UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Case No. 25-1703

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION, a Michigan Nonprofit Corporation (WOMP); BOWERS HARBOR VINEYARD & WINERY, INC, a Michigan Corporation; BRYS WINERY, LC, a Michigan Corporation; CHATEAU GRAND TRAVERSE, LTD., a Michigan Corporation; GRAPE HARBOR INC., a Michigan Corporation; MONTAGUE DEVELOPMENT, LLC, a Michigan limited liability company; OV THE FARM LLC, a Michigan liability company; TABONE VINEYARDS, LLC, a Michigan liability company; TWO LADS, LLC, a Michigan liability company; VILLA MARI, LLC, a Michigan liability company; WINERY AT BLACK STAR FARMS LLC, a Michigan liability company; CHATEAU OPERATIONS, LTD, a Michigan Corporation,

Plaintiffs/Appellees/Cross-Appellants, (25-1754)

v.

TOWNSHIP OF PENINSULA, MI, a Michigan Municipal Corporation
Defendant/Appellant/Cross-Appellee, (25-1703)

PROTECT THE PENINSULA, INC.
Intervenor/Appellant. (25-1705)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
USDC NO.: 1:20-cv-1008 (Hon. Paul L. Maloney presiding)

DEFENDANT-APPELLANT/CROSS-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE

Appellant has no parent corporation and is not a publicly held corporation owning 10% or more of stock of a party. FRAP 26.1(a).

TABLE OF CONTENTS

CORPORATE DISCLOSURE ii
TABLE OF AUTHORITIES iv
STATEMENT IN SUPPORT OF ORAL ARGUMENT x
STATEMENT OF JURISDICTION 1
STATEMENT OF ISSUES 2
STATEMENT OF THE CASE 3
I. HISTORY OF THE PENINSULA TOWNSHIP ZONING ORDINANCE. 4
A. Plaintiffs' Individual Land-Use History. 7
1. Plaintiffs operating as a "Use by Right". 7
2. Wineries operating under an SUP. 10
B. Identification of Challenged Sections of PTZO Relevant to the Appeal. 16
C. Procedural History. 17
1. Pre-PTP intervention phase. 18
2. PTP is permitted to intervene. 19
3. Post-PTP litigation and dispositive motion practice. 22
4. Trial and post-trial proceedings. 25
SUMMARY OF THE ARGUMENT 25
LAW AND ARGUMENT 30
I. PLAINTIFFS FAILED TO ACHIEVE FINALITY ON THEIR REGULATORY TAKINGS AND AS-APPLIED CONSTITUTIONAL CLAIMS BEFORE FILING SUIT, DEPRIVING THE COURT OF SUBJECT MATTER JURISDICTION OVER KEY CLAIMS. 30
A. Plaintiffs Had Many Avenues To Achieve Finality But Failed To Exercise Any Of Them Before Filing Suit. 33
B. Plaintiffs Filed Suit Before Obtaining A Final Decision From The Township Regarding The Application Of The Regulations To Their Properties, Depriving The Court Of Subject Matter Jurisdiction Over Plaintiffs' Regulatory Takings And As-Applied Claims. 34
II. THE TRIAL COURT ERRED IN CONCLUDING THE TERM "GUEST ACTIVITY USE" WAS UNCONSTITUTIONALLY VAGUE. 38
A. The GAU Provisions Do Not Implicate A Substantial Amount Of Constitutionally Protected Conduct. 41
B. The GAU Provisions Provide Fair Notice And Do Not Authorize Or Encourage Arbitrary And Discriminatory Enforcement. 44
1. Fair Notice 44
2. Arbitrary Enforcement 46
III. THE DISTRICT COURT ABUSED ITS DISCRETION IN STRIKING THE TOWNSHIP'S REBUTTAL DAMAGES EXPERT REPORT AND REFUSING TO ALLOW THE TOWNSHIP TO PRESENT AN EXPERT TO

COUNTER PLAINTIFFS' DAMAGES CLAIM, LEADING DIRECTLY TO THE $49.2 MILLION DAMAGES AWARD. 52
IV. THE DISTRICT COURT ERRED IN AWARDING DAMAGES TO PLAINTIFFS. 61
A. The District Court Erred By Failing To Consider Causation Under Section 1983 When Awarding Millions In Damages. Plaintiffs' Alleged Injuries Were Not Caused By The Winery Ordinances Which Were Permissive In Nature. 63
1. No cause in fact 65
2. Proximate cause 68
B. The District Court Sustained An Objection To The Relevance Of Event Hosting Damages At Trial, Then Awarded $49.2 Million In Damages Based Solely On Event Hosting. 69
C. Plaintiffs Refused To Provide Any Financial Records To Their Own Economic Expert. This Rendered Him Unable To Conduct Any Competent Expert Study Whatsoever. His Sole Task Was To Take A Spreadsheet That Was Populated by Plaintiffs' Counsel And Multiply The Numbers By A "Gross Profit" Margin of 65%. 74
1. Mr. Larson made no attempt to "plan or supervise" the performance of the professional services as required by the AICPA. 76
2. Mr. Larson failed to obtain "sufficient relevant data" in violation of the AICPA standards. 79
3. Mr. Larson Conducted an exercise of multiplication, using a gross profit percentage found on the RMA website. He failed to follow the directives of the RMA to only utilize RMA data as a guideline to supplement a separate financial analysis. He did not conduct any separate analysis. 80
D. Plaintiffs Failed To Offer Any Objective Facts Or Data To Establish That They Could Have Engaged In The Large Event Business And Made A Profit. 82
E. Gross Profit Is Not The Proper Measure Of Damages And Plaintiffs Failed To Offer Any Evidence Of Net Profit. 89
V. THE DISTRICT COURT ERRED BY GRANTING PLAINTIFFS SUMMARY JUDGMENT ON THE TOWNSHIP'S STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE AND PRECLUDING THE TOWNSHIP FROM PRESENTING THE ISSUE AT TRIAL. 95
A. With The Exception Of Hawthorne And Bowers Harbor, Plaintiffs' Claims Accrued More Than Three Years Before Suit Was Filed And, As Such, Are Time Barred. 96
B. The Continuing Violations Theory Does Not Apply And Does Not Extend The Statute Of Limitations To Save Plaintiffs' Claims. 98

VI. THE DISTRICT COURT ERRANTLY FAILED TO CONSIDER THE TOWNSHIP'S LACHES DEFENSE AFTER TRIAL. 102
VII. ON SUMMARY JUDGMENT AND FOLLOWING TRIAL, THE DISTRICT COURT INCORRECTLY CONCLUDED THAT THE PTZO VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS UNDER THREE DIFFERENT THEORIES. 106
A. The Winery Ordinances Contain No Prior Restraints. 107
B. The Winery Ordinances Do Not Compel Speech. 110
C. The Winery Ordinances Do Not Impermissibly Regulate Plaintiff's Alleged Commercial Speech. 112
1. Central Hudson does not require the quantum of proof the District Court demanded. 114
2. The Township presented – and the District Court ignored – significant evidence that the harms the PTZO addressed were real and the challenged sections helped alleviate them to a material degree. 115
VIII. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT TO PLAINTIFFS ON THEIR DORMANT COMMERCE CLAUSE THEORY. 119
IX. THE DISTRICT COURT ERRED IN CONCLUDING THAT TWO SECTIONS OF THE PTZO ARE PREEMPTED BY THE MICHIGAN LIQUOR CONTROL CODE. 125
A. Amplified Music 129
B. Catering 131
X. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SHARPLY LIMITED THE TOWNSHIP'S ABILITY TO PARTICIPATE IN DISPOSITIVE MOTION PRACTICE FOLLOWING THIS COURT'S MANDATE TO RECONSIDER THE SWEEPING 2022 SUMMARY JUDGMENT RULING, PERMITTING THE TOWNSHIP TO ONLY FILE A DISPOSITIVE MOTION ON THE ISSUE OF PREEMPTION. 132
CONCLUSION AND RELIEF REQUESTED 136
CERTIFICATE OF COMPLIANCE FRAP 32(g) 138
CERTIFICATE OF SERVICE 138
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS 139

TABLE OF AUTHORITIES

Cases

46th Circuit Court v. Crawford Cnty., 266 Mich. App. 150; 702 N.W.2d 588 (2005) 116
600 Marshall Entertainment Concepts, LLC v. City of Memphis, 705 F.3d 576 (2013) 50
A to Z, Inc. v. City of Cleveland, 281 Fed. Appx. 458 (6th Cir. 2008) 97
Adam Bros. Farming, Inc. v. Cnty. Of Santa Barbara, 604 F.3d 1142 (9th Cir. 2010) 36
Adcock v. Firestone Tire and Rubber Co., 822 F.2d 623 (6th Cir. 1987) 31
Alexander v. United States, 509 U.S. 544 (1993) 108
Am. Express Travel Related Servs. Co. v. Kentucky, 730 F.3d 628 (6th Cir. 2013) 122
Anderson v. Bessemer City, 470 U.S. 564 (1985) 118
Arnett v. Myers, 281 F.3d 552 (6th Cir. 2002) 31
Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545 (6th Cir. 2007) 41
Avient Corp. v. Westlake Vinyls, Inc., 145 F.4th 662 (6th Cir. 2025) 39, 95, 107, 110, 125
Basista Holdings, LLC v. Ellsworth Twp., 710 Fed. Appx. 688 (6th Cir. 2017) 99
Belle Maer Harbor v. Charter Twp. of Harrison, 170 F.3d 553 (6th Cir. 1999) 39, 42
Bigelow v. Michigan Department of Natural Resources, 970 F.2d 154 (6th Cir. 1992) 33
Bisig v. Time Warner Cable, Inc., 940 F.3d 205 (6th Cir. 2019) 57, 59
Blau v. Ft. Thomas Pub. Sch. Dist., 401 F.3d 381 (6th Cir. 2005) 43
Board of Trustees of State Univ. of N. Y. v. Fox, 492 U.S. 469 (1989) 115, 118
Boutilier v. INS, 387 U.S. 118 (1967) 44, 45
Braun v. Ann Arbor Charter Township, 519 F.3d 564 (6th Cir. 2008) 32
Bridgeport Music, Inc. v. Juston Combs Pub., 507 F.3d 470 (6th Cir. 2007) 103
Brockert v. Skornicka, 711 F.2d 1376, 1382 (6th Cir. 1983) 46, 47
Brown v. City of Albion, 136 F.4th 331 (6th Cir. 2025) 40, 44
Burnett v. New York Cent. R. Co., 380 U.S. 424 (1965) 96
Butler v. Dowd, 979 F.2d 661 (8th Cir. 1992) 65
Cady v. City of Detroit, 289 Mich. 499; 286 N.W. 805 (1939) 127
Cargill, Inc. v. Boag Cold Storage Warehouse, Inc., 71 F.3d 545 (6th Cir. 1995) 92

Carleton Sportsman's Club v. Exeter Twp., 217 Mich. App. 195; 550 N.W.2d 867 (1996) 33
Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980) ..... 25, , 29, 107, 113
City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) 108
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1968) 115
CMR D.N. Corp. v. City of Philadelphia, 703 F.3d 612 (3d Cir. 2013)..... 45, 46
Contract Design Group, Inc. v. Wayne State University, 635 F. App'x 222 (6th Cir. 2015) 89, 90, 92
Cooey v. Strickland, 479 F.3d 412, 416 (6th Cir. 2007) 97
Crabbs v. Scott, 800 Fed. Appx. 332 (6th Cir. 2020) 68
Crosby v. Pickaway Cnty. Gen. Health Dist., 303 Fed. Appx. 251 (6th Cir. 2008) 35
Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) 78
Déjà vu of Cincinnati, L.L.C. v. Union Twp. Bd. Of Trustees, 411 F.3d 777 (6th Cir. 2005) 45
Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty., 274 F.3d 377 (6th Cir. 2001) 108
DeRuiter v. Twp. of Byron, 505 Mich. 130; 949 N.W.2d 91 (2020) 126, 127, 128
Dezman v. Charter Twp. of Bloomfield, ___ Mich. ___, 997 N.W.2d 42 (2023) ... 67
Dibrell v. City of Knoxville, 984 F.3d 1156 (6th Cir. 2021) 97
Dickenson v. Cardiac & Thoracic Surgery of E. Tenn. P.C., 388 F.3d 976 (6th Cir. 2004) 55
DXS, Inc. v. Siemens Medical Systems, Inc., 100 F.3d 462 (6th Cir. 1996) 91
Edison v. State of Tenn. Dept. of Children's Servs. 510 F.3d 361 (6th Cir. 2007) 97, 99
EQT Prod. Co. v. Magnum Hunter Prod., Inc., 768 Fed. Appx. 459 (6th Cir. 2019) 54
Fera v. Vill. Plaza, Inc., 396 Mich. 639, 644; 242 N.W.2d 372, 374 (1976) 82
Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995) 114, 116, 117
Fredonia Farms, LLC v. Enbridge Energy Partners, L.P., 1:12-cv-1005, 2014 WL 3573723, at *5 (W.D. Mich., July 18, 2014) ..... passim
Garber v. Menendez, 888 F.3d 839 (6th Cir. 2018) 124
Garza v. Lansing Sch. Dist., 972 F.3d 853 (6th Cir. 2020) 97
Gen. Am. Life Ins. Co. v. Anderson, 156 F.2d 615 (6th Cir. 1946) 135
Getman v. Matthews, 125 Mich. App. 245; 125 N.W.2d 671 (1983) 90
Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) 111
Goldsmith v. Sharrett, 614 Fed. Appx. 824 (6th Cir. 2015) 100

Grace Cmty Church v. Lenox Twp., 544 F.3d 609 (6th Cir. 2008) 35
Granite State Outdoor Advertising, Inc. v. City of St. Pete Beach, FL, 322 F.Supp.2d 1335 (M.D. Fl. 2004) 65
Grayned, 408 U.S. at 110; *see also Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Supreme Ct.*, 894 F.3d 235 (6th Cir. 2018)..... 40, 46
Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999).....115
Harrison v. Michigan, 722 F.3d 768, 772–73 (6th Cir. 2013) 96
Hill v. Colorado, 530 U.S. 703 120 S.Ct. 2480 (2000) 40, 44
Howe v. City of Akron, 801 F.3d 718 (6th Cir. 2015)..... passim
In re Petition of United States Steel Corp., 479 F.2d 489 (6th Cir. 1973) 136
Insomnia Inc. v. City of Memphis, Tenn., 278 Fed. Appx. 609 (6th Cir. 2008) 35, 37, 38
Janus v. Am. Fed'n of State Cnty. & Mun. Emps., Council 31, 585 U.S. 878 (2018).....111
Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) 110
Jott, Inc. v. Clinton Charter Twp., 224 Mich. App. 513; 569 N.W.2d 841 (1997).....129
Katz v. Vill. of Beverly Hills, 677 Fed. Appx. 232 (6th Cir. 2017) 99
Kellogg Co. v. Exxon Corp., 209 F.3d 562 (6th Cir. 2000), *cert. denied*, 531 U.S. 944; 121 S.Ct. 340 (2000).....104
Knick v. Twp. of Scott, Pa., ___ U.S. ____; 139 S.Ct. 2162 (2019).....35
Knick v. Twp. of Scott, Pa., 588 U.S. 180 (2019) 35
Kuhnle Bros., Inc. v. County of Geauga, 103 F.3d 516 (6th Cir. 1997).....97
Lawton v. Gorman Furniture Corp., 90 Mich. App. 258; 282 N.W.2d 797 (1979)90
Lichtenstein v. Hargett, 83 F.4th 575 (6th Cir. 2023) 108
Lindke v. Tomlinson, 31 F.4th 487 (6th Cir. 2022).....30
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).....114
LRL Props. v. Portage Metro Hous. Auth., 55 F.3d 1097 (6th Cir. 1995) 99
Mallory v. Eyrich, 922 F.2d 1273 (6th Cir. 1991).....133
Maple BPA, Inc. v. Bloomfield Charter Twp., 302 Mich. App. 505; 838 N.W.2d 915 (2013).....129
Mason v. Mitchell, 729 F.3d 545 (6th Cir.2013) 135
Max Trucking, LLC v. Liberty Mut. Ins. Corp., 802 F.3d 793 (6th Cir. 2015) 112
McGlone v. Bell, 681 F.3d 718 (6th Cir. 2012) 108, 109
McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2005) 64
Messinger v. Anderson, 225 U.S. 436, 444, 32 S. Ct. 739 (1912).....135
Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).....115

Metropolitan Gov't of Nashville, 86 F.4th at 714 103
Midwest Media Prop., L.L.C. v. Symmes Tp., Ohio, 503 F.3d 456 (6th Cir. 2007) 100
Miles Christi Religious Order v. Township of Northville, 629 F.3d 533 (6th Cir. 2010) 32, 36, 37, 38
Moss v. Columbus Bd. of Educ., 98 Fed. Appx. 393 (6th Cir. 2004) 99
Nat'l Amusement Co. v. Johnson, 270 Mich. 613; 259 N.W.2d 342 (1935) 128
National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) 99
Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803; 123 S.Ct. 2026 (2003) 31
Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023) 119
Natron Corp. v. STMicroelectronics, Inc., 305 F.3d 397 (6th Cir. 2002) 103, 104
Neuens v. City of Columbus, 303 F.3d 667 (6th Cir. 2002) 51
New Doe Child #1 v. Cong. of United States, 891 F.3d 578 (6th Cir. 2018) 110
Newell Rubbermaid, Inc. v. Raymond Corp., 676 F.3d 521, (6th Cir. 2012) 75
Nickola v. Grand Blanc Township, 47 Mich. App. 684; 209 N.W.2d 803 (1973) 116
North Pacifica LLC v. City of Pacifica, 526 F.3d 478 (9th Cir. 2008) 65
Oppenhuizen v. Zeeland, 101 Mich. App. 40; 300 N.W.2d 445 (1980) 129
Pagan v. Fruchey, 492 F.3d 766 (6th Cir. 2007) 114
Pakdel v. City & Cty. of San Francisco, 594 U.S. 474 (2021) 37
Paragon Properties Co. v. City of Novi, 452 Mich. 568; 550 N.W.2d 772 (1996) 33
People v. Llewellyn, 401 Mich. 314; 257 N.W.2d 902 (1977) 127
Pike v. Bruce Church, 397 U.S. 137 (1970) 124
Pittsfield Twp. v. Malcolm, 375 Mich. 135; 134 N.W.2d 166 (1965) 67
Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Supreme Ct., 894 F.3d 235 (6th Cir. 2018) 40, 45
Polaris Amphitheater Concerts, Inc. v. City of Westerville, 267 F.3d 503, (6th Cir. 2001) 107, 108
Powers v. Hamilton Cty. Pub. Def. Comm'n, 501 F.3d 592 (6th Cir. 2007) 64, 68
River City Capital, LP. v. Bd. of Cty. Comm'rs, 491 F.3d 301 (6th Cir. 2007) 31
Rodriguez v. Tenn. Laborers Health & Welfare Fund, 89 Fed. Appx. 949 (6th Cir. 2004) 133
Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47; 126 S.Ct. 1297 (2006) 43
Russell v. Absolute Collection Servs., Inc., 763 F.3d 385 (4th Cir. 2014) 54
S.C. v. Metropolitan Gov't of Nashville, 86 F.4th 707 (6th Cir. 2023) 62, 112
Semco v. Amcast, Inc., 52 F.3d 108 (6th Cir. 1995) 112
Sharpe v. Cureton, 319 F.3d 259 (6th Cir. 2003) 99

Sokol v Akron Gen. Med. Ctr., 173 F3d 1026 (6th Cir. 1999).....55
Southern States Rack & Fixture, Inc. v Sherwin-Williams Co., 318 F3d 592 (4th Cir. 2003).....55
Stough v. Mayville Cmty. Sch., 138 F.3d 612 (6th Cir. 1998)..... 54, 133
Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 36
Superior Ambulance Serv. v. City of Lincoln Park, 19 Mich. App. 655; 173 N.W.2d 236 (1969) 116
Tenn. Scrap Recyclers Ass'n v. Bredsen, 556 F.3d 442 (6th Cir. 2009) 120, 123
Ter Beek v. City of Wyoming, 495 Mich. 1, 24 n.9; 846 N.W.2d 531 (2014) 128
Texas v. Johnson, 491 U.S. 397; 109 S.Ct. 2533 (1989).....43
Thatcher Enterprises v. Cache Cnty Corp., 902 F.2d 1472 (10th Cir. 1990) 104
Tolbert v. State of Ohio Dep't of Transp., 172 F.3d 934 (6th Cir. 1999)..... 99, 100
Tree of Life Christian Schs. v. City of Upper Arlington, Ohio, 905 F.3d 357 (6th Cir. 2018).....51
Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016).....116
United States Postal Serv. v. Nat'l Ass'n of Letter Carriers, 330 F.3d 747 (6th Cir. 2003).....31
United States v. Campbell, 168 F.3d 263 (6th Cir. 1999) 135
United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1 (2008) 105
United States v. O'Brien, 391 U.S. 367; 88 S.Ct. 1673 (1968).....43
Va. Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748; 96 S.Ct. 1817 (1976).....113
Vill of Belle Terre v. Boraas, 416 US 1; 94 S Ct 1536; 39 L Ed 2d 797 (1974)...127
Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489 (1982) . 40, 41, 44
Wallace v. Kato, 549 U.S. 384 (2007).....97
Walsh v. City of River Rouge, 385 Mich. 623; 189 N.W.2d 318 (1971)..... 126, 127, 132
Warshak v. United States, 532 F.3d 521 (6th Cir. 2008).....31
Westborough Mall, Inc. v. Cape Girardeau, 953 F.2d 345 (8th Cir.1991).....65
Wilkins v. Daniels, 744 F.3d 409 (6th Cir. 2014).....111
Williamson County Reg. Planning Com. v. Hamilton Bank of Johnson County, 473 U.S. 172 (1985)..... 32, 33
Winchester v. WA Foote, 153 Mich. App. 489; 396 N.W.2d 456 (1986).....121
Wineries of the Old Mission Peninsula v. Twp. of Peninsula, No. 22-1534 (6th Cir., Aug. 23, 2022) 133

Statutes

MCL 125.3605 33
MCL 436.1547 131
MCL § 125.3203 115
MCL §§ 125.3201(1) 122
MCL 125.3101 127
MCL 125.3201 127
MCL 125.3203(1) 122
MCL 436.1547 ..... 131, 132
MCL 436.1916(11) 126, 129, 130

Other Authorities

28 U.S.C. § 1291 1
28 U.S.C. §§ 1331 1
28 U.S.C. §§ 1367 1
42 U.S.C. § 1983 ..... 1, 28, 64
Mich. Admin. Code R. 436.1003 127
Mich. Admin. Code R. 436.1003(1) 129, 130, 132
Mich. Admin. Code R. 436.1105(3) 127

Rules

Fed. R. Civ. P. 12(b)(1) 23
Fed. R. Civ. P. 12(h)(3) 23
FRCP 37(c) 52, 53
Mich. Ct. R. 7.122 33
Rule 12(b)(1) 18
Rule 12(b)(6) 18
Rule 436.1003(1) 129
Rule 54(b) 20, 133

Constitutional Provisions

Art. 7, §34 127
Article III of the United States Constitution 31
CONST Art. 7, §34 127

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument would assist the Court in resolving the dispositive errors that drove this zoning case to a $49.2 million damages award against a Michigan township of just over 6,000 residents. While the District Court ultimately arrived at the wrong conclusion in nearly all respects, two errors led directly to the unsupported award.

First, the District Court declared isolated provisions in the township's zoning ordinance vague without conducting a textual analysis of those provisions or considering their fit within the broader zoning scheme. The Court failed to recognize that, as a purely economic land-use regulation, the ordinance warranted the lowest level of vagueness scrutiny. The ordinance neither regulated protected constitutional conduct nor did it carry the specter of criminal penalties. Rather, the challenged provisions provided permissive uses that allowed Plaintiffs to operate expanded enterprises that otherwise would have been prohibited on agriculturally zoned land. Oral argument would assist the Court in addressing the proper framework for vagueness review in the zoning context, where the regulation is economic and nonpunitive.

Second, after erroneously concluding isolated provisions in the zoning ordinance were vague, the District Court awarded $49.2 million in compensatory damages for gross profits based solely on the invalidation of permissive economic

uses that applied only to a subset of Plaintiffs. In doing so, the District Court failed to engage in a causation analysis that should have ended the inquiry. Plaintiffs sought to invalidate (and recover damages from) the very provisions that granted them expanded permissive uses. Absent those provisions, Plaintiffs' enterprises could not have existed in the agriculturally zoned district at all. The challenged ordinance sections did not cause Plaintiffs' alleged injuries. Even if causation were assumed, the damages award remains legally infirm: the District Court accepted gross profits as the measure of damages for event-hosting businesses Plaintiffs had never operated and for which they presented no evidence of feasibility or viability. Due to the nature of this action, stemming from a long history of zoning regulation and individual zoning approvals, oral argument would assist the Court in evaluating the plaintiffs alleged damages and ensures the Court can raise any questions and concerns surrounding the scope of rights authorized under the zoning scheme and the actual land uses each individual plaintiff was authorized to undertake.

Overall, oral argument will help clarify how the District Court's errors compounded across multiple phases of summary judgment, trial, and ultimately damages – and why reversing and entering judgment in favor of the Township is the appropriate disposition.

STATEMENT OF JURISDICTION

The District Court had jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1331 and 1367 as this case involves federal questions under the United States Constitution and federal civil rights under 42 U.S.C. § 1983 as well as various state-law claims.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review the District Court's final judgment that was entered on July 7, 2025. **Judgment, RE 624**. Defendant-Appellants appealed to this Court thereafter. **Notice of Appeal, RE 640**. Plaintiffs' motion to amend the judgment was denied on August 14, 2025. **Opinion, RE 643**.

STATEMENT OF ISSUES

I. Did the District Court err when it concluded that Plaintiffs achieved finality on their regulatory takings and as-applied constitutional claims, vesting this Court with subject matter jurisdiction, before filing suit?

II. Did the District Court err in concluding the term "Guest Activity Use" was unconstitutionally vague?

III. Did the District Court abuse its discretion when it struck the Township's rebuttal damages expert and refused to allow the Township to present an expert to counter Plaintiffs' damages claim without considering the appropriate legal standard under Rule 37?

IV. Did the District Court err in awarding $49.2 million in compensatory damages to Plaintiffs?

V. Did the District Court err when it granted Plaintiffs summary judgment on the Township's statute of limitations defense, which precluded the Township from presenting the issue at trial?

VI. Did the District Court err when it failed to consider the Township's laches defense based on the proofs presented at trial?

VII. Did the District Court err when it concluded the Peninsula Township Zoning Ordinance violated Plaintiffs' First Amendment rights under three different theories – prior restraints, compelled speech, and commercial speech?

VIII. Did the District Court err when it granted summary judgment to Plaintiffs on their dormant Commerce Clause theory?

IX. Did the District Court err when it concluded that the Peninsula Township Zoning Ordinance was preempted by the Michigan Liquor Control Code?

X. Did the District Court abuse its discretion when it sharply limited the Township's ability to participate in dispositive motion practice following this Court's 2022 mandate to reconsider the sweeping 2022 summary judgment ruling?

Defendant-Appellant answers "yes" to all ten questions.

STATEMENT OF THE CASE

This is a zoning case at its heart. Yet, despite Peninsula Township's (the "Township") best efforts, the District Court never recognized the overall zoning framework and further ignored the specific zoning approvals underlying each plaintiffs claimed harm. Plaintiffs – wineries operating on agriculturally-zoned land – filed suit to nullify the comprehensive planning and zoning scheme developed through a 40-year iterative and interactive legislative process. That process benefited Plaintiffs greatly, allowing Plaintiffs permissive use to run wineries on their agriculturally zoned land. Without it, their uses would be impermissible.

Plaintiffs' various claims challenge isolated provisions of the Peninsula Township Zoning Ordinance ("PTZO"), including provisions that define winery land uses and authorize limited accessory and support uses.[1] Ironically, Plaintiffs seek to invalidate the very provisions granting the permissive uses that allowed them to successfully operate their expansive enterprises. Instead of appreciating that folly, Plaintiffs and the District Court treated PTZO expanded authorizations for wineries as if it were an unreasonable economic restriction. The result is litigation rife with error, where the District Court struck the authorizations in the PTZO and

[1] For ease of reference, the entire PTZO is located at **RE 615-7, PageID ##28513-28676**.

"unshackled" the Wineries, thereby awarding $49.2 million in damages in the process.

The appeal of this zoning case follows.

I. HISTORY OF THE PENINSULA TOWNSHIP ZONING ORDINANCE.[2]

Plaintiffs are a group of commercial wineries (plus their trade organization "WOMP") that sit on land zoned agricultural in the Township's A-1 Agricultural District ("A-1 District"). Plaintiffs are subject to the PTZO, including, but not limited to, its general regulations, definitions, supplemental regulations, each of their zoning approvals, and site plan approvals for each operation.

In 1968, the Township enacted its original Master Plan, demonstrating an emphasis on preserving the natural character, open areas and preserving agricultural lands and operations. The Master Plan is updated over time, most recently before litigation in 2011. **RE 142-2**.

In 1972, the Township adopted the PTZO establishing the A-1 District, and a separate C-1 Commercial District. As a permissive zoning ordinance, the PTZO provided for limited uses in the A-1 District such as the production, processing and

[2] The Township's pretrial brief and proposed findings of fact and conclusions of law provide a comprehensive account of the factual background of the PTZO, the legislative history of the relevant amendments, and each of Plaintiffs' individual land-use histories. **RE 581, 583**. For purposes of brevity in this statement of the case, much has been condensed.

wholesale and retail sales of various agricultural products to maintain the original intention of the district.

However, at the request of the wineries, the Township amended the PTZO to allow the wineries to engage in some reasonably restricted commercial activity in the A-1 District. These operations within the A-1 District today have flourished into eleven wineries who chose to open and operate their agriculturally-focused operations within this district. The historical development of the PTZO shows decades of action to maintain the Township's character and preserve agricultural lands. These amendments, adopted over more than a decade from 1989 to 2002, ultimately created three different types of land uses that allowed a land owner to operate a winery. Two of these uses are "special uses" and one is a "use by right".

On December 16, 1989, the Township amended the PTZO through Amendment 79 to allow agriculturally-zoned landowners to obtain a Special Use Permit ("SUP") to operate a land use called a "Winery-Chateau", as set forth in Section 8.7.3(10) of the PTZO and any conditions contained in an applicable SUP. The Winery-Chateau use originated from a request by Bob Begin, the founder of Chateau Chantal. **Tr. Ex. Q, RE 615-8, PageID ##28850-28851**.

On May 12, 1998, the Township again, this time at the request of the Kroupa family (owners of Peninsula Cellars) amended the PTZO to permit agriculturally-zoned landowners to operate a Remote Tasting Room. **Tr. Exs. Ax10, Cx10, RE**

615-27, PageID ##30485-30487, RE 615-27, PageID ##30493-30495. This came via Amendment 120 to the PTZO and authorized the use pursuant to an SUP under Section 8.7.3(12) of the PTZO.

On July 9, 2002, the Township adopted Amendment 139 and amended the PTZO to create a "use by right" Farm Processing Facility. Farm Processing Facilities are permitted as a use by right and do not require an SUP, but did require an administrative farm process permit with site plan approval as set forth Section 6.7.2(19) of the PTZO.[3]

After the creation of the Winery-Chateau use, operators continued to seek expanded commercial uses. Through the legislative process, on August 10, 2004, the Township adopted Amendment 141, adding provisions to Section 8.7.3(10)(u) of the PTZO to authorize "Guest Activities" as an authorized support use to approved Winery-Chateau special land uses.

Following the filing of this lawsuit, the Township approved Amendment 201 to the PTZO on December 13, 2022. **Exhibit, RE 444-2, PageID ##15907-15930.** Amendment 201 dramatically revised Section 6.7.2(19) with three new winery uses and removed the prior scope of the Farm Processing Facility, Winery-Chateau, and

[3] For ease of reference, Sections 6.7.2(19), 8.7.3(10), and 8.7.3(12) of the PTZO, separated from the entirety of the PTZO, are located at **RE 615-7, PageID ##28677-28692**.

Remote Tasing Room as challenged by Plaintiffs when they filed their First Amended Complaint.

Section 6.7.2(19) – "Farm Processing Facility", has been replaced with Section 6.7.2(19) – "Wholesale Farm Processing Facility". ***Id***. Amendment 201 also eliminated Winery-Chateaus from the PTZO through the repeal of Section 8.7.3(10) – Winery-Chateau. A Winery-Chateau use is no longer permitted under the PTZO. As such, prior provisions affecting Winery-Chateaus no longer exist in the PTZO. Section 8.7.3(12) – Remote Tasting Rooms has also been amended through Amendment 201. As such, Section 8.7.3(12) no longer exists in the form challenged by Plaintiffs, and Remote Tasting Rooms now operate under Section 8.7.3(12)(h). ***Id.* at 15929**.

Amendment 201 left Plaintiffs to be governed under the PTZO's nonconforming use provisions.

A. Plaintiffs' Individual Land-Use History.

1. Plaintiffs operating as a "Use by Right".

In May, 2007, Two Lads obtained its Preliminary Farm Processing Facility permit. **RE 459-2, PageID #16361**. On October 18, 2007, Two Lads received its Final Farm Processing Facility Permit from the Township. **RE 459-3, PageID #16363**. Two Lads never applied for any amendments to their Farm Processing

Facility Permit. **Dep., RE 459-1, PageID #16354**. It never requested a variance, an interpretation, or appealed to the ZBA. ***Id.*; Dep., RE 459-4, PageID #16367-16368**.

Black Star obtained its Preliminary Farm Processing Permit in March, 2007. **RE 459-6, PageID #16373**. In September 2007, Black Star obtained its Final Farm Processing Permit. **RE 459-7, PageID #16375**. Black Star never requested to amend the permit. **RE 459-1, PageID #16355-16357**. However, Black Star does have a history of variance requests that were approved by the Township, but it never requested an interpretation from the Township, and none of the variance requests relate to sections of the PTZO challenged in this litigation:

- In 2007, Black Star received a variance to use a non-conforming, pre-existing building for its Farm Processing Facility. **RE 459-8; Dep., RE 459-9, PageID #16386**.
- Later in 2007, Black Star received an exception to §6.7.2(19)(2) from the ZBA that allowed their Township location to sell wine and permit tastings of wine from grapes grown on the Peninsula but processed at a Black Star facility in neighboring Leelanau County. **RE 459-10.**
- In 2011, Black Star requested a variance to expand the processing and storage area of its facility. **RE 459-12**. Black Star rescinded this request. **RE 459-13.**
- In 2018, Black Star submitted another variance request seeking more storage space. **RE 459-14**. The Township did not process the variance request and instead indicated an amendment to the Zoning Ordinance would be required. **RE 459-15**. Black Star took no further action.

Other than this variance history, Black Star never requested an interpretation or appealed to the ZBA. Black Star also operates under a conservation easement strictly prohibiting non-agricultural uses and held by the Township, which purchased the development rights from prior owner for $435,000 in 1997. **RE 457-10.**

Tabone is not a Farm Processing Facility; it is permitted to operate as a Food Processing Plant. Tabone's predecessor in interest, J. Josef Vineyards, applied for and obtained an SUP in April, 2000, authorizing operations as a Food Processing Plant. **RE 459-17**. The SUP was transferred to Tabone in February, 2004. **RE 615-26, PageID ##30443-30444.**

On January 29, 2016, Mario Tabone, through an agent, applied for a "Winery Farm Processing & Tasting Room" structure. **RE 459-18**. On April 27, 2016, the Township advised Tabone of outstanding items required to complete the application for a Farm Processing Facility. **Email, RE 459-19**. Specifically, Tabone required a setback variance of 11 feet from the required 100-foot side yard setback under § 6.2.7(19)(b)(5). ***Id.***

Tabone applied for the setback variance, and a public hearing was scheduled for June 28, 2016. On June 21, 2016, the Township Planner e-mailed Mr. Tabone discussing the option of working within the current SUP, and advising that the winery is not authorized for wine tasting within the building. The Planner explained that wine tasting would require conversion to a Farm Processing Facility – pending approval of the setback – or convert to a Winery-Chateau. ***Id.*** Mr. Tabone withdrew the variance request and responded that he would pursue operations authorized by SUP No. 73 – the SUP that permitted a Food Processing Plant. **Email, RE 459-20**.

Tabone has never sought to amend SUP No. 73. **RE 459-1, PageID #16358**. Nor has the Township ever approved an application for Tabone to operate as a Farm Processing Facility. ***Id.*** Other than the withdrawn variance request, Tabone has never applied for or requested a variance or interpretation from the ZBA regarding SUP No. 73. ***Id.*** The allowed use under SUP No. 73 remains a "Food Processing Plant". **RE 615-26, PageID ##30443-30444**. Food Processing Plants are allowed as a special use under § 8.5 of the PTZO. ***Id.***

2. Wineries operating under an SUP.

Plaintiff, OV The Farm, LLC, ("Bonobo") first obtained its SUP to operate as a Winery-Chateau in May, 2013. The Township Board approved SUP No. 118 on May 14, 2013. **RE 32-6, PageID #1755-1771**. On November 20, 2014, the Township Board approved an amendment to SUP No. 118 to reflect modifications made during construction; the amendment did not change any permitted uses. **RE 463-2; Dep., RE 463-1, PageID #16535**. Since about 1997, the land has been encumbered by a pair of nearly identical conservation easements purchased by the Township for $561,500.00, which strictly prohibit non-agricultural uses of the land. **RE 457-11, 457-12**.

Bonobo never appealed any issues related to its SUP or the Winery-Chateau provisions to the ZBA. Nor did Bonobo seek a variance or interpretation from the ZBA. **Dep., RE 463-3, PageID #16559-16560**. At most, in April, 2019, Bonobo

emailed the Township Zoning Enforcement Officer requesting a definition of "Guest Activity", "Entertainment", and "Accessory Use". **Emails, RE 463-4**. No application or appeal was submitted to the ZBA.

Plaintiff, Bowers Harbor Vineyard & Winery, Inc. ("Bowers Harbor"), has a complicated land-use history. Bowers Harbor was initially approved to operate as a Food Processing Plant; it also operated a Roadside Stand, a use permitted by right under § 6.7.2. **SUP, RE 63-6, PageID ##2825-2838**. SUP No. 32 permitted Bowers Harbor to operate a winery with wine tasting and limited retail sales. ***Id.***

On August 10, 2010, Bowers Harbor amended SUP No. 32 to allow Open Space Uses consisting of up to 20 outdoor events annually with catered dinners, addition of a bathroom facility and extension of the tasting room to include an outdoor portion. **SUP Amendment, RE 463-5**.

After years of discussions with the Township, Bowers Harbor sought to transition to a Winery-Chateau. SUP No. 32 was replaced by SUP No. 132 in July, 2019. **RE 63-6, PageID #2839-2855**. Bowers Harbor has not sought to amend SUP No. 132. **Dep., RE 463-1, PageID #16536**. Nor has Bowers Harbor asked the ZBA to review the Township Board's decision to issue SUP No. 132 or otherwise appealed it administratively or judicially. **Dep., RE 463-6, PageID #16584**.

In connection with SUP No. 132, Bowers Harbor received a variance reducing the minimum acreage requirement for Winery-Chateau from 50 to 45.77 acres. **RE**

463-7; RE 463-1, PageID #16536. A second variance request – to reduce the required 75% active production requirement to 26.8% for a Winery-Chateau – was removed from consideration after Bowers Harbor's committed to adding additional acres of plantings. **Email, RE 463-8, RE 63-6, PageID #2839-2855**.

Plaintiff, Brys Estate Vineyard & Winery ("Brys"), received SUP No. 115 on February 8, 2011 to operate as a Winery-Chateau. **RE 463-9**. Since issuance, Brys has sought and obtained four amendments:

- April 10, 2012 – First Amendment permitting physical additions to the principal structure, expanded production capacity, outdoor visitor space, and permitting Guest Activity Uses. **RE 463-10**.
- April 8, 2014 – Second Amendment permitting an addition to the tasting room. **RE 463-11**.
- September 25, 2018 – Third Amendment permitting conversion of the Manager's Residence into five guest rooms and construction of a new residence; Brys never proceeded with the conversion. **RE 463-12; Dep., RE 463-13, PageID #16650-16651**.
- December 19, 2018 – Fourth Amendment permitting expansion of the outdoor deck, adding a viewing platform, and remove grape vines to accommodate the expansion. **RE 463-14**.

No additional amendments to SUP No. 115 have been approved. **RE 463-1, PageID #16537-16538**. Brys has never appealed or judicially challenged SUP No. 115. ***Id.* at 16538**.

The only variance Brys ever requested or obtained – approval of a temporary structure during residential construction in 2000 – was unrelated to the operation of the winery or the sections of the PTZO challenged in this case. **ZBA Decision, RE**

463-15. This variance came more than 20 years before this lawsuit. Brys has never requested a variance or interpretation from the ZBA concerning its winery operations.

Plaintiff, Chateau Operations, Ltd. ("Chateau Chantal"), obtained SUP No. 21 on January 9, 1990 to operate as a Winery-Chateau. **RE 463-16**. In December, 2004, Chateau Chantal obtained SUP No. 95, which replaced SUP No. 21, and added "Guest Activity Uses" as a permitted use following Amendment 141 of the PTZO. **RE 463-17**. SUP No. 95 remains the operative SUP for Chateau Chantal.

On January 12, 2010, SUP No. 95 was supplemented by SUP No. 114, which permitted expansion of the cellar, a revised driveway and an addition to the tasting room and outdoor patio. **RE 463-18**. In November, 2014, SUP No. 114 was amended to permit installation of solar power equipment, additional vineyard plantings, an outdoor wine consumption area, and relocation of a future warehouse site. **RE 463-19**. Since 2014, no permits have altered the uses allowed under SUP No. 95. **RE 463-1, PageID #16539**.

In 1998, Chateau Chantal litigated the meaning of "registered guest" in SUP No. 21 and agreed to a Consent Judgment. **RE 463-20**. Under the Consent Judgement, Chateau Chantal stipulated to the phrase "registered guests" as used in the Winery-Chateau provisions of the PTZO and in Special Use Permit No. 21. ***Id.***

Since then, Chateau Chantal has not sought any variances or interpretations from the ZBA. **RE 463-1, PageID #16539; RE 463-21, PageID #16724-16725**.

Plaintiff, Chateau Grand Traverse, LTD, ("CGT") transitioned to a Winery-Chateau under SUP No. 24 on July 10, 1990. Since 1990, Chateau Grand Traverse has sought and obtained multiple new and amended SUPs:

- On June 25, 1998, the Township approved SUP No. 59 which replaced SUP No. 24. **RE 463-22**. Chateau Grand Traverse was approved to convert an existing single-family structure into the Chateau Building. ***Id.*** Plans for the Chateau included the owner/manager residence and 6 rental rooms with up to three guests per room; SUP No. 59 did not permit occupancy of the Chateau. ***Id.*** Brandy making within the structure was also approved. ***Id.***

- On July 13, 1999, SUP No. 66 was approved replacing SUP No. 59. **RE 463-23**. SUP No. 66 approved three additional rental rooms with a maximum of five guests per room. ***Id.*** The findings approved by the Township Board on June 25, 1998 related to SUP No. 59 were incorporated by reference. ***Id.*** SUP No. 66 is Chateau Grand Traverse's operative SUP.
- On September 14, 2004, SUP No. 94 was approved amending SUP No. 66 and allowing two building additions. **RE 463-24**. There was no change in use and the new SUP number was created only to track the change. ***Id.***

Since Chateau Grand Traverse obtained SUP No. 66 in 1999, it has not sought any further amendments to its SUP, requested a variance, or submitted a request for interpretation to the Zoning Board of Appeals. **RE 463-1, PageID #16540**. Chateau Grand Traverse has never appealed the issuance or terms contained in SUP No. 66 to the Circuit Court.

Plaintiff, Montague Development, LLC ("Hawthorne"), originally operated as a Farm Processing Facility under a permit issued on October 30, 2013. **RE 463-**

25. Hawthorne transitioned to a Winery-Chateau in 2020, receiving SUP No. 135 on June 15, 2020. **RE 463-26**.

Hawthorne has not sought an amendment to its SUP, requested a variance, or submitted a request for interpretation to the ZBA. **RE 463-1, PageID #16541**. Hawthorne has not appealed SUP No. 135 since its approval in 2020. ***Id.***

Plaintiff, Villa Mari, LLC ("Villa Mari"), obtained SUP No. 126 on March 15, 2016 to operate as a Winery-Chateau. **RE 63-10, PageID ##2994-3020**. No subsequent permits have altered the permitted uses. **RE 463-1, PageID #16542**. Since obtaining its SUP, Villa Mari has not sought variances, ZBA interpretations, or appealed its SUP. ***Id.***

Finally, Plaintiff Grape Harbor, Inc. ("Peninsula Cellars"), operates a Remote Winery Tasting Room pursuant to SUP No. 62 issued on November 10, 1998. **RE 463-27**. There have been no amendments sought or made to SUP No. 62 since it was issued. **Dep., RE 463-28, PageID #16778; RE 463-1, PageID #16543-16544**. Peninsula Cellars has never appealed, sought a variance, or requested a ZBA interpretation. ***Id.* at 16544**.

Peninsula Cellars placed two igloos on its property without first obtaining a Land Use Permit. **RE 463-28, PageID #16779-16780**. After the Township Board approved igloos as a temporary structure on October 13, 2020 (during the height of the COVID-19 pandemic), Peninsula Cellars applied for and received a Land Use

Permit for the igloos. **Meeting Minutes, RE 463-29; 2/9/21 Letter, RE 463-30; Land Use Permit, RE 463-31**.

B. Identification of Challenged Sections of PTZO Relevant to the Appeal.

Farm Processing Facility	
Section 6.7.2(19)(a)	Intent to preserve local agriculture by permitting Farm Processing Facilities limited to Peninsula-grown products and prohibiting non-agricultural uses
Section 6.7.2(19)(b)(1)(ii)	OMP grape-sourcing requirement (85% local fruit)
Section 6.7.2(19)(b)(1)(iii)	OMP fruit-sourcing requirement (85% local fruit)
Section 6.7.2(19)(b)(1)(v)	Logo merchandise related to agriculture
Section 6.7.2(19)(b)(2)(i)	At least 85% of agricultural products sold must be grown on Old Mission Peninsula
Section 6.7.2(19)(b)(2)(v)	Fruit predominantly Peninsula-grown (85%) and farm-grown (50%), with off-site processing limited to the amount returned for sale.
Winery-Chateau	
8.7.3(10)(u)	The Township Board may approve guest activities as an additional support use
8.7.3(10)(u)(1)(b)	Guest Activity Uses are intended to promote OMP agriculture through locally identified food or beverages, agricultural promotional materials, and winery or agricultural tours.
8.7.3(10)(u)(2)(b)	Meetings of local 501(c)(3) nonprofit groups are permitted, provided they do not resemble a bar or restaurant and only light lunch or buffet served.
8.7.3(10)(u)(2)(c)	Meetings of Agricultural Related Groups that have a direct relationship to agricultural production
8.7.3(10)(u)(2)(e)	May provide limited food service tied to wine tasting, and any wine served must be Old Mission Peninsula

	appellation wine produced on-site and accompanied by food.
8.7.3(10)(u)(3)	GAUs require Township-grown or purchased grapes at a ratio of 1.25 tons per approved participant
8.7.3(10)(u)(5)(a)	GAUs shall include agricultural production by identifying Peninsula-produced food or beverages, providing agricultural promotional materials, and including winery or agricultural tours
8.7.3(10)(u)(5)(c)	Only alcoholic beverages produced on-site may be served at Guest Activity Uses.
8.7.3(10)(u)(5)(d)	Wine sales by the glass or for on-premises consumption are prohibited.
8.7.3(10)(u)(5)(g)	Amplified instrumental music is prohibited, while amplified voice and recorded background music are permitted at conversational volume levels
8.7.3(10)(u)(5)(h)	No outdoor displays of merchandise, equipment, or signs
8.7.3(10)(u)(5)(i)	Kitchen facilities may be used only for on-site food service related to Guest Activity Uses and not for off-site catering.
Remote Winery Tasting Room	
8.7.3(12)(i)	Retail sales are limited to logo promotional items that promote winery or OMP agriculture.
8.7.3(12)(k)	Signs and advertising may not promote or identify any food or non-food items sold in the tasting room.

C. Procedural History.[4]

Plaintiffs filed this lawsuit on October 21, 2020, challenging multiple provisions of the Peninsula Township Zoning Ordinance ("PTZO") regulating permitted zoning uses for wineries and related tasting rooms in the A-1 District: Farm Processing Facilities, Winery-Chateaus, and Remote Winery Tasting Rooms.

[4] The procedural history of this case is lengthy and tortured. The Township has endeavored to assemble the most pertinent history for purposes of this appeal.

Complaint, RE 1. Plaintiffs pled wide-ranging theories alleging the PTZO was preempted by Michigan law, violated the First Amendment, the Dormant Commerce Clause, was unconstitutionally vague, and constituted a regulatory taking of the liquor licenses.

1. Pre-PTP intervention phase.

The Township moved to dismiss several of the claims under Rule 12(b)(1) and 12(b)(6). In response, Plaintiffs amended their complaint. **First Amended Complaint, RE 29**. The Amended Complaint (which remains the operative complaint) asserted ten counts:

- Facial and as-applied claims under the First and Fourteenth Amendments, asserting violations of free speech, freedom of expression, and free exercise of religion (Counts I-III)
- Due process vagueness (Count IV)
- Dormant Commerce Clause violations (Counts V-VI)
- Regulatory takings (Count VII)
- State-law conflict preemption (Count VIII)
- Violation of the Michigan Zoning Enabling Act (Count IX)
- Injunctive Relief (Count X)

The Township answered, **RE 35**, and discovery began in preparation for dispositive motion practice.

On February 16, 2021, and during initial phases of discovery, Protect the Peninsula ("PTP") moved to intervene. **RE 40**. The District Court denied PTP's request on November 18, 2021 and PTP appealed. **RE 108; RE 121**.

Plaintiffs and the Township proceeded through discovery and filed several cross-motions for summary judgment on the preemption claim and the remaining constitutional claims. **Plaintiffs' Preemption Motion, RE 53; Township Response & Cross Motion on Preemption, RE 62; Plaintiffs' Motion on Constitutional Claims, RE 135; Township's Motion on Constitutional Claims, RE 142**.

On June 3, 2022, the District Court issued an omnibus Opinion resolving the cross-motions for summary judgment. It held that provisions of the PTZO were invalid and unenforceable under both state preemption and federal constitutional law; it also enjoined the Township from enforcing certain sections of the PTZO. **RE 162**. On June 17, 2022, the Township filed its Notice of Appeal of the Opinion and Order. **RE 164**. The District Court eventually separately enjoined the Township from enforcing any subsection of the PTZO that the Court found to be unconstitutional or contrary to law. **RE 206**. The Township also sought to stay the injunction pending appeal, which the District Court denied. **RE 169, 207**.

2. PTP is permitted to intervene.

On July 27, 2022, this Court reversed the District Court's denial of PTP's motion to intervene. **RE 215**. As a result, the District Court adjourned the 2022 trial. **RE 236**. This Court further vacated the District Court's injunction against the Township. **RE 251, 252**.

The Township moved under Rule 54(b) to vacate the June 3, 2022 summary judgment order, arguing this Court's decision permitting PTP to intervene made reconsideration mandatory, not discretionary. **RE 288**. PTP filed a similar Rule 54(b) motion, seeking nearly identical relief. **RE 285**. The Township further requested renewed summary judgment proceedings with full participation by all parties after appropriate discovery, permission to pursue summary judgment on state-law claims and damages. **RE 288**. The Township also moved to amend the Case Management Order or alternatively for leave to disclose a rebuttal damages expert and to continue the deposition of Plaintiffs' expert. **RE 292**.

In December, 2022, the District Court resolved the outstanding Rule 54(b) motions and the Township's motion to amend the Case Management Order. **RE 301, 303**. These opinions set the stage for the next phase of the case. The District Court, as a result of PTP's intervention "pick[ed] apart" its June 3, 2022 Opinion on summary judgment, but allowed PTP to only litigate a subset of issues – not everything was on the table. **RE 301**. The District Court picked apart its previous ruling as follows:

- Set aside in their entirety (***Id.* at PageID ##10697-10698**):
    - Preemption
    - Prior restraints
    - Weddings and hours of operation
    - The Michigan Zoning Enabling Act
    - Injunctive relief
    - Commercial speech

  - Compelled speech

- Not set aside because "no party received summary judgment" (***Id.* at PageID #10698**):

  - Content based restrictions
  - Laches
  - Freedom of association/freedom of religion
  - Regulatory takings

- Not set aside because it "does not affect PTP members' property interests" (***Id.***):

  - Dormant Commerce Clause
  - Vagueness

The District Court let PTP litigate (including conducting discovery, filing motions, and "generally participat[ing]" in) the following: "preemption, prior restraints, weddings, hours of operation, freedom of religion, regulatory taking, injunctive relief, MZEA, and laches." **RE 301, PageID ##10702-10703**. After additional motion practice, PTP was allowed to litigate commercial speech, content-based restrictions, and compelled speech. **RE 319**.

The Township was, however, relegated to a passenger role. The District Court denied the Township's motion for relief from the June 3, 2022, summary judgment Order and denied its motion to amend the Case Management Order to disclose a damages expert. **RE 303**. The District Court ruled the Township was allowed to only file a renewed summary judgment motion limited to preemption; it was barred from filing dispositive motions on any other issues. **RE 301**. At most, the Township was

permitted to respond to PTP and Plaintiffs' dipositive motions. ***Id.*** The Township was not allowed to actively participate in renewed discovery; it could only respond. ***Id.*** Additionally, the District Court errantly relied on "good cause" under Rule 16(b) to reopen expert deadlines, and refused to allow the Township to present a rebuttal expert. **RE 303**.

3. Post-PTP litigation and dispositive motion practice.

The parties engaged in phased dispositive motion practice once the case was partially reset following PTP's intervention.

On April 18, 2023, Plaintiffs moved for partial summary judgment on preemption. **RE 333**. PTP filed a cross-motion for summary judgment on the preemption claims on May 16, 2023. **RE 355**. On September 11, 2023, the Township filed its own motion for summary judgment regarding Plaintiffs' preemption claims. **RE 443**.

On February 29, 2024, the District Court resolved the motions. **RE 525**. It concluded two sections of the PTZO were preempted by Michigan law: § 8.7.3(10)(u)(5)(g) and § 8.7.3(10)(u)(5)(i). All other preemption challenges were rejected or not considered. The District Court also concluded the Township was immune from monetary damages for preemption violations under the Michigan Government Tort Liability Act.

On September 8, 2023, Plaintiffs filed motions for partial summary judgment requesting the District Court dismiss essentially all of the Township and PTP's affirmative defenses. **Plaintiffs' MSJ on Township Affirmative Defenses, RE 439; Plaintiffs' MSJ on PTP Affirmative Defenses RE 441**.

On March 12, 2024, the District Court resolved the motion. **RE 528**. Among other defenses, the District Court entered "summary judgment" on the Township's statute-of-limitations (holding the zoning scheme constituted a continuing violation that limited only damages) and laches defense (as to injunctive relief).

The Township moved to dismiss Plaintiffs' as-applied and regulatory takings claims pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3) for lack of subject matter jurisdiction because Plaintiffs failed to achieve finality and that the claims were moot because the challenged ordinance had been repealed and replaced by Amendment 201. **RE 458; RE 462**.

The District Court denied the Townships' motions on February 16, 2024. **RE 518**. The District Court concluded further administrative steps would be futile and likely lead to the same dispute returning to court. Accordingly, despite recognizing the lack of strict finality, the Court held the claims were ripe and allowed them to proceed. The Court also held the claims were not moot. As a result, the Court allowed Plaintiffs' takings and as-applied constitutional claims to proceed.

On October 6, 2023, Plaintiffs filed a motion for partial summary judgment requesting that the District Court declare various sections of the PTZO unconstitutional under the First, Fifth and Fourteenth Amendment and enjoin enforcement of the ordinances. **RE 468**. PTP also filed a motion for summary judgment on the constitutional claims. **RE 516**.

The District Court resolved the outstanding motions on April 5, 2024. **RE 559.** The Court granted summary judgment to Defendants on Plaintiffs' freedom of association claim and on all regulatory takings claims, holding that Michigan liquor licenses and related operating privileges are not property interests protected by the Takings Clause. On the First Amendment speech claims, the Court rejected Plaintiffs' theory that "agritourism" and hosting events constituted protected speech and granted Defendants summary judgment on content-based challenges and several prior-restraint theories.

However, the Court granted Plaintiffs' summary judgment on their compelled-speech claims, holding that §§ 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) unconstitutionally required wineries to promote Peninsula agriculture as a condition of hosting guest activities. The Court also granted Plaintiffs' summary judgment on their prior restraint claims as to §§ 8.7.3(10)(u)(2)(b) and 8.7.3(10)(u)(2)(c), finding the ordinance vested unbridled discretion in the Zoning Administrator. Finally, the

Court ruled on Plaintiffs' request for injunctive relief, concluding that the sections of the ordinance that he found unconstitutional will be enjoined.

4. Trial and post-trial proceedings.

This case proceeded to a bench trial on limited issues from April 29, 2024 to May 13, 2024. **RE 589-599**.[5] Before trial, the parties submitted briefs and proposed findings of fact and conclusions of law. **RE 580, 581, 583**. The issues live for trial were: (1) a partial *Central Hudson* analysis of tailoring; (2) damages; and (3) injunctive relief. The parties submitted post-trial briefing and conducted closing arguments on October 29, 2024. **RE 617, 618, 619**.

On July 7, 2025, the District Court issued its bench Opinion concluding several sections of the PTZO infringed upon Plaintiffs' commercial speech rights, awarded $49.2 million in damages solely based on Plaintiffs' vagueness theory, but correctly denied Plaintiffs' requested injunctive relief. **RE 623**. The judgement issued the same day. **RE 624**.

This appeal follows.

SUMMARY OF THE ARGUMENT

This appeal follows from a series of District Court decisions on summary judgment and following a bench trial that found constitutional violations under

[5] Trial transcripts are designated in the records as **RE 601-608**. Additionally, the parties submitted deposition and discovery designations by stipulation. ***See*** **RE 611, 612, 615**.

multiple theories, invalidated several sections of the PTZO, and awarded $49.2 million in compensatory damages to Plaintiffs – eleven wineries that are zoned agricultural, yet seek unfettered, incompatible commercial uses – in this zoning dispute. The District Court's decisions over several years are infirm on jurisdictional prerequisites, the merits of the claims, and in awarding compensatory damages that are not even causally related to the challenged sections of the PTZO and not tethered to individual zoning approvals for each Plaintiff.

From the outset, the District Court lacked subject matter jurisdiction over Plaintiffs' regulatory takings and as-applied constitutional claims because Plaintiffs failed to achieve finality. They never obtained a final decision regarding the application of the challenged provisions to their land. Rather than pursuing potential administrative remedies (e.g., seeking amended permits, variances, or interpretations of the zoning ordinance), Plaintiffs immediately filed suit. Although the District Court acknowledged Plaintiffs' failure to achieve finality, it nevertheless excused that jurisdictional failure based on alleged "pervasive enforcement" and informal negotiations between the parties. This is contrary to controlling Supreme Court and Sixth Circuit precedent and deprived the District Court of subject matter jurisdiction under Article III.

The District Court also erred in concluding the term "Guest Activity Use" was unconstitutionally vague. The challenged provisions in Section 8.7.3(10)(u)(2)

(and applied only to a small subset of Winery-Chateaus) are narrow economic land-use regulations that do not implicate a significant amount of constitutionally protected conduct. Rather, the GAU provision provides clear notice of the permitted and prohibited activities and contains objective enforcement standards. But rather than analyzing the text of the PTZO, the District Court seized upon alleged confusion by former Township officials in their (mis)understanding of a straightforward provision and invalidated the ordinance.

The District Court's vagueness decision – which it refused to set aside after PTP's intervention – had cascading effects. Indeed, after trial, the District Court concluded that all of Plaintiffs' $49.2 million in damages stemmed from the "vagueness" of the term "Guest Activity Use".[6] But far before trial, the District Court compounded its errors and abused its discretion in striking the Township's rebuttal damage expert report and refusing to permit any expert testimony countering Plaintiffs' damages proofs. On two separate occasions, the District Court failed to consider or apply the appropriate legal standard governing Rule 37 sanctions required by this Court. The exclusion of the Township's rebuttal expert left, as the

[6] The District Court awarded $49.2 million in damages for enterprises that are already undoubtedly successful in the A-1 District. For example, the owner of Chateau Grand Traverse testified to sales revenue of greater than $7.5 million annually for 2016 to 2020. **Testimony of E. O'Keefe, RE 607, PageID #24825.**

District Court concluded, the record lopsided on damages and directly contributed to the extraordinary damages award.

The damages decision itself is entirely unsupported by the record and is legally faulty for several reasons. As an initial issue, the District Court failed to consider causation under § 1983. Plaintiffs' alleged damages were not caused by the permissive uses that allowed them to operate commercial uses in the A-1 zone; had the challenged provisions ceased to exist, Plaintiffs would still not be able to host for-profit events because of their agricultural zoning. Had the District Court passed through this initial gate, it still errantly awarded nearly $50 million in damages for speculative lost gross profits for event hosting businesses that some Plaintiffs had never before operated. Contrary to accepted forensic accounting standards, Plaintiffs' expert relied on an attorney-generated "damages matrix" and generalized gross profit multipliers to arrive at his conclusions. The District Court accepted this gross profit analysis which grossly inflated the damages award.

The District Court also improperly granted summary judgment in favor of Plaintiffs on the Township's statute of limitations defense, precluding the Township from putting on proofs that Plaintiffs waited years – and in some cases decades – before filing suit. Plaintiffs' claims are derived from discrete land-use decisions, not continuing violations, and are therefore time barred. In the same vein, the District Court refused to consider the Township's laches defense, claiming it was "waived"

when the Township established before trial a rebuttable presumption of laches. Plaintiffs failed to rebut this presumption.

Additionally, the District Court's decisions on Plaintiffs' First Amendment theories – coming on summary judgment and after the bench trial – were erroneous. The challenged provisions are not prior restraints, do not compel speech, and do not unlawfully regulate commercial speech. The District Court, in reaching the opposite conclusion, misapplied the legal standards, disregarded the Township's extensive legislative history, and demanded a level of empirical proof not required by the Supreme Court in the *Central Hudson* context.

Finally, the District Court erred in concluding that certain PTZO provisions violated the dormant Commerce Clause and are preempted by the Michigan Liquor Control Code ("MLCC"). The challenged provisions do not discriminate against interstate commerce and do not mandate local sourcing of grapes. Additionally, the MLCC expressly requires compliance with local zoning and, even if it did not, the MLCC does not conflict preempt the PTZO because, at most, the PTZO places additional restrictions on what the MLCC permits.

Over a period of several years, the District Court arrived at a host of errant decisions, all of which culminated in an unsupported $49.2 million damages award. This Court should reverse the District Court's liability conclusions against the

Township, vacate the unsubstantiated damages award, and direct judgment in favor of the Township.

LAW AND ARGUMENT

I. PLAINTIFFS FAILED TO ACHIEVE FINALITY ON THEIR REGULATORY TAKINGS AND AS-APPLIED CONSTITUTIONAL CLAIMS BEFORE FILING SUIT, DEPRIVING THE COURT OF SUBJECT MATTER JURISDICTION OVER KEY CLAIMS.

Plaintiffs failed to achieve finality on their regulatory takings and as-applied claims prior to filing this lawsuit. The Township filed motions to dismiss these claims based on lack of subject matter jurisdiction. **RE 458, 462**. The District Court denied the Township's motions. **RE 518**. A district court's decision on a motion to dismiss for lack of subject matter jurisdiction is reviewed *de novo*. *Lindke v. Tomlinson*, 31 F.4th 487, 490 (6th Cir. 2022).

In resolving the motions to dismiss, the District Court correctly ruled that the Plaintiffs "did not show that each entity appealed or sought the proper amendments or variances before suing, which could render their regulatory takings and as applied constitutional claims unripe." **RE 518, PageID #20733**. The District Court was right to reach such a conclusion because none of the Plaintiffs testified to pursuing final land use decisions and receiving a denial. Indeed, the history of the Township's winery provisions and Plaintiffs' zoning requests reflect repeated approvals via amendments to the zoning ordinance to accommodate new and expanded uses, amendments to SUPs, and related variances.

The District Court, despite concluding that Plaintiffs failed to achieve finality, relied on prudential standing and concluded that this failure by Plaintiffs did not deprive the Court of subject matter jurisdiction because "pervasive enforcement of the PTZO" and "an attempt by the Wineries to remedy those issues prior to filing suit" precluded dismissal. **RE 518, PageID #20733**. The District Court's conclusion was in error.

The requirement of finality emanates from the ripeness requirements of Article III of the United States Constitution. Article III limits the jurisdiction of federal courts to actual cases and controversies and precludes federal courts from providing advisory opinions. *Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir. 2002) (citing *Adcock v. Firestone Tire and Rubber Co.*, 822 F.2d 623, 627 (6th Cir. 1987)). The doctrine of ripeness "focuses on the timing of the action." *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 330 F.3d 747, 751 (6th Cir. 2003). Ripeness encompasses "Article III limitations on judicial power" as well as "prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (internal citation and quotation marks omitted). Through enforcement of ripeness requirements, courts discourage "premature adjudication" of legal questions and avoid judicial entanglement in abstract controversies. *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (en banc). Ripeness "is more than a mere procedural question; it is determinative of

jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *River City Capital, LP. v. Bd. of Cty. Comm'rs*, 491 F.3d 301, 309 (6th Cir. 2007) (internal citation and quotation marks omitted).

The Supreme Court in *Williamson County Reg. Planning Com. v. Hamilton Bank of Johnson County,* 473 U.S. 172, 187 (1985) made clear a taking claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the applicability of the regulations to the property at issue." The Sixth Circuit in *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533 (6th Cir. 2010), explained how the ripeness doctrine has evolved into a "finality" requirement in the land-use context for takings and federal constitutional claims. The "insistence on finality" is a foundational prerequisite for any as-applied federal land-use claim:

> To decide whether a dispute has ripened into an action amenable to and appropriate for judicial resolution, we ask two questions: (1) is the dispute "fit" for a court decision in the sense that it arises in "a concrete factual context" and involves "a dispute that is likely to come to pass"? and (2) what are the risks to the claimant if the federal courts stay their hand? *Warshak*, 532 F.3d at 525; *see Abbott Labs.*, 387 U.S. at 149, 87 S.Ct. 1507. In the land-use context, the demands of "a concrete factual context" and "a dispute that is likely to come to pass" converge in an insistence on "finality," an insistence that the relevant administrative agency resolve the appropriate application of the zoning ordinance to the property in dispute.

Miles Christi, 629 F.3d at 537.

Sixth Circuit decisions preceding *Miles Christi* have been consistent that local regulatory decisions are generally not ripe for constitutional attack until all state-law processes have been exhausted. *Braun v. Ann Arbor Charter Township,* 519 F.3d 564 (6th Cir. 2008); *Bigelow v. Michigan Department of Natural Resources,* 970 F.2d 154 (6th Cir. 1992). The Michigan Supreme Court has echoed this jurisdictional requirement for land-use cases in *Paragon Properties Co. v. City of Novi*, 452 Mich. 568, 576-577; 550 N.W.2d 772 (1996), holding that as-applied challenges to the constitutionality of a zoning ordinance are not ripe until the plaintiff has obtained a final decision regarding the permitted use of the land. The Michigan Supreme Court quoted favorable to *Williamson County*, "'[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury' . . . ." *Id.* at 577 (quoting *Williamson*, 473 U.S. at 186).

A. Plaintiffs Had Many Avenues To Achieve Finality But Failed To Exercise Any Of Them Before Filing Suit.

The final decision necessary for finality, and thus jurisdiction of the district court, depends on whether the proposed use is by right or requires an SUP. If a Plaintiff seeks a new SUP or an amendment to its pre-existing SUP under the PTZO, that process is administered by the Planning Commission, which recommends to the Township Board, the final decision-maker, whether to grant or deny an SUP. Should an applicant be aggrieved by the decision of the Township Board, the applicant has

a right to appeal that decision to the Circuit Court. *See* Mich. Ct. R. 7.122; MCL 125.3605. *See also Carleton Sportsman's Club v. Exeter Twp.*, 217 Mich. App. 195; 550 N.W.2d 867 (1996). However, if a Plaintiff is not seeking an SUP, but rather a variance, interpretation of the PTZO, or appeal of a Zoning Administrator determination (which includes any enforcement determination), that process is handled by the ZBA. Both processes afford Plaintiffs the opportunity for a record to be developed that elucidates the final decision of the Township.

For a Farm Processing Facility, which is a use by right, the owner would challenge the issuance of a permit or a determination by the Zoning Administrator through an appeal to the ZBA. Because permits for a Farm Processing Facility are issued solely by the Zoning Administrator, under §5.7.1 of the PTZO, the ZBA has the power to review the Zoning Administrator's decision.

To the extent a Farm Processing Facility seeks an interpretation of the PTZO under §5.7.2, the ZBA has the power to interpret, upon request, "the provisions of this Ordinance in such a way as to carry out the intent and purpose of this Ordinance . . . ." (*Id.*). Finally, if a Farm Processing Facility seeks a variance, the ZBA has the power to authorize specific variance requests.

B. Plaintiffs Filed Suit Before Obtaining A Final Decision From The Township Regarding The Application Of The Regulations To Their Properties, Depriving The Court Of Subject Matter Jurisdiction Over Plaintiffs' Regulatory Takings And As-Applied Claims.

The District Court correctly concluded that Plaintiffs did not achieve finality before filing suit. This failure deprives the Court of subject matter jurisdiction over Plaintiffs' regulatory takings and as-applied constitutional claims. The District Court was in error to find it was a discretionary decision to still exercise jurisdiction over such claims. Plaintiffs' Fifth Amendment regulatory taking claim and as-applied constitutional claims are not ripe for judicial review until they prove they have received "a final decision regarding the application of the regulations to the property at issue." *Grace Cmty Church v. Lenox Twp.,* 544 F.3d 609, 615 (6th Cir. 2008) (quoting *Insomnia Inc. v. City of Memphis, Tenn.,* 278 Fed. Appx. 609, 612 (6th Cir. 2008)).

Historically, Plaintiffs were required to satisfy two prerequisites before pursuing a federal takings claim: (1) the government entity charged with implementing the regulations had reached a final decision regarding the applications of the regulations to the property at issue; and (2) the property owner has exhausted the proper state procedures (i.e., the property owner filed and pursued a case in state court). *See, e.g.*, *Crosby v. Pickaway Cnty. Gen. Health Dist.*, 303 Fed. Appx. 251, 259 (6th Cir. 2008) (internal citation omitted)). But relatively recently the Supreme Court eliminated the second requirement. *See Knick v. Twp. of Scott, Pa.*, 588 U.S. 180 (2019).

Nevertheless, *Knick* expressly preserved the finality requirement. *Id.* at 188 ("Knick does not question the validity of this finality requirement, which is not at issue here."). Accordingly, Plaintiffs were still obligated to obtain a final decision before their claims became ripe.

A "final decision" exists when: "(1) a decision has been made "about how a plaintiff's own land may be used" and (2) the local land-use board has exercised its judgment regarding a particular use of a specific parcel of land, eliminating the possibility that it may "soften[ ] the strictures of the general regulations [it] administer[s]." *Adam Bros. Farming, Inc. v. Cnty. Of Santa Barbara*, 604 F.3d 1142, 1147 (9th Cir. 2010) (quoting *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738-739 (1997)). Thus, a decision relating to Plaintiffs' land use is not "final" until the local "land-use board" – here, the Township Board or ZBA – has been presented with the issue and rendered a decision. *Miles Christi*, 629 F.3d at 537.

In its most distilled form, Plaintiffs operating pursuant to an SUP were required to seek amended SUPs and obtain final Township Board decisions. Those seeking variances or interpretations were required to obtain final ZBA decisions. Entities operating as Farm Processing Facilities likewise failed to pursue available ZBA appeals, variances, or interpretations.

As the District Court acknowledged, none of the Plaintiffs obtained a final decision regarding the application of the challenged PTZO provisions. **RE 518,**

PageID #20733. Plaintiffs' avoidance of the Township Board and ZBA confirms that their claims were not ripe for judicial review. The District Court nevertheless relied on alleged "pervasive enforcement" and pre-suit negotiations. **RE 518, PageID ##20733-36**. That reasoning misapprehends finality, which requires a definitive position on how the regulations apply to the specific property. *Pakdel v. City & Cty. of San Francisco*, 594 U.S. 474, 478 (2021).

The District Court's examples of "enforcement" – correspondence to Bowers Harbor regarding compliance with its *previous* SUP (**RE 518, PageID #20734 (citing RE 487-11, PageID #18795))** and a 2021 letter to Peninsula Cellars referencing amplified music restrictions (**RE 518, PageID #20735 (citing RE 487-28, PageID #18851)**) do not reflect final determinations. At most, they invited Plaintiffs to pursue formal administrative relief. Nor do stalled negotiations substitute for finality. **RE 518, PageID #20736**. The zoning history demonstrates that formal processes routinely expanded permitted uses. Plaintiffs' failure to invoke those processes confirms the absence of finality, it does not demonstrate the appropriate exercise of prudential standing as the District Court concluded.

The Court's decisions in *Miles Christi* and *Insomnia* illustrate why finality matters: administrative review could clarify the ordinance, grant relief, or narrow disputes. Each of these could potentially eliminate the need for federal review. In *Miles Christi*, the Court reasoned:

> An appeal to the zoning board not only will ground this dispute in a concrete legal setting—by permitting the zoning board to clarify the township's application of its land-use laws to this property—but it also may help Miles Christi. The zoning board may grant a variance to the religious order, or it may provide a different intensive-use determination. Both forms of relief will considerably narrow the grounds of dispute between the parties if not end the dispute altogether.

Miles Christi, 629 F.3d at 538. Moreover, as the Court reasoned in *Insomnia*, had the plaintiffs followed the available administrative options, "there is a chance that their proposal [would] be approved" and they would have obtained the result their sought. *Id.* As the Sixth Circuit noted, "[s]uch an outcome would discharge any claim of First Amendment retaliation and obviate the need for federal review. If, however, Plaintiffs' renewed plan . . . is rejected, this outcome [would] further define the contours of Plaintiffs' claim of First Amendment retaliation." *Id.* at 615-616.

Because Plaintiffs bypassed available administrative avenues, the District Court erred in denying the Township's jurisdictional challenge. This Court should reverse and dismiss Plaintiffs' as-applied challenges and regulatory takings claim for lack of subject matter jurisdiction.

II. THE TRIAL COURT ERRED IN CONCLUDING THE TERM "GUEST ACTIVITY USE" WAS UNCONSTITUTIONALLY VAGUE.

Plaintiffs and the Township both moved for summary judgment on the vagueness claim. **RE 135; 142**. The District Court granted Plaintiffs' motion and denied the Township's. **RE 162, PageID #6016-6019**. The District Court refused to

reopen the vagueness issue following PTP's intervention. **RE 301, PageID #10694-10698**. Unfortunately, that let stand the District Court's refusal to consider the text of the GAU provisions within the PTZO, the specific prohibited conduct set forth within the challenged provisions, and the fact that little, if any, protected speech comes within the purview of the GAU provisions. The District Court's decision on summary judgment is reviewed *de novo*. *Avient Corp. v. Westlake Vinyls, Inc.*, 145 F.4th 662, 665 (6th Cir. 2025).

Plaintiffs' due process void for vagueness claim focuses on the definition of the support use, "Guest Activity Use", provided by Amendment 141 to the PTZO in 2004. The GAU provisions, contained in Section 8.7.3(10)(u), were added to address uses for non-overnight guests of the Winery-Chateaus. GAUs are authorized for Winery-Chateaus through SUP approval. **RE 136-3, PageID ##4791-4796.** Plaintiffs allege the term GAU is "unconstitutionally vague because the person of average intelligence cannot tell from the face of the Winery Ordinances what constitutes a 'Guest Activity' prohibited under the Winery Ordinances and cannot govern his or her behavior to comply" with the PTZO. **RE 29, PageID #1121.** Plaintiffs further claim this purported vagueness chills speech and expressive association. ***Id.***

"The Due Process Clauses of the Fifth and Fourteenth Amendments provide the constitutional foundation for the void-for-vagueness doctrine." *Belle Maer*

Harbor v. Charter Twp. of Harrison, 170 F.3d 553, 556 (6th Cir. 1999). To prevail, Plaintiffs must show that the term "Guest Activity Use" either (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480 (2000); *see also Brown v. City of Albion*, 136 F.4th 331, 344 (6th Cir. 2025). The Court in *Brown* recently reiterated the framework for evaluating a vagueness claim:

> When determining whether a law provides a reasonable opportunity to understand its prohibitions, courts begin with the plain text of the statute. *Id.* Courts should not require "mathematical certainty" regarding the precise extent of the statute. *Id.* (quoting *Grayned*, 408 U.S. at 110, 92 S.Ct. 2294). And when the common meaning of a term makes clear what conduct is prohibited, failure to further define the term will not render the statute void for vagueness. *Id.* at 247

As *Brown* explains, courts begin with the ordinance's plain text and do not demand "mathematical certainty." *Brown*, 136 F.4th at 344 (quoting *Grayned*, 408 U.S. at 110). Merely because an ordinance may contain some ambiguities does not render it impermissibly vague. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 502 (1982). Courts are mindful that, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110; *see also Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Supreme Ct.*, 894 F.3d 235, 246 (6th Cir. 2018). The fact that a law is "marked

by 'flexibility and reasonable breadth, rather than meticulous specificity'" does not render it unduly vague. *Grayned*, 408 U.S. at 110 (internal citation omitted).

A. The GAU Provisions Do Not Implicate A Substantial Amount Of Constitutionally Protected Conduct.

"[T]he degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007) (cleaned up) (quoting *Flipside*, 455 U.S. at 498). Civil laws not implicating the First Amendment are reviewed less stringently than criminal laws "because the consequences of imprecision are qualitatively less severe." *Flipside*, 455 U.S. at 499. A law that imposes criminal sanctions or covers "a substantial amount of constitutionally protected conduct" requires a high level of definiteness to withstand a facial due process challenge, *id.* (quoting *Flipside*, 455 U.S. at 494), but, if the law does not fit that description, then a facial challenge will succeed "only if the enactment is impermissibly vague in all of its applications," *Flipside*, 455 U.S. at 495. *Flipside* also reasoned that economic regulations are "subject to a less strict vagueness test". *Id.* These standards need not be employed mechanically.

The GAU provisions are economic land-use regulations governing a narrow sub-set of land uses: Winery-Chateaus. They are content neutral by design – focused on expanding permissive activities for non-registered guests of a Winery-Chateau by balancing such additional support uses with additional farmland being in wine

fruit production on the Peninsula. They impose no criminal penalties and do not regulate speech. Accordingly, the lowest level of vagueness scrutiny applies. The GAU provisions were further lauded as not only adding additional farm land in wine fruit production, the ancillary judgment that such uses would: GAUs "help the promotion of Peninsula agriculture" by addressing the scope of land uses that may be provided those non-overnight guests (or registered guests) who visit the Winery-Chateau but may not be staying in one of the authorized overnight accommodations. GAUs thus include identifying Peninsula-produced products, providing agricultural promotional materials, or allowing agricultural tours. **RE 136-3, Page ID #4792**. GAUs are "limited to" the uses described in Section 8.7.3(10)(u)(2). The GAU provisions also expressly exclude "wine tasting and such related promotional activities as political rallies, winery tours and free entertainment (Example – 'Jazz at Sunset') . . ." and entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass." ***Id.*** **at PageID #4792-4793.**

Turning to those uses that may be approved as a GAU, Section 8.7.3(10)(u)(2) lists the only activities eligible as GAUs:

- Wine and food seminars and cooking classes with advance notice, Section 8.7.3(10)(u)(2)(a);
- Meetings of qualifying 501(C)(3) non-profit organizations, Section 8.7.3(10)(u)(2)(b)); and
- Meetings of agricultural related groups with a direct relationship to agricultural production, Section 8.7.3(10)(u)(2)(c)).

Section 8.7.3(10)(u)(2)(d) further imposes detailed operational limits on sound, music, lighting, merchandise, food services, and outdoor activities. ***Id.* at PageID ##4792-4794**.

Nothing in these provisions implicates a substantial amount of constitutionally protected conduct. *Belle Maer*, 170 F.3d at 557. The ordinance regulates unprotected conduct, not speech. "The protections of the First Amendment do not generally apply to conduct in and of itself." *Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005). The First Amendment protects conduct only when it is "inherently expressive." *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 66 (2006). Conduct is inherently expressive when the conduct in question comprehensively communicates its own message without additional speech. *Id.* In other words, would the conduct itself be "understood by those who viewed it" as conveying a message. *Texas v. Johnson*, 491 U.S. 397, 404; 109 S.Ct. 2533 (1989). Without such limitations, "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376; 88 S.Ct. 1673 (1968).

Section 8.7.3(10)(u)(2) does not regulate speech or expressive conduct. It does not restrict what a winery may say or the message it may communicate. It regulates conduct alone, which is not protected in and of itself. GAUs – seminars, meetings, and agricultural events – are not inherently expressive activities. The ordinance does

not regulate what the wineries may say, but what uses may be approved via SUP in "support" of the Winery-Chateau and the non-registered guests that visit it.

B. The GAU Provisions Provide Fair Notice And Do Not Authorize Or Encourage Arbitrary And Discriminatory Enforcement.

Because the definition of GAUs does not implicate a substantial amount of constitutionally protected activity, the ordinance is subject to the lowest level of vagueness scrutiny. To succeed, Plaintiffs must show that the term "Guest Activity Use" (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732. Plaintiffs failed to do so.

1. Fair Notice

Section 8.7.3(10)(u)(2) clearly delineates which uses qualify GAUs for SUP approval and which do not. A person of ordinary intelligence would understand that GAUs include the uses listed in subsections 8.7.3(10)(u)(2)(a)-(c) and exclude those listed. This is quintessential fair notice. This Court in *Brown*, made clear when the prohibited conduct that falls outside the scope of a term is clear, failure to further define term, which is the case here given the three specific uses defined with GAUs, it will not render the ordinance void for vagueness. *Brown*, 136 F.4th at 247. In fact, some of the Plaintiffs themselves had sufficient understanding to identify the scope of GAUs and make application for such uses through the SUP approval process.

As an economic regulation, the GAU provision is entitled to substantial latitude. *See Flipside*, 455 U.S. at 498. As the Supreme Court in *Boutilier v. INS*, 387 U.S. 118, 123 (1967), reasoned, to find an economic civil statute void for vagueness, it must be "so vague and indefinite as really to be no rule or standard at all." Section 8.7.3(10)(u)(2) regulates economic activity and the subject matter of the GAU provision is exceptionally narrow; its applicable only to Winery-Chateaus that applied for, and were granted, GAUs by the Township Board in an SUP. If any uncertainty existed, a Winery-Chateau could seek guidance or clarification through administrative channels. *Déjà vu of Cincinnati, L.L.C. v. Union Twp. Bd. Of Trustees*, 411 F.3d 777, 798 (6th Cir. 2005). Even if the GAUs permitted and not permitted by Section 8.7.3(10)(u)(2) "leave some wiggle room", *Platt*, 894 F.3d at 247, when read in the context of the entire GAU provision, Section 8.7.3(10)(u), it is sufficiently clear what the term "Guest Activity Use" means.

The Third Circuit's decision in *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612 (3d Cir. 2013), is instructive. In *CMR*, the plaintiff challenged a zoning ordinance, claiming that the undefined phrase "development appropriate in scale, density, character and use for the surrounding community," was unconstitutionally vague. The Third Circuit considered the Supreme Court's guidance from *Flipside* and *Boutilier*, and rejected the plaintiff's claims:

> Guided by these principles, it is clear from the entirety of the CRO and the CRO Regulations that they do not provide "no standard at

> all." First, the words on which Waterfront focuses, "surrounding community," have clear, ascertainable meanings. It is undisputed that the geographical reach of the CRO is clearly defined and unambiguous . . . Thus, a developer need only look at other structures in the immediate vicinity of a proposed project to determine whether it is similar to existing constructions in "scale, density, character or use," words which Waterfront does not and cannot contend are ambiguous . . . If a developer of reasonable intelligence faces a close call after analyzing the constructions in the district, it can apply for a permit to eliminate any remaining ambiguity. This is sufficient to comply with constitutional requirements.

CMR, 703 F.3d at 632 (internal citations omitted). Additionally, *CMR* noted that the CRO provided – as does the GAU section – a listing of the prohibited and permitted uses for lots covered by the CRO and identified factors to guide future evaluation of proposed plans. *Id*. at 632-633. Importantly, were the GAU provisions affirmed as vague, similar economic regulations that provide the discretionary approval standards for SUPs, planned unit developments, and variances would all have to fail under the District Court's analysis in this case. That is not what the Supreme Court and this Court's precedent demands, which is why reversal is paramount.

2. Arbitrary Enforcement

To prevent arbitrary enforcement, laws must provide "explicit standards for those who apply them." *Grayned*, 408 U.S. at 108-109. Sections 8.7.3(10)(u)(2)(a) and (b) leave no room for discretion. At most, under Section 8.7.3(10)(u)(2)(c) allows limited administrative judgment in determining whether a group is agricultural related, but that discretion is guided by explicit criteria. Even where

some discretion exists, "the danger of arbitrary enforcement is not great enough to warrant invalidation". *Brockert v. Skornicka*, 711 F.2d 1376, 1382 (6th Cir. 1983). This section does not "delegate[ ] basic policy matters to policeman, judges, and juries for resolution on an *ad hoc* and subjective basis," as the Supreme Court warned against in *Grayned*. 408 U.S. at 108-109. Instead, the ordinance vests authority in the Zoning Administrator, who is charged with regularly implementing and managing zoning matters for the Township. *See Brockert*, 711 F.2d at 1382.

At summary judgment, Plaintiffs did not argue that the GAU provisions authorized arbitrary enforcement. Instead, they argued the ordinance was vague because Township representatives allegedly misunderstood it. **RE 136, PageID #4748**. The District Court accepted this argument. There was no analysis of the actual text of the PTZO, let alone the specific GAU provision challenged, to determine whether the ordinance was vague. The District Court completely ignored whether there was simply a failure by specific individuals deposed to understand the GAU provisions. Three Township individuals – one of whom filled an elected position and was not responsible for zoning administration or enforcement, and a second who had no current employment with the Township – cannot be a proper basis to decide facial vagueness challenges to any zoning ordinance. **RE 162, PageID ##6017-6018**. The GAU provisions were enacted more than 20 years ago, and the legislative record details the extensive consideration of the work to provide

for the text of the GAU provisions. **RE 583, PageID ##22803-22811**. It is not uncommon for individuals to not appreciate the nuances of such text two decades later, which is precisely why the District Court is charged with using its interpretative powers to read and discern the meaning of the text. The PTZO itself provides for interpretive cannons in Section 3.1, and certainly a term enacted since 2004, approved via SUP for several Winery-Chateaus' approvals had meaning.

The District Court, in considering the parties' arguments further, mischaracterized Section 8.7.3(10)(u)(2) as ambiguous by suggesting that it merely "gives examples of Guest Activity Uses that 'may be approved' by the Township Board" but "this language is ambiguous as to whether these activities are the *only* permitted Guest Activity Uses". **RE 162, PageID #6017**. The ordinance states otherwise: "The following Guest Activity Uses may be approved", then the ordinance lists in Section 8.7.3(10)(u)(2)(a)-(c) the GAUs permitted and what is not considered a GAU.

Instead of arguing that a person of reasonable intelligence could not understand the ordinance or that the ordinance authorized arbitrary enforcement (which cannot be the case since it is merely a permissive authorization of expanded uses to be permitted upon SUP review), Plaintiffs focused entirely on obfuscation and alleged misunderstandings by Township representatives. Plaintiffs' only alleged "ambiguity" was in relation to Plaintiff Bowers Harbor in 2017 when Bowers Harbor

was still operating as a "Food Processing Plant" – not as a Winery-Chateau. **RE 136, PageID #4750; RE 136-22 to 25**. Bowers Harbor became a Winery-Chateau in 2019. Plaintiffs' entire vagueness argument was based on correspondence and handwritten notes about events it allegedly cancelled in 2017. Moreover, Plaintiffs argue "according to the Township, activities such as wine pairings, vineyard tours, painting classes, happy hours and other similar activities are events which require pro-approval from Peninsula Township." **RE 136, PageID #4750 (citing RE 136-22)**. But the cited document is *not* from the Township; it is a handwritten list of events prepared by Bowers Habor.

Nevertheless, the District Court took the bait hook, line, and sinker. It concluded the "Township has represented that weddings, wedding receptions, entertainment events, and family reunions are not Guest Activities for which a Winery-Chateau needs Township approval, but that wine pairings, vineyard tours, painting classes, and happy hours are Guest Activities that require prior Township approval (*see* ECF No. 136 at PageID.4750)." **RE 162, PageID #6018**. The District Court's ruling was ripped directly from Plaintiffs' brief, which was, in turn, based on a faulty premise – that the Township exercised unbridled discretion over approval of a long list of events on a handwritten list provided by Bowers Harbor. This is simply false, and an improper record to base the meaning of the GAU provisions.

The text controls, and even some ambiguity does not result in the provisions being void for vagueness.

Finally, the District Court's analysis of the vagueness claim conflates certain former Township representatives' failure to understand clear ordinance language with vagueness. Nearly the entirety of Plaintiffs' argument was that Section 8.7.3(10)(2) must be vague because the Township representatives did not know what a GAU is. **RE 136, PageID ##4747-4750**. This does not make the ordinance itself vague.

This Court rejected a similar argument in *600 Marshall Entertainment Concepts, LLC v. City of Memphis*, 705 F.3d 576 (2013). In *600 Marshall*, the Court addressed a vagueness challenged to a "Dance Hall Ordinance". But the plaintiff did not challenge any language in the ordinance itself as vague. Rather (like Plaintiffs), it argued that because city representatives failed to understand the ordinance and "bungled its implementation", the ordinance "must be vague". *Id.* at 587. This Court disagreed and noted "the officials' misunderstanding was more likely due to a failure to actually read the Ordinance than to any vagueness inherent in the Ordinance itself. Their confusion did not stem from misinterpreting the language of the Ordinance." *Id.* As the Court noted, "[a]lthough we find it disturbing that city officials demonstrated such confusion regarding the straightforward Ordinance they were

responsible for implementing, 600 Marshall has not shown that the ordinance itself is unconstitutionally vague." *Id.*

Here, it is unfortunate that former Township representatives demonstrated such confusion regarding their interpretations of the simple language in Section 8.7.3(10)(u)(2), but that does not mean that the ordinance is vague. Plaintiffs cannot use these individuals' failure to understand the PTZO as the basis of their legal burden. The District Court also erred by abdicating its duty to independently interpret the ordinance and make a determination of law. *Neuens v. City of Columbus*, 303 F.3d 667, 670 (6th Cir. 2002) (internal citation omitted) (finding district court erred when it "blindly accepted" stipulation that a party was acting under color of law "without engaging in an independent review".). Indeed, "interpreting ambiguous statutory language is a core function of the courts." *Tree of Life Christian Schs. v. City of Upper Arlington, Ohio*, 905 F.3d 357, 370 (6th Cir. 2018).

Moreover, Bonobo's own conduct refutes any claim that the GAU provisions were so vague as to provide no fair notice. In 2016, Bonobo received three citations for hosting unauthorized Guest Activity Uses. **RE 457-8**. Bonobo pled responsible to these violations, demonstrating its understanding that GAUs required Township authorization – authorization Bonobo lacked. In 2019, recognizing this gap, Bonobo submitted an application to amend SUP No. 118 to add GAUs as a permitted use.

RE 463-4. Yet, as litigation loomed, Bonobo withdrew this amendment application. A party who acknowledges through its own conduct – pleading responsible to violations and seeking permit amendments – that it understands the regulatory requirements cannot credibly claim that those same requirements provided no notice to a person of ordinary intelligence.

Chateau Chantal's history further demonstrates that the GAU provisions provided adequate notice. In 1998, Chateau Chantal litigated the meaning of "registered guest" under its SUP and the zoning ordinance. **RE 463-20**. The resulting Consent Judgment – negotiated by attorneys and entered by Grand Traverse Circuit Court Judge Philip E. Rogers, Jr. – defined "registered guests" as guests registered to stay overnight and established detailed standards governing food service, outside activities, wine tasting, and special events. *Id.* The Township Board adopted these standards in February 1999 as the basis for an amendment to Section 8.7.3(10) – the very amendment that created the GAU provisions in 2004. This is not vagueness – it is voluntary noncompliance.

The District Court's grant of summary judgment to Plaintiffs on the vagueness claim should be reversed and all damages flowing from that claim vacated.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN STRIKING THE TOWNSHIP'S REBUTTAL DAMAGES EXPERT REPORT AND REFUSING TO ALLOW THE TOWNSHIP TO PRESENT AN EXPERT TO COUNTER PLAINTIFFS' DAMAGES CLAIM, LEADING DIRECTLY TO THE $49.2 MILLION DAMAGES AWARD.

On July 29, 2022, the Township disclosed to Plaintiffs a rebuttal damages expert, Michael Kahaian. While this disclosure occurred after the expert report deadline, the late disclosure was substantially justified under this Court's guidance from *Howe v. City of Akron*, 801 F.3d 718 (6th Cir. 2015). On August 2, 2022, Plaintiffs moved to strike the report pursuant to FRCP 37(c). **RE 219.** The following day – without permitting the Township any opportunity to respond – Magistrate Judge Ray Kent granted the motion in a one-paragraph, perfunctory Order that neither cited nor analyzed the governing Rule 37 standard. **RE 222.**

The Township timely objected, but the District Court overruled the objections. **RE 284, PageID #10193.** In doing so, the District Court likewise failed to consider the *Howe* factors governing whether exclusion was an appropriate sanction under Rule 37(c).

Following this Court's 2022 remand and PTP's intervention, the Township moved to amend the Case Management Order (or alternatively for leave) to disclose Mr. Kahaian. **RE 292.** The District Court again denied the request, again without applying the *Howe* factors. **RE 303.** This ruling did not occur on the eve of trial, nor would it have required reopening completed discovery. To the contrary, the District Court acknowledged that the request came "early in the litigation." **RE 623, PageID #31471.** The denial followed the Court's decision to reopen discovery after

intervention and to reconsider its prior summary judgment rulings, eliminating any plausible claim of prejudice. ***See*** **RE 301.**

After the Court barred Mr. Kahaian's testimony, discovery was reopened, additional summary judgment motions were litigated, and trial occurred nearly eighteen months later. During this period, the District Court could have imposed a lesser sanction (such as costs involved in deposing Mr. Kahaian, etc.), particularly where the exclusion of rebuttal expert testimony directly contributed to a nearly $50 million damages award.

This Court reviews Rule 37(c) sanctions for an abuse of discretion. *Howe*, 801 F.3d at 747. That review encompasses a district court's affirmance of a magistrate judge's sanction order. *See EQT Prod. Co. v. Magnum Hunter Prod., Inc.*, 768 Fed. Appx. 459, 467 (6th Cir. 2019). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, when it improperly applies the law, or uses an erroneous legal standard." *Stough v. Mayville Cmty. Sch.*, 138 F.3d 612, 614 (6th Cir. 1998). "In other words, the reviewing court must determine that the lower court's action leaves it with 'a definite and firm conviction that the trial court committed a clear error of judgment.'" *Id.* (internal quotation omitted).

Here, the District Court abused its discretion by failing on two separate occasions to utilize the appropriate legal standard and, consequently, improperly

applied the law. The Sixth Circuit has adopted a five-factor test for determining if a failure to disclose is justified or harmless:

> (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

Howe, 801 F.3d at 748 (quoting *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 396-97 (4th Cir. 2014)). Although exclusion is "automatic" under Rule 37(c)(1) unless non-disclosure was justified or harmless," *Dickenson v. Cardiac & Thoracic Surgery of E. Tenn. P.C.*, 388 F.3d 976, 983 (6th Cir. 2004), courts **must** analyze the *Howe* factors and determine whether those conditions exist. *Southern States Rack & Fixture, Inc. v Sherwin-Williams Co.*, 318 F3d 592, 597 (4th Cir. 2003) (when performing its analysis under Rule 37(c)(1), the Court recognized that a district court "must consider" the factors identified). The *Howe* factors were not presented as suggestions that the District Court could consider. It was mandatory. "A district court by definition abuses its discretion when it makes an error of law." *Sokol v Akron Gen. Med. Ctr.*, 173 F3d 1026, 1030 (6th Cir. 1999). The *Howe* factors demonstrate an obligation to review the factors to effectively arrive at a reasoned conclusion under Rule 37, and the failure to consider them, without more, is a reversible error of law. *Id.* See also, *Southern States*, 318 F3d 597.

Neither the Magistrate Judge nor the District Court analyzed the *Howe* factors. Instead, the Magistrate Judge struck the report before the Township could respond. **RE 222**. The District Court then overruled the Township's objections, despite the Township's detailed *Howe* analysis, without once referencing the controlling law. **RE 284, PageID ##10193-10195**.

Compounding the error, when the Township later moved to amend the Case Management Order to permit the disclosure, the District Court again ignored *Howe* and instead applied a "good cause" standard. **RE 292; RE 303, PageID ##10838-10842**. That, too, was a reversible clear error of law.

A proper application of the *Howe* factors overwhelming favors the Township.

First, there was no meaningful surprise. Mr. Kahaian's report did not contain any new data or information that had not been previously disclosed to Plaintiffs. To the contrary, Mr. Kahaian's report was pure rebuttal – it was constrained to attacking the methodology and opinions in Plaintiffs' damages expert report. The report did not introduce new financial data. While the Township did inform Plaintiffs that it did not have a "testifying" expert, communication between counsel was clear that the Township had a consulting damages expert that would appear at the deposition of Plaintiffs' damages expert and that Plaintiffs' damages expert's methodology was under scrutiny. **RE 238-1, PageID #8662.** Additionally, the parties' Joint Final Pre-Trial Order, which was filed on July 11, 2022, placed Plaintiffs on notice that the

Township planned on calling necessary rebuttal expert witnesses. **RE 190, PageID #7401.** The first *Howe* factor favors the inclusion of Mr. Kahaian's reasoned expert opinions.

The second and third factors – a party's ability to cure the surprise and potential disruption to trial – both weigh in favor of the Township. Any surprise was certainly curable between July, 2022 and the eventual trial in April, 2024. The Township presented Plaintiffs with a complete expert report and offered to produce Mr. Kahaian for a deposition at Plaintiffs' counsel's office. While the 2022 trial date (which was adjourned on August 8, 2022, **RE 236**, well before the District Court overruled the Township's objections to the Magistrate Judge's order) was initially close to the disclosure of Mr. Kahaian's expert report, ultimately when the District Court struck Mr. Kahaian's rebuttal report, there was no trial date set. Trial did not start for nearly another year and a half. Plaintiffs had more than enough time – *another entire discovery period* that included additional expert disclosures by PTP and Plaintiffs – to cure any alleged surprise through interrogatories, requests for production, and a full discovery deposition. *See Howe*, 801 F.3d at 749.

Similarly, there would have been absolutely no disruption to trial. Trial was not scheduled when the District Court overruled the Township's objections, and there was no risk that Plaintiffs would have been forced to forgo trial preparation to

respond to the disclosure of Mr. Kahaian's report. Plaintiffs had ample time to prepare. Factors two and three also weigh in favor of the Township.

The fourth factor, the importance of the evidence, weighs decisively in favor of the Township. "The more important the proof, the greater the effect of preclusion, but also the greater the harm in tardy disclosure." *Bisig v. Time Warner Cable, Inc.*, 940 F.3d 205, 220 (6th Cir. 2019) (cleaned up). Here, the proofs were of vital importance and resulted in a cataclysmic result at trial. The effect of the District Court's Rule 37 sanction – and the importance of the stricken testimony – is crystalized in the post-trial bench opinion:

> This case presents an unusual scenario. Three things make these damages calculations more difficult than in a typical case. First, only the Plaintiffs retained a damages expert. So naturally, the proofs are lopsided in their favor. When it comes to damages, the Township is limited to attempts at impeachment on cross examination and attorney argument . . . . And third, the Wineries' financial data is not in the record. [**RE 623, PageID #31468**].

Mr. Kahaian's stricken expert report – and his anticipated testimony – would have addressed the District Court's concerns with the difficulty in resolving the damages calculations. His testimony would have substituted in large part for the attorney argument that the Township was left to rely upon. Even without the benefit of a counterbalancing expert, the District Court freely conceded significant issues with Mr. Larson's testimony:

- "[T]he Township also criticized the large (nearly $70 million) discrepancy between Larson's first and second reports. Rightfully so. But Mr. Larson took

the stand, explained his discrepancies, and updated his analysis to reflect more accurate figures. Ultimately, these mistakes-early in the litigation-do impugn Mr. Larson's credibility somewhat. The court does not have another damages expert to credit, however. The proofs, which were subject to rigorous cross examination, are the proofs." **RE 623, PageID #31471.**

- "The Township's first, and perhaps best, critique of Larson's report is that he calculated net revenue and not net profits for his damages determination. The Wineries assert that it was not an issue and using gross revenue was proper. The difference between the two calculations can be substantial." ***Id.*** **at PageID #31472.**
- "Because Mr. Larson's calculations are not a proper fit or reasonable under Schedules 1 and 5, the court declines to award damages for those violations. These calculations should have been based upon net profits rather than gross revenue." ***Id.*** **at PageID #31473.**
- "If Mr. Larson had used net profits instead of revenue, there is some substance in the record to support that the damages under Schedules 1 and 5 would be 1/13 of what was proffered. R**E 609, PageID #30926**. The court declines to award damages on that basis alone, however. If that were enough, the Wineries in theory would be entitled to 1/13 the damages proposed under Schedules 1 and 5." ***Id.*** **at PageID #31473, n.8.**
- Finally, when awarding nearly the entirety of the total $49.2 million in damages based on Schedules 6 and 7, the trial court again relied on Mr. Larson's gross profit methodology, noting "crucially, the court does not have the benefit of proofs to the contrary. The Township did not retain a damages expert." ***Id.*** **at PageID ##31477-31478.** This is false, the Township did *retain* a damages expert, but the Court refused to permit his testimony.

The fifth factor, the non-disclosing party's explanation for its failure to disclose the evidence, also weighs in the Township's favor. Here, the Township's failure to disclose "was more likely the result of negligence, confusion, and lack of information than underhanded gamesmanship." *Howe*, 801 F.3d 718 at 749. As this Court has noted, the goal of the *Howe* factors is to "separate[e] 'honest,' harmless mistakes from the type of 'underhanded gamesmanship' that warrants the harsh

remedy of exclusion." *Bisig*, 940 F.3d at 221. While an argument could be made that the Township's failure to disclose an expert earlier was not an acceptable practice, it was not "underhanded gamesmanship". Rather, as the Township previously explained to the District Court, it identified the need for a rebuttal expert after securing Mr. Larson's deposition in June, 2022. The *Howe* panel recognized that "lack of information" and "confusion" fall on the opposite end of the continuum from underhanded gamesmanship.

The circumstances here are even further from gamesmanship since the Township, after identifying the need for an expert, provided Mr. Kahaian's report and offered to produce him for deposition at Plaintiffs' attorney's office. Had the Township sincerely intended to prejudice Plaintiffs, they would not have voluntarily produced a report, nor would they have voluntarily offered a deposition.

The District Court ignored these considerations and imposed the most severe sanction available. Had the District Court weighed the *Howe* factors, it could have found no need to sanction the Township or that a less severe sanction was available (e.g., ordering the deposition of Mr. Kahaian at the Township's expense). That one remedy would have alleviated many of the additional errors committed by the District Court, set forth in the following sections, that led to such an unreasoned damages award. But the District Court let the opportunity pass and ignored the binding legal precedent *Howe* represents. That alone is legal error, but here it was

compounded when the District Court utilized a "good cause" standard to evaluate the Township's conduct when the correct law – *Howe* – had been proffered.

The only appropriate remedy for this clear error is a reversal of the District Court's damages award and a remand to permit the Township to present Mr. Kahaian as an expert witness at a subsequent trial.

IV. THE DISTRICT COURT ERRED IN AWARDING DAMAGES TO PLAINTIFFS.

The District Court's error in finding liability on vagueness had significant downstream effects – every single cent of the $49.2 million in damages "extend from the vagueness of the [GAU] provision of the PTZO." **RE 623, PageID #31475**. This error, invited by the Wineries, led to a cascade of other errors that undermine the validity of the $49.2 million dollar verdict. To name just a few: (1) the Court overlooked Plaintiffs' failure to prove a causal connection between their damages and the permissive nature of the Winery Ordinance; (2) the Court struck Schedule 7, but award $42 million in damages under it; (3) all damages are speculative since the Plaintiffs failed to introduce any financial documents at trial; (4) Plaintiffs failed to establish that the large commercial events they seek to host are feasible and permissible in the A-1 Districts in which they sought to hold them; and (5) the Court improperly relied on gross profit when awarding Plaintiffs $49 million in damages.

These errors were invited by Plaintiffs through their own flawed presentation, or through the testimony of their expert who testified that he (1) never attempted to

calculate net profits; (2) did not follow accepted AICPA standards when collecting and verifying data; (3) did not perform any financial or damage analysis, let alone one that complied with RMA standards; and (4) has no expertise in business development, market demand, or the feasibility of the new ventures in which Plaintiffs sought to engage on their agriculturally-zoned properties.

These unforced errors, mostly invited by Plaintiffs themselves, led the Court to award millions of dollars in damages under Schedule 7, which it had previously said it would not award. These are critical mistakes, errors that, when corrected, reverse the avalanche of damages facing the Township and its residents.

Because the District Court erred in finding liability on the vagueness claim, the concomitant damages award should similarly be vacated. "In an appeal taken from a bench trial, the district court's factual findings are reviewed for clear error, and the legal conclusions are reviewed *de novo*." *S.C. v. Metropolitan Gov't of Nashville*, 86 F.4th 707, 714 (6th Cir. 2023).

The District Court committed several significant errors in arriving at its damages award following trial, each individually warrants reversal, but collectively paints a picture of a damages award that is untethered from reality and must be reversed.

The damages analysis should have been phased by the District Court – first examining whether the challenged sections of the ordinance caused Plaintiffs'

injuries, then determining whether the damages were appropriate. The District Court's Opinion failed to consider the first question, then completely missed the mark on the second.

Even if the analysis survives past causation, the damages analysis is flawed from inception. Plaintiffs' damage claims rest entirely on a report prepared by accountant Eric Larson. **RE 611-144**. Mr. Larson's testimony established:

- He never attempted to calculate lost ***net profits***.
- He did not participate in, plan or supervise *any* aspect of requesting, formulating or obtaining *any* information from the wineries, in clear violation of the AICPA standards. RE 609, PageID ##25134-25135.
- He never requested or obtained, and Plaintiff never produced at trial, one single financial statement of any sort. *Id*. at 25151-25152.
- He did not conduct any financial or damage analysis. He accepted a Spreadsheet, populated by Plaintiffs' counsel, and multiplied the numbers by a random **gross** profit percentage found on the Risk Management Association ("RMA") website. *Id*. It's established that this violated RMA standards.

- Mr. Larson is an accountant and testified that the scope of his knowledge is limited to the accounting. He has zero expertise in business development, demand, marketing, or feasibility, of Plaintiffs proposed large or small event businesses. Plaintiff did not provide any expert testimony regarding their capability of entering the event business and hosting weddings and large events. *Id*. at 25111.

Mr. Larson made it clear that his sole duty was to calculate gross profit from numbers provided by Plaintiffs' counsel. He never reviewed a single financial document and did not attempt to verify any aspect of Plaintiffs' counsels' spreadsheet.

A. The District Court Erred By Failing To Consider Causation Under Section 1983 When Awarding Millions In Damages.

Plaintiffs' Alleged Injuries Were Not Caused By The Winery Ordinances Which Were Permissive In Nature.

The damages award is flawed because the District Court did not consider whether the challenged sections of the PTZO caused Plaintiffs' damages. Instead, the Court boldly declared that "[t]he only barrier [to millions in damages] was the now repealed PTZO."[7] **RE 623, Page ID # 31474**. This is error on a fundamental level. The District Court assumed that if the Winery Ordinances no longer existed, Plaintiffs would be able to engage in unfettered event hosting. That is simply not true. In reaching this conclusion, the District Court ignored the Township's caution that Plaintiffs' agricultural zoning designation – not the permissive land uses that allowed them to operate in the first place – that precludes commercial event hosting. This failure to engage in the mandated § 1983 causation analysis requires reversal and vacation of the damages award.

Under § 1983, Plaintiffs must establish a causal connection between the constitutional violation and the damages they seek. *See Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 608 (6th Cir. 2007) ("Traditional tort concepts of causation inform the causation inquiry on a § 1983 claim.") (citing *McKinley v. City*

[7] It is unclear what the District Court means when it says the "PTZO" has been "repealed". The PTZO – which is the Township's zoning ordinance – was not "repealed" by Amendment 201; instead, only sections 6.7.19, 8.7.3(10), and 8.7.3(12) were repealed. This is yet another example of the District Court's imprecision.

of Mansfield, 404 F.3d 418, 438 (6th Cir. 2005)). "Causation in the constitutional sense is no different from causation in the common law sense." *McKinley,* 404 F.3d at 438. As with traditional tort claims, this requires a showing of both cause in fact and proximate cause. *Powers*, 501 F.3d at 608. Plaintiffs must therefore show that the alleged vagueness of the GAU provisions was both the cause in fact and proximate cause of their inability to engage in commercial event hosting. Fundamental land use law clearly establishes Plaintiffs can do neither.

1. No cause in fact

Cause in fact is assessed using the "'but for' test", which asks whether the harm would have occurred absent the defendant's conduct *Id.* (internal citation omitted). "'Conduct is the cause in fact of a particular result if the result would not have occurred but for the conduct. Similarly, if the result would have occurred without the conduct complained of, such conduct cannot be a cause in fact of that particular result.'" *Id.* (quoting *Butler v. Dowd,* 979 F.2d 661, 669 (8th Cir. 1992)).

Independent barriers can break the causal chain and foreclose compensatory damages. *See, e.g.*, *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486-497 (9th Cir. 2008) (nominal damages only where development could not proceed for reasons independent of the unconstitutional zoning decision); *Westborough Mall, Inc. v. Cape Girardeau,* 953 F.2d 345, 347 (8th Cir.1991) (no damages where venture "was plagued with problems" before the unconstitutional actions); *Granite*

State Outdoor Advertising, Inc. v. City of St. Pete Beach, FL, 322 F.Supp.2d 1335, 1344 (M.D. Fl. 2004) (no damages where permit "would have been rejected anyway" under other requirements, so plaintiff "cannot show any injury caused by any allegedly unconstitutional restrictions").

Neither Plaintiffs nor the District Court addressed causation, which is made more appalling since the Township argued before trial that Plaintiffs would not (and could not) establish causation for their claimed damages. **RE 581, Page ID ##22687-22691**. Plaintiffs did not respond with a causation showing, nor did the Court respond with an order denying damages despite Plaintiffs' glaring burden of proof failure. Instead, both focused on redressability, **RE 618, Page ID ##31107-31109**, which misses the point. Had the Township "ceased" the challenged conduct (i.e., repealed the GAU provisions), Plaintiffs would have been in no better position because their properties remain zoned A-1, and the A-1 District does not permit the commercial uses they seek.

The A-1 District's purpose is the independent barrier that legally prevents Plaintiffs from ever proving cause in fact. The A-1 District is specifically intended to preserve land "presently being used predominantly for farming purposes," allowing only "other limited uses" compatible with agricultural and open-space uses. **RE 29-1, Page ID # 1180**; § 6.7.1 of PTZO. Despite Plaintiffs' (and the District

Court's) arguments, neither A-1 District uses permitted by right nor special uses permit unfettered commercial activity like for-profit event hosting.

This is clear from the PTZO itself, including, for example, Section 6.1.4 (among others):

> No building or structure, or part thereof, shall be erected, moved, constructed, or altered, and no new use or change in use shall be made unless in conformity with the provision of this Ordinance and with the regulations specified for the district in which it is located.
>
> (1) The regulations applying to each district include specific limitations on the use of land and structure, height and bulk structures, density of population, lot area, yard dimensions, and area of lot that can be covered by each structure.

Ultimately, only uses specifically listed as permissible within the A-1 District are allowed, to the exclusion of all others. This is classic permissive zoning. Commercial uses, including for-profit event hosting, are not specifically listed as permitted uses in the A-1 District, meaning they are impermissible. See, *Dezman v. Charter Twp. of Bloomfield*, ___ Mich. ___, 997 N.W.2d 42 (2023). ("[The] absence of [a] specifically stated use must be regarded as excluding that use.") quoting *Pittsfield Twp. v. Malcolm*, 375 Mich. 135, 142; 134 N.W.2d 166 (1965).

Bonobo and Black Star face a secondary causation hurdle that also precludes an award of damages. The parcels their wineries sit on are burdened by conservation easements under which Bonobo and Black Star sold certain rights back to the Township to limit development and keep the land in agricultural use. **RE 457-10,**

457-11, 457-12. The conservation easements – which are identical in language – provide that the grantors of the easement granted to the Township all development rights not specifically granted in the easement(s). ***Id.*** The conservation easements identify what uses are permitted on conserved land, but all uses must be incidental to agricultural uses. There is no right to engage in commercial activity. ***Id.*** Bonobo and Black Star's conservation easements are additional independent barriers that break the causal chain and preclude compensatory damages.

The District Court nonetheless awarded nearly $50 million in compensatory damages premised on commercial event hosting – an impermissible A-1 District use. Therefore, removing the GAU provisions would not eliminate Plaintiffs' alleged injury, on the contrary, Plaintiffs would still be barred from unfettered for-profit event hosting by their A-1 zoning designation, which is a textbook example of an independent barrier to causation that requires reversal of the District Court's award of damages.

2. Proximate cause

The *Powers* panel reasoned that proximate cause "'is not about causation at all but about the appropriate scope of responsibility'", so the analysis "is a kind of line-drawing exercise in which we ask whether there are any policy or practical reasons that militate against holding a defendant liable even though that defendant is a but-for cause of the plaintiff's injury." *Powers*, 501 F.3d at 609 (internal citation

omitted). "The cornerstone of the proximate-cause analysis is foreseeability; we ask 'whether it was reasonably foreseeable that the complained of harm would befall the § 1983 plaintiff as a result of the defendant's conduct.'" *Crabbs v. Scott*, 800 Fed. Appx. 332, 338 (6th Cir. 2020) (quoting *Powers*, 501 F.3d at 609).

It was not reasonably foreseeable that the GAU provisions in the PTZO would cause the alleged harm to Plaintiffs. Primarily, this is because the GAU provisions were permissive uses that allowed Plaintiffs to host events that would otherwise not otherwise be permitted in the A-1 District.

B. The District Court Sustained An Objection To The Relevance Of Event Hosting Damages At Trial, Then Awarded $49.2 Million In Damages Based Solely On Event Hosting.

The District Court awarded $49.2 million in damages, referred to as "Schedule 6 and 7" damages, which were respectively for small and large events that Plaintiffs argued they should be able to host. **RE 623, Page ID #31475**. Every single penny of those damages flowed from the District Court's conclusion that the "Guest Activity Use" provision was vague. ***Id.*** ("The Township enforced the PTZO against the Wineries . . . given the insular nature of the community, as well as WOMP, all the Wineries were familiar with the Township's enforcement. The Wineries' damages extend from the vagueness of the Guest Activity Uses provision of the PTZO."). However, this post-trial conclusion was clearly erroneous as the District Court ruled during the bench trial that damages evidence related to "event hosting" was not

relevant – naturally including both large (Schedule 7) and small (Schedule 6) events. **RE 600, Page ID ##23090-23103** (sustaining Township objection to relevance of damages related to event hosting).

> Mr. Rajsic: Objection, your Honor . . . This Court has ruled that it is not protected First Amendment activity. There is no basis for damages as it's related to these large events or event hostings, this Court has already resolved that. So this is no longer relevant, your Honor.
>
> The Court: How is this consistent with my prior ruling?
>
> Mr. Infante: Well, your Honor, first, this schedule is not limited to the issue of commercial speech, this goes to prior restraint as guest activity uses, it goes to vagueness of guest activities, which the Court has already found liability in favor of the Wineries on those two.
>
> * * *
>
> Mr. Infante: Sorry. Yes, sorry. (10)(u)(2)(d) guest activities, uses to not include entertainment, wedding, wedding receptions, family reunions. So what is left? What is a guest activity? I have no idea, neither does this Court. So there is still the vagueness issue, because no one know what a guest activity is. And so how could they prohibit the Wineries from engaging in guest activities if no one know what a guest activity is.
>
> The Court: All right. So it's not a – So you are not talking about a First Amendment claim?
>
> Mr. Infante: Well, I think, reading your opinion at 21918, it is inconsistent with, you know, this cannot be reconciled – 21918 cannot be reconciled with your statement several pages prior.
>
> The Court: I recognize that is the problem, but the problem is that in a short declarative sentence I said that (10)(u)(2)(d) does not implicate the First Amendment.
>
> Mr. Infante: Yes, and then five pages later, you say –
>
> The Court: The objection is sustained.

> Mr. Infante: All right. Your honor, you're just limiting this to proofs as to First Amendment, not to things – I'm not sure what the objection was, and now that we have been through this.
>
> The Court: Well, I thought the objection related to large events.
>
> Mr. Rajsic: Correct, your Honor. And again, related to event hosting, and I'm – whatever, however they define large events, I guess, is up to them. The ordinance section, weddings, receptions, family reunions, it related to the event hosting issue, your Honor.
> Mr. Infante: But it's still a guest activity that's vague. We can still obtain damages under due process for a vague ordinance in prohibiting the activities they can engage in . . . We can still get damages on vagueness.
>
> * * *
>
> The Court: Okay. Here is the way we are going to proceed. I'm going to sustain the objection. If you want to make a record on the nature of the inquiry that you wish to make with the witness, go ahead, but it's subject to a grant of the objection. [*Id.*].

Despite concluding that evidence regarding event hosting was no longer relevant, the District Court awarded $49.2 million in damages based on an inability by the Wineries to host events. **RE 623, PageID #31475-31480.** The District Court's post-trial damages award is irreconcilable with its trial ruling and is clearly erroneous.

Meanwhile, the District Court's grant of the Township's objection dramatically affected the Township's trial strategy, from the evidence the Township put on, to the scope and nature of the cross examination of Plaintiffs' representatives. By way of example, the Township strategically decided not to introduce Plaintiffs' financial documents because the Court concluded that damages related to event

hosting was no longer relevant. The Township also considered calling a rebuttal fact witness regarding the viability of hosting events to show a lack of demand for event hosting at existing greater-Traverse City rental spaces. In short, the Township relied on the District Court's ruling, but the District Court awarded $49.2 million in event-based damages. The District Court's inclusion of damages for "schedules" that were no longer relevant at trial requires reversal.

After trial, the District Court concluded that only wineries classified as "Winery-Chateau's" were entitled to damages under Schedule 7 for large event hosting because "the Winery-Chateaus were subject to the vague Guest Activity Uses provisions. The difference is that large events used to require compliance with the unconstitutional requirements in the PTZO governing Winery-Chateaus." **RE 623, PageID #31478**. The District Court spoke out of both sides of its mouth to arrive at completely contradictory conclusions: Plaintiffs were entitled to damages under Schedule 7 because "large events" used to – allegedly – require compliance with the "vague" GAU provisions, but also, at the same time, Plaintiffs are entitled to damages under Schedule 6 for small events when, according to the District Court, no such compliance with the GAU provisions was required.

If the District Court previously concluded Plaintiffs "damages extend from he vagueness of the [GAU] provision" **RE 623, PageID #31475**, then how could any winery but a Winery-Chateau recover damages under Schedule 6 because, according

to the District Court, only "those Wineries classified as Winery-Chateaus are entitled to damages . . . for Schedule 7 . . . because the Winery- Chateaus were subject to the vague [GAU] provisions"? **RE 623, PageID #31478**. Despite this obvious internal conflict, the District Court ended up awarding damages to *all* Plaintiffs under Schedule 6.

But the District Court's ruling is further infirm when analyzing Schedule 7. The District Court concluded that not all of the Plaintiffs were entitled to damages under "Schedule 7 because they were not subject to the vague [GAU] Provisions." **RE 623, PageID #31478**. The District Court did correctly conclude the Farm Processing Facilities (Black Star, Two Lads, and Tabone) and Peninsula Cellars, as the Remote Winery Tasting Room, did not have SUPs under Section 8.7.3(10). ***Id.*** So, the District Court concluded that Bonobo, Bowers Harbor, Brys, Chateau Chantal, CGT, Hawthorne, and Mari were eligible for damages under Schedule 7 because they "have special use permits" as Winery-Chateaus. ***Id.***

Even assuming *arguendo* that the Sixth Circuit affirms the vagueness finding, reversal and remand is required to address the District Court's erroneous treatment of Plaintiffs with SUPs uniformly. The District Court ignored that some wineries possessed explicit event-hosting authority that otherwise authorized events that would fall within the categories of events that Larson calculated for damages. For example, Chateau Grand Traverse's SUP No. 24 (1990) expressly authorized

"outdoor functions such as wine tasting parties, festivals, etc." with up to 75 guests, and permitted additional guests with a special permit. **RE 463-22** (SUP No. 59, incorporating prior findings). The District Court's award of uniform damages disregards distinctions among Plaintiffs. A proper damages analysis must examine each Plaintiffs' SUP and zoning approval to determine what activities were already authorized, and calculate lost profits based only on the incremental harm attributable to the challenged provisions—not the false assumption there was zero authorization among all Plaintiffs.

C. Plaintiffs Refused To Provide Any Financial Records To Their Own Economic Expert. This Rendered Him Unable To Conduct Any Competent Expert Study Whatsoever. His Sole Task Was To Take A Spreadsheet That Was Populated by Plaintiffs' Counsel And Multiply The Numbers By A "Gross Profit" Margin of 65%.

A district court's task in assessing evidence proffered under Rule 702 is to determine whether the evidence "both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). One key consideration is "whether the reasoning or methodology underlying the testimony is scientifically valid." *Id.* at 592-93. The inquiry is "a flexible one," and "[t]he focus . . . must be solely on principles and methodology, not on the conclusions they generate." *Id.* at 594-95. An expert who presents testimony must "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

Although there is no "definitive checklist or test" for meeting this standard, *Daubert* set forth a number of factors that typically "bear on the inquiry." 509 U.S. at 593. These include whether the theory or technique in question "can be (and has been) tested," whether it

> "has been subjected to peer review and publication," whether it has a "known or potential rate of error," and whether the theory or technique enjoys "general acceptance" in the "relevant scientific community." *Id.* at 593-94 (internal quotation marks omitted). **Red flags that caution against certifying an expert include reliance on anecdotal evidence, improper extrapolation, failure to consider other possible causes, lack of testing, and subjectivity.** *Best v. Lowe's Home Ctrs., Inc.*, 563 F.3d 171, 177 (6th Cir. 2009). In addition, if a purported expert's opinion was prepared solely for litigation, that may also be considered as a basis for exclusion. *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 434 (6th Cir. 2007).

Newell Rubbermaid, Inc. v. Raymond Corp., 676 F.3d 521, 527(6th Cir. 2012) (emphasis added).

Mr. Larson, a CPA by trade, admitted he was required to follow the AICPA Statement on Standards for Forensic Services. **RE 609, PageID.25118**. These standards within Mr. Larson's practice require:

> 6. The general standards of the profession are contained in the "General Standards Rule" (ET sec. 1.300.001 and 2.300.001) and apply to all services performed by a member, including forensic services. They are as follows:
>
> - *Professional competence.* Undertake only those professional services that the member or the member's firm can reasonably expect to be completed with professional competence.
> - *Due professional care.* Exercise due professional care in the performance of professional services.
> - ***Planning and supervision.*** **Adequately plan and supervise the performance of professional services.**
> - ***Sufficient relevant data.*** **Obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.**

RE 615-30.

Yet, Mr. Larson's work came nowhere near adherence to AICPA's professional standards. Mr. Larson's work consisted of the following:

1. Mr. created a **blank** template he called a "damage matrix." (hereinafter "Blank Spreadsheet")

2. Mr. Larson provided that Blank Spreadsheet to Plaintiffs' counsel. Plaintiffs' counsel then filled in the Blank Spreadsheet and returned it to Mr. Larson.

3. Mr. Larson blindly accepted the numbers Plaintiffs' counsel's input into the Blank Spreadsheet as true. Indeed, Mr. Larson **never** requested a single financial document, receipt, statement or anything from Plaintiffs' counsel or Plaintiffs to verify to numbers that Plaintiffs' counsel inserted into the Blank Spreadsheet.

4. Mr. Larson multiplied them by a "gross profit" percentage number he obtained from the RMA website, regarding random, unknown restaurants at unknown locations throughout the country. (**RE 609, PageID ##25152-25153**).

This summary of Mr. Larson's "work" properly demonstrates that it was outside the bounds of his professional requirements under the AICPA, minimally, and lacked any indicia of reliability.

1. **Mr. Larson made no attempt to "plan or supervise" the performance of the professional services as required by the AICPA.**

Plaintiffs' counsel told Mr. Larson that he had obtained the numbers that counsel input in to the Blank Spreadsheet from the Wineries. This is not verified in

any way, such as an e-mail chain, affidavit, or handwritten note. Therefore, Mr. Larson had no information to identify the location of the data he relied on to perform his calculations. Nor did Mr. Larson obtain any documents from any Wineries to support the numbers, himself. Mr. Larson admitted that he blindly accepted Plaintiffs' counsel's word that the numbers were accurate and did absolutely nothing to verify the accuracy. **RE 609, PageID ##25134-25135, 25123-25124, 25143**.

Mr. Larson made further admissions, such as: (1) he was in control of the project but did not provide counsel or Plaintiffs any instructions on what information to gather for the Blank Spreadsheet (***id.* at PageID.25122-25123**); (2) he did not send them a request for documents that he wanted so he could verify the information later put into the Blank Spreadsheet (***id.***); (3) he did not ask for or review any financial statements, which could also be used to verify some of the data in the Blank Spreadsheet (***id.* at PageID.25123**); (4) that, even though the compilation of documents, and who is compiling those documents, is very important for the integrity of his opinions, he did not go send anyone to meet with Plaintiffs' representatives to gather information and documents (***id.* at PageID.25123-25125**); (5) that he just sent a blank "damages matrix" and has no idea who participated in compiling the information (yet he considered it the "backbone" of his report) (***id.* at PageID.25125**); and **(6) the only proffered evidence regarding the validity of the**

numbers in the damage matrix is that Plaintiffs' counsel assured him that the numbers were accurate (*id.* at Page ID.25143-25144).

Unfortunately, the numbers were not accurate and could not be supported. They consisted of pure speculation as to how many events each of the Plaintiffs might be able to host if they ever opened an event hosting business. The winery owners even admitted that they "purely speculated" when they provided the numbers. **RE 600, PageID #23103**. These numbers were the backbone of his opinions, but Mr. Larson never stopped to ask how winery owners could provide accurate numbers on fictional businesses that they never operated. Even Mr. Larson, a purported expert in accounting practices, could not have created these numbers, but he saw it fit to rely on numbers provided by Plaintiffs' Counsel. And the Court accepted those numbers despite the very clear problem associated with reliance on an advocate's perception of his own clients' damages. Minimally, a market or feasibility expert should have been required to justify Mr. Larson's opinion, but one was never done.

Mr. Larson's failure to participate in the planning or supervision of the project, including the compilation of data, and his blind reliance of the representations of Plaintiffs' counsel, with no attempt at verification, is a clear violation of the AICPA standards. One would have to assume that the only purpose of Mr. Larson's report was to produce a large damages number, with zero evidentiary support, just as an

attempt to scare the Township into settling. Regardless, the failure to comply with the AICPA standards renders Mr. Larson's testimony inadmissible under *Daubert*.

2. Mr. Larson failed to obtain "sufficient relevant data" in violation of the AICPA standards.

In addition to the shortcomings of his methodology discussed above, Mr. Larson admitted that he never requested or reviewed financial information from the Wineries, and also that he lacks experience in winemaking or commercial farming. Mr. Larson further admitted he has conducted no market or feasibility analysis, performed no business valuation, and reviewed no financial records, business plans, projections, payroll data, or employee information. He also gathered no information regarding winery facilities, parking, property ownership, debt, loans, grape pricing, or the local, statewide, or national markets for weddings, events, or wine. In addition, he did not review Township ordinances or correspondence, USDA or TTB filings, PPP loan applications, winery websites, or any comparable businesses, nor did he recommend that the Wineries obtain any market or feasibility study. ***Id.* at ##25101–25118**.

In short, Mr. Larson obtained zero financial documentation from Plaintiffs and has no knowledge of their industry, financial history, projections, or business or marketing plans. He made no effort to obtain "sufficient relevant data" as required by AICPA standards, rendering his purported expert opinions unreliable because

they fall well outside what is accepted within his industry, rendering his opinions entirely inadmissible.

3. Mr. Larson Conducted an exercise of multiplication, using a gross profit percentage found on the RMA website. He failed to follow the directives of the RMA to only utilize RMA data as a guideline to supplement a separate financial analysis. He did not conduct any separate analysis.

Mr. Larson boiled his methodology down something any fourth-grade student can perform, multiplication:

> Q: The only study you did was you took the damage matrix, multiplied it by the RMA data and got the gross profit, right?
> A: The revenues multiplied by the RMA data gives you the profit amount, that's correct.
> Q: And that's the only study you did?
> A: As far as gathering that additional third-party data, that's correct.

***Id.* at ##25152-25123**.

Instead of gathering historical and projected data from Plaintiffs (or other local wineries in the surrounding area), Mr. Larson utilized random data provided by RMA, which consists of data provided by unknown restaurants at unknown locations in the United States, and multiplied it to yield millions of dollars in speculative damages that the District Court accepted and award. Yet, Mr. Larson had no idea where the RMA data he used in his multiplication problem came from:

> Q: It could be from a -- I don't know, let's see, it could be from a Red Lobster in Anchorage or a Chi Chi's in Phoenix, right?
> A: It could be.
> Q: You just have no idea.
> A: That’s correct.

***Id.* at #25128**.

The mystery surrounding the reliability of RMA data was of no concern to Mr. Larson despite his required adherence to AICPA. Therefore, when Mr. Larson also admitted that he used nothing other than RMA data to support his claimed loss of gross profits for the Wineries, and that the same RMA calculations were used for Schedules 3, 6, and 7, his performance in this case fell far below what is required of a forensic accountant. ***Id.* at ##25155–25156**.

It is incomprehensible that an economic expert would fail to obtain any historic financial information from the eleven wineries involved and instead rely on generalized RMA data drawn from unidentified establishments in unknown cities and climates. RMA itself cautions against such use, advising that its "Annual Statement Studies" are only "general guidelines" and must be used as a supplement to other financial analyses, not as industry norms. **RE 615-31**.

Except for Mr. Larson, there were no "other" financial analyses. Mr. Larson testified that he conducted none, did not request historic or projected financial data from the Wineries, and did not study local wedding or event venues. Although he could have compared actual winery data to RMA benchmarks, he did not, compounding the reliability concerns clouding his opinions. By relying exclusively on RMA data (contrary to RMA's own guidance) his methodology violates accepted standards and renders his opinions inadmissible.

Interestingly, this partially came to a head during trial, not that it made any dent in the District Court's multimillion dollar verdict. During trial, Mr. Larson admitted that he applied a gross profit margin that was 10 to 15 times greater than the net profit percentage of 5-10% to which the wineries testified. Rather than analyze the Wineries' actual financials, Mr. Larson relied on inflated RMA figures untethered to local conditions, *and the Court accepted them*. This is clear error.

D. Plaintiffs Failed To Offer Any Objective Facts Or Data To Establish That They Could Have Engaged In The Large Event Business And Made A Profit.

> Michigan allows lost profits for new businesses as long as they may be established with "reasonable certainty." *Fera v. Vill. Plaza, Inc.,* 396 Mich. 639, 644, 242 N.W.2d 372, 374 (1976). **Although Michigan courts have not explicitly listed the types of evidence that may be used to demonstrate lost profits for a new business, courts in other states have examined expert reports, market analyses, comparisons to similar businesses operating under similar market conditions, and economic and financial data.** 11 Corbin on Contracts § 56.17 (2012). *See also Andrew v. Power Mktg. Direct, Inc.,* 978 N.E.2d 974, 992 (Ohio Ct. App. 2012); *Mrozek v. Intra Fin. Corp.,* 281 Wis. 2d 448, 478, 699 N.W.2d 54, 68 (Wis. 2005); *Kaech v. Lewis Cnty. Pub. Util. Dist. No. 1,* 106 Wash. App. 260, 277, 23 P.3d 529, 539 (Wash. Ct. App. 2001). In general, a new business may recover lost profits "[w]here estimates of lost profits are based on objective facts or data and there are firm reasons to expect a business to yield a profit." 22 Am. Jur. 2d Damages § 459."

Fredonia Farms, LLC v. Enbridge Energy Partners, L.P., 1:12-cv-1005, 2014 WL 3573723, at *5 (W.D. Mich., July 18, 2014) (Quist, J.) (emphasis added). The concept in *Fredonia* is fairly simple. If you seek damages for a business that you

never operated, you must establish with reasonable certainty that it was a legally permitted, market driven, financed, demanded, realistic business supported by expert reports and market analyses. Relying heavily on *Fera*, the *Fredonia* court stated:

> For an established business, "a reasonable prediction can often be made as to its future on the basis of its past history." *Id.* However, if the business "has not had such a history as to make it possible to prove with reasonable accuracy what its profits have been in fact, the profits prevented are often but not necessarily too uncertain for recovery." *Id.* (emphasis added). Thus, the question becomes whether the instant case falls into the "reasonably certain" category or the "too uncertain for recovery" category. In this Court's judgment, the instant case falls into the latter.

In *Fredonia*, the plaintiff's expert conducted significant research on all aspects of the prospective business:

> In concluding his valuation of this "unique" community, Hewlett assumed that the Zinnyard would have obtained the necessary zoning changes, complied with all environmental requirements, obtained financing for infrastructure, planned and completed the necessary infrastructure (including streets and utilities), successfully marketed the development to wine lovers, obtained financing sources for purchasers of the lots, planted a vineyard, produced a quality wine that would be consumed and sold, built a successful retail shop, and opened a profitable restaurant, among other things. Furthermore, Hewlett anticipates that the lots would not be all sold until 2016, when no one could predict the economy. Hewlett then valued the damage to the 400 acres of property not as damage to the land itself, but as the projected financial loss incurred because Plaintiffs cannot realize their dream of building a unique community of vineyards with a successful wine producing facility, retail space, and restaurant. Although Hewlett's report purports to value an asset, he essentially projects lost profits for the Zinnyard, a business that has never existed. Thus, regardless of what label is used, Plaintiffs' claim is essentially one for lost profits from the Zinnyard, a development that had not yet begun construction or gone to market.

Fredonia, at 7. Despite all of the studies and reliance on historical and prospective expert information, the *Fredonia* Court still found that the lost profits were too speculative to award.

Here, Plaintiffs made no effort to utilize any objective facts or data to support any claim for lost profits. They offered no expert testimony to support their new large event business. Plaintiffs did not hire any expert to discuss zoning, market demand, or any aspect of feasibility of large event hosting. And the one expert that they utilized, Mr. Larson, made clear that he had no knowledge of event hosting, did not study in that area, and never saw a single financial document of the Wineries or any large event/wedding hosting facility in order to opine on damages. Plaintiffs did not even attempt to begin the required analysis set forth in *Fredonia*, as they did not even hire a relevant expert, let alone provide the necessary information in the record, such as existing financial data, to start that presentation.

The District Court's use of usual business practices for post-trial damages is sweeping in its analysis of the wineries – failing to account for the specific circumstances of each. For example, Bonobo was not granted GAUs in its SUP. **RE 457-6, PageID #16195**. Bonobo received citations for hosting unauthorized events and pled responsible to those violations. **RE 457-8**. It then attempted to cure this deficiency by submitting an amendment application for GAUs, which it

subsequently withdrew. A plaintiff cannot recover damages for being prevented from conducting activities it never had permission to conduct.

Instead of legitimate evidence, Plaintiffs presentation consisted of testimony from their team members, like in *Fredonia* "that they believe Zinnyard would have been a success," *Fredonia,* at 12, and argument the District Court erroneously accepted. The *Fredonia* Court, unlike the District Court, found the team members were not experts and had not engaged in the business. Similarly, the Wineries here were not experts in the large event/wedding business, as they had never been allowed to host such events. Further, they offered no testimony or support for any realistic market demand or feasibility for large events in the Traverse City area. Their only evidence consisted of their own self-serving testimony that they remembered receiving "a lot" of emails and some telephone calls asking if they could host events or weddings. On this pivotal point, the District Court stated:

> Each of the Winery representatives discussed the demand for group services. Every Winery representative explained that the figures provided to Mr. Larson reflect their **usual business practices**. The court does not require market studies and feasibility analyses when the proofs are overwhelmingly clear that the Wineries shared a thorough demand to host large and small events.

RE 623, PageID #31471 (emphasis added).

The "usual business practices" of the Wineries that the District Court used to award millions of dollars in damages was *irrelevant* because the Wineries had never engaged in large event hosting. Therefore, the Court should have dismissed their

self-serving, speculative testimony of their "usual business practices" out of hand, but instead welcomed it when calculating the Wineries' $49.2 million damages award.

The first item from *Fredonia* that Plaintiffs failed to establish was that the property is properly zoned and allows large event hosting. Plaintiffs' properties are in the Agricultural district. The Township and prior winery owners worked together for decades to increase the commercial activities allowed. Plaintiffs, however, sought to have that ordinance struck as vague and were successful. **RE 162.** The ordinance that remained did not allow event hosting. For the years that damages were sought, 2017-2021, Plaintiffs cannot establish that they had the necessary zoning to host any events, let alone large events. The District Court did not grant any injunctive relief or rezoning that would have granted Plaintiffs, either retroactively or prospectively, the right to host events. **RE 623**. And the District Court affirmatively ruled that the allowance of such events was not compelled pursuant to any of Plaintiffs' constitutional claims. (***Id.)*** Plaintiffs simply cannot establish that they were properly zoned to host events from 2017 to 2021.

Next, even if the proper zoning was in place, Plaintiffs' representatives testified that they had never been in the event/wedding business. They argue that they could not because it was not allowed. In the next breath, however, they claim to be large and small event experts capable of testifying as to the demand for all

events throughout the area. They certainly could not be experts if they have never engaged in the event business, and they were never offered as experts. Regardless, their "expert" testimony would have been limited to their beliefs that they received "a lot" or "a bunch" of emails inquiring as to events over the years. Plaintiffs' representatives and Mr. Larson also testified that they did no market or feasibility studies either for the event business or for the litigation. **RE 609, PageID #25104**. Because the Wineries had not engaged in these businesses in the past, they would need information such as that set forth in *Fredonia Farms* in order to establish any future lost profits: **expert market analyses, feasibility studies, evidence of sufficient financials, comparison to similar businesses in similar market conditions, and other financial/market studies**. Mr. Larson testified that none of this relevant information was requested or made available to him in this case, and that he had no opinion on this information, or on the current, historic or future marketing/business plans or financial situation of any Plaintiff. ***Id.* at ##25104-25105**.

Mr. Larson responded to extensive questioning regarding the absence of any evidence concerning the Wineries' historic financial information, facilities, future business plans, market studies, feasibility studies, or other data relevant to an economic analysis. ***Id.* at ##25100-25106**. See Section IV.B., supra. This questioning was drawn directly from *Fredonia Farms*. Mr. Larson consistently

testified that he did not request or receive such information, was not an expert in these areas, and had no opinion regarding market demand, feasibility, or any aspect of the event-hosting business. **RE 609, PageID ##25100-25106**. Neither Mr. Larson nor any winery owner contacted local wedding or event venues to inquire about demand, seasonality, winter closures, or similar issues. ***Id.* at #25104**. The Wineries likewise lacked any understanding of the facilities, equipment, financing, staffing, food and beverage requirements, or other necessities of operating a large event or wedding business.

Even so, despite lacking any understanding of what it takes to operate large-scale events, Plaintiffs assert that they would not close during weddings, but would keep tasting rooms and patios open to the public while hosting weddings elsewhere on the property. *See, e.g.* **RE 602, PageID ##23417, 23419; RE 603, PageID #23815; RE 608, PageID ##24986-24988**.. There were no coherent answers regarding bride expectations, parking, or feasibility, and defense counsel was cut off when probing whether facilities could realistically host both the public and a wedding simultaneously. **RE 608**, **PageID ##24993-24995**. Nonetheless, the District Court accepted this non-expert testimony and awarded more than $42 million in damages based on shared-use event hosting.

As to market demand, Plaintiffs' "evidence" consisted of anecdotal testimony that they received "a lot" of emails about weddings and could host multiple events

per week year-round despite winter conditions.(*See, e.g.* **RE 603, PageID ##23642, RE 604, PageID ##24010, 24016; RE 606, PageID ##24272, 24445, 24543.** These aspirations were unsupported by any substantive evidence. Bonobo Winery's owner candidly admitted that his estimates were "purely speculative." **RE 600, PageID #.23103**.

Although the District Court repeatedly criticized Defendants for not designating an economic expert, Plaintiffs presented no expert testimony on feasibility, market demand, or facility suitability. Rather than precluding this testimony, the Court accepted Plaintiffs' business aspirations as fact and awarded tens of millions of dollars in damages for ventures that never existed.

Under *Fredonia*, and the cases cited therein, far more was required. Plaintiffs were not experts, retained no experts, and failed to establish a legally permitted, market-driven, financed, and realistic business supported by expert analysis. Plaintiffs are not entitled to lost-profit damages for a speculative business they never operated and failed to establish with reasonable certainty.

E. Gross Profit Is Not The Proper Measure Of Damages And Plaintiffs Failed To Offer Any Evidence Of Net Profit.

In finding gross profits (instead of net profits) to be an appropriate measure of damages, the District Court relied wholly upon *Contract Design Group, Inc. v. Wayne State University*, 635 F. App'x 222 (6th Cir. 2015). This case was cited by Plaintiffs, and the error that comes with it was invited by them. *Contract Design*,

does not support the Court's massive damages decision. To the contrary, *Contract Design* reaffirmed the nationwide rule – cited by the District Court itself – that "use of gross rather than net profits has also been found to be an inappropriate way of calculating lost profits." *Id.* at 235. *Contract Design* further characterized the expert's opinion there as "hardly a model of precision." Critically, this Court noted that "[t]he only damages it awarded on the procedural due process claim were awarded to Murray personally, apparently based on his emotional distress rather than lost profits," rendering any discussion of lost-profit methodology largely dicta.

Here, the District Court conducted no comparable methodological scrutiny, applied an improper gross-profit measure untethered to any actual financial data, and did so under circumstances requiring *de novo* review. Every other published Michigan and Sixth Circuit decision (which were ignored by Plaintiffs and the District Court) holds that gross profit is not a proper measure of damages. Reliance on the uniquely situated *Contract Design* decision to impose a damages award exceeding $49 million against a municipality was in error.

The remaining cases that guide this Court's decision support the general rule that gross profit damages are not available. For example, for more than forty years Michigan courts have held that damages for lost profits are limited to lost *net profits*, rather than lost *gross profits*. *See, e.g.*, *Lawton v. Gorman Furniture Corp.*, 90 Mich. App. 258, 267; 282 N.W.2d 797 (1979) (reasoning that "[d]amages for lost profits

must be based on the loss of net, rather than gross, profits."); *Getman v. Matthews*, 125 Mich. App. 245, 250; 125 N.W.2d 671 (1983) (reiterating that damages must be for lost net, not gross, profits). These cases make logical sense because, finding otherwise, plaintiffs would recover a greater sum than they would have earned had the breach not occurred.

This Court has also held, when applying Michigan law, that damages for lost profits must be based on net profits rather than gross profits. *DXS, Inc. v. Siemens Medical Systems, Inc*., 100 F.3d 462, 473 (6th Cir. 1996).

> Similarly, the Sixth Circuit affirmed summary judgment on a lost-profits claim where the plaintiff failed to account for cost savings during an operational shutdown. *Bessemer Lake Erie R.R. Co. v. Seaway Marine Transport*, 596 F.3d 357 (6th Cir. 2010). There, after a ship struck plaintiff's coal-loading machinery, the plaintiff recovered repair costs but no lost profits. *Id.* at 360, 362. The Court explained that lost profits are calculated by deducting costs saved from lost gross revenue. *Id.* at 367. Although the plaintiff argued it incurred no cost savings, the court rejected that contention, observing: But it suspends reality to suggest that [plaintiff] would not have avoided any costs when it did not have to transport millions of pounds of coal as a result of the dock shutdown, whether it be from fuel not used, employees laid off or the day-to-day cost of operating a shiploader.

Id. at 369.

The same logic applies here. It likewise suspends logic to suggest that Plaintiffs avoided no costs by not hosting events. The District Court concluded that "there would be no change in overhead costs" or that such costs were "baked into" event pricing. **RE 623, PageID ##31476-31477**. That conclusion ignores numerous

event-specific costs Plaintiffs necessarily avoided, including labor, setup and teardown, rentals, food, permits, marketing, utilities, and insurance riders. If an event never occurred, those costs were never incurred.

The Court's reliance on the notion that costs were "baked into the event pricing" misunderstands lost-profit damages. The relevant inquiry is not how prices were set, but whether expenses would have been incurred but for the lost opportunity. Event-specific costs are variable and avoided when events do not occur. Treating them as non-existent because they were contemplated in pricing permits recovery of gross profits and results in a windfall. *See*, *e.g.*, *Cargill, Inc. v. Boag Cold Storage Warehouse, Inc.*, 71 F.3d 545, 554 (6th Cir. 1995). Accordingly, the Court erred by awarding damages based on gross profits rather than net profits.

Even accepting the District Court's reliance on *Contract Design*, such a claim would require extraordinary expert testimony and financial evidence establishing both legal permissibility and the absence of operational expenses. None was provided. As discussed in *Fredonia*, neither Mr. Larson nor the winery owners were experts in large-event hosting, market demand, feasibility, or the facilities and equipment required for such operations, and expert testimony on these issues was necessary but entirely absent. There was, likewise, no record evidence supporting the illogical premise that large commercial events could be conducted with zero overhead.

Only on redirect did Mr. Larson attempt—without expertise or supporting testimony—to suggest that the Wineries could host events with no additional costs. He admitted he was not an expert in this area, and no winery owner testified otherwise. When defense counsel sought to call winery owners during Defendants' case to establish the numerous unavoidable costs of hosting large events, that request was denied. **RE 609, PageID #25190-25191**.

At the time, the District Court's denial of that request was not concerning because the District Court had precluded Schedule 7 event hosting damages from evidence. In its final Opinion, however, it granted over $49 million in damages for event hosting, making the error associated with this preclusion glaring.

Even assuming gross profit damages were recoverable upon a showing that no incremental costs existed, Plaintiffs failed to place such evidence in the record. Moreover, the District Court refused further inquiry on the issue before the Township even presented its defense.

Because gross profits are not allowed, and Plaintiffs failed to offer any testimony whatsoever on net profit, Plaintiffs are not entitled to damages in this case. Indeed, Mr. Larson did not investigate, evaluate, or have an opinion regarding net profits in this case:

> Q: All right. So if the RMA provides an operating expense and a net profit number, you did not look at that, correct?
> A: I looked at it, but it's not part of my calculation.
> Q: You didn't use it?

A: That's correct.
Q: You have no opinion whatsoever in this case as to what lost net profits are, correct?
A: Lost net income, I do not.

(***Id.* at PageID. ##25148-25149**).

Mr. Larson testified that the RMA Guidelines, on which he based his entire opinion, contain a percentage not only for gross profit, but also net profit. Mr. Larson, however, chose to ignore the net profit percentage and provided no expert opinion on net profit, choosing instead to base his opinion on the significantly higher gross profit percentage. (***Id.* at PageID. #25097**). The difference is substantial. Mr. Larson testified that if he had used the RMA figures upon which he based his report and testimony to perform such a calculation, the net profit number might have been 1/13th the gross profit calculation:

Q: So if we applied that number, the five percent instead of the gross profit number, the number you come up with would be 1/13th of what we show there, correct?
A: That's correct.
Q: But you didn't do that in this case and that's not part of your report, correct?
A: That's correct.

(***Id.* at PageID #25162**).

Having failed to offer any evidence whatsoever regarding alleged lost ***net*** profit, there is no evidence in the record to support Plaintiffs' claims for lost profits.

Finally, the District Court recognized the tenuous nature of awarding gross profits instead of net when it refused to award Plaintiffs damages for increased grape costs of merchandise sales: "For the instant case, net profits are a more accurate way to calculate the Wineries' damages based on Schedule 1 . . . and Schedule 5". **RE 623, PageID #31473**. As the District Court noted, because "Mr. Larson's calculations are not a proper fit or reasonable under Schedules 1 and 5, the court declines to award damages for those violations. These calculations should have been based upon net profits." *Id.* Yet only a matter of pages later, the District Court reversed course and adopted gross profits as the proper measure of damages for event hosting despite the host of issues identified with that decision identified above. ***Id.* at PageID ##31474-31478**.

The District Court's damages award is irretrievably flawed for several reasons and should be reversed. Plaintiffs are not entitled to any damages.

V. THE DISTRICT COURT ERRED BY GRANTING PLAINTIFFS SUMMARY JUDGMENT ON THE TOWNSHIP'S STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE AND PRECLUDING THE TOWNSHIP FROM PRESENTING THE ISSUE AT TRIAL.

Plaintiffs moved for summary judgment on each of the Township's affirmative defenses. **RE 439**. Among the defenses was the statute of limitations. The Township intended to present this defense at trial because it was precluded from filing a dispositive motion and many of Plaintiffs' claims accrued years, if not decades, before suit. Nevertheless, the District Court granted Plaintiffs' motion and

barred the Township from presenting evidence that Plaintiffs failed to timely prosecute their claims. **RE 528, PageID ##21254-21255**. The District Court's grant of summary judgment is reviewed *de novo*. *Avient Corp.*, 145 F.4th at 665.

In its Answer, the Township properly pled that Plaintiffs' "claims are barred in whole or in part as a result of the expiration of the applicable statute of limitations." **RE 35, PageID #1950**.

The Supreme Court has explained that statutes of limitation "promote justice by preventing surprises through the revival of claims that have been allowed to slumber," particularly where "evidence has been lost [and] memories have faded." *Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 428 (1965) (internal citation omitted).

The District Court's decision was in error and should be reversed.

A. With The Exception Of Hawthorne And Bowers Harbor, Plaintiffs' Claims Accrued More Than Three Years Before Suit Was Filed And, As Such, Are Time Barred.

Plaintiffs' claims concern events that occurred years and, in several cases, decades before this action was filed. Chateau Grand Traverse, for example, obtained its SUP in 1990. Plaintiffs universally allege harm arising from the initial grant of land-use approvals. Yet they allowed their claims to "slumber" until October, 2020, precisely the circumstance statutes of limitations are designed to prevent. *Id*.

Section 1983 claims are governed by a three-year statute of limitations. While state law supplies the limitations period, federal law governs accrual. *Harrison v. Michigan*, 722 F.3d 768, 772–73 (6th Cir. 2013). Michigan's three-year statute of limitations applies to claims brought under Section 1983. *Garza v. Lansing Sch. Dist.*, 972 F.3d 853 (6th Cir. 2020). Plaintiffs' claims in Counts I-VII are, therefore, subject to a three-year statute of limitations.

A Section 1983 claim accrues when the plaintiff has a "complete and present cause of action". *Wallace v. Kato*, 549 U.S. 384, 388 (2007). In this circuit, accrual occurs when the plaintiff "knows or has reason to know" of the act giving rise to the injury. *Cooey v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007).[8] The inquiry focuses on when a reasonably prudent person would have been alerted to protect their rights. *Edison v. State of Tenn. Dept. of Children's Servs.* 510 F.3d 361, 635 (6th Cir. 2007) (quoting *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997)).

In the zoning context, claims accrue when the government takes a discrete land-use action alleged to have caused harm. *See A to Z, Inc. v. City of Cleveland*, 281 Fed. Appx. 458 (6th Cir. 2008) (holding that the statute of limitations for a §

[8] The Court recently recognized its "discovery rule" is not wholly consistent with the Supreme Court's "standard rule" for accrual of federal claims. *Dibrell v. City of Knoxville*, 984 F.3d 1156, 1162 (6th Cir. 2021). The *Dibrell* panel, however, declined to "resolve this tension" because the claims at issue were barred even if the standard rule were applied. *Id.*

1983 action that challenged zoning ordinance accrued when the city ordered the denial of a zoning permit). Here, Plaintiffs' claims arise from discrete actions: approving SUPs land-use permits. These actions were readily ascertainable. If they did not have a viable cause of action at that time, they should have known of the cause of action once they obtained either a permit to operate as a Farm Processing Facility or an SUP.

For all Plaintiffs except for Hawthorne (SUP issued in 2020) and Bowers Harbor (SUP to operate as a Winery-Chateau issued in 2019), these operative approvals occurred far more than three years before suit:

- Chateau Grand Traverse – SUP 24 issued July 10, 1990.
- Chateau Chantal – SUP 21 issued January 9, 1990.
- Peninsula Cellars – SUP 62 issued November 10, 1998.
- Tabone – SUP 73 was transferred to Tabone in February 2004.
- Black Star – Final Farm Processing Permit issued September, 2007.
- Two Lads – Final Farm Processing Permit issued October, 2007.
- Brys – SUP 115 issued February 8, 2011.
- Bonobo – SUP 118 issued May 14, 2013.
- Villa Mari – SUP 126 issued March 15, 2016.

Applying the statute of limitations should have barred all Plaintiffs (except for Hawthorne and Bowers Harbor) claims.

B. The Continuing Violations Theory Does Not Apply And Does Not Extend The Statute Of Limitations To Save Plaintiffs' Claims.

The District Court relied on the continuing violations doctrine to defeat the Township's statute of limitations defense. **RE 528, PageID #21254; RE 559, PageID #21915**. That reliance was misplaced.

Federal courts recognize that, when a pattern or practice of behavior results in a continuing violation of a plaintiff's rights, the statute of limitations is deemed to begin running only with the conclusion of the pattern of harmful conduct such as when the last wrongful event occurs. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). A continuing violation "requires continued action and not simply continuing harm or 'passive inaction.'" *Moss v. Columbus Bd. of Educ.*, 98 Fed. Appx. 393, 396 (6th Cir. 2004).

The doctrine is disfavored outside of the context of Title VII claims, *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1105 n.3 (6th Cir. 1995), and this Court "rarely extends it to § 1983 actions." *Katz v. Vill. of Beverly Hills*, 677 Fed. Appx. 232, 236 (6th Cir. 2017) (quoting *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003)); *Basista Holdings, LLC v. Ellsworth Twp.*, 710 Fed. Appx. 688, 693 (6th Cir. 2017).

The Court applies a three-part test: (1) the wrongful conduct must continue after the precipitating event that began the pattern; (2) injury to the plaintiff must continue to accrue after the event; and (3) further injury would have been avoided if the defendant ceased the wrongful conduct. *Edison v. Tenn. Dep't of Children's*

Servs., 510 F.3d 631, 635 (6th Cir. 2007) (quoting *Tolbert v. State of Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999).

None of the elements are met; this case does not warrant the rare occurrence where the continuing violations doctrine should be extended outside of the context of a Title VII claim. Plaintiffs' claims arise from discrete acts: approving SUPs and land-use permits. These are not ongoing violations. Plaintiffs allege, at most, continuing effects of past actions, which is insufficient. *See Tolbert*, 172 F.3d at 940 ("[A] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation.").

Plaintiffs (with the exception of Hawthorne and Bowers Harbor) obtained their land-use approvals years before filing this suit, at which point in time, any reasonably prudent Plaintiff would have been aware of the actions causing harms that gave rise to their causes of action. Discrete, easily identifiable acts are antithetical to a continuing-violations theory. *See Goldsmith v. Sharrett*, 614 Fed. Appx. 824, 828 (6th Cir. 2015).

These actions were certainly ascertainable by Plaintiffs. If they did not have a viable cause of action at that time, they should have known of the cause of action once they obtained either a permit to operate as a Farm Processing Facility or an SUP. A reasonably prudent plaintiff would be aware of the actions comprising such harms and acted.

Moreover, Plaintiffs cannot satisfy the third prong. Even is the Township repealed the challenged provisions, Plaintiffs' alleged injuries would persist because their properties remain in the A-1 District, which does not allow for the commercial uses they seek. *See* discussion, *supra* regarding causation for damages.

This mirrors the redressability analysis for standing purposes. In *Midwest Media Prop., L.L.C. v. Symmes Tp., Ohio*, 503 F.3d 456 (6th Cir. 2007), the plaintiffs challenged sign regulations that banned "off-premises" signs. The plaintiffs' applications were denied on the basis of the "off-premises" provision and some were also rejected on the basis that the proposed signs violated size and height requirements in the ordinance. *Id.* at 459-460. The defendants argued that the plaintiffs lacked standing because had they prevailed on the claim that the "off-premises" ban was unconstitutional, their claims were not redressable because the signs could have been equally rejected on other grounds because the signs did not comply with size and height regulations. *Id.* at 460. The size and height regulations went unchallenged in the lawsuit.

The Sixth Circuit affirmed the District Court's decision granting the defendants' summary judgment on redressability. In doing so, it reasoned:

> The key problem with plaintiffs' claim is one of redressability. Even if plaintiffs could show that the township's original off-premises advertising ban (or its sign-approval process) violated the First Amendment, each of Midwest Media's nine sign applications sought permission to post signs that plainly violated the township's size and height regulations . . . . Yet plaintiffs chose not to challenge the size

> and height requirements in their complaint—perhaps in view of the difficulty of such a challenge here. *See Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 818–21 (6th Cir.2005) (rejecting challenge to sign ordinance's size and height requirements); *see also Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 807, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (rejecting challenge to city's ban on posting signs on public property).
>
> Having chosen not to challenge the size and height regulations and having filed nine applications to post a sign in the township that violated these regulations, plaintiffs cannot tenably show that success in challenging other regulations of the sign ordinance will redress any injury caused by these regulations. For even in the absence of these regulations—even if, consistent with the relief sought in plaintiffs' complaint, our court invalidated them—that **would not redress plaintiffs' injury because the size and height restrictions still would preclude the township from approving their sign applications** and thus still would preclude plaintiffs from erecting each of these signs.

Id. at 461-462 (emphasis added). The same analysis applies here. Even if the Township stopped enforcing the challenged sections, Plaintiffs' injuries would not be redressed because their location in the A-1 District would preclude their proposed commercial uses.

The District Court erred by granting summary judgment on the statute of limitations defense and barring the Township from presenting the issue at trial. The district court's decision should be reversed.

VI. THE DISTRICT COURT ERRANTLY FAILED TO CONSIDER THE TOWNSHIP'S LACHES DEFENSE AFTER TRIAL.

The District Court erred when it failed to apply the Township's laches affirmative defense at trial despite the Township clearly identifying the defense in

its trial brief and Plaintiffs' failure to rebut the defense at trial. **RE 581, PageID ##22683-22685**. As a matter of law, the Township established Plaintiffs lacked reasonable diligence in asserting their claims and this lack of diligence prejudiced the Township. At trial, Plaintiffs did not rebut the presumption that their delay was prejudicial and unreasonable. Nevertheless, the District Court did not just ignore the laches defense in its Bench Opinion, but claimed that the Township "waived" the defense because "[n]either the Township, nor PTP presented any witnesses related to laches". **RE 623, PageID #31481**. Put bluntly, the District Court is wrong; the Township had already met its burden on laches and Plaintiffs did not present any evidence to rebut. The District Court's error is reviewed *de novo*. *See Metropolitan Gov't of Nashville*, 86 F.4th at 714.

With the exception of Hawthorne and Bowers Harbor, Plaintiffs sat on their claims for years (if not decades), to the significant prejudice of the Township and its residents. As this Court has recognized, "[l]aches is the negligent and unintentional failure to protect one's rights." *Natron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 408 (6th Cir. 2002) (cleaned up). "A party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Bridgeport Music, Inc. v. Juston Combs Pub.*, 507 F.3d 470, 493 (6th Cir. 2007) (internal citations omitted). The Court presumes that a plaintiff's delay in asserting its rights is reasonable as long as an analogous statute of

limitations has not elapsed, correspondingly, however, "a delay beyond the three-year statutory period is presumptively prejudicial and unreasonable." *Natron*, 305 F.3d at 408. The relevant statute of limitations for this Section 1983 claim is three years (e.g., October 21, 2017 – three years before the date filing). As discussed *supra*, Plaintiffs delayed well beyond the expiration of the statute of limitations to file suit.

As the Township argued in its pre-trial brief, there was a presumption of an unreasonable delay and prejudice to the Township. The proofs at trial did not undermine this presumption, but rather bolstered it. Once the Township demonstrated an unreasonable and prejudicial delay – here because the claims were allowed to linger for decades – the burden shifted to Plaintiffs to rebut the presumption of laches. Plaintiffs did not do so. "In order to overcome the presumption of laches, plaintiff must: (1) rebut the presumption of prejudice; (2) establish that there was a good excuse for its delay; or (3) show that the defendant engaged in 'particularly egregious conduct which would change the equities significantly in plaintiff's favor.'" *Natron*, 305 F.3d at 409 (internal citation omitted). The *Natron* panel emphasized that "*any* prejudice is sufficient, including an increase in potential damages or a loss of evidence." *Id.* (internal citations omitted). Laches would operate to bar damages that occurred before the filing date of the lawsuit. *Id.* at 412 (citing *Kellogg Co. v. Exxon Corp.*, 209 F.3d 562, 568 (6th Cir. 2000), *cert.*

denied, 531 U.S. 944; 121 S.Ct. 340 (2000)). That Plaintiffs advance constitutional claims does not alter this analysis. *Thatcher Enterprises v. Cache Cnty Corp.*, 902 F.2d 1472, 1475-76 (10th Cir. 1990) ("Whether the reason is called laches, estoppel, waiver, or public policy, challenges to the procedural invalidity of a zoning ordinance and constitutional challenges based thereon must be brought within a reasonable time from enactment of the ordinance. If not brought in a timely manner, the plaintiff will be barred from challenging the zoning ordinance."); *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 9 (2008) ("[a] constitutional claim can become time-barred just as any other claim can") (internal quotation and citation omitted).

The unreasonable delay is exemplified by Bonobo's conduct. Bonobo pled responsible to citations for unauthorized GAUs in 2016 and submitted (then withdrew) an amendment application in 2019 – yet waited until the collective filing of this lawsuit to assert constitutional violations. **RE 457-8; RE 463-4**. Bonobo's delay prejudiced the Township by permitting damages to accumulate that would have been avoided had Bonobo either complied with its SUP or timely challenged the ordinance.

The same analysis applies to Chateau Chantal, which negotiated and consented to a judgment defining a similar standard in 1998, yet waited over two decades to claim those same standards were unconstitutionally vague. **RE 463-20**.

It negotiated standards through counsel, obtained judicial approval via Consent Judgment, and watched those standards become codified in the 2004 GAU amendment. For over two decades, Chateau Chantal operated under these negotiated terms without complaint. Only when joined with other wineries in collective litigation did Chateau Chantal suddenly discover constitutional infirmity in provisions it helped draft. This delay, following active participation in the regulatory process, exemplifies the inequitable conduct that laches exists to address. The Township relied on the 1998 settlement and subsequent compliance to its significant detriment – damages that would not have accrued but for Chateau Chantal's decades of silent acquiescence.

Plaintiffs made no effort to rebut the presumption of laches at trial. And here, there can be no question that the Township suffered increased damages as a result of Plaintiffs' delays. Indeed, the District Court's blindness to the laches defense resulted in the damages award reaching back to 2017, when laches should have been applied to bar damages for Plaintiffs' claims (with the exception of Hawthorne and Bowers Harbor) from before the date of filing of the lawsuit.

The Court should reverse the District Court's finding that the Township "waived" laches, find that laches applies, and reverse the District Court's award of damages from before the filing of the complaint.

VII. ON SUMMARY JUDGMENT AND FOLLOWING TRIAL, THE DISTRICT COURT INCORRECTLY CONCLUDED THAT THE

PTZO VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS UNDER THREE DIFFERENT THEORIES.

Plaintiffs claim various sections of the PTZO constitute content-based restrictions, prior restraints, compel speech, and impermissibly regulate commercial speech. The District Court's rulings were phased. The Township and Plaintiffs initially filed cross motions for summary judgment on all First Amendment issues. The District Court denied the Township's motion and granted Plaintiffs, finding liability. **RE 162**. Following this Court's remand in 2022, the District Court reconsidered its rulings and permitted PTP to litigate the First Amendment issues. **RE 301**. While Plaintiffs and PTP were allowed to refile motions for summary judgment on the First Amendment claims, the Township was precluded from participating. *Id.*

On renewed summary judgment, the District Court found no content-based restrictions, concluded two PTZO sections were prior restraints, two compelled speech, and sent five sections to trial for *Central Hudson* proofs on potential commercial speech violations. **RE 623, PageID ##31414-31415, 31455-31456**. The District Court's First Amendment findings are erroneous and should be reversed.

A. The Winery Ordinances Contain No Prior Restraints.

On summary judgment, the District Court concluded that two sections of the PTZO were unconstitutional prior restraints: (1) Section 8.7.3(10)(u)(2)(b), which allows a Winery-Chateau to host meetings of 501(c)(3) groups within Grand

Traverse County, and (2) Section 8.7.3(10)(u)(2)(c), which allows meetings of agricultural related groups with a direct relationship to agriculture. **RE 559, PageID ##21909-21910**. The district court's decision on summary judgment is reviewed *de novo*. *Avient Corp.*, 145 F.4th at 665.

A "prior restraint" is an administrative or judicial order that blocks expressive activity before it occurs. *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 506 (6th Cir. 2001) (citing *Alexander v. United States*, 509 U.S. 544, 550 (1993)). Under a prior restraint, speech turns on advance governmental approval. *Id.*; *see McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012); *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001). Prior restraints typically refers to a licensing or administrative scheme that places "unbridled discretion in the hands of a government official or agency." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).

As an initial matter, the District court wrongly assumed Sections 8.7.3(10)(u)(2)(b) and (c) implicate speech. **RE 559, PageID ##21909-21910** (failing to address predicate argument that Sections 8.7.3(10)(u)(2)(a) and (c) do not implicate First Amendment protections). There can be no prior restraint when there is no "administrative or judicial order[] that block[s] expressive activity before it occurs." *Polaris Amphitheater*, 267 F.3d at 506. "The First Amendment protects only what the Court has called 'inherently expressive' conduct." *Lichtenstein v.*

Hargett, 83 F.4th 575, 594 (6th Cir. 2023). "To qualify as inherently expressive, an action must possess two traits . . . [t]he actor must intend to express a 'particularized message' by engaging in the action . . . [a]nd a high 'likelihood' must exist that the audience who sees the action will understand its message." *Id.* (internal citations omitted).

Section 8.7.3(10)(u)(2)(b) does not regulate speech or expressive conduct. It provides that, once GAUs are approved in an SUP, the Winery-Chateau may host meetings of qualifying 501(c)(3) groups, and clarifies that the activity is not intended to resemble a bar or restaurant, so full-course meals are not allowed. Nothing targets speech or expressive conduct.

Section 8.7.3(10)(u)(b)(c) likewise does not regulate speech or expressive conduct. It permits meetings of agricultural-related groups with a direct relationship to agriculture. It does not require pre-approval. While a Winery-Chateau may seek prior approval, and they are encouraged to provide 30-days' notice, nothing requires approval before the event occurs. The ordinance states only that the Zoning Administrator "can give prior approval". That does not convert the provision into a prior restraint. The Winery-Chateau's conduct is simply hosting a meeting; the group remains free to discuss any topic – wine, politics, religion, or Michigan football. The ordinance does not regulate any message or expressive conduct.

Because neither Section 8.7.3(10)(u)(2)(b) nor (c) makes the exercise of a First Amendment right dependent on "prior approval", *McGlone*, 681 F.3d at 733, the District Court erred in granting summary judgment to Plaintiffs on these provisions. The ruling should be reversed and summary judgment entered for the Township.

B. The Winery Ordinances Do Not Compel Speech.

The District Court erred in granting summary judgment to Plaintiffs on their compelled speech theory, concluding that §§ 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) compel speech. The District Court's decision on summary judgment is reviewed *de novo*. *Avient Corp.*, 145 F.4th at 665.

Section 8.7.3(10)(u)(1)(b) is an intent provision describing GAUs as promoting Peninsula agriculture by identifying "Peninsula Produced" food or beverages, providing promotional materials, and/or offering agricultural tours. Section 8.7.3(10)(u)(5)(a) implements that intent by recommending similar promotional activities. These provisions apply only to Winery-Chateaus that elect to seek GAU approval.

Plaintiffs' compelled-speech claim fails for two independent reasons. First, Plaintiffs have not argued – much less presented evidence – that they were required to convey a message with which they disagree. Second, the challenged provisions do not compel speech under this Court's guidance.

The compelled-speech doctrine "stringently limits a State's authority to compel a private party to express a view with which the private party disagrees." *New Doe Child #1 v. Cong. of United States*, 891 F.3d 578, 593 (6th Cir. 2018). The Supreme Court has recognized compelled speech where an individual must personally express a message he disagrees with or to subsidize such a message. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005). The constitutional concern is forcing endorsement of objectionable ideas and "betray[ing]" an individual's convictions. *Janus v. Am. Fed'n of State Cnty. & Mun. Emps., Council 31*, 585 U.S. 878, 893 (2018). Promoting Peninsula agriculture does not "betray" Plaintiffs' convictions, and Plaintiffs have not claimed otherwise.

Moreover, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997), rejected a compelled-speech challenge to agricultural marketing requirements, reasoning it was "fair to presume" producers agreed with speech promoting their own products. The same presumption applies here. Plaintiffs have not claimed they disagree with promoting Peninsula agriculture or their own wine and agricultural products. Rather, Plaintiffs seek *greater* opportunities for commercial speech. Plaintiffs cannot plausibly claim disagreement with promoting Peninsula agriculture – it is their own product.

Moreover, the PTZO does not actually compel speech. Compelled-speech violations occur "only in the context of actual compulsion." *Wilkins v. Daniels*, 744

F.3d 409, 415 (6th Cir. 2014). Plaintiffs identify no penalties or consequences that compel them "to choose a course of conduct." *Id.*; **RE 469, PageID #16972**. There is no evidence of enforcement mechanisms or sanctions for failing to engage in promotional activities. As *Wilkins* explains, a "minimal" or "wholly subjective" discouragement is not unconstitutional compulsion. 744 F.3d at 415.

The District Court's compelled speech ruling should be reversed and judgment entered for the Township.

C. The Winery Ordinances Do Not Impermissibly Regulate Plaintiff's Alleged Commercial Speech.

Following the bench trial, the District Court invalidated five sections of the PTZO as unconstitutional commercial speech regulations. **RE 623, PageID ##31454-31466**. The District Court invalidated:

- Section 6.7.2(19)(b)(1)(v) – retail merchandise sales
- Section 8.7.3(10)(u)(1)(b) – intent provision
- Section 8.7.3(10)(u)(5)(h) – no outdoor displays during GAUs
- Section 8.7.3(12)(k) – retail merchandise signs
- Section 8.7.3(12)(i) – signs and advertising

The District Court's decision was in error. "In an appeal taken from a bench trial, the district court's factual findings are reviewed for clear error, and the legal conclusions are reviewed *de novo*." *S.C. v. Metropolitan Gov't of Nashville*, 86 F.4th 707, 714 (6th Cir. 2023). "Clear error will be found only when the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Max*

Trucking, LLC v. Liberty Mut. Ins. Corp., 802 F.3d 793, 808 (6th Cir. 2015) (citation omitted).

"Commercial speech" is that speech "'which does no more than propose a commercial transaction.'" *Semco v. Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995) (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976)).

Central Hudson provides a four-part test: (1) a court "must determine whether the expression is protected by the First Amendment"—i.e., the regulated speech at issue must "concern lawful activity and not be misleading;" (2) a court assesses "whether the asserted governmental interest is substantial;" (3) if the speech falls under the First Amendment and the governmental interest is substantial, a court next considers "whether the regulation directly advances the governmental interest asserted;" and (4) the reviewing court must determine whether the regulation "is not more extensive than is necessary to serve that interest." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557 (1980).

Before trial, the District Court concluded the five provisions implicate commercial speech and that the Township's interests were substantial, thus resolving the first two factors. *See* **RE 559, PageID ##21916-21919**. The remaining issues were direct advancement and narrow tailoring. The District Court concluded the Township failed "to show how these PTZO provisions 'directly and materially

advance[d]' the governmental interests and that the regulations were 'narrowly drawn.'" **RE 623, PageID #31457**. That conclusion is belied by the trial record. The proofs demonstrate the challenged provisions "directly and materially advance" the governmental interests and are "narrowly drawn." *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 625-626 (1995).

1. *Central Hudson* does not require the quantum of proof the District Court demanded.

To satisfy prong three, the Township must show the harms are real and the restriction alleviates them to a material degree *Id.* at 626. The Township must present evidence "beyond its own belief" that the harms "are concrete and that its regulatory regime advances the stated goals." *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007) (citation omitted). But *Went For It* makes clear that empirical data need not be accompanied by extensive background and restrictions may be justified by studies, anecdotes from other locales, or even "history, consensus, and simple common sense." *Went For It*, 515 U.S. at 628.

Despite the District Court's suggestion otherwise, the Township presented substantial evidence – the Master Plan, PTZO text, decades of amendments and legislative history, deposition testimony, and common sense – showing real harms and material alleviation.

Prong four requires a reasonable fit, not the least restrictive means. *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 556 (2001) ("We have made it clear that 'the

least restrictive means' is not the standard; instead, the case law requires a reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.'") (internal quotation omitted); *see also Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981).

Zoning ordinances effectuate a community land use plan. MCL § 125.3203 ("[a] zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare, to encourage the use of lands in accordance with their character and adaptability, to limit the improper use of land"). The fit must be evaluated within that contest. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1968) ("essence of zoning" is to make some area of the community available for certain uses "while at the same time preserving the quality of life in the community at large by preventing those [uses] from locating in other areas.").

2. The Township presented – and the District Court ignored – significant evidence that the harms the PTZO addressed were real and the challenged sections helped alleviate them to a material degree.

At trial, the Township presented evidence the harms were real and the challenged provisions alleviated them to a material degree. The proofs included the PTZO itself, the Master Plan, decades of meeting minutes from the Township

Planning Commission and Township Board, trial testimony of Dr. Thomas Daniels, and deposition testimony of: (1) former Township Zoning Administrator and Planner, Gordon Hayward; (2) Grant Parsons; (3) John Wunsch; and (4) former Township Supervisor Rob Manigold. The Township summarized this record in its post-trial brief. **RE 617, PageID ##30889-30902**.

The District Court nonetheless ignored the legislative history, stating it lacked a fact witness "who could explain the meeting minutes and give them a credibility litmus test", and that the court was "largely deaf to their value as proof." **RE 623, PageID #31417**. In assessing fit, the district court chose to "credit [the wineries] testimony over . . . recorded statements from twenty years ago." *Id.* at **PageID #31461**. But legislative history is the best evidence of *why* an ordinance was enacted.

The District Court's approach conflicts with precedent recognizing reliance on legislative history and common sense as a method of showing direct advancement and narrow tailoring. *Went For It*, 447 U.S. at 628; *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 694 (6th Cir. 2016) (reasoning that the means-ends fit can be established by "legislative history, empirical evidence, case law, and even common sense" but not by "mere anecdote and supposition" in the Second Amendment context). The District Court's reasoning also conflicts with Michigan law that a township speaks through its minutes and resolutions. *See 46th Circuit Court v. Crawford Cnty.*, 266 Mich. App. 150, 161; 702 N.W.2d 588 (2005); *Nickola v.*

Grand Blanc Township, 47 Mich. App. 684; 209 N.W.2d 803 (1973); *Superior Ambulance Serv. v. City of Lincoln Park*, 19 Mich. App. 655, 660-661; 173 N.W.2d 236 (1969).

Post-trial the District Court also labeled years of Township minutes and legislative history as "hearsay". RE 623, PageID #31461. That is belied by the trial record. Plaintiffs objected to minutes as hearsay, to which the Township responded that they were public records and, to the extent the documents included statements from the public, those statements were not offered to prove the truth of the matter asserted. **RE 601, PageID ##23147-23151**. The District Court overruled the objection and admitted the exhibit. *Id.* at PageID #23151. The District Court later reiterated: "For the reasons already stated on the record, I think the Township's minutes are admissible, accordingly, they are received over objection." **RE 609, PageID ##25208-25209**. The Bench Opinion confirms the "documents into the records over Plaintiffs' continuing hearsay objection." **RE 623, PageID #31416**. The District Court's rejection of the Township's legislative history as "hearsay" was errant.

Second, the District Court erred when it discounted the Township's proofs for not including a fact witness. The Township did not need a live "fact witness" to "explain" the minutes. *Went For It* permits reliance on history and common sense.

447 U.S. at 628. The Township submitted decades of legislative history documenting what was said, considered by the Township, and done to tailor the ordinance.

Finally, the District Court disregarded evidence supporting direct advancement. It relied on the testimony of former Township Supervisor Manigold to conclude the provisions did not advance the Township's interest, while discounting the credibility and testimony of former Zoning Administrator and Planner Hayward – who had more direct experience with the challenged provisions and explained the harms and how the provisions alleviated them. **RE 623, PageID ##31457-31461**; **RE 617, PageID #30899**. The District Court's factual findings are not insulated from review simply by "denominating them credibility determinations." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

In total, the trial record, including extensive legislative history, the Master Plan, expert and lay testimony, outlined the community interests and harms the sections were enacted to balance and advance. *See Fox*, 492 U.S. at 480 (describing the fourth factor and stating, "[w]hat our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends."). Overall, the evidence at trial demonstrated the PTZO authorized certain uses without eliminating the all-important nexus to agriculture that is so deeply rooted in the tradition and history of the Township. All of this with the goal of ensuring that the winery uses do not overtake or override the agricultural purpose of the A-1 District.

The District Court's commercial speech findings were erroneous and should be reversed.

VIII. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT TO PLAINTIFFS ON THEIR DORMANT COMMERCE CLAUSE THEORY.

As with many other issues, the Township and Plaintiffs filed cross motions for summary judgment on Plaintiffs' dormant Commerce Clause theory. **RE 135; RE 142**. The District Court granted summary judgment to Plaintiffs on their dormant Commerce Clause claim after concluding the following PTZO provisions "on their face[] discriminate against all out-of-state farmers" and fail strict scrutiny: 6.7.2(19)(a), 6.7.2(19)(b)(1)(ii), 6.7.2(19)(b)(1)(iii), 6.7.2(19)(b)(2)(i), 6.7.2(19)(b)(2)(v), 8.7.3(10)(u)(2)(e), 8.7.3(10)(u)(3), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(d). RE 162, PageID #5999. The District Court's decision on summary judgment is reviewed *de novo*. *Avient Corp.*, 145 F.4th at 665.

The dormant Commerce Clause "prohibits the enforcement of state laws driven by economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Pork Producers Council v. Ross,* 598 U.S. 356, 370 (2023) (internal quotation marks and citations omitted). The Sixth Circuit takes a two-tiered approach to assess the permissibility of economic regulations under the dormant Commerce Clause:

> The first prong targets the core concern of the dormant commerce clause, protectionism--that is, differential treatment of in-state and

> out-of-state economic interests that benefits the former and burdens the latter. Protectionist laws are generally struck down without further inquiry, because absent an extraordinary showing the burden they impose on interstate commerce will always outweigh their local benefits. However, if the Court determines that the law is not protectionist, it goes on to analyze the law under the deferential *Pike* balancing test.

Tenn. Scrap Recyclers Ass'n v. Bredsen, 556 F.3d 442, 448-449 (6th Cir. 2009) (cleaned up). The PTZO and nine challenged provisions are not discriminatory economic regulations; they are standard zoning provisions that ensure winery land uses remain consistent with the intent and purpose of the Agricultural district and support the Township's substantial interests in maintaining A-1 zoning and supporting agricultural preservation.

The District Court mistakenly concluded, without analysis of the PTZO provisions, the challenged PTZO provisions "require Farm Processing Facilities and Winery-Chateaus to purchase a certain percentage of grapes from Peninsula Township farmers." **RE 623, PageID #31414**. The District Court first erred because, by their plain language, none of the provisions require a winery operator to purchase any grapes from local farmers. The invalidated GAU provisions do not require any purchases; Winery-Chateaus that host GAUs may grow all their own grapes. (PTZO 8.7.3(10)(u)(2)(e), 8.7.3(10)(u)(3), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(d)) The Farm Processing Facility provisions, similarly, allow winery operators to qualify for the use-by-right Farm Processing Facility land use growing a majority (51%) of the

fruit processed and sold, and by growing *or* buying an additional 34% of the fruit processed and sold, such that "[n]ot less than 85% of all of the agricultural produce sold fresh or processed shall be grown on Old Mission Peninsula and a majority shall be grown on the land owned or leased for the specific farm operation by the same party owning and operating the specific Farm Processing Facility." (PTZO 6.7.2(19)(2)(I)). Fifteen percent of produce processed and sold may source from anywhere. The use itself must occur on large acreage that will already support such growth requirements. As a result, neither the GAU nor Farm Processing Facility provisions require OMP wineries to buy any local produce.

The District Court further erred by failing to consider the PTZO as a whole. *See Winchester v. WA Foote*, 153 Mich. App. 489, 501; 396 N.W.2d 456 (1986) ("Zoning ordinances must be construed as a whole, with regard to the object sought to be obtained and the general structure of the ordinance as a whole.") (citations omitted). Section 8.5 of the PTZO permits another land use that allows unlimited wine making on five-acre parcels irrespective of produce origin. Section 8.7.3(12) similarly permits a fourth land use (Remote Winery Tasting Rooms) to allow the sale and tasting of wine without reference to product source. Additional land and land uses are further allowed in the Township's commercial zoning district for unlimited sale of wine and wine tasting without restrictions as to source.

Moreover, these are all decisions at the election of the winery operators. Nothing in the PTZO gives the Township any control over what land use an operator elects to utilize, how much wine to produce, whether to grow or buy grapes, whether to host GAUs, where purchased grapes originate, or otherwise. These are all winery choices, none are PTZO mandates. *See Am. Express Travel Related Servs. Co. v. Kentucky,* 730 F.3d 628, 634 (6th Cir. 2013) (challenged law "does not *require* AmEx to operate differently in Kentucky.") (emphasis in original). At bottom, the Township imposes no obligation on any winery to buy local grapes, nor prevents every winery land use from buying non-local grapes. The PTZO is non-discriminatory – it does not benefit local economic interests nor burden out-of-state competitors.

The District Court also misapplied strict scrutiny. The District Court doubted the legitimacy of the Township's interests in maintaining its character and preserving agriculture, noting that "such protection is exactly what the dormant Commerce Clause seeks to prohibit." **RE 162, PageID ##6000-6001**. However, the District Court later acknowledged that such Township interests "are not limited to just the preservation of agriculture" and are substantial. **RE 585, PageID #22850**; **RE 559, PageID ##21918-21919**. The Township enacted the challenged PTZO provisions, not to burden interstate commerce, but to ensure community development consistent with its Master Plan, maintain compatible land uses in the

A-1 District, conserve natural resources, provide for food production, and much more. MCL §§ 125.3201(1), 125.3203(1); PTZO 2.1, 6.7.1; PDR Ord. #23 (**RE 615-7, PageID ##28695-28696**). The District Court's scrutiny was tainted by its misunderstanding of the scope and importance of the Township's zoning and agricultural preservation interests.

The District Court's conclusion that the local source provisions are discriminatory is undermined by its own assessment that the challenged provisions "harm[] the Wineries – which are local agricultural businesses." **RE 162, PageID ##6000-6001**. This assessment is based on the transcribed comments of Plaintiffs' attorney at a public meeting, who assured the audience that the Wineries want to buy OMP fruit but the supply is insufficient, "so they can't make as much wine as they can sell," and Two Lads' testimony that in some years "there's not enough fruit" to keep the winery tasting rooms satisfied, "let alone make as much wine as they could sell." *Id.* According to the District Court, the problem with local source provisions is not their burden on out-of-state farmers, but their ineffectiveness in supporting "local agricultural businesses" – i.e., wineries. More particularly, per the District Court, the problem is that the challenged provisions *harm* local agricultural businesses. *See Tenn. Scrap*, 556 F.3d at 449 ("this ordinance is challenged by in-state parties because it disadvantages them. This is not the sort of protectionist local legislation that is virtually per se invalid under the dormant commerce clause.")

(citation omitted; emphasis in original). This negates the core dormant Commerce Clause requirement (i.e., that the challenged provision are designed to benefit in-state economic interests by burdening out-of-state competitors).

Because the PTZO "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church,* 397 U.S. 137, 142 (1970). The challenged PTZO provisions pass the test. *See Garber v. Menendez,* 888 F.3d 839, 845 (6th Cir. 2018) ("Keep in mind that the Court has not invalidated a law under *Pike* balancing in three decades."). The Township's interests in maintaining uniformity in the A-1 district and supporting agricultural production are substantial. There is no evidence or argument that the challenged provisions have even an incidental impact on interstate commerce, nor any basis to weigh the burden on interstate commerce relative to the local benefits to Peninsula Township. *Garber,* 888 F.3d at 845 ("Difficulty becomes unworkability when courts are forced to speculate about the extent of a hypothetical burden without concrete proof. For that reason, courts have held that the party challenging the law bears the responsibility of proving that the burdens placed on interstate commerce outweigh the law's benefits and have turned away challengers who failed to meet that responsibility.") (citations omitted).

There is no basis to conclude that the nine challenged provisions are invalid under the dormant Commerce Clause. The District Court's grant of summary judgment on this claim should be reversed and, instead, judgment should be entered in favor of the Township.

IX. THE DISTRICT COURT ERRED IN CONCLUDING THAT TWO SECTIONS OF THE PTZO ARE PREEMPTED BY THE MICHIGAN LIQUOR CONTROL CODE.

Plaintiffs assert various sections of the PTZO are preempted by the Michigan Liquor Control Code ("MLCC"). Plaintiffs allege as follows:

- "Section 8.7.3(10)(u)(5)(b) conflicts with Mich. Admin Code R. 436.1403(1), which allows wineries to serve alcohol until 2:00 AM every night." RE 29, PageID # 1125 (¶290 of Plaintiffs' First Amended Complaint).

- "Section 8.7.3(10)(u)5(g) conflicts with MCL 436.1916(11), which grants wineries the right to hose [sic] "[t]he performance or playing of an orchestra, piano, or other types of musical instruments, or singing" without a permit." *Id.* at PageID #1126 (¶291 of Plaintiffs' First Amended Complaint).

- "The Winery Ordinances, including Section 8.7.3(10)(u)5(i), conflict with MCL 436.1536, which states a "wine maker [or] small wine maker . . . may own and operate a restaurant . . . as part of the on-premises tasting room . . .," and with MCL 436.1547, which allows Plaintiffs to [sic] a restaurant to cater private events off their premises where they may serve food and alcohol they manufacture." *Id.* at PageID #1126 (¶292 of Plaintiffs' First Amended Complaint).

Plaintiffs and the Township filed cross motions for summary judgment. The District Court found Section 8.7.3(10)(u)(5)(b) was not preempted, but Sections 8.7.3(10)(u)5(g) and 8.7.3(10)(u)5(i) were preempted. **RE 525, PageID ##21129-**

21134. The District Court's decision on summary judgment is reviewed *de novo*. *Avient Corp.*, 145 F.4th at 665.

Plaintiffs claim they are each licensed as Small Wine Makers or Wine Makers, each with a tasting room permit. With a tasting room permit, Plaintiffs assert they may also receive "'a Sunday sales permit, catering permit, dance permit, entertainment permit, specific purpose permit, extended hours permit, [and] authorization for outdoor service.'" **RE 334, PageID #12022-12023**. Plaintiffs claim they are entitled to the performance or playing of any type of musical instrument or singing without any further permit. *See* MCL 436.1916(11) ("[t]he following activities are allowed without the granting of a permit under this section: [t]he performance or playing of an orchestra, piano, or other types of musical instruments, or singing.").

The MLCC does not preempt the PTZO. The MLCC regulates sale of liquor and expressly requires licensees to comply with local zoning. The MLCC imposes the co-existence between local zoning and statewide regulation through the state law's plain language, the administrative rules, and licenses issued by the Liquor Control Commission (the "Commission"). *See* Mich. Admin. Code R. 436.1003.

"In the context of conflict preemption, a direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *DeRuiter v. Twp. of Byron*, 505 Mich. 130, 140; 949 N.W.2d 91

(2020) (internal citations omitted). **"**If either is silent where the other speaks, there can be no conflict . . . . Where no conflict exists, both laws stand." *Walsh v. City of River Rouge*, 385 Mich. 623, 635-36; 189 N.W.2d 318 (1971). The PTZO may add to the conditions of state law "as long as its additional requirements do not contradict the requirements set forth in the statute." *DeRuiter*, 505 Mich. at 147 (internal citation omitted).

Michigan recognizes the importance of allowing local zoning power as a way to plan development, preserve security and economic structure, stabilize property values, attract and retain citizenship, *Cady v. City of Detroit*, 289 Mich. 499, 513; 286 N.W. 805, 810 (1939), and to "protect that sometimes difficult to define concept of quality of life." *Vill of Belle Terre v. Boraas*, 416 US 1, 13 (1974). The MZEA, MCL 125.3101 *et seq*., codifies the general power of local governments to regulate land use. Section 201 of the MZEA specifically provides that local government units may establish zoning districts within its zoning jurisdiction. MCL 125.3201. This authority is to be "liberally construed" in favor of the Township. CONST Art. 7, § 34. The MZEA authorizes a municipality's zoning regulations so long as those regulations are not "inconsistent and irreconcilable with" the Act. *Walsh*, 385 Mich. at 635-36. The MLCC itself contemplates coexistence with local zoning. The Commission requires licensees to comply with local zoning, Mich. Admin. Code R.

436.1003, and directs denial of an application if zoning requirements are not met. Mich. Admin. Code R. 436.1105(3).

The Michigan Supreme Court's decision in *DeRuiter* is instructive. There, the court held a zoning ordinance regulating the location of medical marijuana cultivation was not preempted by the Michigan Medical Marijuana Act ("MMMA") because it did not prohibit the activity; it regulated where the lawful activity could occur. *DeRuiter*, 505 Mich. at 143-144. Rejecting the argument that state law foreclosed all local regulation, the *DeRuiter* Court explained that the MMMA's "enclosed, locked facility" requirement did not speak to where marijuana could be grown, and therefore did not conflict with local land-use restrictions. *Id.* at 143-144. The court reiterated that local law may "add to the conditions" so long as it does not "prohibit what the statute had permit[ted]." *Id.* at 144-145 (quoting *Nat'l Amusement Co. v. Johnson*, 270 Mich. 613, 617; 259 N.W.2d 342 (1935)); *see also Ter Beek v. City of Wyoming*, 495 Mich. 1, 24 n.9; 846 N.W.2d 531 (2014). Ultimately, the *DeRuiter* Court held that zoning restrictions that "add to and complement" state-law limitations are valid so long as they do not prohibit or penalize the activity and are not "unreasonable and inconsistent with regulations established by state law." *DeRuiter*, 505 Mich. at 147-148 (internal citation omitted).

Under Michigan law the Township has the right to zone the wineries as both an inherent right and as expressly authorized by the Commission's administrative

rules. The PTZO does not preclude Plaintiffs from operating a restaurant, having amplified music, or extended hours at every location in the Township. To the contrary, Plaintiffs are free to operate a restaurant, have amplified music, or extended hours – just not in the A-1 District.

The MLCC, the Commission, and Michigan Courts recognize this zoning deference. Rule 436.1003(1) provides that: "A licensee shall comply with all state and local . . . zoning . . . laws, rules, and ordinances as determined by the state and local law enforcement officials who have jurisdiction over the licensee." The Commission warns on each license "does not waive this requirement." **RE 444-3**. Michigan courts likewise recognize municipalities' power to regulate MLCC licensees' operations through zoning. *See Maple BPA, Inc. v. Bloomfield Charter Twp.*, 302 Mich. App. 505, 513; 838 N.W.2d 915 (2013); *Jott, Inc. v. Clinton Charter Twp.*, 224 Mich. App. 513, 541-543; 569 N.W.2d 841 (1997); *Oppenhuizen v. Zeeland*, 101 Mich. App. 40, 48; 300 N.W.2d 445 (1980).

A. Amplified Music

Plaintiffs contend MCL 436.1916(11) preempts Section 8.7.3(10)(u)(5)(g) and grants an unconditional right to amplify music in the A-1 District. The District Court agreed, reasoning a "complete prohibition of amplified music is preempted by Michigan law, which expressly allows certain licensees to have musical instrument

performances without a permit." **RE 525, PageID #21133**. This conclusion is inconsistent with the statute's plain text and the ordinance's actual language.

MCL 436.1916(11) provides: "The following activities are allowed without the granting of a permit under this section: (a) The performance or playing of an orchestra, piano, or other types of musical instruments, or singing." (emphasis added). The statute is silent on amplification. It merely eliminates the need for an MLCC permit for musical performances; it does not confer a right to amplify and does not displace zoning. *See* Mich. Admin. Code R. 436.1003(1).

Section 8.7.3(10)(u)(5)(g) is not a complete prohibition. It states: "No amplified instrumental music is allowed, however amplified voice and recorded background music is allowed, provided the amplification level is no greater than normal conversation at the edge of the area designated within the building for guest purposes." Thus, amplified voice and amplified prerecorded music is allowed, subject to noise level limitations. Only live amplified instrumental music is disallowed. Moreover, Section 8.7.3(10)(u)(5)(g) only imposes amplification restrictions in the A-1 District. Plaintiffs can play amplified music as part of a permitted special land use in the C-1 District, and they can also play amplified music in any other manner traditionally permitted by the PTZO and other local regulation.

As in *DeRuiter*, the PTZO adds conditions where state law is silent. MCL 436.1916(11) addresses permitting; the PTZO addresses land use. They can and do

coexist: Plaintiffs may hold live performances permitted by MCL 436.1916(11) while complying with Section 8.7.3(10)(u)(5)(g). Because the MLCC requires zoning compliance, Mich. Admin. Code R. 436.1003(1), there is no conflict preemption.

The District Court's conclusion regarding Section 8.7.3(10)(u)(5)(g) should be reversed and summary judgment entered for the Township.

B. Catering

Plaintiffs contend that MCL 436.1547 preempts Section 8.7.3(10)(u)(5)(i) and grants an unequivocal right to "cater" food and alcohol in the A-1 District. The District Court agreed. **RE 525, PageID #21134**. Again, the holding is belied by the plain text of the statute and ordinance.

MCL 436.1547 authorizes catering permit holders to "sell and deliver beer, wine, and spirits in the original sealed container . . . for off-premises consumption" where the permit holder serves the alcohol. The statute does not authorize food service or kitchen use. By contrast, Section of 8.7.3(10)(u)(5)(i) provides: "Kitchen facilities may be used for on-site food service related to Guest Activity Uses but not for off site catering." This ordinance provision regulates food service and kitchen use – not alcohol sales.

The two provisions regulate different activities and use the word "catering" differently. Under MCL 436.1547, "catering" refers to limited alcohol service in the

original sealed container, not food or other beverages. Under 8.7.3(10)(u)(5)(i), "catering" only applies to food service, not alcohol.

These regulations are ships passing in the night; they are completely unrelated. While catering permits can only be issued to entities that are also licensed food service establishment, MCL 436.1547 is clear that the "catering" contemplated is only the provision of alcohol. There is no conflict when one regulation speaks while the other is silent. *Walsh*, 385 Mich. at 635-36.

The PTZO limits the use of kitchens for commercial purposes in the A-1 District. This is not preempted by the MLCC. MCL 436.1547 deals with permitting and licensing – it allows for the granting of a permit to a license holder to cater. It does not address land use. The Commission leaves local regulation of land uses in place, recognizing the power of municipalities to zone. Mich. Admin. Code R. 436.1003(1).

The District Court's conclusion regarding Section 8.7.3(10)(u)(5)(i) should be reversed and summary judgment entered for the Township.

X. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SHARPLY LIMITED THE TOWNSHIP'S ABILITY TO PARTICIPATE IN DISPOSITIVE MOTION PRACTICE FOLLOWING THIS COURT'S MANDATE TO RECONSIDER THE SWEEPING 2022 SUMMARY JUDGMENT RULING, PERMITTING THE TOWNSHIP TO ONLY FILE A DISPOSITIVE MOTION ON THE ISSUE OF PREEMPTION.

Both PTP and the Township filed motions for relief from the June 3, 2022 summary judgment Opinion and Order under Rule 54(b), asserting manifest injustice would result if the District Court did not reconsider its previous summary judgment ruling. **RE 285; RE 288**. Realistically, the District Court's hands were tied; resolution of the Rule 54(b) motions was not discretionary but rather mandated by this Court's previous opinion in *Wineries of the Old Mission Peninsula v. Twp. of Peninsula*, No. 22-1534 (6th Cir., Aug. 23, 2022) (holding that PTP's intervention "changes the landscape" of the case and "requires reconsideration of the district's court's partial grant of summary judgment"). This Court's language was compulsory, not discretionary, in its instructions on remand.

The Court reviews a district court's denial of a motion to reconsider an interlocutory order for an abuse of discretion. *See Rodriguez v. Tenn. Laborers Health & Welfare Fund*, 89 Fed. Appx. 949, 952 (6th Cir. 2004). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, when it improperly applies the law, or uses an erroneous legal standard." *Stough*, 138 F.3d at 614. Under Rule 54(b), district courts have inherent power to modify, reconsider and rescind interlocutory orders. *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991). Rule 54(b) allows a district court to reopen any part of a case before entry of a final judgment to reconsider these interlocutory orders. *Id.* at 1282. A court will reconsider interlocutory orders "when there is (1) an intervening change of

controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Rodriguez*, 89 Fed. Appx. at 959.

The District Court, however, took liberties with this Court's remand instructions and opted to sideline the Township for the rest of the litigation. In two separate opinions, the District Court resolved the companion Rule 54(b) motions opposite ways. First, the District Court concluded that PTP showed manifest injustice would result if the entirety of the June 3, 2022 Opinion and Order was not set aside. **RE 301, PageID #10696**. The District Court then, instead of resetting the litigation to square one, opted to "pick apart" its previous ruling, setting aside only portions of the original Opinion and Order and leaving significant rulings in place. However, when considering the Township's companion Rule 54(b) motion, despite having just concluded manifest injustice would result if the previous summary judgment opinion was not set aside, the District Court reversed course. It concluded the Township had not shown manifest injustice and, despite just days before concluding that manifest injustice would result if the Opinion was not, at least in part, set aside, concluded that no such injustice existed. As a result, the District Court concluded the Township would not be permitted to participate in renewed summary judgment proceedings on any issue except preemption. The District Court cited no caselaw that supported the proposition that manifest injustice could result for one litigant and not another as to the same interlocutory order.

The District Court abused its discretion by refusing to grant the Township's Rule 54(b) motion when it previously *granted* the same relief to PTP and when it simultaneously ruled that the Township would not be able to actively participate in the next round of summary judgment practice.

The District Court was bound by the mandate issued by this Court, which required reconsideration of the previous summary judgment ruling. *United States v. Campbell,* 168 F.3d 263, 265 (6th Cir. 1999) ("The basic tenet of the mandate rule is that a district court is bound to the scope of the remand issued by the court of appeals"); *see also Mason v. Mitchell,* 729 F.3d 545, 550 (6th Cir.2013) ("[t]he trial court must proceed in accordance with the mandate and the law of the case as established on appeal") (internal quotation omitted)

The District Court erred when it reached inconsistent rulings: it granted PTP's Rule 54(b) motion because manifest injustice would result if the summary judgment opinion was not set aside, but then denied the Township the same relief as to the same Opinion. The District Court had already concluded the standard had been met. It was an abuse of discretion to treat PTP and the Township differently on the very same issue. Under the law of the case doctrine, the "'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messinger v. Anderson,* 225 U.S. 436,

444, 32 S. Ct. 739 (1912). Despite that, a court's power to reach a result inconsistent with a prior decision reached in the same case is "to be exercised very sparingly, and only under extraordinary conditions." *Gen. Am. Life Ins. Co. v. Anderson,* 156 F.2d 615, 619 (6th Cir. 1946). To reach a different result, "we must find some cogent reason to show the prior ruling is no longer applicable," such as if the previous opinion was a "clearly erroneous decision which would work a manifest injustice." *In re Petition of United States Steel Corp.,* 479 F.2d 489, 494 (6th Cir. 1973).

The District Court abused its discretion in refusing to allow the Township to fully defend this case when it was reset following PTP's intervention. If this matter is remanded to the District Court for further proceedings that include dispositive motion practice, the District Court should be required to allow the Township to participate in dispositive motion practice.

CONCLUSION AND RELIEF REQUESTED

This case went off the rails at vagueness and never recovered. The District Court invalidated narrow, economic land-use provisions that granted additional, permissive uses without engaging the text of the ordinance, without applying the correct level of scrutiny, and based on anecdotal confusion by former Township representatives. That legal error became dispositive. After refusing to revisit this ruling after PTP intervened, the District Court then attributed *all* of Plaintiffs' alleged economic losses to that supposed defect – despite undisputed evidence that

Plaintiffs' agricultural zoning was an independent barrier to the commercial uses they seek. The Constitution simply does not permit a $49.2 million damages award untethered from causation and the law. The law also does not permit an award of compensatory damages for gross profits based on speculative projections for businesses Plaintiffs never operated and could not lawfully operate independent of the very permissive zoning provisions they challenged. These errors along require reversal and entry of judgment in favor of the Township.

But the errors do not stop there. Plaintiffs' as-applied and regulatory takings claims were not ripe for lack of finality, were barred in substantial part by the statute of limitations, and unsupported by proof of causation. The District Court further erred in its First Amendment analysis, its conclusion on dormant Commerce Clause, and in its preemption rulings.

Wherefore, the Township requests that this Court vacate the District Court's judgment, reverse its liability findings on the constitutional and state-law claims, and direct entry of judgment in the Township's favor.

McGRAW MORRIS MASUD
Attorney for Defendant-Appellant/Cross-Appellee

Dated: February 4, 2026

BY: */s/ Bogomir Rajsic, III*

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CERTIFICATE OF COMPLIANCE FRAP 32(g)
(WORD COUNT)

The undersigned certifies that on February 3, 2026, Defendant-Appellant/Cross-Appellee filed a Motion's to File Brief to Exceed Word Count (#27). In accordance with its pending motion, Defendant-Appellant/Cross-Appellee certifies its First Appeal Brief consists of 32,383 words in compliance with its Motion and FRAP 32(g) and was created using Microsoft Word 2016.

McGRAW MORRIS MASUD
Attorney for Defendant-Appellant/Cross-Appellee

Dated: February 4, 2026 BY: */s/ Bogomir Rajsic, III*
Bogomir Rajsic, III (P79191)

CERTIFICATE OF SERVICE

I certify that on February 4, 2026, the foregoing document was served on all parties or their counsel of record through the CM/ECF system which will serve all parties who have appeared or their attorneys of record.

McGRAW MORRIS MASUD
Attorney for Defendant-Appellant/Cross-Appellee

Dated: February 4, 2026 BY: */s/ Bogomir Rajsic, III*
Bogomir Rajsic, III (P79191)

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE	PageID Range	Description of Document
1	#1-434	Complaint
2	#435-437	Plaintiff Motion for Preliminary Injunction
3	#438-884	BIS of Plaintiff Motion for Preliminary Injunction
22	#904-932	Township Motion for Partial Dismissal
24	#936-1000	Township Response to Plaintiff Motion for Preliminary Injunction
29	#1086-1571	First Amended Complaint
30	#1572-1613	Plaintiffs' Response to Township Motion for Partial Dismissal
32-6	##1756-1771	SUP No. 118 for Bonobo Winery
34	#1864-1877	Order Denying Motion for Preliminary Injunction
35	##1878-1954	Township Answer to Plaintiff First Amended Complaint
40	##1965-1966	PTP Motion to Intervene
41	##1967-2120	BIS of PTP Motion to Intervene
46	##2132-2149	Plaintiffs Response to PTP's Motion to Intervene
53	##2270-2271	Plaintiffs' MPSJ Preemption
54	#2272-2551	BIS Plaintiffs' MPSJ Preemption
56	##2553-2627	PTP Motion for Leave to Supplement Motion to Intervene
62	##2737-2738	Township Response to Plaintiffs' MPSJ Preemption and Cross MSJ Preemption
63	##2739-3078	BIS of Township Response to Plaintiffs' MPSJ Preemption and Cross MSJ Preemption
63-6	##2825-2838	Bowers Harbor SUP No. 32
63-6	##2838-2855	Amendment to Bowers Harbor SUP No. 32
63-10	##2994-3020	Mari SUP No. 126

70	#3140-3179	Plaintiff Reply BIS of MPSJ and in Opp. to Township Cross-MSJ
108	#4167-4175	Order Denying PTP Motion to Intervene and Motion to Supplement
121	#4343	PTP Notice of Appeal of ECF 108
135	#4710-4711	Plaintiffs' MPSJ Constitutional Claims
136	#4712-4947	BIS Plaintiff MPSJ Constitutional Claims
142	#4961-5342	Township MSJ Constitutional Claims
142-2	##5009-5092	Township Master Plan (2011)
143	#5343-5625	Township Response in Opposition to Plaintiffs' MPSJ Constitutional Claims
145	#5627-5708	Reply BIS of Plaintiffs' MPSJ Constitutional Claims
146	#5709-5832	Plaintiffs' Response to Township MSJ Constitutional Claims
147	#5833-5846	Township Reply BIS of its MSJ Constitutional Claims
147	#5833-5846	Township Reply BIS of MSJ Constitutional Claims
162	#5981-6030	Opinion on MSJs
164	#6032-6085	Township Notice of Appeal of ECF 162
169	#6218-6339	Township Motion for Stay of Injunction
171	#6341-6459	Plaintiffs Response to Motion for Stay of Injunction
173	#6555-6557	Township Motion to Alter/Amend Judgment
174	#6558-6605	Township BIS of Motion to Alter/Amend Judgment
187	#7036-7220	Plaintiffs' Corrected Response to Motion to Alter/Amend Judgment
206	#7795	Preliminary Injunction
207	#7796-7801	Order Denying Motion to Stay Injunction
211	#7805-7817	Order Denying Motion to Alter/Amend Judgment
215	#8177-8193	USCA Opinion re PTP Appeal
219	#8378-8381	Plaintiffs' Motion to Strike Supplemental Exhibit to Sealed Motion to Strike
220	#8382-8411	Plaintiffs BIS of Motion to Strike Supplemental Exhibit to Sealed Motion to Strike
222	#8413	Order Granting Plaintiffs' Motion to Strike
232	#8469-8474	Order Denying Township Motion to Strike Plaintiff's Supplemental Expert Witness Report
236	#8538	Order Adjourning Trial
238	#8646-8664	Township's Objection to Order Granting Plaintiffs' Motion to Strike Supplemental Exhibit

240	#8714-8721	Township's Objection to Order Denying Motion to Strike Expert CPA Eric Larson
242	#8734-8794	Township's Notice of Appeal from ECF 206
243	#8795-8797	USCA Mandate re PTP Appeal
245	#8801-8807	Township Objection to Order Denying Motion to Strike Plaintiffs' Supplemental Expert Report
248	#8812-8892	PTP Answer to Plaintiff's First Amended Complaint
249	#8893-8913	PTP Motion for Relief from CMO and to Stay Trial
250	#8914-8973	PTP Motion to Dismiss Plaintiff's State Law Claims
251	#8974-8982	USCA Order for Township Appeal of ECF 162
252	#8983	USCA judgment vacating injunction
253	#8984-9010	Plaintiffs' Response to Township Objection to Order Granting Plaintiff's Motion to Strike Supplemental Exhibit
259	#9134-9184	Plaintiff's Response to Township Objection to Order Denying Motion to Strike Expert Witness Larson
263	#9379-9407	Plaintiffs' Response to Township's Objection to Order Denying Motion to Strike Plaintiffs' Supplemental Expert Report
263	#9431-9559	Plaintiffs' Response to PTP Motion to Dismiss
264	#9560-9561	USCA Mandate
272	#9910-9938	Township's BIS Response to PTP Motion to Dismiss
273	#9939-9971	PTP Reply to Plaintiffs' Response to PTP Motion to Dismiss
284	#10186-10202	Order Resolving Objections to Orders
285	#10203-10212	PTP Motion to Set Aside SJ Order and BIS
288	#10217-10243	Township Motion for Relief from Order
291	#10251-10336	PTP First Amended Answer to Plaintiff's First Amended Complaint
292	#10337-10379	Township Motion to Amend CMO/Leave to Disclose Expert
294	#10384-10481	Plaintiff's Response to PTP Motion to Set Aside SJ Order
295		Plaintiffs' Response to Township's Motion to Amend CMO Disclose Expert Witness
300	#10587-10605	Plaintiffs' Response to Township Motion for Relief from Order

301	##10685-10705	Opinion and Order on PTP Motion to Amend CMO, Motion to Dismiss, and Motion to Set aside Order
303	##10835-10843	Opinion and Order resolving Townships Motion for Relief from Order and Motion to Amend CMO
304	##10844-10863	PTP brief regarding additional interests
310	##11434-11453	Plaintiffs' response to PTP's brief regarding additional interest
319	##11878-11890	Opinion and Order on PTP's interests
333	##12013-12014	Plaintiffs MPSJ Preemption
334	##12015-12055	Plaintiffs BIS of MPSJ Preemption
353	##12897-12936	Township Response to Plaintiffs' MPSJ Preemption
355	##12938-12941	PTP Response to Plaintiff MPSJ Preemption and Cross-Motion on Preemption
356	##12942-12985	PTP BIS of Response to Plaintiff MPSJ Preemption and Cross-Motion Preemption
365	##13417-13435	Plaintiff Reply to Township Response to Plaintiff MPSJ Preemption
366	##13480-13500	Plaintiff Reply to PTP response to Plaintiff MPSJ Preemption and Cross-Motion Preemption
439	##15540-15541	Plaintiffs Motion Township Affirmative Defenses
440	##15542-15565	Plaintiffs BIS of Motion Township Affirmative Defenses
441	##15617-15618	Plaintiffs Motion PTP Affirmative Defenses
442	##15619-15661	Plaintiffs BIS Motion PTP Affirmative Defenses
443	##15778-15779	Township MSJ Preemption
444	##15780-15820	Township BIS of MSJ Preemption
444-2	##15907-15930	Amendment 201 to PTZO

457	##16033-16074	PTP Response to Plaintiff Motion PTP Affirmative Defenses
457-10	##16203-16217	Conservation Easement related to Black Star
457-11	##16218-16232	Conservation Easement related to Bonobo (I)
457-12	##16233-16245	Conservation Easement related to Bonobo (II)
458	##16314-16316	Township Motion to Dismiss FPF Subject Matter Jurisdiction
459	##16317-16348	Township BIS Motion to Dismiss FPF Subject Matter Jurisdiction
459-1	#16354	Deposition of Jennifer Cram
459-2	#16361	Two Lads Preliminary FPF Permit
459-3	#16363	Two Lads Final FPF Permit
459-4	#16367-16368	Deposition of Christopher Baldyga
459-6	#16373	Black Star Preliminary FPF Permit
459-7	#16375	Black Star Final FPF Permit
459-8	#16377-16381	Black Star 2007 Variance Request Documentation
459-9	#16386	Deposition of Lee Lutes
459-10	#16388-16393	ZBA Minutes, August 9, 2007
459-12	#16397-16407	Black Star 2011 Variance Request
459-13	#16409	Email from Lee Lutes to Peninsula Township
459-14	#16411-16416	Black Start 2018 Variance Request
459-15	#16418	6/12/18 Letter from C. Deeren to R. Mampe
459-17	##16425-16433	SUP No. 73 related to Tabone
459-18	##16435-16448	Tabone Land Use Permit Application
459-19	##16450-16451	Email to Mario Tabone
459-20	#16453	Email from Mario Tabone
462	##16489-16491	Township Motion to Dismiss WC Subject Matter Jurisdiction

463	##16492-16527	Township BIS Motion to Dismiss WC Subject Matter Jurisdiction
463-1	##16529-16544	Deposition Testimony of Jennifer Cram
463-2	##16546-16555	Bonobo SUP Amendment Application
463-3	##16559-16560	Deposition of Todd Oosterhouse
463-4	##16562-16566	Emails from Bonobo to Township
463-5	##16568-16575	Amendment to SUP No. 32 for Bowers Harbor
463-6	##16577-16584	Deposition of Spencer Stegenga
463-8	#16588	Linda Stegenga e-mail to Township
463-9	##16590-16600	Brys SUP No. 115
463-10	##16602-16613	First Amendment to SUP No. 115
463-11	##16615-16629	Second Amendment to SUP No. 115
463-12	##16631-16646	Third Amendment to SUP No. 115
463-13	##16648-16651	Deposition of Patrick Brys
463-14	##16653-16667	Fourth Amendment to SUP No. 115
463-15	#16669	ZBA Decision
463-16	##16671-16677	Chateau Chantal SUP No. 21
463-17	#16679	Chateau Chantal SUP No. 95
463-18	##16681-16686	Chateau Chantal SUP No. 114
463-19	##16688-16716	First Amendment to SUP No. 114
463-20	##16718-16720	Chateau Chantal Consent Judgment
463-21	##16722-16725	Deposition of Marie Chantal-Dalese

463-22	##16727-16736	Chateau Grand Traverse SUP No. 59
463-23	##16738-16745	Chateau Grand Traverse SUP No. 66
463-24	##16747-16749	First Amendment to SUP No. 66
463-25	#16751	Hawthorne Vineyards Final Farm Processing Permit
463-26	##16753-16763	Hawthorne SUP No. 135
463-27	##16765-16774	Peninsula Cellars SUP No. 62
463-28	##16776-16780	Deposition of John Kroupa
463-29	##16782-16786	10/13/20 Township Board Meeting Minutes
463-30	#16788	2/9/21 Letter from Township to John Kroupa
463-31	##16790-16796	LUP Documentation
466	##16830-16867	Township Response to Plaintiffs' MSJ Township Affirmative Defenses
468	##16939-16940	Plaintiffs MPSJ Constitutional Claims
469	##16941-16983	Plaintiffs BIS MPSJ Constitutional Claims
473	##17980-18020	Plaintiffs' Response to Township MSJ Preemption
475	##18187-18206	Plaintiffs' Reply in Support of Plaintiffs' MPSJ on PTP Affirmative Defenses
476	##18325-18344	Plaintiffs' Reply in Support of Plaintiffs' MPSJ on Township Affirmative Defenses
478	##18400-18417	Township Reply in support of Township MSJ Preemption
485	##18506-18544	Township Response to Plaintiffs' MSJ Constitutional Claims
487	##18731-18766	Plaintiffs' combined Response to Townships Motions to Dismiss Subject Matter Jurisdiction
488	##18908-18955	PTP Response to Plaintiffs' MSJ Constitutional Claims

499	##19280-19299	Township combined Reply to Plaintiffs' combined Response to Townships Motions to Dismiss Subject Matter Jurisdiction
501	##19449-19468	Plaintiffs' Reply to PTP's Response to Plaintiffs' MSJ Constitutional Claims
502	##19567-19587	Plaintiffs' Reply to Township Response to Plaintiffs' MSJ Constitutional Claims
516	##19996-20000	PTP MSJ Constitutional Claims
517	#20001-20073	PTP BIS MSJ Constitutional Claims
518	##20726-20740	Order Denying Motions to Dismiss Subject Matter Jurisdiction
519	##20741-20780	Township Response in Support of PTP's MSJ Constitutional Claims
521	##20890-20950	Plaintiffs' Response to PTP MSJ Constitutional Claims
525	##21120-21138	Opinion and Order resolving Preemption Motion
526	##21139-21163	PTP Reply to Plaintiff's Response to PTP's MSJ Constitutional Claims
528	##21250-21272	Opinion and Order on MSJs Affirmative Defenses
559	##21896-21922	Opinion and Order on MSJ Constitutional Claims
573	##22249-22429	Final Pretrial Order
580	##22582-22642	Plaintiffs' Trial Brief and Proposed Findings of Fact and Conclusions of Law
581	##22653-22707	Defendants' Joint Trial Brief
583	##22784-22843	Defendants' Joint Proposed Findings of Fact and Conclusions of Law
589	#22911	Minutes of Trial 4/29/24
590	#22912	Minutes of Trial 4/30/24
591	#22913	Minutes of Trial 5/01/24
592	#22914	Minutes of Trial 5/02/24
593	#22915	Minutes of Trial 5/06/24
594	#22916	Amended Minutes of Trial 5/07/24

595	#22917	Minutes of Trial 5/07/24
596	#22918	Minutes of Trial 5/08/24
597	#22919	Minutes of Trial 5/09/24
598	#22920	Minutes of Trial 5/10/24
599	#22921	Minutes of Trial 5/13/24
600	#22922-23412	Trial Transcript from 4/29/24
601	##23143-23368	Trial Transcript from 4/30/24
602	##23369-23623	Trial Transcript from 5/01/24
603	##23624-23855	Trial Transcript from 5/02/24
604	##23856-24069	Trial Transcript from 5/06/24
605	##24070-24263	Trial Transcript from 5/07/24
606	##24264-24561	Trial Transcript from 5/08/24
607	##24562-24841	Trial Transcript from 5/09/24
608	##24842-25036	Trial Transcript from 5/10/24
609	##25037	Trial Transcript from 5/13/24
611-1 to 611-150	##25276-27735	Plaintiffs' Admitted Trial Exhibits
611-151	##27738-27826	Plaintiffs' Designations from Deposition of C. Deeren
611-152	##27827-27861	Plaintiffs' Designations from Deposition of D. Sanger
611-153	##27862-27920	Plaintiffs' Designations from Deposition of G. Meihn
611-154	##27921-28040	Plaintiffs' Designations from Deposition of R. Manigold
612	##28041-28046	Order Granting Stipulation and Order regarding Trial Exhibits and Deposition Designations
613	#28047	Plaintiffs' Admitted Supplemental Exhibit 163-1
615	##28049-28064	Defendants' Deposition Designations and Discovery Document Designations and Admitted Trial Exhibits

615-1	##28065-28142	Defendant's Designations from Deposition of R. Manigold
615-2	##28143-28181	Defendant's Designations from Deposition of J. Wunsch
615-3	##28182-28240	Defendant's Designations from Deposition of G. Hayward
615-4	##28241-28289	Defendant's Designations from Deposition of G. Parsons
615-5	##28290-28312	Defendant's Designations from Deposition of C. Deeren
615-6	#28313-28511	Defendant's Discovery Designations
615-7 to 615-31	##28512-30796	Defendant's Admitted Trial Exhibits
615-7	##28512-28676	Peninsula Township Zoning Ordinance
615-7	##28677-28692	Sections 6.7.2(19), 8.7.3(10), and 8.7.3(12) of the PTZO
615-8	##28850-28851	Defendant's Trial Exhibit Q
615-26	##30443-30444	Transfer of SUP No. 73 to Tabone
615-27	##30485-30487	Defendant's Trial Exhibit 10xA
615-27	##30493-30495	Defendant's Trial Exhibit 10xC
617	##30879-30937	Township Post-Trial Brief
618	##30954-31113	Plaintiffs' Post-Trial Brief
619	##31199-31253	PTP's Post-Trial Brief
621	#31305	Minutes from Closing Arguments
623	##31410-31484	Post-Trial Bench Opinion
624	#31485	Final Judgment
628	##32034-32035	Plaintiffs' Motion to Amend Judgment to Include Prejudgment Interest

629	##32036-32043	Plaintiffs' BIS Motion to Amend Judgment to Include Prejudgment Interest
633	##32059-32074	Township's Response to Plaintiffs' Motion to Amend Judgment
635	##32122-32135	PTP's Response to Plaintiffs' Motion to Amend Judgment to Include Prejudgment Interest
640	#32186-	Township Notice of Appeal from ECF 624
641	#32187-32188	PTP Notice of Appeal from ECF 624
642	##32189-32192	Plaintiffs' Reply in Support of Plaintiffs' Motion to Amend Judgment
643	##32193-32196	Order Denying Motion to Alter Judgment
653	#32597	Plaintiffs Notice of Cross-Appeal from ECF 624