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

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION'S BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Whether, if the Court grants certiorari to consider the Sixth Circuit's holding as to extraterritoriality, the Court should also grant the cross-petition to consider whether the courts below erred in finding the statute does not have a protectionist purpose and is not discriminatory in violation of the dormant Commerce Clause.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are reproduced in petitioner Michigan Beer & Wine Wholesalers Association's ("MB&WWA's") appendix to the petition. The Commerce Clause, U.S. Const. Art. I., Sec. 8, Cl. 3, is at App. 143a.[1] The entire statute at issue, Mich. Comp. Laws §§ 445.571 et seq., is at App. 144a-175a. The specific provision challenged by the respondent American Beverage Association ("Association"), Mich. Comp. Laws § 445.572a(10), is at App. 156a-157a.

STATEMENT OF THE CASE

MB&WWA will attempt to avoid repetition of points that have been stated in prior briefs. MB&WWA relies on the statement of the case contained in its petition, pp. 2-5, and on the State of Michigan's response points in the statement of the case in its brief in opposition to the cross-petition, pp. 3-5.

The Association repeatedly asserts that the 2008 Bottle Bill amendment imposes a criminal penalty on sales *in* other states. E.g., cross-petition, p. 3 (the "unique-mark mandate criminalizes the sale *in* all 49 States of the same packaged beverages that are sold in Michigan. . . . Accordingly, any sale of any Michigan beverage *in* any other State constitutes a crime

[1] "App" refers to the appendix to MB&WWA's Petition. "Resp. App." refers to the appendix attached hereto.

punishable by up to six months' imprisonment and a fine of $2,000"), and p. 10 (the statute "criminaliz[es] sales occurring entirely outside of Michigan."). (Emphasis added.) The Association says this to bolster both its extraterritorial argument and its discrimination argument, but it is wrong. Michigan's unique mark statute can be violated only by a sale "in this state." Mich. Comp. Laws § 445.572a(1) through (9).[2] Any penalty for violation of the unique mark requirement could therefore be imposed only for a sale in Michigan. Mich. Comp. Laws § 445.572a(11). App. 157a. For a further discussion of this point, please see MB&WWA's reply brief in support of its petition.

REASONS FOR DENYING THE CROSS-PETITION

I. The claimed disparate treatment is based on volume thresholds, not whether a manufacturer engages in interstate commerce. Volume thresholds, which actually reduce the overall burden and are focused on sales most closely tied to the problem of fraudulent redemptions, do not establish discrimination against interstate commerce.

"The modern law of what has come to be called the dormant Commerce Clause is driven by concern

[2] Every one of the subsections is limited to sales "in this state," except subsections (2), (4) and (6), which are limited to sales "in the Upper Peninsula." App. 151a-156a.

about 'economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue v. Davis*, 553 U.S. 328, 337-338 (2008), quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988). The district judge and all three Court of Appeals judges analyzed and correctly rejected the Association's asserted discrimination against interstate commerce. All the lower court judges found that Mich. Comp. Laws § 445.572a(10) is not protectionist, and applies evenhandedly to all manufacturers who meet the volume thresholds – those who sell in Michigan only as well as those who sell in multiple states – and regardless of where located. App. 100a-109a and 11a-18a. The analysis of the district court and the Court of Appeals was correct and need not be reviewed by this Court.

The challenged law is a valid exercise of Michigan's police powers. It fosters respect for the Bottle Bill. It is aimed at preventing criminals from collecting money that belongs to people who paid the deposit or, where the deposit is not claimed by the rightful owner, belongs to the State by escheat.

The Bottle Bill was amended in 2008 with input from industry members including beer manufacturers and soft drink representatives such as the Michigan Soft Drink Association, whose members include Coca Cola, Pepsi and 7-Up. See affidavit of former Michigan Senator Ronald Jelinek, who sponsored the Senate bill that became the 2008 Bottle Bill amendment. Resp. App. 9. With industry input, Michigan

developed a system that would remedy the ongoing criminal fraud, but at the same time take the concerns and technologies of the affected industries into account:

> "4. I sponsored Senate Bill 1532 which became 2008 Public Act No. 389.
>
> "5. The purpose behind Senate Bill 1532 was to amend the Michigan Bottle Deposit Law to stop the fraudulent redemption of containers that were not purchased in Michigan. . . . The 2008 Amendment to the Bottle Deposit Law was intended to address and stop this fraud, and maintain support for the Bottle Deposit Law.
>
> "6. . . . I participated in Senate Committee hearings and numerous meetings and discussions with members of the public and members of the industries involved in the manufacture and distribution of beverage containers subject to the Michigan Bottle deposit law. Among those who were consulted and had ongoing involvement in the development of what became Senate Bill 1532 were soft drink companies such as Coca Cola and Pepsi-Cola, individually or through their trade association. The various feasible methods to accomplish the identification of containers subject to Michigan's Bottle Deposit Law were developed with industry input. I do not recall being told that these methods were overly burdensome.

> "7. Prior to enactment of Senate Bill 1532 there had been almost two years of ongoing discussions with industry and affected parties about how to stop the fraudulent redemption problem. Elected officials, including myself, sought input from the involved industries (such as Miller Coors and the Michigan Soft Drink Association, whose members included producers of brands like Coke, Pepsi and 7-Up) in an attempt to arrive at a solution that would be fair to those industries, yet solve the problem of fraudulent redemption. In this regard, numerous meetings were held and numerous alternatives were considered over this approximately two-year period before enactment of the statute. This included experimental marking of containers."

Resp. App. 10.

The Association's main theme is that a state statute does not have to be protectionist to violate the Commerce Clause; rather, the Commerce Clause prohibits discrimination "against the act of engaging in multistate commerce itself." Cross-petition, p. 18. Thus, the Association argues, "a State may not discriminatorily burden businesses *because* they engage in commerce in more than one State." *Id.*, p. 17. (Emphasis in original.)

The main problem with the Association's "discrimination . . . against the act of engaging in multistate commerce itself" argument is that § 445.572a(10) does no such thing. Rather, the unique mark requirement applies to all manufacturers whose containers

meet the volume thresholds, whether those manufacturers sell in Michigan only or in multiple states. The glaring reality ignored by the Association is that many of its own members operate in interstate commerce, selling in Michigan and in other states, yet are not required to use a unique mark because they do not meet the volume thresholds. The Association asserts that it represents 187 soft drink companies.[3] Yet only a few types (brands) of containers, sold by some soft drink companies and brewers of beer, meet the volume thresholds that trigger the unique mark requirement in § 445.572a(10). App. 7a. Most of the Association's members (many of whom presumably are not located in Michigan, but sell in Michigan) are not affected by the unique mark statute because of the volume thresholds.

In fact, the volume thresholds were urged by the beverage industry to lessen the burden and focus on the high-volume containers that were most closely tied to the fraudulent redemption problem. Consistent with arguments made by the beverage industry, the law exempts low sales volume containers (wherever manufactured) since those bottles and cans were not contributing in any major way to the fraudulent redemption of containers in Michigan. See, R. No. 17, Defendants' Response to Motion for Summary Judgment, Exhibit 6, Fraudulent Redemption in Michigan,

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[3] District Court R. No. 26, Plaintiff's Reply Brief in Support of Motion for Summary Judgment, Exhibit E, McManus Declaration, paragraph 3.

a Comprehensive Industry Solution, p. 5, where representatives of the soft drink industry, including affected members of the Association, stated before the passage of the 2008 Bottle Bill amendment:

> "Lower volume brands would not need to be included in the new marking, because not only is the incremental unit cost to implement the marking on lower volume brands significantly higher than for major brands, but it is also highly doubtful that the would be criminal could find it financially worthwhile to sort through a mass of non-redeemable major brand containers just to find a few redeemable ones to bring over the border."

The statute provides that if evidence of significant overredemption of below-threshold brands develops in the future, those containers would then have to meet the requirements. See M.C.L. 445.572a(1) through (9). App. 151a-156a.

Differential treatment that does not favor in-state interests over out-of-state interests is not invalid. See *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 649 (6th Cir. 2010), where the court rejected a similar claim, saying an Ohio regulation's labeling restriction on statements regarding use of rbST in milk production did not violate the Commerce Clause because the disparate treatment was, in reality, of farmers and processors who used rbST in production versus those who did not, regardless of where the farmers or processors were located. The Court said the argument

was of no help in meeting the claimant's burden of showing how Ohio economic actors were favored by the regulation at the expense of out-of-state actors. *Id.* The same is true here.

The district court correctly recognized the essential flaw in the Association's attempt to bootstrap the volume thresholds – a valid exercise of Michigan's police powers which lessens the overall burden on manufacturers – into a claim of discrimination against interstate commerce. The court pointed out 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, but that does not prove discrimination against interstate commerce:

> "To hold that the unique-mark requirement is facially discriminatory, and therefore *per se* invalid, simply because it imposes a greater burden on those engaged in interstate commerce than those who do not would, in effect, mean that every state labeling restriction is unconstitutional. However, '[n]egatively affecting interstate commerce is not the same as discriminating against interstate commerce.' *Cotto Waxco Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995)." App. 105a.

The Court of Appeals also rejected the Association's arguments. App. 16a-17a.

Much of the cross-petition addresses the burden that § 445.572a(10) allegedly imposes on the few

companies whose soft drinks meet the volume thresholds.[4] But the Commerce Clause argument disappears once it is seen that the alleged burden is not on interstate commerce, but rather, merely reflects one of the business costs of the large-volume sales enjoyed by Coca Cola, Pepsi and Dr. Pepper/Snapple. In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), Maryland passed a statute prohibiting petroleum producers or refiners from operating any retail service station within the state, and requiring the producers and refiners to divest themselves of such service stations. The producers and refiners argued the statute violated the Commerce Clause because the burden of divesture fell solely on interstate companies. This Court rejected the argument, holding, "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce," and the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." 437 U.S. 117, 126, 127. Accord: *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987), and *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 474 (1981). See also, *National Electrical Manufacturers Ass'n v.*

[4] The claimed burden is not factually supported and most of the discussion is off point anyway, being more relevant to a balancing of local benefits versus burdens as required by *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), an analysis which the district court has not undertaken since the extent of the burden presents a question of fact. Please see discussion, *infra.*

Sorrell, 272 F.3d 104, 111 (2d Cir. 2001), holding that a multi-state manufacturer's costs of complying with a state labeling requirement is "a burden . . . simply attributable to legitimate intrastate regulation" and must be borne by the manufacturer as part of the cost of doing business in a multi-state market or passed on to consumers.

The Association relies primarily on *Healy v. Beer Institute*, 491 U.S. 324 (1989), for its argument that § 445.572a(10) violates the Commerce Clause "because it burdens only interstate businesses." Cross-petition, p. 17. *Healy* does not support the Association's argument. First, the Connecticut price affirmation law in that case effectively controlled prices that could be charged for beer in the bordering states of Massachusetts, New York, and Rhode Island. This Court held the Connecticut statute impermissibly imported pricing decisions into the Connecticut market regardless of local competitive conditions. "States may not deprive businesses and consumers in other States of 'whatever competitive advantages they may possess' based on the conditions of the local market." 491 U.S. 324, 339, quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 580 (1986). The statute in *Healy* clearly was aimed at economic protectionism – favoring Connecticut entities at the expense of entities in bordering states.

Further, the Connecticut price affirmation statute expressly applied only to interstate businesses or shippers of beer, i.e., to those who sold in both Connecticut and at least one of the three border states.

Michigan's unique mark statute applies to all manufacturers whose products meet the volume thresholds, regardless of where they are located and whether they are engaged in interstate commerce. As discussed above, many out-of-state companies, including many of the Association's own members, are not required to use the unique mark because the low volume of their containers is not contributing significantly to the fraudulent redemption problem and they do not meet the thresholds. The district court succinctly rejected the assertion that § 445.572a(10) only applies to companies engaged in interstate commerce:

> "Even if the threshold levels that trigger coverage implicated only high volume, national companies like Coca-Cola, small volume out-of-state companies, just like small volume in-state companies are exempt." App. 108a.

The Court of Appeals agreed. App. 13a-18a.

Nor do the other cases cited by the Association support its position. The Association cites *American Trucking Ass'n v. Michigan Public Service Comm.*, 545 U.S. 429, 433 (2005), for the point that, "[t]he Commerce Clause protects interstate commerce from disadvantages imposed because of its interstate character." Cross-petition, p. 17. As already shown, that principle is inapplicable because it is the volume thresholds, not interstate versus intrastate sales, that trigger the obligation to comply with the unique mark requirement. In any event, *American Trucking* does not help the Association. The regulation there

imposed a $100 annual fee for all trucks engaged in intrastate hauling, i.e., trucks making point-to-point hauls between Michigan cities. It applied equally to trucks hauling solely in Michigan and to trucks involved in both interstate and intrastate trips. The petitioner claimed that trucks making both intrastate and interstate trips used Michigan resources less than Michigan-only trucks, and therefore the flat fee discriminated against interstate commerce. This Court rejected the challenge, saying the regulation was a valid exercise of Michigan's police power, operated evenhandedly and did not discriminate against or unduly burden interstate commerce.

The Association also relies on *Granholm v. Heald*, 544 U.S. 460 (2005), and *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1997), both of which involved economic protectionism. In *Granholm*, the Court considered wine direct shipment statutes in Michigan and New York. The statutes were held to violate the Commerce Clause because they favored in-state wineries by allowing them to ship wine directly to consumers, whereas in Michigan out-of-state wineries could sell to Michigan residents only through in-state wholesalers and retailers, and in New York out-of-state wineries were required to establish an in-state distribution operation in order to ship to New York residents. This Court found the statutes violated the Commerce Clause because they favored in-state wineries at the expense of out-of-state competitors.

Similarly, in *Hunt*, *supra*, this Court addressed a North Carolina statute that required all apples

shipped into North Carolina in closed containers be identified by no grade on the containers other than the applicable federal grade or a designation that the apples were not graded. Washington had a stringent, mandatory state inspection and grading system that exceeded federal requirements. The Court held the North Carolina statute violated the Commerce Clause because it had the effect of stripping Washington growers of their competitive advantages, thus benefitting North Carolina growers. In the present case, the district court contrasted the Michigan statute with the North Carolina statute at issue in *Hunt*, stating:

> "Michigan's unique mark statute, on the other hand, does not strip out-state actors of any competitive advantage to the benefit of in-state actors. And like [*International Dairy Foods v.*] *Boggs*, the unique mark requirement burdens in-state beverage manufacturers who meet the designated thresholds to the same extent it burdens out-of-state manufacturers who meet the designated thresholds." App. 108a.

See also, Court of Appeals opinion, App. 16a-18a.

The Association also relies on *Philadelphia v New Jersey*, 437 U.S. 617 (1978). In that case, in order to conserve land fill space in New Jersey, the state enacted a statute prohibiting the importation of most solid or liquid waste originating or collected outside the state's borders. The Court said the "crucial inquiry" was whether the New Jersey statute "is

basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." 437 U.S. 617, 624. Appropriate to the present case, the Court stated:

> "The opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. [Citation omitted.] The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a state's borders. [Citation omitted.] But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142." 437 U.S. 617, 623-624.

The Court found the New Jersey statute violated the Commerce Clause because "[o]n its face" "the State has overtly moved to slow or freeze the flow of commerce for protectionist reasons." 437 U.S. 617, 628.

The Association's reliance on *Philadelphia v. New Jersey* is without merit. The Michigan statute is a

legitimate legislative response designed to reduce criminal behavior which deprives the State of its own funds (unredeemed deposits belong to the State by escheat). Beer and soft drink manufacturers have been complying with the law since March 2010 as to cans and March 2011 as to bottles. Containers have not been stopped at Michigan's borders; commerce has not come to a halt or even been slowed.

The Association asserts the statute is protectionist because it imposes on interstate companies "the burden and expense of raising revenue for local retailers, who get 25% of all escheated deposit revenue, and funding local environmental programs." Cross-petition, p. 21.

The goal of the 2008 amendments was to stop criminals from claiming bottle deposits to which they are not entitled.[5] It is incorrect to say that the purpose of the 2008 amendments was to raise money for retailers, and many retailers are themselves multi-state businesses. The statutory provisions dividing escheated money between various environmental funds (75%) and retailers (25% to help cover *some* of the costs associated with container collection and storage at retailer sites) pre-date the challenged 2008

[5] If all consumers of containers subject to the Bottle Bill were to return all of their containers for refunds of the deposits they paid on those containers, no deposit money would escheat to the State. It is only because some consumers (for whatever reason) fail to claim their deposit money back that money escheats to the State.

amendments to the Bottle Bill. Moreover, the funds received by retailers through the escheat program represent a small fraction of retailers' Bottle Bill compliance costs. Most important, the repeated theme that there is a burden imposed on interstate commerce is false, since the law treats all manufacturers the same. The burden, if there is one, is neutral with respect to interstate versus intrastate, but is a cost of business for those manufacturers who enjoy large-volume sales, which is hardly surprising since the industry admits it is those large volume brands that are most closely tied to the problem of fraudulent redemptions. See R. No. 17, Exhibit 6, quoted *supra*. The courts below correctly rejected the Association's claim that the statute is protectionist. As the district court aptly held:

> "Moreover, Plaintiff has cited no case, and the Court is aware of none, holding that a state does not have a legitimate interest in preventing an illegal activity simply because that illegal activity is one which has the primary effect of decreasing state revenue. Finally, it is undisputed that the majority of the funds that are lost to fraudulent redemption each year would otherwise go into a cleanup and redevelopment trust fund. Protecting the environment is a legitimate public benefit. *See Maine v. Taylor*, 477 U.S. 131; 106 S. Ct. 2440 (1986)." App. 119a-120a.

The Michigan statute is not protectionist on its face, in purpose or in effect, as both the district court and the Court of Appeals found. It imposes only a

minimal and incidental burden on manufacturers (in-state or out-of-state) who meet the volume thresholds. The courts below were correct in finding the Michigan statute does not favor in-state interests at the expense of out-of-state ones, and does not discriminate against interstate commerce.

II. The claimed burden on interstate commerce is contrary to the factual record. In any case, the minimal burden is incidental to the State's legitimate effort to reduce fraudulent redemptions and, at most, implicates the balancing test under *Pike v. Bruce Church, Inc.*

The Association devotes much of its cross-petition to discussing the burden that § 445.527a(10) allegedly imposes on manufacturers who meet the volume thresholds, which the Association wrongly characterizes as a burden on interstate commerce. But, in any event, most of that discussion is directed toward the balancing test under *Pike v. Bruce Church, Inc.*, an analysis which the district court has not undertaken yet.[6]

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[6] "Where the statute regulates evenhandedly to effectuate a legitimate local public purpose, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and whether it could be

(Continued on following page)

Since the district court has not undertaken any balancing test under *Pike*, having found the alleged burden to present a question of fact, the Association's discussion of any burden is not particularly relevant to the issue presented in the cross-petition. In any event, the allegations of the burden imposed by the statute are not supported by the record. Separately marking cans for distribution in Michigan and other deposit states is well within the industry's capability and, in fact, both soft drink manufacturers and beer manufacturers have been complying with the law since it took effect in March 2010 as to cans and in March 2011 as to bottles.

The affidavit of Terry Staed, who specializes in package design, technology, innovation and labeling (including deposit markings), describes the process by which manufacturers comply with unique mark requirements. Resp. App. 1. Indeed, some Michigan Soft Drink Association members represented during the legislative process that they were already marking containers so they could be identified as deposit containers by reverse vending machines. See R. No. 17, Exhibit 7A, Michigan Soft Drink Redemption Report: "We [some soft drink manufacturers] are already marking our can bottoms in order to accommodate the new [Reverse Vending Machine] technology," and the proposed 2008 amendment "is a mandate . . . which is insisting that we do" what we are already doing.

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promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church*, 397 U.S. 137, 142.

See R. No. 32, Exhibit 5, the Michigan Soft Drink Association webpage dated May 8, 2009: "Rather than using a Michigan specific UPC code, we would instead put a mark on the bottom of our cans which could be read by an upgraded RVM by indentifying the can as a Michigan container. All of our Michigan major soft drink bottlers are currently ink jetting the Michigan mark on our can bottoms during the bottling process."

The relative ease with which current technology allows manufacturers to mark containers and to segregate them for distribution is described in the Staed affidavit, Resp. App. 1, and in the affidavit of Robert Clarke, an associate professor of packaging at Michigan State University. Resp. App. 13. Mr. Clarke and Mr. Staed both note it is common for beer and soft drink manufacturers to produce unique containers for sale in specific geographic markets. Resp. App. 20 and 13.

The challenged law had a long lead in time for implementation to help accommodate any technological issues that might be encountered. Michigan also has demonstrated its commitment to solving the fraud problem by making state funds available for reverse vending machine upgrades and technology (and the State has appropriated over $1,000,000 so far). See Jelenick affidavit, Resp. App. 9.

III. Reviewing the extraterritoriality issue raised in the State's and MB&WWA's petitions does not require the Court to review the lower courts' unanimous holdings of no discrimination against interstate commerce; however, if the Court believes a review of the discrimination issue would help inform its review of the extraterritoriality issue, MB&WWA has no objection to the granting of the cross-petition.

The Association says its cross-petition should be granted because, "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." Cross-petition, p. 15.

MB&WWA takes the above-quoted statement as meaning that before the issue of extraterritoriality could be addressed in this context, this Court must also make a determination that the statute is not discriminatory in violation of the Commerce Clause. However, both the district court judge and all three Court of Appeals judges have unanimously agreed that the statute is non-protectionist and does not discriminate against interstate commerce. If this Court determines, as it should, that the decisions below in that regard are well supported by the authorities, granting the cross-petition to examine the claim of discrimination against interstate commerce would serve little purpose. Respectfully, this Court can and should accept the decisions below as to that issue,

and proceed to address whether the extraterritoriality doctrine requires striking down a statute that is evenhanded, is not economically protectionist, is properly directed to preventing fraudulent activity in the state, and has only a miniscule effect in other states. For those reasons, the cross-petition should be denied.

However, MB&WWA recognizes that its petition, in part, requests the Court to consider whether the extraterritoriality doctrine should remain as a stand-alone virtually *per se* (or *per se*) test under the Commerce Clause, or whether the Court should consider the statute's extraterritorial effect as part of *Pike v. Bruce Church, Inc.* balancing, as advocated in Judge Sutton's concurring opinion. App. 26a. If the Court believes review of the issue raised in the cross-petition may inform the Court's decision on extraterritoriality and the proper test to be applied, MB&WWA does not object to the Court granting the cross-petition as well as the petitions.

CONCLUSION

The Michigan Beer & Wine Wholesalers Association respectfully requests the Court to deny the Association's conditional cross-petition, or in alternative, requests the Court to grant the conditional cross-petition if the Court believes review of the issue raised in the cross-petition will inform the Court's analysis of the extraterritoriality issue.

Respectfully submitted,

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August 9, 2013

BRIEF IN OPPOSITION TO
CONDITIONAL CROSS-PETITION
APPENDIX TABLE OF CONTENTS

Page

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN BEVERAGE ASSOCIATION,

Plaintiff,

v

RICK SNYDER, Governor, *et al*,

Defendants,

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervening Defendant.

Case No. 1:11-cv-195
Hon. Gordon J. Quist

AFFIDAVIT OF TERRY STAED

STATE OF MICHIGAN)
) SS
COUNTY OF)

Terry Staed, being duly sworn, deposes and states:

1. I make this affidavit based upon my own knowledge and if called as a witness I can competently testify to the facts stated herein.

2. I was employed at Anheuser-Busch for approximately 28 years (from 1982 until 2010) specializing in the areas of package technology and innovation,

package design, labeling (including deposit markings), package manufacturing, and distribution processes.

3. I am currently the owner of Image By Design, LLC, a Missouri limited liability company. This company provides resources and consulting services to companies throughout the world regarding package technology and innovation, package design, labeling (including deposit markings), package manufacturing, and distribution processes.

4. I have been retained by the Michigan Beer and Wine Wholesalers Association to analyze the claims made by the American Beverage Association.

5. In connection with my employment at Anheuser-Busch I participated with others, including representatives of other beer manufacturers, to review and make recommendations regarding the proposed legislation that ultimately resulted in the 2008 amendment to the Michigan Bottle Bill (hereinafter the 2008 Bottle Bill amendment). As part of that process I also met with Michigan legislators and representatives of soft drink manufacturers.

6. Representatives of the soft drink industry who were knowledgeable in their packaging and distribution processes including Coca Cola, Pepsi, and Dr Pepper Snapple Group were actively involved in discussions leading up to the 2008 Bottle Bill amendment.

7. During the meetings and discussions that led up to the 2008 Bottle Bill amendment, representatives

of the Michigan Soft Drink Association and its members (which included Coca Cola and Pepsi) discussed and agreed to the type of mark (inkjet) that would be used on beverage cans. I do not recall soft drink representatives saying that their compliance with what became the 2008 Bottle Bill amendment would be technically or logistically impossible with respect to applying an inkjet code differentiation in order to comply with the Bottle Deposit law in Michigan.

8. To the best of my recollection, the soft drink manufacturer representatives indicated that they wanted to use "inclusionary deposit marks" rather than "exclusionary deposit marks" on the beverage containers. Anheuser-Busch chose to use "exclusionary marks".

9. Based upon my experience, I am of the opinion that beverage companies that ship large volumes of containers containing bottle deposit markings to states that do not have bottle deposit laws undermine bottle deposit laws and this also lays the groundwork for fraudulent redemption by unscrupulous persons.

10. Prior to the passage of the 2008 Bottle Bill amendment, there was a meeting in State Senator Ron Jelinek's office, at which members of the beer and soft drink industry were present including Bill Lobenherz of the Michigan Soft Drink Association and representatives of Coca Cola, Pepsi, Anheuser-Busch, and MillerCoors. At that meeting manufacturer representatives assured Senator Jelinek that their companies would not include deposit markings on

beverage containers shipped to states surrounding Michigan that do not have bottle deposit laws. If that representation is true, the deposit state/non-deposit state segregation of containers used by many manufacturers should not be substantially more burdensome because of the requirements of the 2008 Bottle Bill amendment.

11. Based on my understanding of what was intended by the process that resulted in the 2008 Bottle Bill amendment, Michigan does not require segregation of Michigan-only containers during the production or distribution process. I always understood that any identification marks needed to comply with the 2008 Bottle Bill amendment can be used in any other state with a bottle deposit law. It was standard practice by major beer manufacturers to segregate single serve containers based on their status as "deposit state" containers or "non-deposit state" containers, and only in recent years had the practice of shipping deposit into non-deposit states become more common. It is my opinion, based on my experience in the beer industry, that the requirements of the 2008 Bottle Deposit amendment do not substantially increase the burden of complying with the pre-existing Bottle Bill law.

12. If additional states adopt bottle deposit legislation like Michigan's, it should result in manufacturers of containers having more flexibility to move deposit beverage containers across state lines rather than less because there will be more deposit states with which to share inventory.

13. Based upon my experience and knowledge of the production and distribution process, beer manufacturers are able to comply with a bottle deposit law such as Michigan's (including the 2008 Bottle Bill amendment) and are doing so or have represented that they will do so. As I recall, beer manufacturers found the 2008 Bottle Bill amendment acceptable because it took into consideration industry concerns, allowed for flexibility as to the manner and types of designations used and allows Michigan containers to be sold in other deposit law states.

14. Based on current technology, it is my opinion that the period of time necessary to change a canned beverage production line from "deposit" lids to "non-deposit" lids and to segregate them for secondary packaging is a few minutes at most. This process has been done for many years by beer manufacturers and is, and has been for years, part of the routine production process for containers produced for "deposit" states and "non-deposit" states. Other than the inclusion of the inkjet code within the production code date, the 2008 Bottle Bill amendment does not substantially change this process.

15. Based on my review of beverage cans, there is already inkjet code on the bottom of the cans. The new mark required by Michigan law would result in a modification to the inkjet marking.

16. Based on current technology, the period of time necessary to change a bottled beverage production line from "deposit" labels to "non-deposit" labels

and to segregate them for secondary packaging is a matter of a few minutes at most. This process has been done for many years by beer manufacturers and is, and has been for years, part of the routine production process for containers produced for "deposit" states and "non-deposit" states. The 2008 Bottle Bill amendment does not substantially change this process.

17. Based on current technology, it is my opinion that the inkjet technology (contemplated by the 2008 Bottle Bill amendment) that is used on cans is impractical for use on bottles. However, the production process changeover for labeled bottled beverages is less difficult than for preprinted cans, so this should not be a concern and was not a major concern to beer manufacturers in discussions leading up to the 2008 Bottle Bill amendment.

18. In combination with the deposit lids, the current marks that are being put on cans and bottles to comply with Michigan law are visible to the human eye and, if trained, people could likely determine whether the mark is meant for a "deposit" state.

19. Based on my experience, it is my belief and understanding that all affected beer manufacturers are including a unique mark on their containers for the purpose of complying with the 2008 Bottle Bill amendment. I am not aware that this has resulted in any substantial interference with production or distribution.

20. Based on my experience, it is not uncommon for beer and soft drink manufacturers to design specific can and bottle graphics to appeal to a regional or local geographic market and the technology and logistical support already exists to do that.

21. It is my understanding that the American Beverage Association asserts that there has been increased consolidation of production and distribution in the soft drink industry. If that is true, it may result in longer production runs with fewer issues for the larger operations in the segregation and distribution of beverages based on my experience in the beer industry.

22. I am aware of studies conducted to attempt to determine the level of fraudulent redemptions committed through reverse vending machines and bulk/manual redemptions. I do not recall these studies to show or conclude that the total volume of fraudulent redemption was committed more through bulk/manual redemptions than through the use of reverse vending machines.

23. Based on my experience in the beer industry, producers of alcoholic beverages are very much aware of year-to-year sales and production volume trends. Therefore, producers should know in advance if a low volume brand is becoming a high volume brand subject to the 2008 Bottle Bill amendment and then anticipate and manage for compliance. Upon information and belief, I suspect this is also true for major soft drink manufacturers.

Further affiant says not.

/s/ Terry Staed
Terry Staed

Subscribed and sworn to before
me this 10 day of May, 2011

/s/ Kathleen M. Geldmacher
KATHLEEN M GELDMACHER, Notary Public
St. Louis County, Missouri
Acting in St. Louis County, MO
My Commission Expires: 8-13-14

[Notary Stamp]

AFFIDAVIT OF RON JELINEK

STATE OF MICHIGAN)
)SS
COUNTY OF BERRIEN)

Ron Jelinek being duly sworn, deposes and states:

1. I make this affidavit based upon my own knowledge and if called as a witness I can competently testify to the facts stated herein.

2. I was elected to the Michigan House of Representatives in 1996 and I served in that elected capacity until I was elected to the Michigan State Senate in 2002.

3. In 2008, I was the Chair of the Michigan Senate's Appropriations Committee.

4. I sponsored Senate Bill 1532 which became 2008 Public Act No. 389.

5. The purpose behind Senate Bill 1532 was to amend the Michigan Bottle Deposit Law to stop the fraudulent redemption of containers that were not purchased in Michigan. The fraudulent redemption in Michigan of marked containers sold in States without a similar Bottle Deposit Law was and remains an ongoing problem particularly in Michigan's border counties. The 2008 Amendment to the Bottle Deposit Law was intended to address and stop this fraud, and maintain public support for the Bottle Deposit Law.

6. As an elected official concerned with fraudulent redemption of beverage containers in Michigan, I participated in Senate Committee hearings and numerous meetings and discussions with members of the public and members of the industries involved in the manufacture and distribution of beverage containers subject to the Michigan Bottle Deposit Law. Among those who were consulted and had ongoing involvement in the development of what became Senate Bill 1532 were soft drink companies such as Coca Cola and Pepsi-Cola individually or through their trade association. The various feasible methods to accomplish the identification of containers subject to Michigan's Bottle Deposit Law were developed with industry input. I do not recall being told that these methods were overly burdensome.

7. Prior to enactment of Senate Bill 1532 in December of 2008, there had been almost two years of ongoing discussions with industry and affected parties about how to stop the fraudulent redemption problem. Elected officials, including myself, sought input from the involved industries (such as MillerCoors and the Michigan Soft Drink Association, whose members included producers of brands like Coke, Pepsi and 7-Up) in an attempt to arrive at a solution that would be fair to those industries, yet solve the problem of fraudulent redemption. In this regard, numerous meetings were held and numerous alternatives were considered over this approximately two-year period before enactment of the statute. This included testing experimental marking of containers.

8. Additionally, because some manufacturers including, to the best of my knowledge soft drink manufacturers, requested a long lead-in time for implementation of the statute, the effective date of Senate Bill 1532 was almost a year after it was originally passed in December of 2008, and container manufacturers then had anywhere from 90 to 450 additional days to come into compliance with the statute's requirements, depending on the type of container.

9. Additionally, because these statutory changes required an upgrading of reverse vending machines it was agreed that some of that cost would be borne by the State of Michigan and the law would not become effective until the Legislature appropriated money for the beverage container redemption antifraud fund. Subsequently, the State appropriated more than $1 million towards the efforts to upgrade reverse vending machines in counties along Michigan's borders to ensure that they could identify the containers that were compliant with the amended Bottle Deposit Law.

Further affiant says not.

/s/ Ron Jelinek
Ron Jelinek

Subscribed and sworn to before
me this 23 day of MARCH 2011

/s/ Elizabeth A. Rettig_____
_____, Notary Public
_____ County, MI
Acting in _____ County, MI
My Commission Expires: _____

[NOTARY STAMP]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN BEVERAGE ASSOCIATION,

Plaintiff,

v

RICK SNYDER, Governor, *et al*,

Defendants,

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervening Defendant.

Case No. 1:11-cv-195
Hon. Gordon J. Quist

AFFIDAVIT OF ROBERT H. CLARKE

STATE OF MICHIGAN)
)SS
COUNTY OF INGHAM)

Robert H. Clarke, being duly sworn, deposes and states:

1. I make this affidavit based upon my own knowledge and if called as a witness I can competently testify to the facts stated herein.

2. I have been an associate professor at The School of Packaging at Michigan State University from 1997 until the present. I teach courses in

packaging operations and quality control, robotics in packaging, and radio frequency identification.

3. I participated in the packaging research lab at Michigan State University from 1977 and 1980, which was the first academic packaging program in the country. From 1980 until 1997, I worked with various manufacturing and distribution companies in the areas of package design and testing, plant operations, maximization of output, quality, and safety. I have also done extensive research in the areas of automatic identification (coding) of products.

4. I have toured bottling and canning operations throughout the world, including the United States, Spain, England, Thailand, and Japan.

5. I have been retained by the Michigan Beer and Wine Wholesalers Association to analyze the claims made by the American Beverage Association.

6. In order to comply with the 2008 amendment to the Michigan Bottle Bill, it is my understanding that manufacturers are adding a visible mark by inkjet to the bottom of each can while on the production and filling line.

7. The current technology of production facilities will allow a person to turn on a specific inkjet marking mechanism in order to mark canned products without changing the speed of the production line. Current technology should enable that to be done without changing the speed of the production

line for containers that are designed to go to states with deposit laws.

8. Bottle labels that would be necessary to comply with the 2008 amendment to the Michigan Bottle Bill are manufactured prior to the production process. The time necessary to change labels during the beverage filling process for "deposit" states to "non-deposit" states (and vice versa) is likely a matter of seconds. This should be able to be done without shutting down the production line.

9. When there is a changeover between containers that are produced for "deposit" states, for "non-deposit" states, for customized containers, or for any other product changes, there are techniques that are employed to minimize the down time of the production line to handle the changeover.

10. Based on current technology of the casing and palletizing machines, different products can be segregated at the back end of the production line and it is not necessary to shut the line down for any extended period of time. In fact, the Bottle Deposit Law that was in effect prior to the 2008 amendment may have required the same period of time necessary to shut down the production line where product changeover based on "deposit" states or "non-deposit" states occurs.

11. Based on current technology, bottling and distribution facilities have very sophisticated forecasting techniques that will allow companies to quite accurately predict the necessary product supply that

is necessary to meet demand. Due to this technology, the 2008 amendment to the Michigan Bottle Bill should not likely result in the need for any significant increases in production volume of beverages or warehouse space.

12. I have been advised that beer manufacturers like MillerCoors are complying with the requirements of the Michigan Bottle Bill. If beer manufacturers are able to comply, it is my opinion that soft drink manufacturers should also be able to respond to changes in supply and demand of products and comply with the 2008 amendment to the Michigan Bottle Bill.

13. It is common for beer and soft drink manufacturers to produce unique containers that are only sold in specific geographic regions. The burden for marking these types of containers, in my opinion, would probably be greater or equal to any burden imposed by the 2008 amendment to the Michigan Bottle Bill.

14. It is my understanding that the high volume brand manufacturers to which the 2008 Bottle Bill amendment would apply require their bottling and distribution centers to meet strict compliance standards. These standards and the current available technology should enable soft drink and beer manufacturers to comply with the Michigan 2008 Bottle Bill without undue burden.

Further affiant says not.

/s/ Robert H. Clarke
Robert H. Clarke

Subscribed and sworn to before
me this 9th day of May, 2011

/s/ Laura J. Riley
LAURA J. RILEY, Notary Public
Ingham County, MI
Acting in Ingham County, MI
My Commission Expires: 01/25/2012