No. 12-

In The
Supreme Court of the United States

AMERICAN BEVERAGE ASSOCIATION,
Cross-Petitioner,
v.

RICK SNYDER, BILL SCHUETTE, ANDREW DILLON, AND MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Michigan law has made it a crime for beverage companies to sell in any of the other 49 States the same beverage products that the companies sell in Michigan, absent Michigan's permission. Michigan law also forbids companies from selling in Michigan the same packaged beverage products that they sell in other States, solely because those products are sold in interstate commerce. M.C.L. § 445.572a(10). The United States Court of Appeals for the Sixth Circuit held that Michigan's law violates the Commerce Clause because it extraterritorially regulates commercial transactions in other States, but that the law does not unconstitutionally discriminate against interstate commerce.

Cross-respondents have filed petitions for a writ of certiorari seeking review of the court of appeals' extraterritoriality decision. *See Snyder, et al. v. American Beverage Association*, No. 12-1221 (filed April 8, 2013); *Michigan Beer & Wine Wholesalers Ass'n v. American Beverage Association*, No. 12-1224 (filed April 8, 2013). To ensure full consideration of the law's comportment with the dormant Commerce Clause, if either of those petitions is granted, review should also be granted of the following question:

Whether the law's mandate of a Michigan-only beverage product unconstitutionally discriminates against interstate commerce because it precludes the sale of an interstate product within Michigan solely because that product is sold in other States, and the law burdens only companies that engage in business in more than one State.

PARTIES TO THE PROCEEDING

Cross-petitioner the American Beverage Association was the plaintiff in the district court, appellant in the court of appeals, and is the respondent in Nos. 12-1221 and 12-1224.

Cross-respondent Rick Snyder is the Governor of Michigan, Bill Schuette is the Attorney General of Michigan, and Andrew Dillon is the Treasurer of Michigan. They were the defendants in the district court, appellees in the court of appeals, and are the petitioners in No. 12-1221.

Cross-respondent Michigan Beer and Wine Wholesalers Association was the intervenor-defendant in the district court, intervenor-appellee in the court of appeals, and is the petitioner in No. 12-1224.

CORPORATE DISCLOSURE STATEMENT

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

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The American Beverage Association respectfully submits this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. The Court should deny the petitions for writs of certiorari filed by cross-respondents in Case Nos. 12-1221 and 12-1224. If the Court grants either of those petitions, however, then it should also grant this conditional cross-petition.

OPINIONS BELOW

The amended opinion of the court of appeals on rehearing (App., *infra*, 1a-40a) is not yet reported. The initial opinion of the court of appeals (App., *infra*, 41a-80a), is reported at 700 F.3d 796. The district court's decision (App., *infra*, 93a-128a) is reported at 793 F. Supp. 2d 1022.

JURISDICTION

The court of appeals entered its amended judgment on rehearing on January 7, 2013. App., *infra*, 1a. Cross-respondents filed their respective petitions for a writ of certiorari on April 8, 2013, and the cases were docketed as Nos. 12-1221 and 12-1224 on April 10, 2013. This conditional cross-petition is timely pursuant to this Court's Rule 12.5. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 135a-168a.

STATEMENT OF THE CASE

To increase revenue for the State, App., *infra*, 6a, Michigan has outlawed the sale in Michigan of popular-brand beverages, such as Coca-Cola, Pepsi, and Dr. Pepper, *id.* at 7a nn.3-4, unless those beverages are packaged in Michigan-exclusive containers bearing a mark that is "unique to this state, or used only in this state and 1 or more other states that have laws substantially similar to this

act." M.C.L. § 445.572a(10). [1] That unique-mark mandate criminalizes the sale in all 49 States of the same packaged beverages that are sold in Michigan. The law also outlaws the sale within Michigan of packaged beverages sold anywhere else in the United States for the sole reason that the beverages are sold in other States. Accordingly, any sale of any Michigan beverage in any other State constitutes a crime punishable by up to six months' imprisonment and a fine of $2,000. *Id.* § 445.572a(11).

The Sixth Circuit held that the mandate that interstate beverage companies produce and market, on pain of criminal penalty, a unique-to-Michigan packaged beverage product was unconstitutionally "extraterritorial in violation of the dormant Commerce Clause because it impermissibly regulates interstate commerce by controlling conduct beyond the State of Michigan." App., *infra*, 26a. The court separately ruled, however, that the law's prohibition on interstate commerce in packaged beverages, solely because those products are sold in more than one State, does not unconstitutionally discriminate against interstate commerce. *See* App., *infra*, 12a-18a.

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[1] On the face of the statute, no state law qualifies as substantially similar. *See* M.C.L. § 445.571(d) ("returnable container" defined as a container for which a ten-cent deposit has been paid); *id.* § 445.572a(10) (unique packaging must "allow a reverse vending machine to determine if [a] container is a returnable container"); App., *infra*, 24a n.6 (no other State has a ten-cent deposit on these containers). But counsel for Michigan has voiced in this litigation its view that the exception could cover nine States. *See* Mich. Pet. 9-10.

Michigan officials Governor Rick Snyder, Attorney General Bill Schuette, and Treasurer Andrew Dillon (collectively, "Michigan") and intervenor Michigan Beer and Wine Wholesalers Association ("Michigan Wholesalers") have both petitioned for a writ of certiorari requesting review of the Sixth Circuit's extraterritoriality decision. The Association will oppose those petitions for the reasons set forth in its brief in opposition. However, if the Court grants either Michigan's or the Michigan Wholesalers' petition, the Association requests that the Court also grant this conditional cross-petition to review whether the law unconstitutionally discriminates against interstate commerce. The law's extraterritorial prohibition on the sale of Michigan products in the rest of the Nation and its discriminatory prohibition on the sale of rest-of-the-Nation products within Michigan are two interconnected constitutional inquiries that must be considered together, if the case is to be considered at all.

1. The Commerce Clause of the United States Constitution authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States[.]" U.S. CONST., Art. I, § 8, cl. 3. In addition to empowering Congress to enact national legislation, the Commerce Clause operates as a "restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *see also Department of Revenue v. Davis*, 553 U.S. 328, 337 (2008) ("[W]e have sensed a negative implication in the provision since the early days."). Specifically, the Commerce Clause "significantly limits the ability of States and localities to regulate or otherwise

burden the flow of interstate commerce." *Maine v. Taylor*, 477 U.S. 131, 151 (1986).

The "Commerce Clause's overriding requirement" is that there be a "national 'common market.'" *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977). The Clause's foundational purpose was to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). Thus, at its most basic level, the Clause prohibits the States from "'retreating into *** economic isolation,'" *Davis*, 553 U.S. at 338. Under the dormant Commerce Clause, a law is virtually per se invalid if it "directly regulates or discriminates against interstate commerce." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

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

When a distributor collects more deposits than it refunds over the course of a year, the unclaimed deposits are deemed abandoned property and escheat to the State. *See* M.C.L. §§ 445.573b, 445.573d. The State Treasurer then gives 25% of the unclaimed deposit revenue to in-state beverage retailers and 75% to finance a Michigan cleanup and redevelopment trust fund. *See id.* § 445.573c; *see also* App., *infra*, 5a. Statewide, beverage containers are chronically underredeemed so that more deposits are collected from consumers in the aggregate than refunds are made. *See* Michigan Dep't of Env'tl Quality, *Michigan Bottle Deposit Law Frequently Asked Questions*, at 1 (2010).[2] Between 1990 and 2008, unclaimed deposits produced approximately $215,900,000 in revenue for the State treasury. *See id.* at 1.

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

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

any overredemption of containers still reduces the amount of revenue flowing to the State.

One potential cause of overredemption is individuals or retailers redeeming containers in Michigan that were purchased out of State and thus for which no deposit was paid in Michigan. App., *infra*, 5a. Local retailers, however, are often complicit in bulk or large-scale improper redemptions. *See* Press Release, Mich. Attorney Gen., Can Scam (Sept. 27, 2007) (indictments issued where out-of-state cans were crushed, bagged and sold by weight at a discount to complicit retail stores in Michigan that redeemed the containers).[3] It was not until 2008, as part of the same legislative package that imposed the unique-mark mandate at issue in this case, that the Michigan Legislature for the first time criminalized the knowing acceptance of out-of-state containers by retailers and distributors. *See* M.C.L. § 445.574a.

4. As part of a package of amendments designed to increase revenue to the State, the Michigan Legislature amended the Bottle Bill in 2008 to require certain manufacturers to sell their beverages in "designated" glass, metal, or plastic containers. *See* M.C.L. § 445.572a; App., *infra*, 6a. A "designated" container is a beverage package that bears "[a] symbol, mark, or other distinguishing characteristic that is placed *** by a manufacturer to allow a reverse vending machine to determine if th[e] container is a returnable container[.]" M.C.L.

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

§ 445.572a(10). A "returnable container" is a container for which "a deposit of at least 10 cents has been paid, *** and for which a refund of at least 10 cents in cash is payable." *Id.* § 445.571(d). Thus, the law requires beverage packages to include a "distinguishing characteristic" that designates the can or bottle as "returnable" for ten cents, and is meant to prove that the can or bottle was purchased in Michigan. The law is directed only to making the packaging readable by reverse vending machines.

The Michigan-specific beverage packaging "must be unique to this state," and can be "used only in this state and 1 or more other states that have laws substantially similar to this act." M.C.L. § 445.572a(10). The statute does not define "substantially similar," and the State has issued no regulatory guidance interpreting the term. The State has taken the litigating position in this case that the term includes the nine other States with container deposit programs. Mich. Pet. 10. No other State charges a ten-cent deposit for the size containers covered under the unique-mark mandate, however, and thus as a matter of law no other States' containers are "returnable" in Michigan. *See* M.C.L. § 445.571(d).[4]

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[4] Only California provides for a ten-cent refund value on any nonalcoholic container, and it does so only for 24-ounce or larger containers, and even then only when certain recycling targets are not achieved. *See* Cal. Pub. Res. Code § 14560(a)(3). Michigan's unique-mark mandate does not apply to 24-ounce beverage containers. M.C.L. §§ 445.572a(1), (3), (5).

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

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

5. The American Beverage Association is a non-profit association of the manufacturers, marketers, distributors, and bottlers of virtually every nonalcoholic beverage sold in the United States, including the companies that sell products subject to Michigan's unique-mark packaging mandate. App., *infra*, 7a.

The Association's member companies commonly manufacture beverages through production processes that generate packaged beverages in volumes large enough to supply geographical regions comprising part or all of multiple States. App., *infra*, 172a-174a ¶ 11-13 (Declaration of Michael T. Redman, Exhibit C to the Association's Motion for Summary Judgment). To ensure product freshness, member companies design their production, warehousing, and transportation systems so that they can respond rapidly to frequently occurring changes in demand by increasing production or moving inventory across state lines, rather than by stockpiling reserves of state-specific product. *Id.* at 179a-181a ¶¶ 22–24. Because the unique-mark mandate prevents inventory from being moved from bordering States into Michigan and vice versa, the law forces member companies to meet Michigan demand by establishing dedicated, separate production lines for Michigan-exclusive beverages or by incurring downtimes to switch production on mixed-State production lines between Michigan-exclusive and rest-of-the-Nation production. *Id.* at 180a-181a ¶ 24. To comply with the law, member companies also have to maintain state-segregated warehousing and distribution systems. *Id.* at 177a ¶ 19.

6. The day after the unique-mark mandate went into effect for plastic bottles, the Association challenged the law on the ground that the unique-mark mandate violates the dormant Commerce Clause by (i) discriminating against interstate commerce, (ii) unconstitutionally regulating beverage sales extraterritorially by criminalizing sales occurring entirely outside of Michigan, and (iii)

imposing a burden on interstate commerce that far exceeds the putative local benefits, *see Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). App., *infra*, 7a-8a.[5]

The Association and Michigan both sought summary judgment. App., *infra*, 8a-9a. The Michigan Wholesalers intervened in support of Michigan. *Id.* at 9a. The district court granted summary judgment to Michigan with respect to the Association's claims that the unique-mark mandate is discriminatory and extraterritorial, but denied summary judgment for either party on the unconstitutional burden claim. *Id.* at 127a. The court subsequently certified its summary judgment order for interlocutory appeal under 28 U.S.C. §1292(b), *id.* at 92a, and the Sixth Circuit granted permission for interlocutory appeal, *id.* at 133a-134a.

7. The Sixth Circuit affirmed in part and reversed in part. That court reversed the district court's judgment with respect to extraterritoriality. The court held that the unique-mark mandate "allows Michigan to dictate where the product can be sold" in other States, and therefore it "is extraterritorial in violation of the dormant Commerce Clause because it impermissibly regulates interstate

[5] Although enacted in 2008, the effective date of the unique-mark mandate was contingent upon the Michigan Legislature appropriating at least $1 million to retrofit reverse vending machines to read the new unique marks on cans, which did not occur until late 2009. App., *infra*, 97a. The law provided for staggered effective dates for different types of containers, with the unique-mark mandate for plastic containers going into effect on February 24, 2011. *Id.* at 7a.

commerce by controlling conduct beyond the State of Michigan." App., *infra*, 25a-26a. The court noted that there was "no need to consider whether the state had some legitimate local purpose or whether there is a reasonable nondiscriminatory alternative," *id.* at 25a, given the law's extraterritorial operation. The court then went on to rule that, in any event, "no other efforts were made by [Michigan] that could potentially satisfy the state's purported legitimate purpose in a non-extraterritorial fashion." *Id.* at 23a.

The Sixth Circuit, although concluding that Michigan's law unconstitutionally regulated extraterritorial commerce, nonetheless affirmed the district court's separate holding that the unique-mark mandate did not discriminate against interstate commerce. The court rejected the Association's claim that the law treated companies that engage in interstate commerce—*i.e.*, "companies that engage in commerce in Michigan plus one other state"—differently from "companies that operate solely within Michigan," concluding that "[a]ny Michigan-based company that meets the State's threshold sales requirement *** is subject to the same unique-mark provision as companies that compete in the national market and conduct business in Michigan." App., *infra*, 14a n.5. The court then concluded that the law did not discriminate because the statute "does not distinguish between in-state and out-of-state beverage manufacturers" on its face, *id.* at 13a, and "regulat[es] the conduct of both in-state and out-of-state actors," *id.* at 16a. The court further ruled that there was no discrimination in effect because "the Michigan provision does not favor

in-state beverage manufacturers and distributors over out-of-state." *Id.* at 18a.

Judge Sutton (App., *infra*, 27a-37a) and Judge Rice (App., *infra*, 38a-40a) filed concurring opinions. Judge Sutton suggested that the extraterritorial doctrine served no independent purpose, noting that it has generally been an alternative holding in this Court's decisions because discrimination has gone hand in hand with such impermissible extraterritorial overreach by States. *See id.* at 35a (noting that, in finding impermissible extraterritorial regulation in *Healy v. Beer Institute*, 491 U.S. 324 (1989), this Court also held the statute at issue discriminatory because it imposed no restrictions on wholly intrastate beverage companies "so long as that manufacturer or shipper does not sell its beer in a border state").

Judge Rice also concurred, explaining that the district court erred in its reasoning that the law was not extraterritorial just "because no other State has enacted a 'unique mark' requirement." App., *infra*, 38a-39a. In Judge Rice's view, "Michigan does not get a 'free pass' to enact extraterritorial legislation just because it is the first State to do so." *Id.* at 39a. Judge Rice also stressed that, "because we have found the statute to be extraterritorial, it must be struck down, and that is the end of the inquiry." *Id.*

The Sixth Circuit granted Michigan's request to stay its mandate pending the filing of a petition for certiorari. App., *infra*, 131a-132a.

REASONS FOR GRANTING THE WRIT

There is no reason for this Court to disturb the Sixth Circuit's straightforward application of the rule that a State may not "directly control[] commerce occurring wholly outside the boundaries of [that] State," *Healy*, 491 U.S. at 336, to Michigan's purported regulation of and criminal prohibition on the sale of Michigan-packaged beverages in 49 other States. But if the Court takes up that issue, the question presented in this conditional cross-petition—whether the law also discriminates against interstate commerce by imposing criminal prohibitions only on beverage companies that choose to do business in Michigan and at least one other State, and by prohibiting the sale of packaged beverages within Michigan simply because they are also sold in interstate commerce—is a closely related question and provides an alternative ground for resolving the case in the Association's favor.

The law's overt discrimination against interstate commerce provides an independent basis for holding the law unconstitutional that is in addition to its impermissible extraterritorial reach. *See Healy*, 491 U.S. at 344 (Scalia, J., concurring) (joining in only the discrimination holding of decision striking down a state statute on both extraterritoriality and discrimination grounds, because the "statute's invalidity is fully established by its facial discrimination against interstate commerce—through imposition of price restrictions exclusively upon those who sell beer not only in Connecticut but also in the surrounding States"). As in *Healy*, the unique-mark mandate is both extraterritorial and discriminatory.

Ordinarily, a "party need not cross-petition to defend a judgment on any ground properly raised below." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355, 364 (1994). But a cross-petition is required "when the respondent seeks to alter the judgment below." *Id.* In this case, the Sixth Circuit's judgment invalidating Michigan's law on extraterritorial grounds separately affirmed in its judgment "the district court's order granting summary judgment to Defendant on the basis that the State statute is not discriminatory." App., *infra*, 26a-27a. Because the court of appeals' judgment specifically affirmed the district court's discrimination ruling, granting this cross-petition would ensure that the Court can address the dormant Commerce Clause question in full. Indeed, this Court could not fully evaluate Michigan's claim that the extraterritoriality doctrine serves no independent function, *see* Mich. Pet. 21-22, without also examining whether the law is unconstitutionally discriminatory.

Moreover, under a correct reading of this Court's precedents, the combined effect of both the in-state and out-of-state prohibitions inherent in the unique-mark mandate is to wall off Michigan from the national economy in a way that discriminates against—and only against—interstate commerce. For that reason, both the inward-looking and outward-looking sides of the Michigan-specific mandate should be considered together, in keeping with this Court's repeated caution against a cramped dormant Commerce Clause analysis hewing to artificial lines between doctrines. *See C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511

U.S. 383, 402 (1994) (quoting *Brown-Forman Distillers Corp.*, 476 U.S. at 579) (noting that in any case, "'the critical consideration is the overall effect of the statute on both local and interstate activity'").

THE COURT OF APPEALS' HOLDING THAT THE UNIQUE-MARK MANDATE DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE CONTRADICTS THIS COURT'S PRECEDENT.

The Sixth Circuit invalidated Michigan's mandate of Michigan-exclusive packaged beverages because the law "not only requires beverage companies to package a product unique to Michigan but also allows Michigan to dictate where the product can be sold" outside the State. App., *infra*, 25a. While that ruling was correct, the Sixth Circuit failed to recognize that the component of the mandate internal to Michigan—"requir[ing] beverage companies to package a product unique to Michigan"—is equally impermissible under the dormant Commerce Clause because it discriminates against interstate commerce. By forbidding sales within the State of anything except a Michigan-exclusive product, Michigan places a heavy burden solely on companies that operate in interstate commerce, *i.e.*, that choose to sell their products in Michigan and at least one other State. And Michigan imposes that burden precisely because the company sells its product in other States. Michigan, in other words, has walled off its economy from a product solely because of that product's interstate character.

Such a criminal prohibition on the entry of products sold in other States constitutes impermissible discrimination against interstate commerce. First, the unique-mark mandate discriminates against interstate commerce by imposing heavy burdens—indeed, a flat prohibition—on cross-border commerce that commerce entirely internal to the State does not bear. The fact that a hypothetical Michigan-based interstate business, if there were one (there is not), would be treated just as poorly as out-of-state businesses is beside the point because the discrimination would still be against the company because it chose to engage in *interstate* commerce. Second, the Michigan law discriminates against interstate commerce by quarantining the Michigan economy from interstate products for no reason other than the fact that those products are sold in other States.

1. The Commerce Clause protects interstate commerce from disadvantages imposed because of its interstate character. It therefore precludes States from "'plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'" *American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005).

In particular, a State may not discriminatorily burden businesses *because* they engage in commerce in more than one State: that is "either [Michigan manufacturers] who sell both in [Michigan] *and* in at least one [other] State or out-of-state [manufacturers] who sell both in [Michigan] and in at least one [other] State." *Healy*, 491 U.S. at 341. A state law that burdens only interstate businesses while leaving

purely intrastate businesses unaffected violates that cardinal principle.

Furthermore, it is no answer to such discrimination to claim that the statute treats in-state and out-of-state businesses the same. *See Healy*, 491 U.S. at 326 n.2 (no in-state competitors existed that could benefit from the state law). The discrimination is against the act of engaging in multistate commerce itself, regardless of who engages in it, through the imposition of burdens "exclusively upon those who sell [products] not only in [one State] but also in the surrounding States." *Id.* at 344 (Scalia, J., concurring). That is exactly what the Michigan-specific packaging mandate does.

Indeed, the unique-packaging mandate discriminates against interstate commerce on its face. It demands the inclusion on container packaging of a "distinguishing characteristic" that is "used only in this state and 1 or more other states that have laws substantially similar to this act." M.C.L. § 445.572a(10). That requirement applies only to businesses that operate interstate because a manufacturer that operates exclusively internally to the State cannot, by definition, "use" a mark in any other State. And that type of discrimination is precisely the same as the facial discrimination against interstate commerce invalidated in *Healy*, in which this Court found that a statute that purported to apply to "*every* holder of a manufacturer or out-of-state shipper's permit," 491 U.S. at 328 n.5 (emphasis added), in fact discriminated "[o]n its face" against interstate commerce because, "[b]y its plain terms, the Connecticut *** statute applies solely to interstate [manufacturers] or shippers of [beverages]"

in that only companies that sold in Connecticut *and* a bordering State were affected by the law, *id.* at 340-341.

That discrimination against interstate businesses is not only plain from the face of the statute, but is demonstrated by the statute's designed purpose and effect. The very *raison d'être* of the law is to prevent the sale in Michigan of the same packaged beverages sold in other States, and vice versa. *See* M.C.L. § 445.572a(10).

The law, moreover, has at least four discriminatory effects on interstate businesses from which intrastate companies are insulated, each of which is forbidden by this Court's precedent.

First, the law requires interstate companies to create and maintain special state-exclusive production and distribution operations to do business in Michigan, when purely intrastate companies operate single-state production and distribution lines by default. That mirrors the unconstitutional discrimination against commerce that this Court struck down in *Granholm v. Heald*, 544 U.S. 460 (2005), because it had the effect of requiring out-of-state wineries "to establish a distribution operation in New York in order to gain the privilege" of selling directly to New York consumers, while New York wineries operated New York distribution operations by definition, *id*. at 474.

Michigan's law likewise creates substantial disincentives for manufacturers to move production for Michigan out of Michigan because of the inability to manufacture and distribute a common regional product in other States. Because the state-exclusive

packaging requirement brings with it the practical necessity of having state-exclusive production runs, state-exclusive distribution systems, state-exclusive warehousing, and state-exclusive transportation systems, Michigan's law "exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted [a] measure rather than 'among the several States.'" *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286-287 (1987). Such incentives to locate commercial activity within a State, as well, provide "a forbidden impact on interstate commerce." *Id*. at 286.

Second, Michigan's law eliminates the competitive advantages otherwise enjoyed by interstate companies through their ability to streamline production and distribution across multiple States, as compared to purely intrastate manufacturers. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-351 (1977) (invalidating law barring use of apple packaging and labels because out-of-state apple growers had to incur costs to change their containers and the law "stripp[ed] away *** the competitive and economic advantages" for the burdened competitors).

Third, the state-specific packaging requirement impedes the free movement of commerce by imposing an economic toll applicable only to interstate companies seeking to sell beverages within Michigan. *See Scheiner*, 483 U.S. at 284 (invalidating tax that impeded "the free movement of commerce by placing a financial barrier around the State").

Fourth, while the Sixth Circuit focused on the differential treatment of competitors, *see, e.g.*, App.,

infra, 13a (discussing discrimination between "in-state and out-of-state beverage manufacturers"), 18a (comparing "in-state beverage manufacturers and distributors" to "out-of-state" ones), this Court's test is whether the interstate-commerce burdening law benefits local "interests," not just local competitors. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978) (invalidating law that "impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space"); *C & A Carbone*, 511 U.S. at 393 ("The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests.").

The unique-packaging mandate is openly designed to protect local interests by shifting to interstate companies (all of whom are also out of State) the burden and expense of raising revenue for local retailers, who get 25% of all escheated deposit revenue, and funding local environmental programs. *See* M.C.L. § 445.573c.

In short, the Sixth Circuit's discrimination analysis defied this Court's precedent by refusing to look beyond the statute's treatment of in-state and out-of-state actors and to consider the law's facial prohibition on interstate commerce itself. *See* App., *infra*, 14a-18a. What should have been dispositive is that the disparate burdens imposed by Michigan on interstate companies "penaliz[e]" Michigan beverage companies "if they seek border-state markets and out-of-state [beverage companies] if they choose to sell both in [Michigan] and in a border State." *Healy*, 491 U.S. at 341. Outright hostility to interstate commerce in a product discriminates against

interstate commerce just as much, if not more, than local favoritism.

2. Beyond the disparate treatment of interstate companies, the combined effect of the unique-mark mandate's within-Michigan and its outside-Michigan sales prohibitions is to segregate Michigan's beverage market from the rest of the national economy. Simply put, products sold in Michigan cannot circulate in both spheres. That prohibition on the sale of interstate products simply because they are sold interstate is discrimination against interstate commerce in its most raw form.

The "central concern of the Framers"—the concern that "was an immediate reason for calling the Constitutional Convention"—was that, "in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations *** among the States under the Articles of Confederation." *Hughes,* 441 U.S. at 325. But the unique-mark mandate creates this Balkanization by express design. The only way to comply with Michigan's law is to make and sell a product that will not and cannot be sold in any other State. No covered product sold in the Michigan market may be sold in the rest of the Nation, and no covered product sold in the rest of the Nation may be sold in Michigan. That is flatly contrary to the "Commerce Clause's overriding requirement" of a "national 'common market.'" *Hunt*, 432 U.S. at 350.

Moreover, the burden on interstate commerce is made worse by the fact that the law purports to grant and withhold leave to sell products within Michigan based on whether Michigan unilaterally approves of

the laws of those other States as "substantially similar" beverage recycling laws. M.C.L. § 445.572a(10). To begin with, no other States could qualify under the law's plain text (Michigan's litigating position notwithstanding). *See* note 1, *supra*.

More to the point, Michigan's willingness to allow interstate commerce with specified States—when it deems their laws to be sufficiently acceptable—runs headlong into the Commerce Clause rule that States cannot give preference to commerce with some States while discriminating against commerce in all others. To allow Michigan "to insist that a sister State" either adopt a recycling program "acceptable to [Michigan] or else be absolutely foreclosed from exporting its products to [Michigan] would plainly 'invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.'" *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976) (striking down Mississippi law allowing sales of safe, out-of-state milk only from States that reciprocally accepted Mississippi milk); *see also New Energy Co. v. Limbach*, 486 U.S. 269, 275 (1988) ("The present law *** imposes an economic disadvantage upon out-of-state sellers; and the promise to remove that if reciprocity is accepted no more justifies disparity of treatment than it would justify categorical exclusion.").

The Constitution, of course, allows ample room for State regulatory preferences to flourish. *See Davis*, 553 U.S. at 338 ("[T]he Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy.").

Michigan may reasonably require particular information on the labels of products sold on its shelves. *See International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 632 (6th Cir. 2010) (rejecting Commerce Clause challenge to in-state milk labels); *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001) (same for in-state light bulb labels). Indeed, the Michigan bottle bill has long imposed, without constitutional problem, a labeling requirement requiring designation of Michigan's refund value. M.C.L. § 445.572(7).

But the state-specific packaging mandate at issue here materially departs from such permissible regulation and crosses the line into unconstitutional discrimination against commerce because it goes far beyond requiring information on a label; it requires a state-*exclusive* package that absolutely prohibits interstate commerce in the packaged product in a way that strikes at the very foundational purpose of the Commerce Clause.

For those reasons, if this Court chooses to review the Sixth Circuit's holding regarding the unique-mark mandate's extraterritorial prohibition, it should also grant review of this petition to consider the full impact of Michigan's law on interstate commerce and to overturn the Sixth Circuit's erroneous conclusion that the deliberate withdrawal of the Michigan economy from interstate commerce in packaged beverages was not discriminatory.

CONCLUSION

For the foregoing reasons, if the Court grants Michigan's petition in No. 12-1221 or the Michigan Wholesalers' petition in No. 12-1224, then this

conditional cross-petition for a writ of certiorari should also be granted.

Respectfully submitted.

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