No. 12-1344

In The
Supreme Court of the United States

AMERICAN BEVERAGE ASSOCIATION,
Cross-Petitioner,
v.

RICK SNYDER, GOVERNOR OF MICHIGAN, *ET AL.*,
Cross-Respondents.

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

REPLY BRIEF FOR THE CROSS-PETITIONER TO THE MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION'S BRIEF IN OPPOSITION

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INTRODUCTION

The Michigan Beer & Wine Wholesalers Association ("Michigan Wholesalers") acknowledges that its own petition for certiorari asks the Court to consider "whether the extraterritoriality doctrine should remain as a standalone" test under the Commerce Clause. BIO 21; *see* Michigan Wholesalers' Pet. 14-16. For that reason, the Michigan Wholesalers ultimately "do[] not object to the Court granting th[is] [conditional] cross-petition"

to "inform the Court's decision" whether the extraterritoriality doctrine does, in fact, stand alone from the Commerce Clause's non-discrimination rule. BIO 21.

In addition, the Michigan Wholesalers nowhere dispute that granting the cross-petition would effectuate this Court's well-settled rule that the Court can affirm a lower court judgment based "'upon any matter appearing in the record in support of the judgment.'" *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 558 U.S. 67, 80 (2009) (citation omitted). The Wholesalers would just prefer that, in analyzing the law's constitutionality under one Commerce Clause test, the Court completely ignore the law's transgression of another. BIO 20-21. That makes no sense. The Beverage Association brought this suit because the Michigan-exclusive-product law violates the Commerce Clause of Article I, Section 8 of the Constitution. This Court's different analytical tests under that Clause are simply means of answering that single, foundational constitutional question.

Accordingly, while no review at all is needed of the court of appeals' decision, if this Court were to grant either Michigan's or the Michigan Wholesalers' petition, the Court should also grant this conditional cross-petition rather than decide the constitutionality of Michigan's unique law with one eye closed to its distinct discriminatory defect.

MICHIGAN'S CRIMINALIZATION OF BEVERAGE SALES *SOLELY* BECAUSE THE PRODUCT IS SOLD IN INTERSTATE COMMERCE UNCONSTITUTIONALLY DISCRIMINATES AGAINST INTERSTATE COMMERCE.

In the normal course, this Court would, if it granted review, automatically consider both the extraterritoriality and discrimination challenges to Michigan's anomalous law criminalizing the simple act of engaging in interstate commerce. That is because the Beverage Association ordinarily would be able to defend the court of appeals's judgment on the alternative ground, fully preserved in the record, that Michigan's law unconstitutionally discriminates against commerce. It is only because the Sixth Circuit took the highly unusual step of entering separate judgments on the two analytical tests employed under the dormant Commerce Clause that a cross-petition is needed at all. *See* Pet. App. 26a-27a. That procedural fluke, however, has no bearing on the proper scope of the question before this Court if certiorari were to be granted.

Perhaps for that reason, virtually the entirety of the brief in opposition ignores the logic of review and, instead, is devoted to defending the court of appeals's discrimination ruling on the merits. BIO 2-19. Needless to say, the Beverage Association begs to differ. But the question at this certiorari juncture is not whether the Michigan Wholesalers or the Beverage Association is correct, but whether the Court should only half decide the constitutionality of Michigan's law if review were to be granted. For the reasons explained in the cross-reply to Michigan's

brief in opposition (at 3-5), granting review on the question whether Michigan's law discriminates against interstate commerce is inherently bound up in Michigan's and the Michigan Wholesalers' certiorari petitions, which ask whether the extraterritoriality doctrine does any independent work. That question cannot logically be answered without determining whether the extraterritoriality doctrine and the non-discrimination rule independently give different answers when analyzing the same law.

Beyond that, the Michigan Wholesalers' arguments on the merits are not only wrong, but foreclosed by this Court's precedent. Indeed, the discrimination against interstate commerce could hardly be more stark: Michigan makes it a crime to sell a packaged beverage in Michigan *for the sole reason* that the same packaged beverage was sold in another State. The plain text of Michigan's law dictates what may and may not be sold based exclusively on whether the product is also sold in interstate commerce, mandating on pain of criminal fine and imprisonment that only packaged beverages "unique" to Michigan and sold "only in [Michigan]" may be offered (or even donated to charity). M.C.L. § 445.572a(10).

Under settled Commerce Clause law, however, Michigan may not selectively burden "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 v. Beer Inst.*, 491 U.S. 324, 341 (1989); *see also id.* at 344 (Scalia, J., concurring) (law discriminates by imposing

restrictions "exclusively upon those who sell beer not only in Connecticut but also in the surrounding States"). That is exactly what the unique-packaging law does.

The Michigan Wholesalers try four different ways to escape the Commerce Clause's command, but all of them are flat wrong.

A. The Law Discriminates Against Products Because They Are Interstate, Not Because Of Volume Levels.

The Michigan Wholesalers place great weight (BIO 5-8) on the law's use of sales volumes to identify which companies are subject to the ban on interstate commerce. That is a straw man. The problem with Michigan's law is not the volume limits per se; it is what the law does to companies who meet those volume limits. The volume limits, in other words, simply define who is forbidden to engage in interstate commerce.

That does nothing to dissipate the law's discrimination against interstate commerce. The Michigan Wholesalers presumably would not dispute that a Michigan law saying that "no company in Michigan can sell its products in interstate commerce" would be unconstitutionally hostile to interstate commerce. And that constitutional problem would remain even if the law were amended to say that "only those companies in Michigan who are sufficiently successful that their products are broadly desired in other States are forbidden to sell their products in interstate commerce."

The root of the constitutional problem is the law's command of "unique[ly]" packaged products that can be sold "only in" Michigan. M.C.L. § 445.572a(10). By its very terms, the command to desist from sales in interstate commerce only hurts companies engaged in interstate commerce, and not intrastate companies who need change nothing even if they have the same sales volumes.

That is why the Wholesalers' argument that a wholly intrastate manufacturer (if there were one) could be subject to the unique-packaging requirement fails. *See* BIO 5-6, 10-11. For businesses who never sell their products outside of Michigan, everything about their packaged product, including the routine UPC mark is, by definition, "unique" to Michigan. Arguing that the law nominally applies—it just does not require intrastate companies to do *anything*—hardly puts intrastate companies and interstate companies on the same constitutional footing. *See Healy*, 491 U.S. at 344 n.* (Scalia, J., concurring) (finding discrimination even though no solely intrastate business burdened by the law had been identified).

Indeed, Michigan's law is just like the statute invalidated by this Court in *Healy*, which 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) (citation omitted). This Court nonetheless held that the law discriminated "[o]n its face" against interstate commerce because the substantive requirement of the law "applie[d] solely to interstate [manufacturers] or shippers of [beverages]." *Id.* at 341. The same is true here. Michigan's law is the antithesis of a statute that

"appl[ies] evenhandedly to all carriers that make domestic [sales]," because its operation places direct and severe "'burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'" *American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433, 434 (2005) (citation omitted).

Finally, compliance with that burden is enforced with criminal penalties that no intrastate business will ever suffer. *See* M.C.L. § 445.572a(11). Michigan Wholesalers insist (BIO 2) that the law imposes penalties "only for a sale in Michigan." This Court has heard and rejected that same chicken-and-egg argument before in striking down price-affirmation laws. "That the *** law is addressed only to sales of liquor in New York is irrelevant[.]" *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 583 (1986).

What matters is that a packaged beverage sitting on store shelves in Michigan is rendered unlawful at the moment the packaging ceases to be "unique"—which happens the second that a Michigan beverage is sold in another State. In other words, company officials will be sent to jail in Michigan just because they sold a Michigan-compliant beverage in another State. That is a sanction that no purely intrastate company faces.

B. The Ordinary Cost Of Doing Business In Interstate Commerce Does Not Include Being Forced To Halt That Interstate Commerce.

The Michigan Wholesalers' effort (BIO 9-10) to brush the law off as an ordinary state labeling or

packaging requirement blinks reality. An ordinary labeling or packaging law looks internally to how a product is packaged for marketing within the regulating State and is "indifferent" to how that same product sold "anywhere else in the United States [is] labeled[.]" *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001). That is routine, and does not violate the Commerce Clause unless the burden on interstate commerce is excessive in comparison to the local benefits. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981) (upholding law requiring particular container type within Minnesota that did not affect sales in other States).

By contrast, the whole purpose of Michigan's law is outward looking to police and punish the sale of Michigan-labeled products in other States. By its very nature, the "only in" Michigan "unique[ness]" that Michigan's law commands, M.C.L. § 445.572a(10), can only be enforced by prohibiting those products from entering the interstate commerce stream. That is what "unique" means. And that is the type of hostility to interstate commerce for its own sake that the Commerce Clause forbids. *See American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 286-287 (1987) (tax that "exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States,'" violates the Commerce Clause) (quoting U.S. CONST., Article I, § 8, cl. 3)).

It is undoubtedly true that "companies engaged in sales in multiple states often incur business-related burdens not incurred by those who choose to

operate in a single state." BIO 8. It is also irrelevant. Here, Michigan has legislatively compelled beverage companies that choose to operate in more than one State to cease and desist their engagement in interstate commerce in covered products. That is not a routine, business-related burden. That is stopping interstate business in its tracks.

Such a flat prohibition on interstate commerce just because it crosses state lines is precisely the kind of harm to "the interstate market," *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978), that the Commerce Clause was designed to prevent by mandating a "national 'common market,'" *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977) (citation omitted). The Association is not arguing, as were the oil producers in *Exxon*, that the unique packaging law discriminates against interstate commerce because, by happenstance, the law solely affects interstate (and out-of-state) businesses. *See* BIO 9; *Exxon*, 437 U.S. at 125. In *Exxon*, the law could have simply shifted consumption of covered beverages "from one interstate supplier to another." 437 U.S. at 127. Not so here, where Michigan's law is specifically designed to *eliminate* interstate supply of an interstate product just because it is interstate.

C. The Law Burdens Interstate Companies To Benefit Local Interests.

The unique-mark mandate is also protectionist in the constitutionally relevant sense. So-called "economic protectionism" is not the only threat to the national common market. *See City of Philadelphia v.*

New Jersey, 437 U.S. 617, 626 (1978) (invalidating statute without deciding whether it was enacted for "economic protectionism"). Indeed, the price-affirmation statute that this Court invalidated in *Healy* was not aimed at "economic protectionism," BIO 10, in the sense that the Michigan Wholesalers define it. That is, the law was not designed to "favor[] Connecticut entities at the expense of entities in bordering states." BIO 10. This Court acknowledged, in fact, that the law equally burdened Connecticut brewers and out-of-state brewers. 491 U.S. at 341. And there were no purely intrastate brewers who could have benefitted from the law. *Id.* at 344 n.* (Scalia, J., concurring).

Instead, the law's protectionism was the same as Michigan's in that both laws furthered in-state interests at the exclusive expense of companies engaged in interstate commerce. The law in *Healy* advanced the interests of Connecticut consumers in lower product prices. So too here, Michigan's unique-packaging law is designed to further the interests of Michigan's public treasury, Pet. App. 6a, and by extension the Michigan environmental programs and Michigan retailers to which the law channels the deposit revenues, all of which are, by definition, in-State, Pet. App. 5a.

The Michigan Wholesalers' further argument that the purpose of the law is not to raise revenue but to "'[p]rotect[] the [Michigan] environment," BIO 16 (quoting Pet. App. 120a), is no answer at all. *See Philadelphia*, 437 U.S. at 628 (invalidating law that "impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space").

The Michigan Wholesalers attempt to distinguish the law in *Philadelphia* as "'slow[ing] or freez[ing] the flow of commerce," BIO 14 (quoting *Philadelphia*, 437 U.S. at 628). But the only way that law could be deemed different is that Philadelphia did not also make it a *crime* to engage in interstate commerce, and thus the Michigan law is worse.

The real proof of protectionism is in the Michigan Wholesalers' writing. They emphasize (BIO 15) that the law aims to stop "criminals" from obtaining bottle deposits from retailers fraudulently. That very statement confesses that the source of the problem is not the upstream beverage manufacturers, but the downstream third-party customers of Michigan's retailers, as well as some corrupt retailers. *See* Cross-Pet. 7. Shifting all the burden of solving that problem onto the shoulders of interstate-commerce participants rather than in-state customers and retailers is quintessential protectionism.

D. The Burden Of Halting Interstate Sales Is Relevant To The Discrimination Inquiry.

As a last ditch defense, the Michigan Wholesalers argue that the burden on interstate companies is irrelevant "to [any] issue presented in the cross-petition." BIO 18. That cannot be right. The essence of discrimination is disparate treatment, which occurs when a State imposes burdens and costs on a disfavored group that the favored group does not bear. *See Granholm v. Heald*, 544 U.S. 460, 474 (2005) (imposition of "additional steps that drive up the cost" was discriminatory); *Hunt*, 432 U.S. at 351

(statute that "rais[ed] the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected" discriminated against interstate commerce). Thus, the fact that Michigan's law on its face "force[s] [interstate companies] to alter their long-established procedures, at substantial cost" while having "no effect on the existing practices of [intrastate] producers[]" is highly relevant to this Court's discrimination inquiry. *Hunt*, 432 U.S. at 340.

The Michigan Wholesalers try to dismiss those cases as involving economic protectionism (BIO 12-13). This law protects in-state interests as well and, in any event, the relevant point is that the disparate burdens imposed on interstate companies under the Michigan law are of the same kind and magnitude, or worse, than the disparate burdens this Court has previously found discriminatory.

The Michigan Wholesalers' attempt to backhand the disparate treatment on the facts fares no better. *See* BIO 18-19. It is undisputed that production lines must be shut down and cleared to switch between Michigan and rest-of-the-nation production, *see* Resp. App. 5a-6a, and that is just the beginning. Warehousing, transportation, delivery, and marketing must also be segregated into state-specific processes, and inventory may never be moved into and out of Michigan to respond to shifts in consumer demand. The voluntary, occasional introduction of specialized products (BIO 19)—which the companies remain free to sell in any State—is not remotely comparable to the burden, 365 days a year, of achieving perfection in segregating Michigan

packaged beverage production from that for the rest of the Nation, on pain of a $2000 fine and six months imprisonment *per can of soda sold*. *See* M.C.L. § 445.572a(11).

In sum, the Sixth Circuit's conclusion that criminalizing an activity is not discrimination against it defies both precedent and logic. The Michigan Wholesalers have identified no reason this Court should ignore those problems if it decides to address whether Michigan's law violates the Commerce Clause. Accordingly, if this Court chooses to review the Sixth Circuit's holding that Michigan's unique-product mandate is unconstitutionally extraterritorial, it should also grant review of the cross-petition to ensure full consideration of the law's adverse impact on interstate commerce.

CONCLUSION

For the foregoing reasons and those stated in the cross-petition, if the Court grants the petitions for a writ of certiorari in No. 12-1221 or No. 12-1224, then the conditional cross-petition for a writ of certiorari should also be granted.

Respectfully submitted.

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