No. 11-2097

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN BEVERAGE ASSOCIATION,

Plaintiff-Appellant,

v.

RICK SNYDER, Governor, *et al.*,

Defendants-Appellees,

&

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Gordon J. Quist

BRIEF FOR MICHIGAN DEFENDANTS-APPELLEES

Bill Schuette
Attorney General

John J. Bursch
Solicitor General
Co-Counsel of Record

Margaret A. Nelson
Ann M. Sherman
Assistant Attorneys General
Co-Counsel of Record
Attorneys for Defendants-Appellees
Snyder, Schuette, and Dillon
Public Employment, Elections and
Tort Division
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants-Appellees Michigan Governor Rick Snyder, Michigan Attorney General Bill Schuette, and Michigan Treasurer Andrew Dillon submit that oral argument would be beneficial to the Court so that it has both a balanced presentation and a clear understanding of why the District Court was correct in granting partial summary judgment in favor of Defendants and a statute designed to address a multi-million-dollar fraud problem. Accordingly, Defendants respectfully request oral argument.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant, the American Beverage Association (hereinafter, "the Association"), sued Defendants-Appellees Michigan Governor Rick Snyder, Michigan Attorney General Bill Schuette, and Michigan Treasurer Andrew Dillon for declaratory and injunctive relief alleging that M.C.L. 445.572a(10) violates the dormant Commerce Clause by requiring a unique-to-Michigan mark on certain returnable bottles and cans. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). The District Court granted summary judgment in favor of Defendants on two of the Association's three claims.

On July 20, 2011, the District Court certified the following two, discreet issues that it determined to be controlling questions of law: (1) whether the challenged law, M.C.L. § 445.572a(10), unlawfully discriminates in violation of the dormant Commerce Clause; and (2) whether § 445.572a(10) is extraterritorial in violation of the dormant Commerce Clause. (R. 52, Order Denying Motion for Reconsideration and Granting Certification for Interlocutory Appeal.) On September 6, 2011, this Court granted the Association permission to appeal based on those two issues. (R. 54, Sixth Circuit Order, 9/6/11.)

STATEMENT OF ISSUES PRESENTED

1a. Michigan law requires that beverage manufacturers include a unique-to-Michigan mark on all beverage containers sold in Michigan with a 10¢ deposit. Did the District Court correctly hold that this requirement is neither extraterritorial nor discriminatory under the dormant Commerce Clause?

1b. In the alternative, does the unique-to-Michigan mark survive scrutiny because reasonable, nondiscriminatory alternatives are inadequate to serve the State's legitimate local purpose of preventing fraudulent beverage-container redemptions?

2a. The District Court held that there are material, disputed facts regarding application of the *Pike* balancing test used to determine whether a state law excessively burdens interstate commerce. Should this Court accept the American Beverage Association's invitation to address the *Pike* test on an interlocutory basis?

2b. Did the District Court err in holding that there are material, disputed facts regarding the *Pike* test's application?

STATEMENT OF THE CASE

I. Nature of the Case

This dispute involves a unique law that combats a multi-million-dollar problem: the fraudulent importation and redemption of out-of-state bottles and cans for the 10¢ deposit that Michigan retailers collect on beverage containers sold in-state.[1] After a decade trying to combat the fraud by criminalizing it, Michigan amended its Bottle Bill law in 2008 to require that all beverage containers sold in Michigan include a unique-to-Michigan mark. This requirement ensures that beverage containers sold in states without a deposit cannot be redeemed as though they had been sold in Michigan.

The idea of a market-specific mark is nothing new to beverage manufacturers. As discussed below, the idea actually originated with the beverage industry. And beverage manufacturers have long been willing to provide container-specific markings for the purpose of selling event-specific products to very limited geographic markets, such as a state or college-campus community.

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[1] The NBC sitcom *Seinfeld* famously highlighted Michigan's problem in "The Bottle Deposit" episode, with Kramer and Newman scheming to redeem in Michigan thousands of cans and bottles purchased in New York. *See* http://en.wikipedia.org/wiki/The_Bottle_Deposit.

The American Beverage Association filed this suit, claiming that the unique-to-Michigan-mark requirement violates the dormant Commerce Clause, either as an extraterritorial or discriminatory enactment, or under the *Pike* balancing test used to determine whether a state regulation excessively burdens interstate commerce. The District Court correctly concluded that the unique-mark requirement is not extraterritorial and does not discriminate against interstate commerce, facially, purposefully, or in effect. *American Beverage v. Snyder*, 793 F. Supp. 2d 1022, 1032-33, 1035 (W.D. Mich. 2011). The District Court also concluded that genuine issues of material fact exist with respect to the *Pike* balancing test. *Id*. at 1038-39.

The District Court's opinion is fully in harmony with the dormant Commerce Clause jurisprudence of the Supreme Court and this Circuit. It also reflects common sense. The reason the Supreme Court created the doctrine was to thwart states from enacting laws that benefitted in-state businesses while penalizing out-of-state businesses. Michigan's neutral unique-mark requirement has no hallmarks or effects of such protectionist legislation, nor is it "economic Balkanization." The State of Michigan respectfully requests that this Court affirm.

II. Proceedings and disposition below

The Association filed its complaint for declaratory and injunctive relief on February 25, 2011 (R. 1, Complaint), then filed its motion for summary judgment and brief in support only two weeks later (R. 6, Motion; R. 7, Brief). The Michigan defendants filed their response in opposition to summary judgment and, alternatively, requested summary judgment in their favor. (R. 16, Response.)

The Beer and Wine Wholesalers (hereafter "the Wholesalers") moved to intervene as defendants. (R. 15, Motion To Intervene.) The District Court granted that motion on April 26, 2011. (R. 27, Memorandum Order.)

After additional briefing, the District Court heard argument on the Association's motion. (R. 41, Notice.) On May 31, 2011, the District Court issued its Opinion and Order. The District Court denied the Association's motion and granted summary judgment in Defendants' favor "as to the Court's conclusion that M.C.L. § 445.572a(10) is neither discriminatory nor extraterritorial in violation of the dormant Commerce Clause." The District Court denied summary judgment regarding the *Pike* balancing test, concluding that there were material

questions of fact regarding the extent of the burden that M.C.L. § 445.572a(10) places on interstate commerce. (R. 42, Op. 5/3/11; R. 43, Order.)

The Association filed a motion for reconsideration or for certification of questions for interlocutory appeal. (R. 45, Motion.) On July 20, 2011, the District Court denied the motion for reconsideration but granted certification. The District Court certified the following two issues that it determined to be controlling questions of law: (1) whether the challenged law, M.C.L. § 445.572a(10), is discriminatory in violation of the dormant Commerce Clause; and (2) whether § 445.572a(10) is extraterritorial in violation of the dormant Commerce Clause. (R. 52, Order.)

This Court granted the Association's petition to appeal limited to the certified questions. (R. 54, Order.)

STATEMENT OF FACTS

The dormant Commerce Clause's origins and purpose

Shortly after the 13 colonies ratified the Articles of Confederation, they began to enact protectionist trade barriers:

> Massachusetts goods, for example, were subject to discriminatory duties in Connecticut, and Delaware goods were subject to similar duties in Pennsylvania. New York imposed clearance fees on coastal ships visiting its ports, and also imposed fees on boats carrying vegetables that were rowed across the Hudson River. Discriminatory duties almost immediately invited retaliation by other states in the form of imposition of similar duties.

Joseph F. Zimmerman, *Interstate Relations: The Neglected Dimension of Federalism* 117 (1996).

To prevent such behavior after the Constitution's ratification, the Supreme Court recognized a "dormant" or "negative" aspect of the Commerce Clause, a doctrine that prohibits states from engaging in protectionist behavior at the expense of interstate commerce. *See*, *e.g.*, *H.P. Hood & Sons*, *Inc. v. DuMond*, 336 U.S. 525, 539 (1949) ("Neither the power to tax nor the police power may be used by the state of destination with aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.").

As the United States economy has grown increasingly complex, the Supreme Court has struggled somewhat to define the dormant Commerce Clause's parameters. Indeed, numerous Justices, past and present, have criticized the doctrine as a morass. *E.g.*, *Camps Newfound/ Owatonna v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (the doctrine "has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application"); *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 17 (1986) (Burger, C.J., concurring in part) (referring to the doctrine's "cloudy waters"); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 701 (1981) (Rehnquist, J., dissenting) (the doctrine's jurisprudence "remains hopelessly confused").

Nonetheless, the doctrine's primary purpose remains: "States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. . . . Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented." *Granholm v. Heald*, 125 S. Ct. 1885, 1895 (2005). With that purpose in mind, consider the intent and effect of Michigan's unique-mark requirement for beverage containers.

Michigan's Bottle Bill

Michigan enacted its "Bottle Bill" M.C.L. § 445.571 *et seq*., in 1976 to reduce roadside litter, clean up the environment, and conserve energy and natural resources. Michigan is one of ten Bottle Bill States, but the only one requiring a 10¢ deposit. Unsurprisingly, Michigan's 96.9% return rate[2] is the nation's highest.

The Bill applies to beer, soft drinks, carbonated and mineral water, wine coolers, and canned cocktails sold in airtight metal, glass, paper, or plastic containers under a gallon, and requires these beverages to be sold only in returnable containers, that is, containers for which the purchaser has paid a deposit of at least 10¢. M.C.L. § 445.571(d). Consumers may obtain a refund of the deposit by returning the empty container to a retailer or to a reverse vending machine. M.C.L. § 445.572a(12)(j). Businesses that sell these beverages are required to accept empty containers for rebate.

If a distributor collects more deposits than are refunded in a calendar year, the excess is remitted to the Michigan Department of Treasury for deposit into a revolving fund. M.C.L. § 445.573b. The

[2] http://www.bottlebill.org/assets/pdfs/legis/usa/MI-BottleDepositInformation.pdf.

Department of Treasury disburses 25% of the fund to retailers (based on the percentage of empty containers handled by the dealers) to assist with their handling costs, and 75% to the Environmental Response Fund, the Long-Term Maintenance Trust Fund, and the Clean Michigan Fund. M.C.L. §§ 445.573c, 299.609, 609c, 375. The Act prohibits unclaimed deposits from being dispersed to the state's general fund.

The fraudulent redemption problem

Michigan's Bottle Bill has been very successful in protecting the environment, but its high deposit rate has resulted in a serious problem: fraudulent redemption. Each year, containers purchased in other states are brought to Michigan and fraudulently redeemed.

Contrary to the American Beverage Association's assertions in its appeal brief, this fraudulent activity has been well-documented by studies, sting operations, news releases, and the 2008 amendment's legislative history. (R. 16, Response Exs. 1, 2, 3; R. 17, Response Exs. 4, 5, p. 1, ¶ 5.) Even the Michigan Soft Drink Association (MSDA), a trade organization representing Beverage Association members, recognizes that "[i]n recent years, the fraudulent redemption of out-of-state

beverage containers in Michigan has increased."[3] Studies estimate this fraud at between $10 million and $30 million dollars annually. (R. 17, Response Ex. 7.)

Also contrary to the Beverage Association's assertions, Michigan has made numerous attempts to address fraudulent redemption before adopting the unique-mark requirement. In 1998, the Legislature criminalized the knowing redemption of a non-Michigan container. M.C.L. § 445.574a (a person who returns out-of-state containers for a refund faces up to 5 years in jail, a fine of $5,000.00, and restitution). The Legislature also required retailers to post notices advising would-be redeemers of these criminal penalties. M.C.L. § 445.574b. These State enforcement efforts were in addition to private efforts. As the MSDA has recognized, "Michigan's soft drink bottlers and distributors for a number of years had already taken aggressive action to stop fraudulent redemption."[4]

After these attempts failed, industry members began using voluntarily unique-to Michigan marks and developed reverse vending machines capable of reading those marks. Significantly, these efforts

[3] www.mirefreshmentbeverage.org/Fraudulent_Redemption.asp.

[4] *Id.*

occurred before any legislative requirement. (R. 17, Response Exs. 6, 7a.)

The 2008 unique-mark amendment

The 2008 amendment requires certain manufacturers to sell beverages in "designated" glass, metal, or plastic containers. M.C.L. § 445.572a. Codifying many of the MSDA's voluntary practices, the challenged provision, M.C.L. § 445.572a(10), requires a unique-to-Michigan mark for purposes of reverse vending:

> A symbol, mark, or other distinguishing characteristic that is placed on a designated metal container, designated glass container, or designated plastic container by a manufacturer to allow a reverse vending machine to determine if that container is a returnable container must be 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).

The Bill was signed into law December 2008, but the effective date was delayed: March 1, 2010, for nonalcoholic beverages in 12-ounce metal containers, M.C.L. § 445.752a(2), and February 24, 2011, for nonalcoholic beverages in 12-ounce glass or plastic containers, M.C.L. § 445.572a(3)-(5).

The amendment's reach was also limited by sales-volume thresholds. See M.C.L. § 445.572a. For 12-ounce metal containers, a limited number of products currently meet the threshold, including: seven Coca-Cola Enterprises products (Coca-Cola, Diet Coke, Caffeine Free Diet Coke, Sprite, Coca-Cola Zero, Cherry Coke, and Dr. Pepper), five Pepsi Bottling Group products (Pepsi, Diet Pepsi, Mountain Dew, Diet Mountain Dew, Diet Caffeine Free Pepsi), and three Dr. Pepper/Snapple products (A & W, Dr. Pepper, Vernors). (R. 17, Response Ex. 8.)

These manufacturers already have been complying with the law's requirements for approximately one year, with the exception of Dr. Pepper and A & W, which met the threshold in May 2010, and Vernors, which met the threshold in July 2010. (R. 17, Response Exs. 8, 10.) For example, the Coca-Cola manufacturers are placing a unique-to-Michigan ink mark on the bottom of 12-ounce cans consisting of two parallel lines of dots between the date and manufacturing number:

(R. 17, Response Ex. 9.)

For glass and plastic containers, fewer products have met the threshold requirement, including two Coca-Cola Refreshment products (Coca-Cola, Diet Coke) and four Pepsi Beverages Company products (Pepsi, Diet Pepsi, Mountain Dew, Diet Mountain Dew). (R. 17, Response Ex. 10.) Despite the fact that Association members have been complying with the unique-to-Michigan mark for over a year, the Association introduced in the trial court no evidence addressing the alleged discriminatory, extraterritorial, or economic impacts the Association alleged in the complaint and in its appeal briefing.

Containers with the unique-to-Michigan mark may also be used in states with substantially similar bottle bills. Although the Amendment does not define "substantially similar," Michigan interprets the phrase to include all states with Bottle Bill deposit schemes, even those where the deposit is less than Michigan's.

Finally, the challenged provision addresses industry concerns by giving manufacturers flexibility to decide how they will meet the requirement. (R. 17, Response Ex. 12.) They may use a UPC code or some other identifier placed on cans sold in Michigan and other deposit-

law states, such as the inkjet dot matrix (R. 17, Response Ex. 9), or they can leave containers sold in other states unmarked.

The industry's role in the legislative process

The American Beverage Association is a trade organization of manufacturers, marketers, distributors, and bottlers of nonalcoholic beverages sold in the United States. (R. 1, Complaint, ¶ 14.) The Association opposes mandatory container deposits as a misguided policy choice. But Association members actively participated in Michigan's legislative process that began in 2006 and culminated in the 2008 amendment and its package of tie-barred bills related to beverage containers and deposits. (R. 17, Response Ex 5, ¶¶ 6, 7; MSDA website www.mirefreshmentbeverage.org/Fraudulent _Redemption.asp.)

Contrary to the Association's suggestion that there is no proof of a redemption problem, MSDA's president testified in detail regarding the problem of fraudulent deposit container redemption in Michigan, explaining the cooperative steps the industry has taken to combat the crime, and outlining a comprehensive solution that included manufacturers incurring the cost of placing a unique identifier on containers that "would be destined only for Michigan (or perhaps also to

some other deposit state supplied by that manufacturing facility)." (R. 17, Response Exs. 6, 7, 7a, 11, 12; R. 18, Response Ex. 15.)

And though the Association now complains that interstate beverage commerce will come to a screeching halt under the 2008 amendment, the Association waited to file its complaint until more than two years after the amendment's enactment and more than a year after its effective date. (R. 1, Summons.) In fact, at the MSDA's urging, the Michigan Legislature appropriated $1.5 million for refitting reverse vending machines to read the unique-to-Michigan mark. (R. 17, Response Exs. 6, 7, 7a, 14 p. 7.)

The unique mark's "burden" on interstate commerce

As noted above and explained in more detail below, the merits issue regarding the 2008 amendment's burden on interstate commerce is not before this Court on interlocutory appeal. But it is important to understand the extent of the commercial "burden" the Association asserts here.

The MSDA explains on its website that an earlier legislative proposal to solve the multi-million-dollar fraudulent redemption involved modifying beverage containers' UPC code so as to identify

"Michigan only containers." The beverage industry opposed that solution because the UPC code has significant identification, tracking, inventory, financial accounting, and transportation implications. So the industry proposed instead placing a mark on the bottom of cans that could be read by an upgraded reverse-vending machine. The MSDA reported as early as May 2009 that "[a]ll of our major brand soft drink bottlers are currently ink-jetting the [unique-to-]Michigan mark on our can bottoms during the bottling process," and that this solution had been successfully enacted into law.[5]

Notwithstanding the industry's previous support, the Association now complains that a unique-mark requirement is too burdensome. That burden apparently evaporates when the Association's members seek to sell geographic-specific products for events such as a football game:

[5] http://www.mirefreshmentbeverage.org/Fraudulent_Redemption.asp.

(R. 17, Response Ex. 15.) Yet on the basis of the alleged "burden," the Association now seeks to invalidate Michigan's anti-fraud law.

The District Court's summary-judgment opinion

The District Court concluded that § 445.572a(10) does not violate the dormant Commerce Clause doctrine because the statute is not extraterritorial or discriminatory. *American Beverage v. Snyder*, 793 F. Supp. 2d 1022, 1024 (W.D. Mich. 2011). The court also said it was premature to determine whether the alleged burden on interstate commerce is clearly excessive in relation to the putative local benefits of the stature (the *Pike* balancing test) because genuine issues of material fact relevant to this issue exist. *Id.* at 1024, 1037, 1038.

Regarding extraterritoriality, the District Court recognized the *per se* invalidity of a regulation that controls commerce entirely outside of the state in question. 793 F. Supp. 2d at 1029. But the court held that M.C.L. § 445.572a(10) was distinguishable from the price-affirmation statutes the Supreme Court struck down in *Healy v. Beer Inst.*, 491 U.S. 324 (1989), and *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986). Because Michigan's

statute "does not directly control conduct occurring wholly outside the State's borders." *Id.* at 1035. "[M]anufacturers are free to label their products however they see fit in other states. They simply must label their bottles differently for sale in Michigan." *Id.*

Equally important, the unique-to-Michigan-mark requirement does not implicate the "independent concerns about protectionism" that underlie statutes the Supreme Court has invalidated on extraterritoriality grounds. 793 F. Supp. 2d at 1036 (citations omitted). Quite the opposite, "the unique mark requirement does not involve protectionist concerns because both in-state and out-of-state manufacturers are equally burdened." *Id.*

The District Court also emphatically rejected the Association's arguments that the 2008 amendment is facially, in effect, or purposefully discriminatory against commerce. First, "by its plain terms, the unique-mark requirement applies to all beverage manufacturers who meet the specified threshold regardless of their in-state or out-of-state origins." 792 F. Supp. 2d at 1031. Second, "Michigan's unique-mark statute . . . does not strip out-of-state actors of any competitive edge to the benefit of in-state actors." *Id.* at 1033.

Third, "there is nothing that indicates Michigan is attempting to benefit local economic actors at the expense of out-of-state actors. The unique-mark requirement applies to all beverage manufacturers who meet the thresholds regardless of their in-state or out-of-state origins." *Id.* (citations omitted).

STANDARD OF REVIEW

This Court generally reviews a grant of summary judgment *de novo*. *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 635 (6th Cir. 2010). This Court reviews a district court's denial of summary judgment based on the existence of material, disputed facts for abuse of discretion. *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus.*, 648 F.3d 452, 459 (6th Cir. 2011).

SUMMARY OF ARGUMENT

The dormant Commerce Clause doctrine prevents economic protectionism and inconsistent regulation; it is not aimed at artificially constricting state police power to prevent fraud. Michigan has regulated in a traditional area of state concern without undercutting others states' regulatory schemes with respect to labeling of beverage

containers. And Michigan has done so with a law that is evenhanded and non-protectionist. Michigan's legislative choice must be respected.

The Association argues that Michigan's unique-mark requirement amounts to economic Balkanization that would shatter the interstate beverage economy. This unsupported assertion cannot be reconciled with the apparent lack of market impact during the past two years while the unique-to-Michigan-mark requirement has been in effect.

Equally unsupportable are the Association's arguments that the unique-mark requirement is *per se* invalid. As the District Court correctly concluded, Michigan's law does not regulate conduct in other states. And the law applies neutrally to in-state and out-state manufacturers.

The unique-mark requirement is also valid for an additional reason: it advances Michigan's legitimate purpose of preventing the criminal activity that occurs when beverage containers for which no deposit was paid are redeemed in Michigan. Although the District Court had no need to reach this argument, it provides a separate and independent ground for affirmance.

Finally, this Court should decline the American Beverage Association's invitation to apply the *Pike* balancing test. As the District Court recognized, genuine issues of material fact exist regarding the extent of any burden M.C.L. § 445.572a(10) places on interstate commerce in relation to its local benefits. *American Beverage*, 739 F. Supp. 2d at 1037-1038. And to the extent that a burden-shifting analysis is appropriate before Michigan has even had an opportunity for discovery, that analysis weighs dispositively in Michigan's favor.

ARGUMENT

I. Michigan's unique-to-Michigan-mark requirement is a permissible state regulation that does not violate the dormant Commerce Clause *per se*.

As the District Court explained, a dormant Commerce Clause analysis requires a two-part inquiry:

- First, is the state regulation either discriminatory or extra-territorial? If so, the regulation is "virtually *per se* invalid" and "will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." 793 F. Supp. 2d at 1029 (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008)).
- Second, if the state regulation satisfies part one, a court must apply the balancing test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), to determine whether the statute's burden on interstate commerce is "clearly excessive in relation to the

putative local benefits." 793 F. Supp. 2d at 1029 (citing *Int'l Dairy*, 622 F.3d at 645-46).

Under this analysis, M.C.L. § 445.572a(10) is neither discriminatory nor extraterritorial.

A. Michigan's unique-mark requirement does not govern extraterritorially.

The 2008 Bottle Bill amendment is not unconstitutionally extraterritorial for at least six reasons.

First, as the District Court recognized, the unique-mark requirement "does not directly control conduct occurring wholly outside the State's borders." 793 F. Supp. 2d at 1035. "[M]anufacturers are free to label their products however they see fit in other states." *Id.* "They simply must label their bottles differently for sale in Michigan." *Id.*

Second, the Supreme Court's dormant Commerce Clause jurisprudence is concerned with preventing economic protectionism and inconsistent regulation, *not* enforcing geographical limits on states' exercise of their police power that necessarily regulates commerce. *IMS Health Inc. v. Mills*, 616 F.3d 7, 25 (1st Cir. 2010). "Even under the extraterritoriality branch of the dormant Commerce Clause, the Supreme Court has not barred states from regulating any commercial

transactions beyond their borders that involve their own citizens and create in-state harms." *IMS Health Inc.*, 616 F.3d at 25. Michigan's interest here is in deterring criminal fraud, not in protecting any local economic interest or competitive advantage.

Third, the unique-mark requirement differs radically from the statutes the Supreme Court has struck down on extraterritoriality grounds. As the District Court noted, "the Supreme Court has only struck down statutes based on their extraterritorial effects in cases involving price-affirmation statutes or statutes that 'force an out of state merchant to seek regulatory approval in one State before undertaking a transaction in another.'" 793 F. Supp. 2d at 1035 (quotation omitted).

For example, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 576 (1986), the Supreme Court struck down a New York statute that required all liquor distillers or producers selling to wholesalers within the state to affirm that the prices charged were no higher than the lowest price at which the same product was sold in any other state during the month of affirmation. The statute was extraterritorial because once a distiller posted its prices in New

York, it could not change its prices elsewhere in the United States during the month of affirmation unless it sought approval from the New York State Liquor Authority. *Id*. at 582-83. The Court explained that because of the proliferation in price-affirmation statutes, there was a great likelihood that a seller would be subjected to inconsistent obligations. *Id*. at 583.

Likewise, in *Healy*, the Supreme Court struck down a Connecticut statute that required out-of-state beer shippers to affirm that their posted prices for products sold to Connecticut wholesalers were—when posted— no higher than prices at which the same products were sold in bordering states. 491 U.S. at 339. Significantly, the *Healy* Court explained, as it did in *Brown-Forman*, that the overriding concern was protecting competition: "States may not deprive businesses and consumers in other States of 'whatever competitive advantage they may possess' based on the conditions of the local market." *Id*. Michigan's unique-mark requirement does not affect competitive advantage.

Fourth, state powers are not mechanically limited to conduct that occurs within their physical borders. States routinely exert regulatory control over each other and numerous state statutes have extraterri-

torial effect. *See*, *e.g.*, *IMS Health Inc. v. Mills*, 616 F.3d 7, 26 (1st Cir. 2010) (citing *G.E. Metzger*, *Congress*, *Article IV*, *and Interstate Relations*, 120 Harv. L. Rev. 1468, 1521-22 (2007)). States "retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal quotation omitted). Especially in fields that are traditionally subject to state regulation, federal courts "should be particularly hesitant to interfere with [States'] efforts under the guise of the Commerce Clause." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007).

Fifth, although the Supreme Court has not addressed extraterritoriality with regard to regulations on product labeling, both this Circuit and the Second Circuit have done so and have rejected extraterritoriality arguments.

In *International Dairy Foods Association v. Boggs*, 622 F.3d 628 (6th Cir. 2010), for example, this Court upheld an Ohio statute that regulated milk labeling. Plaintiffs argued that because of the complex national distribution channels through which milk products are

delivered, and the costs of changing labels, the regulation required the industry to create a nationwide label. *Id*. at 647. But this Court recognized that compliance with Ohio's rule did not violate other states' regulations, which this Court identified as the key problem in *Brown-Forman*. *Id*. And there is similarly no such conflict here: Michigan is the only state with a unique-mark requirement. And, as the District Court noted below, if other states adopted similar laws, the "substantially similar" language in § 572a(10) would actually diminish the alleged burden, not enhance it. 793 F. Supp. 2d at 1036.

Similarly, the Second Circuit in *National Electric Manufacturers Association v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), upheld a Vermont statute that required mercury-containing products to be so labeled. The court rejected the plaintiff's argument that because of manufacturing and distribution systems, manufacturers would be forced to also label lamps sold in every other state in order to continue selling in Vermont. *Sorrell*, 272 F.3d at 110. The Second Circuit held that "[t]o the extent the statute may be said to 'require' labels on lamps sold outside Vermont, then it is only because the manufacturers are unwilling to modify their production and distribution systems to differentiate

between Vermont-bound and non-Vermont-bound lamps." *Id.* The same can be said here.

Finally, the national beverage market is not uniquely subject to the need for uniformity in labeling or distribution. Neither is there a national interest in the labeling and distribution of beverage products as is present, for example, with commerce-related transportation. The absence of these commercial interests distinguishes this case from the trucking and waste-product cases on which the Association relies.

The Association argues that "a sale that would trigger criminal penalties need have no connection with Michigan for the law to apply," since "[a] can of Coca-Cola bottled in Ohio and sold in Illinois is subject to Michigan's sales prohibitions. . . ." The Association's overbroad, generalized argument is clearly wrong. The statute criminalizes only the concurrent sale of those products in Michigan without the unique mark. Moreover, the Supreme Court, other circuits, and the District Court in this case have all rejected this argument where, as here, there is a clear in-state nexus and impact. In *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987), for example, the Supreme Court upheld an Indiana statute that limited the acquisition of controlling shares in

certain Indiana corporations by out-of state tender offerors, noting the acquisition would affect a substantial number of Indiana residents whom Indiana has an interest in protecting. 481 U.S. at 88-93.

Similarly, in *IMS Health Incorporated v. Mills*, the First Circuit upheld a Maine statutory provision that authorized Maine-licensed drug prescribers to protect the confidentiality of certain identifying data that drug intermediaries used or sold, noting that even though all the underlying transactions that caused harms in Maine did not occur in Maine, they were still bound up with the ultimate use of the information in targeting prescribers in Maine. 616 F.3d at 25-26.

A can of Coca-Cola bottled in Ohio and sold in Illinois has an undeniably clear nexus to Michigan when it is returned for redemption in Michigan. And that can, for which no deposit was paid in Illinois, harms Michigan citizens and businesses when criminal activity occurs in Michigan in the form of fraudulent redemption.

The Association alternatively argues that if Michigan can require unique-to-Michigan labeling, other states can do so as well, thus shattering the interstate economy. (Assoc. Br., at 34-35.) But the Supreme Court has explained that the issue of what effect would arise if

other jurisdictions adopted similar legislation is not a "hypothetical inquiry." *American Beverage*, 793 F. Supp. 2d at 1036 (citing *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406-07 (1994) (O'Conner, J., concurring)). "It is not enough to point to a risk of conflicting regulatory regimes in multiple states; there *must* be a conflict between the challenged regulation and those in place in other states." *Nat'l Electric Mfr. Ass'n. v. Sorrell*, 272 F.3d 104, 112 (2nd Cir. 2001) (emphasis added). The District Court properly recognized that "[n]o such conflict has actually been shown here—Michigan is the only state with a unique-mark requirement." *American Beverage*, 793 F. Supp. 2d at 1036.

Finally, the Association argues that the provision's "substantially similar" language creates a constitutional problem. (Assoc. Br. at 28, 30-31.) But as the District Court held, the purpose of this language was "to lessen the burden on interstate manufacturers in that a bottle marked in accordance with § 572a(1), can also be used in other states with 'substantially similar' laws (i.e., other Bottle Bill States). Michigan's borders, however, are not closed to non-Bottle Bill States." *Id.* at 1036-37.

This Court should affirm the District Court's holding that Michigan's unique-mark requirement is not extraterritorial.

B. Michigan's unique-mark requirement is not discriminatory on its face, in its purpose, or in effect.

To determine whether a statute discriminates against commerce, the inquiry is whether the law results in "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Int'l Dairy Foods*, 622 F.3d at 648 (quoting *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 449 (6th Cir. 2009) (citation omitted)). A state regulation can discriminate against out-of-state interests three different ways: facially, purposefully, or in practical effect. *Int'l Dairy Foods*, 622 F.3d at 648 (citing *E. Ky. Res. v. Fiscal Court of Magoffin County*, 127 F.3d 532, 540 (6th Cir. 1997)). The Association alleges all three but has demonstrated none.

1. The unique-mark requirement is not facially discriminatory.

M.C.L. § 572a(10) does not, on its face, discriminate between in-state and out-of-state manufacturers. As the District Court correctly recognized, "by its plain terms, the unique-mark requirement applies to

all beverage manufacturers who meet the specified threshold regardless of their in-state or out-of-state origins." 793 F. Supp. 2d at 1031.

In this context, "discrimination" is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) (citing *Oregon Waste Sys. Inc. v. Dep't. of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994); accord *E. Ky. Res. v. Fiscal Court of Magoffin County*, 127 F.3d 532, 541 (6th Cir. 1997)). And here, the "unique-mark requirement does not favor in-state manufacturers or disfavor out-of-state manufacturers; regardless of the bottle's point of origin, it must contain a 'symbol mark, or other distinguishing characteristic' that is unique to Michigan." 793 F. Supp. 2d at 1032.

The Association argues that the unique-mark requirement affects only those who engage in interstate commerce and, therefore, that the Court should look not to whether the statute distinguishes between in-state and out-of-state manufacturers, but instead between manufacturers who deal in interstate commerce and those who do not. But as the District Court recognized, "even a wholly intrastate manufacturer must have a 'symbol, mark, or other distinguishing

characteristic' on its bottles—be it a unique UPC code or other mark—so as to permit reverse vending machines to identify it as having been sold in the State." *American Beverage*, 793 F. Supp. 2d at 1031 (quoting M.C.L. § 445.572a(10)).

Equally important, the Association's rationale would "by extension bar all state labeling requirements," because any manufacturer who deals solely intrastate has a distinct advantage over interstate manufacturers having to comply with only one state's labeling requirements. *Id*. Thus, the provision does not in explicit terms seek to regulate interstate commerce and is not discriminatory on its face.

2. The unique-mark requirement is not purposefully discriminatory.

In a half-hearted, one-paragraph argument, the Association claims that the unique-mark requirement is purposefully discriminatory because Michigan is seeking to maximize revenue from unredeemed beverage containers by outlawing out-of-state beverage containers in Michigan, and Michigan beverage containers in almost every other state. (Assoc. Br. at 42.) The failure of this argument is that it has nothing to do with economic protectionism. As the District Court

accurately summarized, "there is nothing that indicates that Michigan is attempting to benefit local economic actors at the expense of out-of-state actors." 793 F. Supp. 2d at 1033 (citing *Int'l Dairy*, 622 F.3d at 648). "The unique-mark requirement applies to all beverage manufacturers who meet the threshold regardless of their in-state or out-of-state origin." *Id.*

In addition, the Michigan Legislature's purpose in creating the unique-mark requirement was to prevent the fraudulent redemption of beverage containers that were never subject to a 10¢ deposit. The problem of fraudulent redemption in Michigan was well-documented and wide-scale when the Legislature began work on amendments to Michigan's Bottle Bill. (R. 16, Exs. 2, 3; R. 17, Response Ex. 5). The MSDA, which participated in the legislative process, recognized that the problem of fraudulent deposit-container redemption in Michigan "perpetrate[s] injury on those distributors who become over redeemers as a result of such activity. . . ." (R. 17, Response Ex. 6.) Nothing about this primary purpose indicates that Michigan is purposefully engaging in protectionist conduct.

3. The unique-mark requirement does not discriminate in practice.

The 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. *Northville Downs v. Governor*, 622 F.3d 579, 589 (6th Cir. 2010) (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127-128 (1978)). Rather, "the claimant must show both how local economic actors are favored by the legislation, and how out-of-state actors are burdened by the legislation." *Int'l Dairy Foods*, 622 F.3d at 648 (citing *E. Ky. Res.*, 127 F.3d at 543). Two contrasting cases emphasize this point.

In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the challenged regulation prohibited importing closed apple containers bearing another state's grading or classification system into North Carolina. The regulation benefitted North Carolina growers at the expense of out-of-state competitors in three ways. It increased the cost of doing business for out-of-state competitors but not in-state apple growers and dealers; it stripped a competitive and economic advantage from Washington growers and dealers who complied with Washington's expensive inspection and grading system;

and it essentially required Washington growers to downgrade their product to inferior USDA grades, benefitting inferior North Carolina apples. *Id.* at 350-52.

Conversely, in *Int'l Dairy*, this Court upheld an Ohio regulation that prohibited dairy processors from claiming their milk was free of the artificial hormone rbST and required processors to include a disclaimer when making such claims about their production process. *Id.* at 632. This Court upheld the regulation because it burdened Ohio dairy farmers to the same extent it burdened out-of-state farmers. *Id.* at 649.

The District Court correctly determined that Michigan's unique-mark requirement is more like *Int'l Dairy* than *Hunt*. First, the statute "does not strip out-of-state actors of any competitive edge to the benefit of in-state actors." 793 F. Supp. 2d at 1033. Second, the statute burdens "in-state beverage manufacturers who meet the designated thresholds to the same extent it burdens out-of-state manufacturers who meet the designated threshold." *Id.* In other words, a Michigan manufacturer would lose no benefit by moving to another state, and a non-Michigan manufacturer would gain no benefit by moving into Michigan. There is no protectionist effect.

In sum, the unique-mark requirement does not facially, purposefully, or practically punish out-of-state companies or benefit Michigan companies. Accordingly, the requirement is not discriminatory.

II. The unique-mark requirement is also valid because it advances Michigan's legitimate interest in preventing fraudulent redemptions, a purpose that cannot be adequately served by reasonable, nondiscriminatory alternatives.

The District Court did not reach the alternative ground for rejecting the Association's *per se* challenge to the unique-mark requirement, namely, the requirement's legitimate purpose. But this Court may affirm the District Court's judgment on any ground supported on the record, including a basis not mentioned in the District Court's opinion. *Louisiana Sch. Employees' Ret. Sys. v. Ernst & Young, LLP*, 633 F.3d 471, 477 (6th Cir. 2010). Accordingly, this Court should also reject the Association's *per se* challenge based on Michigan's legitimate purpose for enacting the unique-mark requirement.

If a state regulation actually *was* extraterritorial or discriminatory, the inquiry does not end. That preliminary determination merely shifts the burden to defendants and subjects the regulation to heightened scrutiny. Under that analysis, a statute "will survive only if

it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Int'l Dairy*, 622 F.3d at 644. If the statute survives heightened scrutiny, the inquiry ends; there is no need to engage in the *Pike* balancing test.

Section 572a(10) survives heightened scrutiny. Michigan's legitimate local purpose in requiring the unique-to-Michigan mark is to prevent fraudulent redemption and the resulting theft of deposit funds that occurs when no-deposit containers are redeemed in Michigan for money. The widespread scale and impact of this fraudulent redemption has been well documented and was presented to the Legislature, as evidenced by the Bottle Bill Amendment's legislative history, discussed above. The harm that fraudulent redemption causes is equally well documented and admitted by Association members doing business in Michigan.

Before passage of the 2008 amendment, Michigan attempted various actions to stop fraudulent redemptions, including criminalization of fraudulent redemption 10 years earlier, and requiring retailers to post notices to that effect. M.C.L. 445.574a, b. These attempts were unsuccessful, prompting development of the unique-mark requirement.

Other nondiscriminatory means would not adequately serve this legitimate local purpose. For example, MSDA noted a significant portion of the fraudulent redemption comes via people bringing containers from out of state and running them through RVMs (Reverse Vending Machines) in Michigan. The machines could not identify the purchase location. About 2/3 of all containers redeemed in Michigan come through RVMs. (R. 17, Response Ex. 6.) It was the MSDA's recommendation that "to be effective, a comprehensive solution which looks at *more than just RVM machines* must be devised to address the problem." (*Id.* (emphasis added).)

Requiring proof of purchase at the time of redemption is also unworkable. It would require additional staff and handling, increasing the retailers' costs. Consumers would also be required to retain all receipts, an unlikely circumstance to be sure.

The Bottle Bill Amendment already provides retailers voluntary authority to limit an individual's daily redemption amount. A retailer may refuse "to accept from a person empty returnable containers for a refund in excess of $25 on any given day." M.C.L. § 445.572(10).

And retailer incentives merely shift a costly burden to the retailers. A consumer need only go a different retail location that will accept the containers, creating a redemption competition that hurts one retailer's business while boosting another's by bringing in customers.

In sum, even if the challenged provision is extraterritorial or discriminatory, and therefore virtually *per se* invalid, the State has a legitimate local purpose that cannot be adequately met by other means. Accordingly, § 572a(10) survives heightened scrutiny and, therefore, does not violate the dormant Commerce Clause.

III. The Association is not entitled to summary judgment based on the *Pike* balancing test, an issue the District Court did not certify for interlocutory appeal, and which requires the Association to present undue-burden evidence.

Under 28 U.S.C. § 1292(b), this Court has interlocutory-appeal jurisdiction when a district court certifies a case for review. It is undisputed that the District Court did *not* certify the issue of the *Pike* balancing test. Accordingly, this Court should decline to decide that issue.

Such a course of action is particularly prudent here, given the abuse-of-discretion standard of review that applies to the District

Court's denial of summary judgment based on the existence of materially disputed facts. *See* Standard of Review, *supra*. And it makes even more sense given that Michigan has not even had the benefit of discovery to test the Association's unsupported claims of an undue burden. There is no reason why this Court should be the first in this litigation to rule on the merits of the Association's *Pike* claim.

1. The District Court did not resolve on the merits the issue of the *Pike* balancing test.

The District Court correctly determined that significant disputed facts existed as to the purpose, operation, and effect of the challenged provision; that these disputed facts were material to the Association's claims and the relief sought; and, these material fact issues precluded review under *Pike*. 739 F. Supp. 2d at 1037, 1038.

The U.S. Supreme Court emphasized, in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), that a case is typically suited for summary judgment only after the non-movant "has had a full opportunity to conduct discovery." *Anderson*, 477 U.S. at 257 (emphasis added). Here, based *Anderson*, a grant of summary judgment in favor of the Association based on the *Pike* balancing test would be improper because

Defendants have been given *no* opportunity for discovery. Indeed, the Association's motion for summary judgment was filed even before the deadline for answering the complaint expired.

Michigan properly demonstrated the existence of facts and evidence necessary to respond to the factual aspect of the Association's motion, and that such evidence was unavailable other than through discovery. Fed. R. Civ. P. 56 (d). (R 16, Response.) Accordingly, the District Court correctly denied the Association's motion for summary judgment. Fed. R. Civ. P. 56(d)(1), (2); *White's Landing Fisheries v. Buchholzer*, 29 F.3d 229 (6th Cir. 1004) (reversing the district court's grant of summary judgment where the non-movant was not given a sufficient opportunity for discovery).

The Association's challenge to the 2008 amendment is fact-specific, as is much of the argument the Association presents to this Court on appeal. For example, the Association alleges that its members cannot combine production for Michigan with production for the rest of the Country without incurring the cost and logistical burden of shutting down the production line every time it is necessary to switch to or from

Michigan production. Plaintiff further alleges its members' ability to conduct interstate commerce in their beverages has been halted.

But certain Association members have been complying with the law, some for approximately two years, with no apparent difficulty or burden to their ability to move product between states. Defendants are entitled to discovery on these fact issues and an appropriate amount of time to conduct that discovery.

2. The Association failed to satisfy the summary-judgment standard in the context of the *Pike* balancing test.

In any event, the unique-to-Michigan mark's alleged burdens on interstate commerce are not excessive in relation to the putative local benefits. The benefit is the protection of Michigan citizens and businesses from fraudulent redemption. The burden is relatively minor, requiring, at most, small modifications to production and distribution systems to differentiate between Michigan-bound and non-Michigan-bound beverages.

To begin, the industry already uses technology to distinguish product by its destination.[6] In addition, the industry already produces

[6] www.mirefreshmentbeverage.org.

location-specific containers when it wants to engage in a geographically-local sales promotion. (E.g., R. 18, Response Ex. 15.) Therefore, any burdens arising from the challenged provision will largely be alleviated by minor changes to bottling procedures and distribution, costs that can either be passed along to Michigan consumers or assumed by manufacturers without causing the demise of the interstate beverage system. The Association has not come forward with admissible evidence sufficient to carry its burden under the *Pike* test.

CONCLUSION AND RELIEF REQUESTED

Michigan's law requiring a unique mark on certain beverage containers is neither extraterritorial nor discriminatory. In addition, the requirement survives required heightened scrutiny because Michigan has a legitimate purpose in combatting criminal activity—the fraudulent redemption of containers—because this purpose cannot be adequately achieved by other, less discriminatory means.

Assuming the Court concludes, as the District Court did, that the challenged provision is not extraterritorial or discriminatory, the *Pike* balancing test controls. But it is premature for this Court to address the balancing test. At a bare minimum, Michigan is entitled to

discovery to determine the legitimacy of the Association's claim that Michigan's unique-mark requirement excessively burdens commerce.

Accordingly, Defendants Michigan Governor Rick Snyder, Michigan Attorney General Bill Schuette, and Michigan Treasurer Andrew Dillon respectfully request that this Court hold that Michigan's unique-mark requirement is neither extraterritorial nor discriminatory, and affirm the District Court's partial grant of summary judgment in their favor.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Solicitor General
Co-Counsel of Record

/s/ Margaret Nelson
Ann M. Sherman
Assistant Attorneys General
Co-Counsel of Record
Attorneys for Defendants-Appellees
Snyder, Schuette, and Dillon
Public Employment, Elections and
Tort Division
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434
Nelsonm9@michigan.gov
shermana@michigan.gov

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 7,788 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Century Schoolbook.

/s/ Margaret Nelson
Ann M. Sherman
Assistant Attorneys General
Co-Counsel of Record
Attorneys for Defendants-Appellees
Snyder, Schuette and Dillon
Public Employment, Elections & Tort Division
PO Box 30736
Lansing, MI 48909
(517) 373-6434
Nelsonm9@michigan.gov
shermana@michigan.gov

CERTIFICATE OF SERVICE

I certify that on February 7, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

/s/ Margaret Nelson
Ann M. Sherman
Assistant Attorneys General
Co-Counsel of Record
Attorneys for Defendants-Appellees
Snyder, Schuette and Dillon
Public Employment, Elections & Tort Division
PO Box 30736
Lansing, MI 48909
(517) 373-6434
Nelsonm9@michigan.gov
shermana@michigan.gov

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellees, per Sixth Circuit Rule 28(c), 30(b), hereby designate the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.
Complaint	02/25/2011	R. 1
Motion for Summary Judgment	03/10/2011	R. 6
Brief in Support of Motion for Summary Judgment	03/10/2011	R. 7
Motion To Intervene and Brief in Support	03/30/2011	R. 15
Dillon, Schuette and Snyder's Response to Motion to Intervene	04/07/2011	R. 16
Exhibits in Support of Response to Motion to Intervene	04/07/2011	R. 17
Additional exhibits in support of response	04/07/2011	R. 18
Memorandum Order Granting Motion to Intervene	04/26/2011	R. 27
Notice of Oral Argument	05/27/2011	R. 41
Opinion	05/03/2011	R. 42
Order	05/03/2011	R. 43
Motion for Reconsideration	06/27/2011	R. 45

Order Denying Motion for Reconsideration and Granting Certification for Interlocutory Appeal	07/20/2011	R. 52
Sixth Circuit Order	09/06/2011	R. 54