit container redemption in Michigan, explaining the cooperative steps the industry has taken to combat the crime, and outlining a comprehensive solution that included manufacturers incurring the cost of placing a unique identifier on containers that "would be destined only for Michigan (or perhaps also to some other deposit state supplied by that manufacturing facility)."

And though the Association now complains that interstate beverage commerce will come to a screeching halt under the 2008 amendment, the Association waited to file its Complaint until more than two years after the amendment's enactment and more than a year after its effective date. In fact, at the MSDA's urging, the Michigan Legislature appropriated $1.5 million for refitting reverse vending machines to read the unique-to-Michigan mark.

E. The unique-mark's "burden" on interstate commerce

The merits issue regarding the 2008 amendment's burden on interstate commerce is not before this Court on interlocutory appeal. But it is important to understand the extent of the commercial "burden" the Association asserts here.

The MSDA explains on its website that an earlier legislative proposal to solve the multi-million-dollar fraudulent redemption involved modifying beverage containers' UPC code so as to identify "Michigan only containers." The beverage industry opposed that solution because the UPC code has significant identification, tracking, inventory, financial accounting, and transportation implications. So the Legislature instead required the industry to place a mark on the bottom of cans that could be read by an upgraded reverse-vending machine. The MSDA reported as early as May 2009 that "[a]ll of our major brand soft drink bottlers are currently ink-jetting the [unique-to-] Michigan mark on our can bottoms during the bottling process," and that this solution had been successfully enacted into law.

Notwithstanding the industry's previous support, the Association now complains that a unique-mark requirement is too burdensome. That burden apparently evaporates when Association members seek to sell geographic-specific products—involving far more elaborate markings—for events such as a bowl game:

Yet on the basis of the alleged "burden," the Association now seeks to invalidate Michigan's anti-fraud law.

F. District court proceedings

The District court concluded that § 445.572a(10) does not violate the dormant Commerce Clause doctrine because the statute is not extraterritorial or discriminatory. App. 100a–117a. The court also said it was premature to determine whether the alleged burden on interstate commerce is clearly excessive in relation to the putative local benefits of the stature (the *Pike* balancing test) because genuine issues of material fact relevant to this issue exist. App. 117a–121a.

Regarding extraterritoriality, the district court recognized that this Court's precedents have noted the *per se* invalidity of a regulation that controls commerce entirely outside of the state in question. App. 109a–111a. But the court held that § 445.572a(10) was distinguishable from the price-affirmation statutes struck down in *Healy* and *Brown-Forman* because the statute "does not directly control conduct occurring wholly outside the State's borders." App. 114a. "[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." App. 114a.

Equally important, the unique-to-Michigan-mark requirement does not implicate the "independent concerns about protectionism" that underlie the statutes the Supreme Court has invalidated on extraterritoriality grounds. App. 115a (citations omitted). Quite the opposite, "the unique mark requirement does not involve protectionist concerns because both in-state and out-of-state manufacturers are equally burdened." App. 115a.

The District court also rejected the Association's claim that the 2008 amendment is facially, in-effect, or purposefully discriminatory against commerce. First, "by its plain terms, the unique-mark requirement applies to all beverage manufacturers who meet the specified threshold regardless of their in-state or out-of-state origins." App. 105a. Second, "Michigan's unique-mark statute . . . does not strip out-of-state actors of any competitive edge to the benefit of in-state actors." App. 108a. Third, "there is nothing that indicates Michigan is attempting to benefit local economic actors at the expense of out-of-state actors. The unique-mark requirement applies to all beverage manufacturers who meet the thresholds regardless of their in-state or out-of-state origins." App. 109a (citations omitted).

G. Sixth Circuit proceedings

The Sixth Circuit reversed, but not because Michigan's unique-mark law was protectionist or played favorites among in-state and out-of-state interests. To the contrary, the court of appeals held that the law is not facially discriminatory against interstate commerce because it "does not distinguish between in-state and out-of-state beverage manufacturers and requires all beverage containers to follow the unique-mark requirement." App. 13a. And the court saw no purposeful discrimination either, agreeing with the district court: "there is nothing that indicates that Michigan is attempting to benefit local economic actors at the expense of out-of-state actors." App. 15a. Finally, the court of appeals rejected the Beverage Association's claim that the law had a discriminatory effect. The court again agreed with the district court: "the unique-mark requirement burdens in-state beverage manufacturers who meet the designated threshold to the same extent it burdens out-of-state manufacturers who meet the designated threshold." App. 17a–18a.

The Sixth Circuit then turned to extraterritoriality, a doctrine this Court has applied "only in the limited context of price-affirmation statutes." App. 18a–19a (citing *Healy* and *Brown-Forman*). The court applied the doctrine to this non-price-affirmation law and criticized Michigan for not exploring alternative measures, such as limiting return volumes or requiring returns to be accompanied by "a proof of purchase receipt, which would indicate that the container was sold and purchased in the state." App. 22a. Having "found that the statute has an impermissible extraterritorial effect, [the court of appeals had] no need to consider whether the state had some legitimate local purpose or whether there is a reasonable nondiscriminatory alternative." App. 23a.

Judge Sutton wrote separately "to express skepticism about the extraterritoriality doctrine." App. 26a. "The key point of today's dormant Commerce Clause jurisprudence," he noted, "is to prevent States from discriminating against out-of-state entities in favor of in-state ones." App. 28a–29a. "Yet the extraterritoriality doctrine, if taken seriously . . ., has nothing to do with favoritism." App. 29a. "Even a hypothetical state law that *facilitated* interstate commerce . . . would be invalid if it had extraterritorial 'practical effect[s].'" App. 29a. "Whatever role extraterritoriality once played in Commerce Clause law, it is difficult to perceive the interstate-commerce function it plays today." App. 29a.

Judge Sutton went on to discuss the many examples of state regulatory activities "that occur entirely within one State but that have effects in many," such as California auto emissions standards and state labeling requirements. App. 30a–31a. He considered such laws indistinguishable from Michigan's unique-mark requirement, App. 31a, and recognized that the *Pike* balancing test and other constitutional limits on state authority were more than adequate to meet the purpose served by the extraterritoriality doctrine, App. 31a–34a.

Significantly, "[e]liminating extraterritoriality as a freestanding Commerce Clause prohibition also would not change outcomes." App. 34a. There is not a "single Supreme Court dormant Commerce Clause holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law." App. 34a. "Nor is there anything special about the Michigan redemption law that ought to make it unconstitutional under the extraterritoriality doctrine but not the traditional dormant Commerce Clause doctrine or some other constitutional guarantee." App. 35a. "Even though the unique-mark requirement serves a vital state interest and imposes only a minuscule burden on interstate commerce, its extraterritorial effect appears to doom it." App. 35a. This has the perverse effect of encouraging Michigan to enact "regulations far more hurtful to interstate commerce yet not extraterritorial." App. 35a.

In sum, "[w]hatever problem [Michigan's unique-mark] law poses," Judge Sutton was "hard-pressed to understand why the dormant-dormant Commerce Clause should regulate it." App. 36a.

Michigan moved to stay the Sixth Circuit's ruling under § 2101(f), triggering the familiar three-part inquiry for staying a mandate pending this Court's review: "There must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted), a significant possibility that the judgment will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed." *Barnes* v. *E-Systems*, *Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers), citing *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powel, J., in chambers). The panel agreed unanimously that Michigan satisfied this stringent standard and granted a stay. App. 142a.

REASONS FOR GRANTING THE PETITION

The scope of the dormant Commerce Clause is an important constitutional issue that demarcates the line between federal and state authority. But the extra-territoriality doctrine does not further the Commerce Clause's purpose, which is to prevent a State from discriminating against out-of-state entities in favor of in-state ones. That means that the extraterritoriality doctrine draws that line in a manner that consistently infringes on areas of state authority. In short, as Judge Sutton observed, "extraterritoriality provides a 'roving license for federal courts to determine what activities are appropriate for state and local government to undertake.'" App. 32a (quoting *United Haulers Ass'n*, *Inc.* v. *Oneida-Herkimer Solid Waste Auth.*, 550 U.S. 330, 343 (2007)). The Court should grant the petition to consider (1) whether the extraterritoriality doctrine should be limited to the price-affirmation and anti-takeover contexts; (2) if not, whether the doctrine should be abandoned entirely, and (3) if not, whether a state law's extraterritorial effect renders it *per se* invalid.

I. Certiorari should be granted to resolve whether Michigan's unique-mark law contravenes the dormant Commerce Clause's extraterritoriality doctrine.

A. This Court should confine the extraterritoriality branch of the dormant Commerce Clause to price-affirmation and anti-takeover contexts.

The Commerce Clause's rationale is "to keep commercial intercourse among the States free from all invidious and partial restraints." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 571 (1997) (quotation omitted). Thus, the Clause invalidates state laws that "discriminate[ ] against or unduly burden[ ] interstate commerce and thereby imped[e] free private trade in the national marketplace." *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 287 (1997) (quotation omitted). Put another way, the Clause prohibits state regulation that has "the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). Such a discriminatory law "is virtually *per se* invalid and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Dep't of Revenue of Ky.* v. *Davis*, 553 U.S. 328, 338 (2008) (quotation omitted).

This Court has also invalidated a state law that "directly controls commerce occurring wholly outside the boundaries of a State [and] exceeds the inherent limits of the enacting State's authority." *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989). The Court asks whether the "practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id*. at 336 (citing *Brown-Forman*, 476 U.S. at 579). To determine that practical effect, courts must consider not only the statute's natural consequences, but also "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many, or every, State adopted similar legislation." *Id*.

As many courts and commentators have recognized, the extraterritoriality doctrine has grown increasingly unwieldy as our nation's economy has evolved away from isolated geographic markets. Thus, a strict territorial conception of state authority has gradually been replaced by the idea that the reach of a state's law should depend not just on geographic formalities but instead on the nature and degree of a state's interests. E.g., Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 L. Rev. Mich. St. U. Det. C.L. 115, 115–17; *United States* v. *Aluminum Co*., 148 F.2d 416, 443 (2d Cir. 1945) (Hand, J.) (a state must be able to "impose liabilities, even upon persons not with its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends"). This evolution from examining state borders to scrutinizing state interests is why it is possible for a state today to "fix the price of natural gas drilled within its borders and purchased at the wellhead, even when 90 percent of the gas will be shipped out of state." App. 28a (Sutton, J., concurring) (citing *Cities Serv. Gas Co*. v. *Peerless Oil & Gas Co*., 340 U.S. 179 (1950)).

Recognizing this economic reality, the Court has effectively cabined the extraterritoriality doctrine, applying it in only two narrow situations: "affirmation laws" that effectively mandate the price at which a company may sell its goods in another state, and "tender-offer" laws that directly regulate transactions that take place "wholly outside" the state. E.g., *Brown-Forman Distiller Corp*. v. *New York State Liquor Auth*., 476 U.S. 573, 576 (1986) (New York statute that required all liquor distillers or producers selling to wholesalers within the state to affirm that prices charged were no higher than the lowest price at which the same product was sold in any other state during the month of affirmation); *Healy* v. *Beer Inst*., 491 U.S. 324 (1989) (Connecticut price-affirmation statute); *Edgar* v. *MITE Corp*., 457 U.S. 624, 642–43 (1982) (plurality opinion) (Illinois' attempted extraterritorial regulation of tender offers).

These types of state statutes are problematic, because they almost always grow out of a protectionist motive. Thus, it should be no surprise that the Court's extraterritoriality holdings in these cases are always a *secondary* reason for invalidation. For example, the doctrine was an alternative holding in *Healy*; the Court struck down Connecticut's law because it "discriminated against brewers who engaged in interstate commerce." App. 34a (Sutton, J., concurring) (citing *Healy*, 491 U.S. at 341). Justice Scalia declined to join the extraterritoriality holding, opining that the Court should have solely addressed discrimination. *Healy*, 491 U.S. at 345 (Scalia, J., concurring). Similarly, New York's law in *Brown-Forman* affected only those distillers selling in other states. 476 U.S. at 576. And the Illinois law at issue in *Edgar* "was a 'direct restraint on interstate commerce' that would have 'thoroughly stifled' the ability of out-of-state corporations to make tender offers." App. 34a (Sutton, J., concurring) (quoting *Edgar*, 457 U.S. at 642). As Judge Sutton put it in his concurrence, "I am not aware of a single Supreme Court dormant Commerce Clause holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law." App. 34a.

B. In striking down Michigan's unique-mark law, the Sixth Circuit wrongly expanded the extraterritoriality doctrine's scope.

Michigan's unique-mark law is neither a price-affirmation nor an anti-takeover prohibition. But it does have an incidental extraterritorial effect, because a "label or container used in Michigan can be used only in Michigan. It cannot be used anywhere else." App. 21a. Thus, the Sixth Circuit felt constrained to conclude that Michigan's law fell within the same extraterritorial prohibition this Court articulated in *Brown-Forman* and *Healy*.

But Michigan's unique-mark law is fundamentally different than the laws at issue in *Brown-Forman* and *Healy*. The Sixth Circuit agreed, unanimously, that Michigan's anti-fraud measure "does not favor in-state entities at the expense of out-of-state ones." App. 29a (Sutton, J., concurring). In other words, Michigan's statute does not implicate the dormant Commerce Clause's core rationale: "to prevent States from discriminating against out-of-state entities in favor of in-state ones." App. 28a–29a (Sutton, J., concurring). Accord, e.g., *Dep't of Revenue*, 553 U.S. at 328 ("Modern dormant Commerce Clause law is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.") (quotation omitted); Donald H. 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, 1874 (August 1987) ("[T]he only dormant commerce clause issue is protectionist purpose").

And Michigan's unique-mark law is equally distinguishable from the laws at issue in *Brown-Forman* and *Healy* from a practical standpoint. When every state adopts a price-affirmation law, there is regulatory gridlock. But if every state adopted a Bottle Bill law that looked like Michigan's, the resulting regime would be uniformity. A beverage company may use its Michigan mark in any other state that has a beverage-container deposit scheme. App. 6a. So a company using a mark in Michigan would be free to use that mark in any other state. Such an outcome does not suggest a need for federal-court intervention.

The problem is that, once untethered from its rationale, the dormant Commerce Clause becomes an anti-federalism tool, a "roving license" to "determine what activities are appropriate for state and local government to undertake." *United Haulers*, 550 U.S. at 343. And the natural consequence is exactly what happened here: federal courts intrude on states' ability to enact and enforce laws that go to the core of sovereign police power (e.g., stopping fraud) but do not discriminate against or unduly burden interstate commerce.

Non-protectionist state laws do not implicate a special national interest in uniformity, and such laws protect in-state residents from out-of-state actors on fronts as wide-ranging as gun control, healthcare, regulation of the Internet, and fraud. The states' role in developing social policy and controlling criminal behavior should not be invalidated in the absence of commercial discrimination or a clear case of protectionism. Michigan's anti-fraud law implicates neither of these concerns.

In addition to the federalism principles at stake, aggressive federal-court policing of incidental extra-territorial effects will have the perverse result of encouraging states to enact laws that are *more* harmful to interstate commerce, though not extraterritorial. Michigan, for example "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 sizes and shapes that fit only Michigan bottle-redemption machines. So long as these regulations survived *Pike* balancing, they would be constitutionally permissible." App. 35a (Sutton, J., concurring). Instead, Michigan "chose a nondiscriminatory method premised on compliance in other States, a seeming requirement of *any* innocuous unique-mark requirement. . . . Whatever problem such a law poses, [it is difficult] to understand why the dormant-dormant Commerce Clause should regulate it." App. 36a (Sutton, J., concurring).

In sum, a beverage bottled in Ohio and sold in Indiana has an undeniable nexus to Michigan when the can or bottle is fraudulently returned for redemption in Michigan. And there is nothing in the dormant Commerce Clause's underlying rationale that suggests a state law regulating such fraud should be *per se* invalid. The Court should grant the petition and adopt the rule that Judge Sutton suggested in his concurrence: "[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 . . . should not be invalided solely because of an extraterritorial effect." App. 33a–34a. (Sutton, J., concurring). Accord *CTS Corp*. v. *Dynamics Corp. of America*, 481 U.S. 69, 88–93 (1987); *IMS Health Inc*. v. *Mills*, 616 F.3d 7, 25–26 (1st Cir. 2010); App. 114a, 115a.

C. The issue presented is recurring and important.

The Sixth Circuit's opinion adds to already existing confusion over the role economic protectionism plays in applying the dormant Commerce Clause doctrine. For example, federal courts have applied the extra-territoriality doctrine and ruled that states have no jurisdiction to enact laws regulating the Internet. *American Libraries Ass'n* v. *Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997) ("only Congress can legislate in this area"); see also *Cyberspace Comm'ns*, *Inc*. v. *Engler*, 55 F. Supp. 2d 737, 751–52 (E.D. Mich. 1999), aff'd and remanded, 238 F.3d 420 (6th Cir. 2000). Under that limited view of a State's authority, practically *any* state law that affects the Internet would be unconstitutional, because the law would have the practical effect of exporting a given state's domestic policies outside the state's boundaries. Other courts have rejected such a broad reading of the extraterritoriality doctrine, see, e.g., *Rousso* v. *Washington*, 204 P.3d 243, 357 (Wash. Ct. App. 2009) (rejecting what it characterized as *American Libraries*' misreading of dormant Commerce Clause jurisprudence and its overbroad holding), exacerbating the conflict and confusion.

The trouble with the Sixth Circuit's approach is that a roving anti-federalism license threatens state statutes across the country on a wide variety of subjects. For example, it threatens state environmental laws, like California's law imposing high emission standards for cars sold in its State. See *Chamber of Commerce* v. *EPA*, 642 F.3d 192, 197–98 (D.C. Cir. 2011). California's emissions law undeniably has extraterritorial effects—it impacts Michigan car companies, for example, by forcing them to choose whether to (1) conform all of their vehicles to California's laws so they can sell cars in California, (2) build California-specific models in addition to ordinary models, or (3) not sell in California. App. 30a.

The same is true of state anti-fraud or consumer-safety laws. Consider a Florida company that sells a widget to a Michigan company and guarantees that the widget is the only one of its kind the Florida company will ever sell. If the Florida company sells an identical widget the next day to a company in Ohio, the Michigan company should be able to bring an action in Michigan court under anti-fraud law even though it is undeniable that liability has been triggered by an entirely non-Michigan commercial transaction.

It is not difficult to think of many such examples. E.g., Rostron, *Misguided Revival*, 2003 L. Rev. Mich. St. U-Detroit C.L. at 117–18 (extraterritoriality implications of state tort laws to a gun company's out-of-state conduct); C. Steven Bradford, *What Happens if Roe is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 Ariz. L. Rev. 87, 88–92 (1993) (abortion regulation); *MeadWestvaco Corp. ex rel Mead Corp.* v. *Ill. Dep't of Revenue*, 553 U.S. 16, 24–25 (2008) (noting prevalence of state business taxes that operate across state lines).

In short, the extraterritoriality doctrine provides an avenue for individuals to use federal courts to challenge a wide variety of state statutes, even though the doctrine does not advance a federal interest. And if it is no small thing for a federal court to strike down an Act of Congress, *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (granting certiorari "to review the exercise of the grave power of annulling an Act of Congress"), then it also should be no small thing for a federal court to strike down "a nondiscriminatory state law that affects a purely intrastate transaction." App. 36a (Sutton, J., concurring). Yet that is precisely what the extra-territoriality doctrine does—it allows a federal court to annul "[a] law that does not discriminate against interstate commerce, that complies with the traditional requirements of due process and that complies with [other constitutional limitations on extraterritoriality] . . . solely because of an extraterritorial effect." App. 33a–34a.

Given the broad impact of the extraterritoriality doctrine, which itself is "a relic of the old world with no useful role to play in the new," App. 28a, on a wide variety of state laws, this Court's immediate intervention is warranted. Cf. *New York* v. *O'Neill*, 359 U.S. 1, 3 (1959) (granting certiorari because a holding "brings into question the constitutionality of a statute now in force in forty-two states); *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 385 (2000) (granting certiorari to review a decision invaliding a state statute limiting political contributions because of "the large number of States that limit [such] contributions").

II. Alternatively, the Court should consider whether to discard the extraterritoriality doctrine altogether.

As discussed above and in Judge Sutton's concurrence, even with respect to this Court's extraterritoriality decisions involving price-affirmation and anti-takeover statutes, the doctrine has no independent effect. At best, the doctrine was an alternative holding in *Healy*, *Brown-Forman*, and *Edgar*. App. 34a.

Even going all the way back to the extraterritoriality doctrine's inception in *Baldwin* v. *G.A.F. Seeling, Inc.*, 294 U.S. 511 (1935), the state law at issue was the "equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin." *Id.* at 527. In sum, there does not appear to be a "single Supreme Court dormant Commerce Clause holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law." App. 34a (Sutton, J. concurring).

This Court's historically limited application of the dormant Commerce Clause's extraterritoriality doctrine is consistent with the way the Court has analyzed Congressional power to legislate extraterritorially. Under Congress's "legislative jurisdiction," Restatement (First) Conflict of Laws § 60 (1934), or "jurisdiction to prescribe," 1 Restatement (Third) of Foreign Relations Law of the United States 235 (1987), this Court has repeatedly upheld Congressional power to make U.S. laws applicable to activities or persons beyond our territorial boundaries if U.S. interests are affected. E.g., *Ford* v. *United States*, 273 U.S. 593, 621–23 (1927); *United States* v. *Bowman*, 260 U.S. 94, 98–99 (1922); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909). Under principles of international comity, congressional power is limited only when there is a conflict between domestic and foreign law such that a regulated entity cannot comply with the law of both jurisdictions. *Hartford Fire Ins.* v. *California*, 509 U.S. 764, 799 (1993) (citing 1 Restatement (Third) Foreign Relations Law § 403, Comment e, § 415, Comment j (1987)).

It is not only possible but entirely logical to consider limits on the state legislative power the same way. If an out-of state activity is causing harm within a particular state's borders, as is the case here, the state has a basis to regulate that activity. A comity problem arises only when that state's regulation makes it impossible for a regulated entity to comply with multiple states' laws. Cf. *Hartford*, 509 U.S. at 799. In the absence of any conflict, there is no good reason for federal courts to strike down state law.

Here, American Beverage does not contend that the unique-mark law makes it impossible for beverage companies to conduct commerce in Michigan and other states without violating at least one state's law. Lacking a conflict, nothing in the Commerce Clause or the federalist structure of our constitutional system of government suggests that a state should be denied the power to regulate extraterritorial conduct that has a direct effect on the state and its residents. States should have the authority to stop fraud. And to the extent the extraterritorial branch of the dormant Commerce Clause purportedly prohibits such regulation, the branch should be abandoned.

III. At a bare minimum, certiorari should be granted to resolve the circuit split regarding whether a state statute that runs afoul of the extraterritoriality doctrine is *per se* invalid.

In addition to confusion about the extraterritoriality doctrine's scope, there is also confusion about, and a circuit split over, how courts should treat a state law that has some extraterritorial effect.

The Sixth Circuit here held Michigan's unique-mark requirement *per se* invalid, i.e., without further inquiry. "Having found that the statute has an impermissible extraterritorial effect, we have no need to consider whether the state had some legitimate local purpose or whether there is a reasonable nondiscriminatory alternative." App. 23a, 24a.

The First Circuit has likewise held that "a state statute is a *per se* violation of the Commerce Clause when it has an 'extraterritorial reach . . . while a discriminatory statute is scrutinized under a 'virtually *per se* invalid rule.'" *Pharm. Research & Mfrs. of Am.* v. *Concannon*, 249 F.3d 66, 79 (1st Cir. 2001).

The Seventh Circuit says this approach is "not sustainable." *Alliant Energy Corp.* v. *Bie*, 336 F.3d 545, 547 (7th Cir. 2003). Because "extraterritorial regulation presents the same threats as regulation of interstate commerce, . . . there is no logical reason to treat the two differently." *Id.* Accordingly, state laws like Michigan's unique-mark statute, which have only "incidental or indirect effects on extraterritorial transactions," are "subject to the *Pike* balancing test." *Id.*

In so holding, the Seventh Circuit carefully considered this Court's decisions in *Edgar*, *Brown-Forman*, and *Healy*. *Id.* at 547–49. The Seventh Circuit said it "would be a mistake to import the language from those cases when [this Court's decision in] *CTS* is more clearly on point. *CTS* says that when a state regulates internal matters and the regulations have external effects, the regulations are not *per se* invalid." *Id.* at 549. Instead, this Court in *CTS* "discussed the interests served by the regulations in question." *Id.* at 549.

At a bare minimum, then, the petition should be granted to resolve the circuit split and explain the effect on state law when a federal court determines that a state law has extraterritorial effect. Assuming the Court reaffirms its analysis in *CTS*, Michigan's law should be upheld.

Although Michigan's unique-mark law has been in effect for several years, American Beverage came forward with no evidence in the district court demonstrating that any real effect on interstate commerce outweighs Michigan's substantial sovereign interest in preventing fraud. Quite the contrary, beverage companies routinely modify can markings (on a much greater scale than Michigan's law imposes) for specific geographic markets when it suits a company's economic interests to do so—as the earlier photo shows.

In sum, the unique-mark requirement would be upheld under the Seventh Circuit's test for statutes that have an incidental extraterritorial effect. The outcome should not be different simply because this dispute arises in the Sixth Circuit.

Certiorari is warranted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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