No. 12-1221

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

REPLY BRIEF

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INTRODUCTION

Michigan's unique-mark bottling law imposes only a "miniscule burden" on interstate commerce, Pet. App. 35a (Sutton, J., concurring), and is not discriminatory, applying equally to both in-state and out-of-state businesses, Pet. App. 13a n.5. The Sixth Circuit nonetheless invalidated Michigan's law under the dormant Commerce Clause solely because the law had extraterritorial effects. This holding demonstrates that the extraterritoriality doctrine provides a roving license for federal courts to strike down state laws and thereby to encroach on a state's authority to regulate harmful conduct (here, fraud against the State).

The Association attempts to minimize the extraterritoriality doctrine's potential to disrupt the balance between state and federal power by focusing on the fact that Michigan's unique-mark requirement, which exists to combat fraud, imposes criminal penalties on out-of-state conduct. But the extra-territoriality doctrine applies to state laws with any "practical effect" outside the state's borders, which means it threatens a wide variety of state laws across the country, laws ranging from California's emissions regulations to state business taxes. And yet applying the dormant Commerce Clause doctrine to a law that does not discriminate against interstate commerce does nothing to advance interstate commerce.

Because of the importance of this doctrine in drawing the line between state and federal authority, and because of the existing circuit split on whether an extraterritorial effect renders a law *per se* invalid, certiorari is warranted.

REPLY ARGUMENT

I. Certiorari is warranted to resolve the scope and necessity of the extraterritoriality doctrine, which demarcates the boundary between state and federal power.

When examining whether a state law violates the extraterritoriality doctrine, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989). While a law imposing "civil and criminal liability" satisfies this practical-effect test, *Edgar* v. *MITE Corp.*, 457 U.S. 624, 630 & n.5 (1982), so does a law that merely affects out-of-state prices, *Healy*, *id.* at 338; *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 583 (1986). Thus, while the Association emphasizes the criminal liability imposed by Michigan's law (a law designed to combat the criminal act of fraud), the extraterritoriality doctrine applies even without the criminal penalties, simply because the law may require the unique mark to be applied out of state.

The fact that any practical extraterritorial effect is sufficient to violate extraterritoriality illustrates the broad sweep of the doctrine and its resulting threat to permissible state laws. As explained in the petition (at 25–27), many state laws have practical effects out-of-state. Consider California's emissions laws, which affect every car manufactured in the United States. Those standards have the practical effect of controlling conduct occurring in Michigan (and in every other state that has vehicle manufacturers).

The Association suggests that the doctrine would not apply to California's regulations because "California's emissions standards are indifferent to compliance in other states," Br. in Opp. 27, but that misses the point. California's regulations effectively impose California's standards on the national common market. As a matter of economic reality, for an auto manufacturer in Michigan (or another state) to be able to sell cars in California, the manufacturer must build cars that comply with those standards. And it must also decide whether to comply with those standards on every manufactured vehicle or to make different vehicles just for California. See *Healy*, 491 U.S. at 345 (Scalia, J., concurring in part and in judgment) (calling the extraterritoriality doctrine "questionable" because of "the mere economic reality" that "innumerable valid state laws" affect conduct, such as pricing decisions, in other states). Because the California regulations control conduct outside California, the Sixth Circuit's reasoning leads to the conclusion that the emissions standards violate the extraterritoriality doctrine. This is true even though the standards are meant to protect the environment, not local businesses.

The Association also argues that this Court has not limited the doctrine "to price-affirmation and anti-takeover statutes with protectionist motives." Br. in Opp. 17, 22. But if the Association is right, that makes matters worse—then the doctrine can be applied in any context and truly is "a 'roving license for federal courts to determine what activities are appropriate for state and local government to undertake.'" Pet. App. 32a (Sutton, J., concurring) (quoting *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Auth.*, 550 U.S. 330, 343 (2007)).

The Association also argues that the doctrine applies even when the challenged state law does not implement protectionist discrimination. Br. in Opp. 16–19 ("Protectionism is not required"). But that is the problem: the extraterritoriality doctrine is then divorced from the purpose of the dormant Commerce Clause. While "[t]he modern law of what has come to be called 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,'" *Dep't of Revenue of Ky.* v. *Davis*, 553 U.S. 328, 337–38 (2008)—the "extraterritoriality doctrine . . . has nothing to do with favoritism," Pet. App. 29a (Sutton, J., concurring). That is why the Sixth Circuit felt compelled here to apply the doctrine to a law that "does not discriminate against interstate commerce." Pet. App. 11a. If protectionism is irrelevant, then the doctrine does nothing to protect commerce.

As Judge Sutton recognized, this Court has never relied solely on the extraterritoriality doctrine when striking down a law, but has applied it only when also finding discrimination against interstate commerce. Pet. App. 34a. The Association disputes this point, contending that economic protectionism was not present in *Healy*. Br. in Opp. 16–17. But this Court held in *Healy* that the Connecticut statute "discriminate[d] against brewers and shippers of beer engaged in interstate commerce." 491 U.S. at 340. The statute "establishe[d] a substantial disincentive for companies doing business in Connecticut to engage in interstate commerce," and it did so without any "neutral justification" for the discrimination. *Id.* at 341.

In short, the statute at issue in *Healy* allowed in-state companies to "charge wholesalers within Connecticut whatever price [they] might choose," while denying out-of-state companies that freedom. Pet. App. 34a (Sutton, J., concurring). Indeed, Justice Scalia concurred separately in *Healy*, refusing to rely on extraterritoriality, because the statute's invalidity was "fully established by its facial discrimination against interstate commerce." 491 U.S. at 344.

The Association also argues that *Edgar*, the case about an Illinois statute regulating tender offers, did not turn on a protectionist motive. But the statute was an attempt by Illinois, the home to a major U.S. financial center, to impose "a direct restraint on interstate commerce" that would have "thoroughly stifled" the ability of out-of-state corporations to make tender offers. *Edgar*, 457 U.S. at 642.

The Association's insistence on these points—that the extraterritoriality doctrine is not limited to price-affirmation statutes and anti-takeover statutes and that it applies even to statutes that have no protectionist motive—underscores how broad the doctrine could reach if applied as the Sixth Circuit did.

Yet the Association never identifies why the extraterritoriality doctrine should be applied so broadly or to a law that "does not discriminate against interstate commerce." Pet. App. 11a. It never explains why barring Michigan's non-discriminatory statute would further what is "'[t]he crucial inquiry'" under the dormant Commerce Clause: "'whether [the challenged statute] is basically a protectionist measure.'" *McBurney* v. *Young*, 133 S. Ct. 1709, 1720–21 (2013) (alteration in original).

If the Association is right that protectionism is not required, that conclusion highlights the expansive scope of the extraterritoriality doctrine and its resulting broad threat to the authority of a state to regulate conduct having direct effects within its territory. Certiorari is warranted to resolve the scope and necessity of the doctrine.

II. Certiorari is warranted to resolve the circuit split over whether the extraterritoriality doctrine is a *per se* rule.

Despite the Association's contentions, this case came out differently in the Sixth Circuit than it would have in the Seventh.

In the Sixth Circuit, *any* extraterritorial effect is fatal to a state law; a statute with an incidental effect cannot survive by passing the *Pike* balancing test (which requires a state to show that a law's in-state regulatory benefits outweigh its out-of-state burdens on interstate commerce, *Pike* v. *Bruce Church*, *Inc.*, 397 U.S. 13 (1970)). To the contrary, because the Sixth Circuit "concluded that Michigan's unique-mark provision does not discriminate against interstate commerce but is extraterritorial, the *Pike* balancing test does not apply." Pet. App. 24a. Thus while the statute would pass the balancing test—because it imposes only a "miniscule burden on interstate commerce" while "serv[ing] a vital state interest," Pet. App. 35a (Sutton, J., concurring)—it never reaches that step. (And it is a miniscule burden; as the pictures in the petition show, Association members frequently sell state-specific products with much more burdensome labels than are necessary to create a unique mark.)

In the Seventh Circuit, in contrast, "direct or facial regulation of wholly extraterritorial transactions is *per se* invalid," but "incidental or indirect effects on extraterritorial transactions are subject to the *Pike* balancing test." *Alliant Energy Corp.* v. *Bie*, 336 F.3d 545, 547 (7th Cir. 2003). The Seventh Circuit's framing of its test presupposes that some extraterritorial effects will be minor enough that they do not automatically invalidate a law. Michigan's law merely requiring a unique mark (such as a line of dots, Pet. 9) to be applied to certain beverage labels is that type of incidental effect. Thus, in the Seventh Circuit, Michigan's unique-mark requirement would be evaluated under *Pike*. And it would survive that balancing, because, as just noted, it serves a vital interest while imposing only a miniscule burden on interstate commerce. Pet. App. 35a (Sutton, J., concurring).

The additional cases the Association cites as applying a *per se* rule, Br. in Opp. 28–29, reinforce the existence of a circuit split, and further confirm that federal courts in the Second, Eighth, Tenth, Eleventh and now the Sixth Circuits have adopted a test that can be used as a license to unnecessarily invalidate state laws even when they are not discriminatory and even when they provide in-state benefits that outweigh any out-of-state burdens they impose.

III. The Association's other arguments against certiorari are unpersuasive.

The Association raises several other arguments that can be quickly dismissed.

First, the Association disputes Michigan's contention that nine other states have bottle bills that are substantially similar to Michigan's bill. The Association points out only one difference between the bills—that "[n]o other State charges a ten-cent deposit." Br. in Opp. 8. But pointing out a single difference in a statute that takes up 32 pages of the cross-petition appendix (at 136a–167a) does not undermine the conclusion that a bill with a different redemption amount could still be substantially similar; much less does it render Michigan's interpretation, as the Association puts it, "text-defying" or "contra-textual." Br. in Opp. 15, 19. Yet reading "substantially similar" to mean "identical" would defy the text.

Second, the Association attempts to reclaim the ground it lost on the discrimination front by suggesting that the statute discriminates by awarding unclaimed revenue to in-state companies and by shifting the fraud burden to interstate bottling companies. Br. in Opp. 5, 18. The statute returns money to in-state retailers, however, to reimburse them for handling costs, such as running reverse vending machines, that fall only on in-state retailers. Mich. Comp. Laws § 445.573c(2)(b). But this is not a windfall; indeed, the district court recognized that "'there is nothing that indicates that Michigan is attempting to benefit local economic actors at the expense of out-of-state actors.'" Pet. App. 15a; Pet. App. 108a–09a. Further, the burden of this anti-fraud provision also falls on companies operating only in Michigan—that is, that do not engage in interstate commerce. Pet. App. 13a n.5 (explaining that in-state Michigan companies are "subject to the same unique-mark provision as companies that compete in the national market and conduct business in Michigan.").

Third, the Association argues that *stare decisis* counsels against reviewing dormant Commerce Clause jurisprudence because Congress can resolve some dormant Commerce Clause issues through legislation. Br. in Opp. 22. But the Association's assertion that "*stare decisis* holds 'special force'" in this context, Br. in Opp. 22 (quoting *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008)), is off-point. In *John R. Sand*, this Court was stating that "*stare decisis* in respect to statutory interpretation has 'special force.'" 552 U.S. at 139. Here, Congress has not affirmatively adopted any extraterritoriality requirement, and this is therefore not an issue of statutory interpretation, where there is a compelling reason for this Court to remain consistent in how it interprets particular statutory language. Instead, the extraterritoriality doctrine is a judicial creation, which means this Court bears the responsibility of ensuring that the doctrine remains consistent with the rest of this Court's dormant Commerce Clause jurisprudence and does not unnecessarily infringe on state authority.

* * *

The extraterritoriality doctrine no longer serves the purposes of the dormant Commerce Clause. Innumerable state laws have out-of-state effects, yet where those effects do not transgress other constitutional limits there is no reason to think that "the dormant-dormant Commerce Clause should regulate" them. Pet. App. 36a (Sutton, J., concurring). This Court should grant certiorari to clarify the scope of the doctrine and to resolve the circuit split over how it should be applied to laws that do not discriminate against out-of-state entities in favor of in-state ones.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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