

No. 12-1224

In The
Supreme Court of the United States

MICHIGAN BEER & WINE
WHOLESALE ASSOCIATION,

Petitioner,

v.

AMERICAN BEVERAGE ASSOCIATION,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

REPLY BRIEF

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REPLY ARGUMENT

Petitioner Michigan Beer & Wine Wholesalers Association adopts the reply filed by the State of Michigan and, in addition, requests the Court to consider the following reply regarding the issue of criminal penalties.

I. Michigan's statute does not penalize conduct occurring in another state.

A major pillar of the American Beverage Association's argument is that the statute is extraterritorial because it imposes criminal penalties for conduct in other states. This is seen in the Association's statement of the question presented, which claims Michigan imposes "criminal prohibition on the sale in other States of the same beverage products sold in Michigan," and in the first sentence of the response, which asserts the statute reaches across state borders and "proscribes, on pain of imprisonment, the sale in every other State of the same packaged beverages Michigan allows to be sold in-state."

It is the Association's main theme, but it is not accurate. It is a made-up attempt to create a picture of offensive extraterritoriality, as though Michigan was bent on imprisoning citizens of California for transactions in California. But not once does the Association actually examine the words of Michigan's statute. In fact, the actual statute before the Court is tailored to regulating only conduct in Michigan, and

certainly the criminal penalties apply only to sales in Michigan that violate the statute's requirements.

Mich. Comp. Laws § 445.572a, subsections (1) through (9), (App. 151a), dictates what is required for sales in Michigan, depending on the type of container, the type of beverage (soft drink versus alcoholic) and specific volume thresholds. Each subsection expressly addresses only sales in Michigan: "[A] manufacturer . . . shall not sell, offer for sale or give a . . . beverage to a consumer, dealer, or distributor **in this state** . . . in a beverage container that is not a 'designated container'." *Id.*, subsections (1) through (9). (Emphasis added.)

By the statute's express terms, the requirement of a unique mark and the applicable penalty for non-compliance (see, Mich. Comp. Laws § 445.572a(10) and (11), App. 157a), apply only to sales in Michigan.

As a practical matter, a manufacturer meeting the volume threshold who uses a particular distinguishing mark on containers sold in Michigan (and other deposit states) may decide to discontinue use of that mark in Michigan and begin using it in non-deposit states. The statute does not prohibit that. As long as the manufacturer no longer uses that same mark in Michigan sales, the statute would be complied with. If the manufacturer thereafter continues sales in Michigan and does not use a different unique mark for those sales (since the previously-used mark would no longer comply with Mich. Comp. Laws § 445.572a(10)), the violation of the unique mark

requirement could occur only in this state. Likewise, any penalty imposed could apply only to sales in Michigan which do not comply with the requirements of Mich. Comp. Laws § 445.572a(10).

Nowhere does the statute impose a penalty, civil or criminal, on activity in any other state. Thus, the major pillar of the Association's extraterritorial argument – that Michigan has reached across state borders to regulate sales in other states “on pain of imprisonment” – is a fiction.

Michigan's statute, like numerous statutes across the country, has an effect in other states. But, as discussed in the petition, the burden is very small and should not, without a review of the degree of the effect or burden, be the basis for striking down an admittedly evenhanded, non-discriminatory statute that serves the public good by preventing fraud. The petition outlines Michigan Beer & Wine Wholesalers Association's argument for making such a qualitative analysis, rather than applying extraterritoriality on the basis of the label “direct” versus indirect.

In any event, an effect in other states is a far cry from saying, as the Association incorrectly insists, that Michigan's statute reaches across state borders to impose criminal sanctions on conduct occurring in other states.



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the judgment of the court of appeals should be vacated and the district court's judgment reinstated, pursuant to Supreme Court Rule 16.1.

Respectfully submitted,

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