

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

OV THE FARM, LLC, a Michigan limited liability company, BOWERS HARBOR VINEYARD & WINERY, INC., a Michigan corporation, and WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION., a Michigan nonprofit corporation,

Case No: 1:25-cv-1588

Honorable Paul L. Maloney

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal corporation,

Defendant.

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AND STONE, PLC

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RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS
FIRST AMENDED COMPLAINT

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I. INTRODUCTION

Peninsula Township threatened to shut down Bonobo. It does not deny it, nor does it deny that its threat was motivated by Bonobo's participation in the *WOMP* case. In response to that threat, Bonobo, Bowers Harbor, and WOMP have filed suit to protect their rights moving forward. Their claims are properly stated, ripe, and ready to be litigated now. This Court should deny the Township's motion to dismiss and force the Township to account for its actions in discovery.

II. BACKGROUND

After the Wineries won the first case against Peninsula Township, Peninsula Township refuses to accept the result. (ECF No. 14, PageID.111-112, ¶¶ 20, 26-27.) It has now taken actions to target Bonobo and, by extension, every other Winery in the Township.

During the *WOMP* case, this Court awarded every Winery damages because the Township unlawfully prohibited them from hosting small and large events. (*Id.*, PageID.112, ¶¶ 23-25.) As part of its analysis, this Court made a finding of fact that the Township had approved Bonobo for Guest Activity Uses. (*Id.*, PageID.111-112, ¶¶ 21-22.) Despite that finding and this Court's judgment, Peninsula Township sent Bonobo an enforcement letter, threatening to revoke Bonobo's special use permit and shut it down if it continued to host events, sell food, and play music. (*Id.*, PageID.113-114, ¶¶ 33-39; ECF No. 14-2, PageID.147-151.) The letter included accusations that Bonobo had violated the Township's Old Noise Ordinance, generically stating that "[s]everal people spoke with the Township and detailed the disturbance caused by this event." (*Id.*, PageID.117, ¶¶ 60-66.) And although the letter purportedly requested "voluntary compliance," Bonobo and the other Wineries "have no reason to believe that the Township's request for 'voluntary compliance' would lead to anything other than official enforcement and revocation of the ability to operate." (ECF No. 14, PageID.114, ¶¶ 40-41.) Indeed, the Township's attorneys

billed the Township for “2025 BONOBO ENFORCEMENT” after writing the letter. (*Id.*, ¶ 42.)

Bonobo, Bowers Harbor, and WOMP initially filed suit in November 2025. (ECF No. 1.) The Township moved to dismiss, (ECF No. 10, 11), and Plaintiffs filed a First Amended Complaint, (ECF No. 14). In the interim between these filings, the Township passed its New Noise Ordinance. (ECF No. 14, PageID.43, ¶ 43.) The New Noise Ordinance makes it a violation to create a “noise disturbance” and makes it a violation to create sound that is “plainly audible” after 10:00 p.m. (*Id.*, PageID.120-121, ¶¶ 91-94.) The New Noise Ordinance creates municipal civil infractions and can be used to revoke permits. (*Id.*, PageID.122-123, ¶¶ 95-96.)

Plaintiffs have raised challenges based directly on Peninsula Township’s letter, its Old Noise Ordinance, and its New Noise Ordinance. In Count I, Bonobo alleges that the Township is retaliating against it for pursuing and winning the *WOMP* lawsuit. In Count II, Bonobo alleges that the Old Noise Ordinance violates Due Process and the First Amendment. In Count III, all Plaintiffs allege that the New Noise Ordinance violates Due Process and the First Amendment. In Count IV, all Plaintiffs allege that the Townships’ enforcement of restrictions that do not exist violates their due process rights to do business free from arbitrary government interference. And in Count V, all Plaintiffs allege that the Township’s ban on restaurants in the A-1 Agricultural zone is preempted by Mich. Comp. Laws § 436.1536(7)(h).

The Township moves to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 23.) The Township raises justiciability arguments of ripeness, mootness, and lack of standing. The Township also contends that Plaintiffs failed to state a claim.

III. ANALYSIS

A. Standard of Review

A motion under Federal Rule of Civil Procedure 12(b)(1) challenges the Court’s subject matter jurisdiction to hear a case. *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014). These

motions “can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack).” *Id.* A facial attack targets the sufficiency of the allegations, so “the court takes the allegations of the complaint as true for purposes of Rule 12(b)(1) analysis.” *Id.* If “an attack on subject-matter jurisdiction also implicates an element of the cause of action, then the district court should find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff’s claim.” *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007) (cleaned up). *See also Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F.2d 236, 239 (4th Cir. 1988) (“The Supreme Court has held that when the contested basis for jurisdiction is also an element of the plaintiff’s federal claim, the claim should not be dismissed for lack of subject matter jurisdiction. When the claim is neither immaterial nor insubstantial, the proper course of action is for the district court to accept jurisdiction and address the objection as an attack on the merits”) (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)). Here, Peninsula Township makes a facial attack—it only references the allegations in the First Amended Complaint—so this Court must accept the allegations as true.

To survive a motion under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The Court construes the record in the light most favorable to plaintiffs and must accept as true all well-pleaded factual allegations. *Philadelphia Indem. Ins. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 649 (6th Cir. 2013). The complaint “will survive a motion to dismiss if it contains ‘either direct or inferential allegations respecting all material elements’ necessary for recovery under a viable legal theory[.]”

Id. (quoting *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276 (6th Cir. 2010)).

B. The Township’s justiciability arguments fail.

This Court should reject the Township’s ripeness, mootness, and standing arguments.

1. The Wineries’ claims for First Amendment retaliation and violation of Due Process in Counts I and IV are ripe.

The Township begins by arguing that Plaintiffs’ claims are not ripe because the Township’s letter only sought “voluntary compliance” and no “sanction” had been levied against Bonobo. (ECF No. 23, PageID.298.) Instead, the Township demands that Bonobo “could seek an official determination from the Zoning Board of Appeals on whether their uses were allowed under the PTZO and that there were processes for seeking an amendment to the PTZO.” (*Id.*, PageID.302.) In essence, the Township’s argument relies on the since-disavowed finality rule from *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*, 473 U.S. 172, 187 (1985).

Williamson County set forth that a plaintiff asserting federal takings claims under 42 U.S.C. § 1983 do two things before seeking judicial relief in federal court. *See Knick v. Twp. of Scott, Pennsylvania*, 588 U.S. 180, 187 (2019). First, the plaintiff had to achieve “finality” by seeking a variance from the zoning board of appeals. *Id.* at 187–88. Second, the plaintiff had to “exhaust” his state law remedies for seeking just compensation before suing in federal court. *Id.*

In the last decade, the Supreme Court significantly altered the *Williamson County* analysis. In *Knick*, the Supreme Court overruled the “exhaustion” requirement and held that a property owner can bring a federal lawsuit when the taking occurs without first pursuing available state court remedies. *Id.* at 193–194, 206. Two years later, the Supreme Court further limited the “finality” requirement, explaining that “nothing more than *de facto* finality is necessary.” *Pakdel v. City & Cnty. of San Francisco, California*, 594 U.S. 474, 479 (2021). “Once the

government is committed to a position,” any “potential ambiguities evaporate and the dispute is ripe for judicial resolution.” *Id.* Requiring a plaintiff to go through an entire administrative process “is inconsistent with the ordinary operation of civil-rights suits” and is not required. *Id.*

The finality requirement is a prudential rather than jurisdictional consideration and is not applied “mechanistically.” *Lilly Invs. v. City of Rochester*, 674 F. App’x 523, 526 (6th Cir. 2017). “Moreover, application of the prudential ripeness doctrine ‘requires that the court exercise its discretion to determine if judicial resolution would be desirable under all of the circumstances.’” *Infinium Builders LLC v. Metro. Gov’t of Nashville & Davidson Cnty.*, 803 F. Supp. 3d 639, 655 (M.D. Tenn. 2025) (quoting *Jackson v. City of Cleveland*, 925 F.3d 793, 807 (6th Cir. 2019)). The Supreme Court “has instructed that claims are fit for review if they present ‘purely legal’ issues that ‘will not be clarified by further factual development.’” *Hill v Snyder*, 878 F.3d 193, 213-14 (6th Cir. 2017). The Sixth Circuit has thus found certain cases ripe where they are based on “theories that require no further factual development and that appear to raise only legal issues.” *Carman v. Yellen*, 112 F.4th 386, 407 (6th Cir. 2024).

Applying the rules from *Knick* and *Pakdel*, Plaintiffs’ First Amendment and Due Process claims are ripe. *First*, *Williamson County*’s finality requirement only applies to certain types of Constitutional claims. *See Miles Christi Religious Ord. v. Twp. of Northville*, 629 F.3d 533, 537 (6th Cir. 2010) (collecting prior cases). Where, as here, the injury from alleged First Amendment retaliation is immediate, the claim is immediately ripe. *See Elvis Presley Enters., Inc., EPPF, LLC v. City of Memphis, Tennessee*, 2019 WL 3804265, at *6 (W.D. Tenn. Aug. 13, 2019); *Temple B’Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1357 (11th Cir. 2013) (“where, as here, the plaintiff alleges that the mere act of designating his or her property historic was motivated by discriminatory animus, [the finality requirement] is inappropriate because the injury is complete

upon the municipality's initial act"); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002) (finality requirement did not apply to First Amendment retaliation claim because that claim was “based on an immediate injury”).

Second, even if *Williamson County*'s finality requirement does apply, Plaintiffs have shown that the Township is committed to a position under *Pakdel*'s “modest” requirement. The Township attorney's letter represents the Township's final position. The First Amended Complaint alleges:

34. “The Township asserted that Bonobo violated the Township's noise ordinance when it played music.” (Exhibit 2: 11/21/25 Letter at 2.)

36-37. The Township asserted that private events, including holiday parties, rehearsal dinners and weddings, and a “Tuscan lunch” “are not permitted by any section of the zoning ordinance for the A-1 Agricultural Zoning District, and we have no record that Bonobo was ever granted guest activity use approval via the Township.” *Id.* at 1-2

38. If the playing of music or holding of events continued, “the Township threatened to revoke Bonobo's special use permit and, effectively, shut Bonobo down.” *Id.* at 5.

39. “The November 21, 2025 Letter represents Peninsula Township's official and final position that ‘events are not permitted by any section of the zoning ordinance for the A-1 Agricultural Zoning District’ with respect to Bonobo and every WOMP member.”

40. “The November 21, 2025 Letter was not a mere request for ‘voluntary compliance’ but instead an overt threat to Bonobo.”

41. “Given the Township's long history of arbitrary enforcement against Bonobo, as outlined in the testimony of Todd Oosterhouse during the WOMP Case, Bonobo, Bowers Harbor, and the other WOMP members have no reason to believe that the Township's request for “voluntary compliance” would lead to anything other than official enforcement and revocation of the ability to operate.”

42. “The attorneys billed the Township for ‘2025 BONOBO ENFORCEMENT’ as listed in the invoices for the Township Board's January 27, 2026 meeting packet.” Exhibit 4.

122. “Peninsula Township's position is based, in part, on its argument that it has ‘no record that Bonobo was ever granted guest activity use approval via

the Township.” (Exhibit 2: 11/21/25 Letter at 2.)

123. In entering judgment in favor of Bonobo, among others, this Court already found that the Township approved Bonobo for guest activity uses. (See WOMP Case, ECF No. 623, PageID.31448–PageID.31449.)

(ECF No. 14, PageID.113-14, PageID.126.)

Peninsula Township has not argued or submitted any evidence to show the letter does not represent its position. Indeed, Peninsula Township at no point represents to this Court that its position that music and hosting events are not allowed is anything but concrete. In fact, Peninsula Township explicitly argues that Bonobo is prohibited from hosting events. (ECF No. 23, PageID.318-319.) That satisfies *Pakdel*’s “de facto finality” requirement. 594 U.S. at 479.

Largely ignoring *Pakdel*, Peninsula Township relies on three cases that are either distinguishable or rely on the pre-*Pakdel* finality requirement.

The Township first cites *Grace Community Church v. Lenox Township*, 544 F.3d 609 (6th Cir. 2008), which predates both *Knick* and *Pakdel* by more than a decade. There, the planning commission revoked a church’s special use permit because of alleged violations of the permit’s conditions. *Id.* at 611–12. Rather than appealing to the zoning board of appeals, the church chose not to present any evidence in support of its position to clarify why it was not committing any violations. *Id.* at 612, 617. “The permit was revoked because the Church’s position was *undefined*. In response to evidence of ongoing permit violations, Rev. Pacey stood mute.” *Id.* at 617. The Sixth Circuit affirmed the dismissal on ripeness grounds because the church had not forced the township into a final position by appealing to the zoning board of appeals as required by *Williamson County*. *Id.* at 617–18. *Grace Community Church* is thus distinguishable for two reasons. First, *Pakdel* eliminated the need for a plaintiff to go to the zoning board of appeals, so Plaintiffs here are situated differently than the church. Second, and more to the point, Peninsula Township did not revoke a permit based on some amorphous violations. Peninsula Township’s

position is crystal clear—no events, no music, and no food service in the agricultural district. (ECF No. 14-2, PageID.147-51.) There is no ambiguity about the parties’ respective positions, and *Grace Community Church* does not change that outcome.

The Township turns next to *Miles Christi*, where a religious order was in a dispute with its local government about the intensity of the order’s land use—specifically, parking on the front lawn. *Miles Christi*, 629 F.3d at 535–36. The order sued after a dispute arose about its new site plan and after the Township filed a state-court enforcement action. *Id.* at 536–37. The Sixth Circuit affirmed the ripeness dismissal because the record did not contain “a definitive statement from the zoning board, the entity charged with interpreting Northville’s zoning ordinances, about which ordinances apply to Miles Christi and about whether Miles Christi must submit a site plan under the ordinances.” *Id.* at 539. *Miles Christi* is inapplicable for two reasons. First, unlike the religious order, Bonobo and the other Plaintiffs hold licenses from the state, they have no need to seek a variance or modification to their site plans, and the Township’s position on its event, music, and restaurant ban is well defined. Second, even if those things were not true, *Miles Christi* is bad law because it required the religious order to exhaust the state administrative procedure. *Pakdel*, decided twelve years later, eliminated that requirement. *See* 594 U.S. at 479.

The Township also cites *Grand v. City of University Heights, Ohio*, 159 F.4th 507 (6th Cir. 2025), which at least comes after *Pakdel*. But *Grand* is factually different. There, the plaintiff withdrew his application for a special use permit to use his home as a “place of religious assembly.” *Id.* at 509–11. He sued without ever receiving a final decision on his application. *Id.* at 511. On appeal, the Sixth Circuit explained *Pakdel*’s modest finality showing: “The point of this requirement is not to channel disputes through elaborate local procedures or three layers of state-court review. Its purpose is simply to determine the government’s position, which is why ‘nothing

more than *de facto* finality is necessary.’ No such finality exists.” *Id.* at 513 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 624 (2001) and quoting *Pakdel*, 594 U.S. at 479). Because the plaintiff withdrew his application before any decision, “we cannot say whether the City has ‘dug in its heels’ because we still do not know where it stands on this application of the ordinance.” *Id.* at 514 (quoting *Murphy v. New Milford Zoning Comm’n*, 402 F.3d 342, 349 (2d Cir. 2005)). *Grand* is far afield from this case, where there has been years of enforcement action from Peninsula Township prohibiting music and events. That prohibition led to a six-year litigation culminating in a \$50 million judgment against Peninsula Township for profits lost from restrictions on events.

The Township’s letter is not an isolated tussle with Bonobo; it states a Township-wide position and threatens SUP revocation for continued music, food, and events. All Wineries in Peninsula Township are confined to the A-1 zone, and WOMP’s members attested they read the letter and credibly fear enforcement. That is more than enough for pre-enforcement standing, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014), and *Pakdel*’s *de facto* finality—no additional local process is required.

Ultimately, the Sixth Circuit has called Peninsula Township’s argument “plainly mistaken” because it conflates ripeness and exhaustion. *Cath. Healthcare Int’l, Inc. v. Genoa Charter Twp., Michigan*, 82 F.4th 442, 448 (6th Cir. 2023). Ripeness “requires only a ‘relatively modest’ showing that the ‘government is committed to a position as to the strictures its zoning ordinance imposes on a plaintiff’s proposed land use.’” *Id.* (quoting *Pakdel*, 594 U.S. at 478–79). “Ripeness does not require a showing that ‘the plaintiff *also* complied with administrative process in obtaining that decision.’” *Id.* (quoting *Pakdel*, 594 U.S. at 479). *See also HRT Enters. v. City of Detroit, Michigan*, 163 F.4th 319, 328 (6th Cir. 2025) (“HRT’s takings claim is ripe because the permissible uses of HRT’s property are known to a reasonable degree of certainty, meaning its

claim does not rest on purely hypothetical or future events.”). Because Peninsula Township has committed to the position that Plaintiffs cannot play music, serve food, and host events, Plaintiffs’ claims are ripe.

2. Count II is not moot because Bonobo could recover damages and the Township has not disclaimed enforcement of the Old Noise Ordinance.

Peninsula Township’s mootness argument focuses on whether this Court can grant declaratory and/or injunctive relief related to a law that has been repealed. Plaintiffs agree with Peninsula Township that this Court cannot grant such relief. But Peninsula Township fails to appreciate that just because it has repealed an unconstitutional law this does not alleviate it of liability for damages, even if those damages are nominal. *Uzuegbunam v. Preczewski*, 592 U.S. 279, 283 (2021). “The existence of this damages claim preserves the plaintiffs’ backward-looking right to challenge the original law and to preserve a live case or controversy over that dispute.” *Midwest Media Prop., LLC v. Symmes Twp., Ohio*, 503 F.3d 456, 461 (6th Cir. 2007). *See also Fehribach v. City of Troy*, 412 F. Supp. 2d 639, 644 (E.D. Mich. 2006) (“Since Plaintiff’s claim for nominal damages enables his action to survive mootness, the Court must address the merits of his constitutional attack on the City’s repealed political sign ordinance.”).

In Count II, Bonobo requests that the Court grant it declaratory relief, award Bonobo its fees and costs, and award “any other relief” that is proper. Charged with construing the complaint liberally, *Duff v. Kentucky Board of Medical Licensure*, 472 F. App’x 400, 401 (6th Cir. 2012), such language includes a request for nominal damages, *e.g.*, *Bailey v. Williams*, 2019 WL 2269833, at *4 (M.D. Fla. May 28, 2019), *Mengesha v. Stokes*, No. 2017 WL 5632668, at *2 (N.D. Fla. Nov. 22, 2017), *report and recommendation adopted*, 2018 WL 3142940 (N.D. Fla. June 27, 2018), *Kanneh v. Burleigh Cnty.*, 2014 WL 6453561, at *6 (D.N.D. Nov. 17, 2014).

The Township’s argument is undercut by the very case it principally relies upon,

Brandywine, Inc. v. City of Richmond, Kentucky, 359 F.3d 830, 836 (6th Cir. 2004). While the Township is correct that in *Brandywine* the Sixth Circuit refused to declare unconstitutional or enjoin a repealed ordinance, it did explain that “Plaintiffs’ claim for monetary damages, however, was not properly dismissed as moot, because an award of monetary damages would compensate plaintiffs for the loss of the opportunity to engage in protected expression caused by the enforcement of the zoning scheme.” *Id.* Here, too, Bonobo’s claim for monetary damages, even if nominal, as well as costs and attorneys’ fees is a live dispute.

Further, while the Township asserts that Bonobo’s claim in Count II is moot, Peninsula Township has not disclaimed enforcement of the Old Noise Ordinance based on the alleged violations on September 30, 2023, September 13, 2024, or September 20, 2025. (ECF No. 14, PageID.117–118, ¶¶ 65, 69.) If the Township were to pursue those violations, it could impose municipal civil infractions and revoke of Bonobo’s special use permit. (*Id.*, PageID.117, ¶¶ 63–64.) Thus, Count II cannot be dismissed as moot.

3. Bowers Harbor has standing.

Bowers Harbor and WOMP join Bonobo in bringing Count III, a facial and as-applied challenge to the New Noise Ordinance under both Due Process and the First Amendment, Count IV, a Due Process challenge to the enforcement of arbitrary zoning restrictions, and Count V, a state law preemption claim which is akin to a facial challenge. The Township challenges Bowers Harbor’s standing but does not challenge WOMP’s. (*See* ECF No. 23, PageID.315.)

Article III standing has three elements: injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury-in-fact is an “invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Id.* Causation exists where the injury is “fairly traceable to the challenged conduct of the defendant.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24,

2016). A plaintiff shows redressability by demonstrating a favorable judicial decision will likely remedy their injury. *Friends of the Earth, Inc. v. Laidlaw Env't Svcs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Plaintiffs, as the party invoking this Court's jurisdiction, bear the burden to prove their standing. *Lujan*, 504 U.S. at 561. Where, as here, Plaintiff is "challenging the legality of government action or inaction ... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 561–62. Finally, "a plaintiff is presumed to have constitutional standing to seek injunctive relief when it is the direct object of regulatory action challenged as unlawful." *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 655 (9th Cir. 2011). A plaintiff is the "object" of a challenged governmental action if it is "within the group of individuals whose conduct the statute regulates." *Phillips v. DeWine*, 841 F.3d 405, 414–15 (6th Cir. 2016).

A plaintiff need not wait for Peninsula Township to target it before filing suit because "action is not a prerequisite to challenging the law." *Driehaus*, 573 U.S. at 158. The Township just needs to make a "genuine threat of enforcement." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). *See also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) ("Our analysis must begin with the recognition that, where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced.").

Two final points merit mention before assessing Bowers Harbor's standing. First, "[s]tanding requirements are somewhat relaxed in the context of First Amendment challenges." *Lamar Co., LLC v. Lexington-Fayette Urb. Cnty. Gov't*, 677 F. Supp. 3d 673, 687 (E.D. Ky. 2023). Second, standing, "focuses on whether the plaintiff is the proper party to bring this suit." *Raines*

v. Byrd, 521 U.S. 811, 818 (1997). It does not depend on the strength of weakness of a claim. *Carman*, 112 F.4th at 399. And standing does not turn on the ultimate success of the merits. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975). *See also White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 461 (4th Cir. 2005) (“If a plaintiff’s legally protected interest hinged on whether a given claim could succeed on the merits, then every unsuccessful plaintiff will have lacked standing in the first place”) (cleaned up).

Besides citing the general law on standing, the Township makes no effort to apply the law to Bowers Harbor. The Township simply argues that the “Complaint makes no attempt to describe how Bowers Harbor has standing in this matter.” (ECF No. 23, PageID.315.) Bowers Harbor is not required to use the words “standing” in a complaint. Instead, Bowers Harbor alleges, for example:

88. Plaintiffs have a First Amendment right to play music on their property.

89. Plaintiffs regularly play music on their property as a form of speech to entice guests to come to their properties and purchase their products as well as to entertain their guests.

90. Bonobo, Bowers Harbor and all of WOMP’s members are subject to and regulated by the New Noise Ordinance.

103. Bonobo, Bowers Harbor and WOMP’s other members similarly would like to play music for their guests past 10:00 p.m. or before 7:00 a.m.

115. Bonobo, Bowers Harbor and WOMP’s other members fear Peninsula Township’s arbitrary and unconstitutional enforcement of the New Noise Ordinance against them.

116. Bonobo, Bowers Harbor, and WOMP’s other members have declined to engage in activities protected by the First Amendment for fear of violating the New Noise Ordinance and have therefore suffered harm through a chilling effect from Peninsula Township’s threatened enforcement of its New Noise Ordinance.

118. Bonobo, Bowers Harbor, and every other WOMP member have a liberty interest, via the Due Process Clause of the Fourteenth Amendment,

in operating their respective business free from arbitrary governmental interference.

134. Bowers Harbor and the other WOMP members are similarly situated to Bonobo both in the proofs provided in the WOMP trial and the Court's ruling.

135. Absent a declaration from this Court, Bonobo, Bowers Harbor, and WOMP's other members will be harmed by Peninsula Township's arbitrary and unlawful interpretation of ordinance restrictions following the WOMP Case.

138. Bonobo, Bowers Harbor, and WOMP's other members are all on-premise licensees and each member holds at least one of a wine maker, small wine maker, small distiller, or brandy manufacturer license issued by the Michigan Liquor Control Commission.

141. The Township has taken the position that "the provision of full-service meals is not allowable within the A-1 district."

146. But for Peninsula Township's ban on wineries operating restaurants, Bonobo, Bowers Harbor, and WOMP's other members would serve food with their wine as a way to market their wine with the goal of eventually selling more to customers.

147. Peninsula Township's ban on restaurants at wineries in the A-1 district conflicts with, and is preempted by, Mich. Comp. Laws § 436.1536(7)(h).

(ECF No. 14, PageID.120, 123, 125-126, 128-130.)

These detailed allegations are far from "no attempt to describe" standing. The allegations sufficiently describe an injury in fact. Bowers Harbor would exercise its First Amendment right to play music (¶¶ 88-90, 103), operate free from arbitrary government interference (¶ 118), and serve food (¶ 146), but has not done these things for fear of the Township's enforcement of its New Noise Ordinance (¶¶ 115-116), the Township's arbitrary enforcement of ordinances that do not exist (¶ 135), and the Township's restaurant ban (¶ 146). *See Lujan*, 504 U.S. at 561-62. The injuries are caused by the Township's New Noise Ordinance, arbitrary enforcement, and restaurant ban, so they are "fairly traceable to the challenged conduct of the defendant." *Spokeo*, 578 U.S. at 338. And a favorable decision from this Court would redress the injuries by enjoining enforcement

of the New Noise Ordinance, arbitrary enforcement, and restaurant ban. *Friends of the Earth*, 528 U.S. at 181.

While the Complaint discusses enforcement against Bonobo, the above allegations also meet the requirements for pre-enforcement review for the same reasons stated above. Bowers Harbor has alleged an intention to engage in a course of conduct that is arguably proscribed by the Township's existing ordinances and regulatory positions and it has also alleged fear of a genuine threat of enforcement from the Township if it does. That is enough. *See Driehaus*, 573 U.S. at 161-64. Even so, Peninsula Township's brief does not address pre-enforcement review. Regardless, Bowers Harbor and WOMP have standing to challenge the Township's ordinances and unlawful positions.

C. The Wineries have stated claims.

1. The Wineries have stated a claim in Count III that the New Noise Ordinance is unconstitutional.

The Township argues that Plaintiffs failed to state a claim that the New Noise Ordinance is unconstitutional. (ECF No. 23, PageID.305.) Plaintiffs challenged the New Noise Ordinance both on its face and as applied. (ECF No. 14, PageID.125.)

For a facial challenge, it is enough at the pleading stage for the plaintiff to allege sufficient factual material to allow the Court to reasonably infer that the contested law is unconstitutionally vague. *See Iqbal*, 556 U.S. at 678. "A vague ordinance violates the Constitution in two significant respects: such an ordinance fails, (1) to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct, and (2) to establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner." *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 556 (6th Cir. 1999). Therefore, a plaintiff can state a vagueness claim either by showing (1) the contested law is so unclear that no person of ordinary intelligence would

be able to read the law and understand what conduct it prohibits, or (2) the law is so unclear that it effectively empowers police officers, judges, and juries to enforce the law on an ad hoc, subjective, arbitrary, or discriminatory basis. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). In short, a vagueness claim lies where those who enforce the law or those who are subject to its enforcement “must necessarily guess at its meaning and differ as to its application.” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

“Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment.” *United States v. Williams*, 553 U.S. 285 (2008). In the First Amendment context, plaintiffs are permitted “to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.” *Id.* (citing *Reno v. A.C.L.U.*, 521 U.S. 844, 870-874 (1997); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & nn.6-7 (1982)). Requirements for clarity are enhanced both where a statute provides for a criminal penalty and where First Amendment rights are implicated. *See Info. Providers’ Coal. for the Def. of the First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991) (citing *Grayned*, 408 U.S. at 109).

Here, there should be no question that the New Noise Ordinance implicates First Amendment rights. (E.g., ECF No. 14, ¶¶ 88-89, 99, 101-112, 114-116.) With First Amendment rights at issue, dismissal under Rule 12(b)(6) would be improper. “The dismissal of a claim challenging a law that abridges protected speech ‘will rarely, if ever, be appropriate at the pleading stage. Instead, factual development will likely be indispensable to the assessment of whether [such a law] is constitutionally permissible.’” *Cornelio v. Connecticut*, 32 F.4th 160, 172 (2d Cir. 2022) (quoting *Bruni v. City of Pittsburgh*, 824 F.3d 353, 357 (3d Cir. 2016)); *see also Preferred Commc’ns, City of Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 495 (1986) (observing

that it was not “desirable to express any more detailed views on the proper resolution of the First Amendment question ... without a fuller development of the disputed issues in the case”); *Council of Greenburgh Civic Ass’ns v. U.S. Postal Serv.*, 586 F.2d 935, 936-37 (2d Cir. 1978) (“Careful balancing of the need for the statute against the statute’s constriction of first amendment rights is called for. Full development of the facts is essential for the court to strike this balance”) (citations omitted). For that reason, “the norm is to wait until the summary judgment stage of the litigation to address the ultimate question of whether the ordinance should stand.” *Graff v. City of Chicago*, 9 F.3d 1309, 1322 (7th Cir. 1993); *see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 221 (1990); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 45 (1986).

a. The Township does not address Plaintiffs’ allegations that § 3(B)(1) of the New Noise Ordinance is overbroad.

The Township’s argument focuses entirely on the definition of “noise disturbance” contained within the noise ordinance. But the Township disregards, and provides no analysis, as to the vagueness of the remainder of the noise ordinance. For example, the Wineries claim that § 3(B)(1) automatically penalizes any noise emanating from any of the Wineries’ properties, or any property in Peninsula Township, that is “plainly audible” from sound-producing devices and musical instruments between the hours of 10:00 p.m. and 7:00 a.m. without regard to whether the noise is reasonable or unreasonable. (ECF No. 14, PageID.123, ¶ 100.) Many courts have addressed similar noise ordinances and struck them down as unconstitutional.

For example, “an outright amplified-sound ban is facially invalid,” but cities may “regulate amplified sound in a manner that is narrowly tailored to preventing the disturbance of others’ use and enjoyment of public and private property within its boundaries.” *Miller v. City of Excelsior, Minnesota*, 618 F. Supp. 3d 820, 834 (D. Minn. 2022) (citing *Saia v. New York*, 334 U.S. 558 (1948) and *Kovacs v. Cooper*, 336 U.S. 77 (1949)). There, the court found invalid an ordinance

“prohibiting all unpermitted amplified sound that can be heard at the property line” as it “burdens substantially more speech than necessary to further the City’s interests.” *Id.* at 834-835.

Most problematically, the ordinance’s reach is not limited to loud, raucous, or disturbing sound; or even sound at a volume likely to be raucous, disturbing, or to interfere with others’ use and enjoyment of the B-1 and B-2 zoning districts. It forbids amplified sound of just about any audible volume. For example, a person walking on a sidewalk who uses a cell phone’s speaker feature almost certainly would violate Section 16-105(b)(3) as written. There is no realistic doubt that the voice of the person with whom the cell phone user is speaking would carry beyond the ‘property line of where it originates’—i.e., the sidewalk’s edge.

Id. at 935.

The *Miller* court also found a second ordinance was not “narrowly tailored” where that ordinance prohibited amplified sound which was “‘plainly audible ... at a distance of five feet or more from its source’ from 9:30 p.m. to 7:30 a.m. or at ‘30 feet or more from its source’ between 7:30 a.m. and 9:30 p.m., ... distances themselves observed by courts to be ‘so limiting’ as to ‘constitute[] a complete ban on the use of amplified sound.’” *Id.* (collecting cases).

Many courts have invalidated as overbroad amplified sound ordinances that prohibited amplified sound outright or that, to varying degrees, curtailed sound to levels below what’s regularly tolerated in the subject forum:

- *Cuviello v. City of Vallejo*, 944 F.3d 816, 828–31 (9th Cir. 2019) (finding facially invalid law requiring permit “for any use of a sound-amplifying device at any volume by any person at any location—without any specifications or limitations that may tailor the permit requirement to situations involving the most serious risk to public peace or traffic safety”);
- *Deegan v. City of Ithaca*, 444 F.3d 135, 143-44 (2d Cir. 2006) (reasoning that ban on “any noise that can be heard 25 feet away” would bar speech at decibel level lower than that “generated by the foot steps of a person in high heeled boots,

conversation among several people, the opening and closing of a door, the sounds of a small child playing on the playground, or the ring of a cell phone”);

- *United States v. Doe*, 968 F.2d 86, 90–91 (D.C. Cir. 1992) (reversing criminal conviction because ordinance restricting use of sound devices at 60-decibel volume measured at 50 feet in national park was not narrowly tailored);
- *Reeves v. McConn*, 631 F.2d 377, 383–85 (5th Cir. 1980) (invalidating as overbroad ordinance provisions prohibiting sound amplification in downtown district except for 6 hours on Sunday; citywide except for nine hours per day; within 100 yards of hospital, school, church, or courthouse; and within 50 yards of any residence or hotel);
- *Hassay v. Mayor*, 955 F. Supp. 2d 505, 520–27 (D. Md. 2013) (preliminarily enjoining prohibition on amplified sound audible at 30 feet at city boardwalk that was “tantamount to complete ban”);
- *Dowd v. City of Los Angeles*, Case No. CV 09-06731, 2010 WL 11591900, at *6–8 (C.D. Cal. Oct. 21, 2010) (enjoining total ban on amplified sound on boardwalk except in limited number of spaces as not narrowly tailored);
- *Lilly v. City of Salida*, 192 F. Supp. 2d 1191, 1194 (D. Colo. 2002) (declaring facially invalid “25 feet limitation on the audibility of sound measured from the property line” without a permit, which was “so limiting that it constitute[d] a complete ban on the use of amplified sound for any form of speech”);
- *Lionhart v. Foster*, 100 F. Supp. 2d 383, 386–88 (E.D. La. 1999) (holding that law “regulat[ing] the production of sound in excess of 55 decibels within 10 feet of hospitals or churches during posted services” was “unreasonably overbroad in the

context of normal activities on public streets and in public parks,” and noting uncontroverted evidence that “55 decibels includes the sound of the human voice in normal conversation, as well as automobile traffic”);

- *Maldonado v. Monterey Cnty.*, 330 F. Supp. 1282, 1285–86 (N.D. Cal. 1971) (preliminarily enjoining ordinance that “effectively bar[red] any [amplified] sound louder than the normal human voice” at all hours on public highways and thoroughfares).

Here, § 3(B)(1) of the New Noise Ordinance is so overbroad that it could not be enforced. The Amended Complaint contains several problematic examples, (*see* ECF No. 14, PageID.123-24, ¶¶ 101-111), but others exist which would stretch the Township’s regulatory powers well past their limits. For example, music coming from a boat on Grand Traverse Bay would be audible on shoreline property. Also, given how sound travels across water, often music from businesses located across Grand Traverse Bay in Elk Rapids is audible at property located within Peninsula Township. Under the noise ordinance, this would be a per se violation. In response to the Wineries’ examples of per se violations, the Township argues that the Township Ordinance Enforcement Officer will not turn the Township into a “police state” and will use his discretion to determine what is and is not an actual violation. (*See* ECF No. 23, PageID.311.) But this is exactly why the New Noise Ordinance is unconstitutional. The Township will pick and choose what is and is not a violation, despite the New Noise Ordinance speaking in absolute terms.

b. The term “noise disturbance” is unconstitutionally vague.

Plaintiffs also allege that the term “noise disturbance” is unconstitutionally vague. (ECF No. 14, PageID.122-123, ¶¶ 97-98.) Relevant here, a “noise disturbance” is “any sound that unreasonably annoys or disturbs a person of normal sensitivities[.]” (*Id.*, PageID.121, ¶ 93.) The Township cites cases suggesting that other courts have upheld the language “unreasonably annoys

or disturbs a person of normal sensitivities.” (ECF No. 23, PageID.308-310.) While that may be true, Plaintiffs have also identified cases striking down similar language.

The Supreme Court of Virginia, for example, struck down an ordinance prohibiting any “unreasonably loud, disturbing and unnecessary noise,” and noise of “such character, intensity and duration as to be detrimental to the life or health of persons of reasonable sensitivity.” *Tanner v. City of Virginia Beach*, 674 S.E.2d 848, 853 (Va. 2009). The *Tanner* court was especially concerned with arbitrary enforcement.

The references in the ordinance to “reasonable persons,” and to persons of “reasonable sensitivity,” do not provide a degree of definiteness sufficient to save the ordinance from the present vagueness challenge. Such terms, considered in their context, delegate to a police officer the subjective determination whether persons whom the police officer considers to be of reasonable sensitivity would find the noise detrimental to their life or health. Likewise, these terms leave to a police officer the determination whether persons the police officer considers to be reasonable would be disturbed or annoyed in their comfort or repose by the particular noise at issue.

Id. Even though Plaintiffs cited *Tanner* in their First Amended Complaint (ECF No. 14, PageID.122, ¶ 97), the Township does not address it in its brief. Plaintiffs also cited *Dupres v. City of Newport, R.I.*, 978 F. Supp. 429, 431-434 (D.R.I. 1997), where a noise ordinance was unconstitutionally vague when it penalized “the making, creation or permitting of any unreasonably loud, disturbing or unnecessary noise” because “the legality of a person’s conduct is judged solely by the subjective characteristics assigned to it by anyone exposed to it.” (ECF No. 14, PageID.123, ¶ 98.) Again, the Township ignores this case. Other cases reached similar results. *See, e.g., Langford v. City of Omaha*, 755 F. Supp. 1460, 1463 (D. Neb. 1989) (“The ordinance provides no standards for determining what noise is considered ‘unreasonable.’ The term ‘unreasonable,’ is not a well-defined term, and is capable of many different interpretations as to its meaning. The fact that the term is likely to be interpreted differently among the various officials enforcing the ordinance is especially troublesome.”).

A Rule 12(b)(6) motion is not the place to litigate the absolute merits of Plaintiffs' claim. Discovery may show, for example, that the New Noise Ordinance could be saved from a vagueness ruling with a sufficient limiting construction. *E.g.*, *Skilling v. United States*, 561 U.S. 358, 405-06 (2010). But that is not the question before the Court in this motion. This Court must accept Plaintiffs' well-pleaded allegations as true and construe them in the light most favorable to Plaintiffs. *Philadelphia Indem. Ins. Co.*, 732 F.3d at 649. With that deference, Plaintiffs were merely required to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Plaintiffs met that burden and the Township's motion should be denied.

2. The Wineries have stated a claim in Count III that the Michigan Liquor Control Code preempts Peninsula Township's ban on restaurants at wineries.

The Michigan Liquor Control Code allows the Wineries to operate restaurants as part of their on-premises tasting rooms. *See* Mich. Comp. Laws § 436.1536(7)(h). Peninsula Township does not allow wineries to operate restaurants. (*E.g.*, ECF No. 14-2, PageID.150 ("Because facility rentals and full-service meals are absent from the listed uses in the A-1 district or within the Former PTZO winery chateau provisions, those uses are excluded and are not presently allowable.")) That direct conflict renders Peninsula Township's restaurant ban void and unenforceable. The Township's argument in support of its motion appears to be that, as a local government, it is allowed to regulate as it wishes. This argument, of course, is completely without legal support.

For instance, the Township references the Michigan Zoning Enabling Act's grant of authority to municipalities to regulate the use of land within their borders. (ECF No. 23, PageID.313.) If the Township were correct, and the MZEA's grant of authority were that broad, then no zoning ordinance could ever be preempted. But the Michigan Supreme Court has rejected that argument. "[T]he fact that the Ordinance is a local zoning regulation enacted pursuant to the MZEA does not save it from preemption." *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 542

(Mich. 2014). Michigan law is replete with examples of state laws preempting local ordinances. *See, e.g., Ter Beek*, 846 N.W.2d at 544 (local ordinance conflicted with Michigan Medical Marijuana Act); *Nat'l Amusement Co. v. Johnson*, 259 N.W. 342, 343 (Mich. 1935) (city's walkathon ban conflicted with state law authorizing walkathons).

Next, the Township asserts Mich. Admin. R. 436.1003(1) grants local governments broad discretion to regulate liquor licensees. (ECF No. 23, PageID.313.) The Township made that exact same argument in *WOMP*, and this Court addressed it and rejected it:

the Township challenges the Wineries' preemption claim in general, arguing that none of the Township Ordinances can be preempted because the MLCC requires licensees to comply with local zoning rules (ECF No. 174 at PageID.6575-76). However, the Court rejects this argument because only zoning rules that are not contrary to law are enforceable. Because the Court ruled that numerous sections of these zoning ordinances are unconstitutional or contrary to law, they are preempted. *See Sheffield c. City of Fort Thomas*, 620 F.3d 596, 604 (6th Cir. 2010) ("Where a municipal ordinance conflicts with a constitutional provision or statute, the ordinance is preempted.").

(*WOMP*, Case 1:20-cv-1008, ECF No. 211, PageID.7808–09.)

Issue preclusion—also known as collateral estoppel—prevents Peninsula Township from re-litigating that Mich. Admin. R. 436.1003(1) immunizes its zoning ordinance from state law preemption.¹ *See Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233 n.5 (1998) ("an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim"). "The purposes of collateral estoppel are to shield litigants (and the judicial system) from the burden of re-litigating identical issues and to avoid inconsistent results." *Gilbert v. Ferry*, 413 F.3d 578, 580 (6th Cir. 2005). Collateral estoppel bars Peninsula Township from re-litigating an argument it already lost.

¹ R. 436.1003 is also an administrative rule and, under basic statutory hierarchy, it cannot nullify permissions granted by statute in Mich. Comp. Laws § 436.1536.

Next, the Township complains that Plaintiffs “cite no case law in support of their position that the MLCC grants them the authority to perform restaurant-like services.” (ECF No. 23, PageID.313.) That’s true, but unsurprising, as Plaintiffs cite a Michigan statute which expressly “grants them the authority to perform restaurant-like services.” Given how explicit the statute is, it is not surprising that no other municipality has decided to litigate the issue. If the statutory grant were not explicit enough, MLCC also provides an information sheet that says wineries “[m]ay serve food or have a restaurant in conjunction with the On-Premises Tasting Room Permit.” (ECF No. 16-4, PageID.248.) It says nothing about local approval on that point. And the lack of case law is not a barrier because Michigan’s conflict preemption principles are well-defined. This Court has made that same observation in response to the same argument from Peninsula Township in *WOMP*. (*WOMP*, Case No. 1:20-cv-1008, ECF No. 301, PageID.10690–91 (“The Court agrees with the Wineries’ characterization of the principles of conflict preemption. There exists a plethora of case law generally outlining the steps in a conflict preemption analysis, which the Court has already conducted in this very case[.]”).)

Finally, in support of its motion the Township cites several Michigan cases which found that local zoning ordinances were not preempted by state law, but each is distinguishable from this dispute. For example, in *Jott, Inc. v. Charter Township of Clinton*, 569 N.W.2d 841, 843 (Mich. Ct. App. 1997), Clinton Township limited topless entertainment to districts zoned B-3 business use. The Michigan Court of Appeals upheld the zoning ordinance as an appropriate time, place, and manner restriction because it “does not ban topless dancing, but, rather, merely restricts the location of such forms of adult entertainment.” *Id.* at 847. *Jott* also considered a challenge to Clinton Township’s definition of nudity. *Id.* at 851. In upholding the definition, the Court of Appeals reasoned that preemption was not appropriate because the Liquor Control Commission

“has adopted Rule 436.1409(1), explicitly recognizing the authority of local governmental units to prohibit different types of nudity in establishments holding liquor licenses.” *Id.* at 854. Thus, Clinton Township was acting under authority that the Liquor Control Commission provided to it.

Next, the Township cites *Maple BPA, Inc. v. Bloomfield Charter Township*, 838 N.W.2d 915 (Mich. Ct. App. 2013). There, a gas station sought local approval to sell beer and wine to go with a specially designated merchant license. *Id.* at 918. Bloomfield Township denied the gas station’s request because the alcohol would be sold too close to fuel pumps to comply with Michigan law. *Id.* at 918–19. The Township subsequently amended its ordinance to prohibit drive-thru sales and to impose location setbacks from major thoroughfares and residential areas. *Id.* at 919. The gas station argued that the Township’s amended zoning ordinance was preempted by the Michigan Liquor Control Code, and the Michigan Court of Appeals rejected that argument for two reasons. First, the Liquor Control Code does not occupy the regulatory field because “the Legislature did not intend to preempt every local zoning statute that concerns alcoholic beverage sales.” *Id.* at 921. Second, and relevant here, the Township’s amended zoning ordinance did not conflict with the Liquor Control Code because “the Legislature has not expressly spoken concerning the sale of alcohol in buildings with drive-thru windows, the minimum building area of buildings at which alcohol is sold, or the number of parking spaces required for a building from which alcohol is sold.” *Id.* at 922. The amended zoning ordinance did not “prohibit what the statute permits,” so there was no conflict. *Id.*

Here, unlike *Jott*, Peninsula Township cites no authority given to it by the Liquor Control Commission to regulate restaurants. And unlike *Maple BPA*, the Legislature has spoken directly on the issue. Winemakers and small wine makers “may own and operate a restaurant or allow another person to operate a restaurant as part of the on-premises tasting room on the manufacturing

premises.” Mich. Comp. Laws § 436.1536(7)(h). Peninsula Township is not regulating in an area where the legislature is silent. Peninsula Township’s ban on restaurant operations at wineries with winemaker and small wine maker licenses conflicts with, and is preempted by, Michigan law.

3. Bonobo has stated a claim for First Amendment retaliation.

In Count I, Bonobo asserts a claim of First Amendment retaliation. To state a claim for retaliation, Bonobo must show that it “engaged in protected conduct,” “an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct,” and that “there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff’s protected conduct.” *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc).

Bonobo alleged every element of the claim. First, it engaged in protected conduct by filing the *WOMP* lawsuit, playing music, and hosting customers and events on its property. (ECF No. 14, PageID.115, ¶¶ 46-50.) Second, the Township took an adverse action against Bonobo by sending the November 21, 2025 Letter with an “overt threat that Peninsula Township would revoke Bonobo’s special use permit and shut Bonobo down if it did not comply with Peninsula Township’s demands to cease playing music, hosting customers, holding events, and serving food.” (*Id.*, ¶ 51.) Bonobo alleged that this action would chill a person of ordinary firmness from continuing to enjoy the rights it won in the *WOMP* case. (*Id.*, ¶ 55.) And third, the Township’s decision to send the letter was motivated by its desire to get Bonobo to abandon the damages it won after engaging in protected conduct by litigating the *WOMP* case. (*Id.*, ¶¶ 52-54.) That was enough for Bonobo to state a claim for First Amendment retaliation.

The Township does not dispute that Bonobo engaged in protected conduct or that its November 2025 letter was motivated by Bonobo’s protected conduct. Instead, it argues that “mere threats of legal action and remand letters” cannot be an adverse action. (ECF No. 23, PageID.317.)

The harassment necessary to rise to a level sufficient to deter an individual is “not extreme.” *Perkins v. Twp. of Clayton*, 411 F. App’x 810, 814 (6th Cir. 2011) (citing *Siggers–El v. Barlow*, 412 F.3d 693, 701 (6th Cir. 2005)). “The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable.” *Bloch v. Ribar*, 156 F.3d 673, 679 (6th Cir. 1998) (citation omitted). For purposes of a First Amendment retaliation claim, therefore, unless the adverse action is “de minimus” or “inconsequential,” the issue of “whether an alleged adverse action is sufficient to deter a person of ordinary firmness is generally a question of fact.” *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583–84 (6th Cir. 2012). “The adverse nature of a particular action ‘will depend on context.’” *Josephson v. Ganzel*, 115 F.4th 771, 787 (6th Cir. 2024) (quoting *Bell v. Johnson*, 308 F.3d 594, 602–03 (6th Cir. 2002)). “As a result, retaliation claims based on all but genuinely ‘inconsequential’ official actions ‘should go to the jury.’” *Id.* (quoting *Bell*, 308 F.3d at 603); *see also Kennedy v. Boneville*, 413 Fed. App’x. 836, 840 (6th Cir. 2011) (“only *de minimis* violations should be dismissed as a matter of law; in general, the adverseness question should survive the pleading stage.”).

The Township is wrong from the jump because it disregards the Sixth Circuit’s decision in *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718 (6th Cir. 2010). There, the plaintiff held a special use permit to operate a business in a township. *Id.* at 720. After the plaintiff spoke out at public meetings, Township officials warned her employer that the employer’s status to operate in the community “would be jeopardized if [the plaintiff] did not refrain” from speaking out in the future. *Id.* at 723. The Sixth Circuit held that threats to the plaintiff’s “economic livelihood,” standing alone, were a sufficient allegation of an adverse action. *Id.* at 728-29.

Just like the plaintiff in *Fritz*, Bonobo challenged the Township. The Township, in return, has targeted Bonobo’s economic livelihood by threatening to shut it down. (ECF No. 14, ¶¶ 32, 38, 40, 51-52.) And just like in *Fritz*, Bonobo has stated an adverse action. At a minimum, the claim should go to a finder of fact. *Josephson*, 115 F.4th at 787. In either case, this Court should deny the Township’s motion.

The Township’s contrary arguments fail. The Township cites *Hornbeak-Denton v. Myers*, 361 F. App’x 684, 689 (6th Cir. 2010), for the proposition that “mere threats” are generally not sufficient to satisfy the adverse action requirement. The case is distinguishable because the “threat” was one parties’ admonition that it would protect its own property rights. *See id.* at 688. Even so, the Township fails to advise this Court that in the very next sentence the Sixth Circuit noted that “[t]his is not a hard and fast rule, as there are no doubt stand-alone threats that would deter a person of ordinary firmness from exercising their protected rights. We do not apply the adverse action inquiry mechanically, as ‘each step of the analysis is flexible enough to take into account the various contexts in which retaliation claims might be made.’” *Id.* (quoting *Thaddeus–X*, 175 F.3d at 395). *Hornbeak-Denton* is thus distinguishable, and *Fritz* makes clear that threats to economic livelihood are sufficient to be an adverse action.

The Township also relies on a distinguishable case from an employment context. A football coach did not suffer an adverse action after he received a letter that “had no detrimental effect” on his job. *Sensabaugh v. Halliburton*, 937 F.3d 621, 628 (6th Cir. 2019). Bonobo, by contrast, faced a direct threat to its economic livelihood.

The Township’s arguments also miss the point of a First Amendment retaliation claim. Bonobo must only allege an adverse action that “may tend to chill individuals’ exercise of constitutional rights.” *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474,

500 (4th Cir. 2005) (citation omitted). Bonobo need not actually lose its special use permit before stating a claim. The adverse action was the issuance of the letter to chill its First Amendment activity, not the actual loss of its permit. Courts have “never held that a plaintiff must prove that the allegedly retaliatory conduct caused [it] to cease First Amendment activity altogether” because “such a subjective standard would expose public officials to liability in some cases, but not in others, for the very same conduct, depending upon the plaintiff’s will to fight.” *Id.*

Here, Peninsula Township’s conduct cannot be considered *de minimis*. *Wurzelbacher*, 675 F.3d at 583. For example, in *Cooperidge v. Woods*, 127 F.4th 1019, 1037 (6th Cir. 2025), the Sixth Circuit found sufficient allegations that the defendants initiated and continued an enforcement action resulting in revocation of a license and noted that “[w]e have repeatedly found similar actions sufficiently adverse to meet this element of a retaliation claim.” *See also Josephson*, 115 F.4th at 787 (holding that a school’s decision not to renew a teacher’s contract was “a traditional example of an adverse action”); *Holzemer v. City of Memphis*, 621 F.3d 512, 520 (6th Cir. 2010) (affirming the district court’s holding that a government employee’s “dilatory tactics with respect to reissuing permits ... amounted to adverse acts that would deter a person of ordinary firmness from engaging in the protected petitioning activity”).

Here, the Wineries’ allegations fit squarely within the contours of *Cooperidge* and *Fritz*. These are allegations of retaliation which the Sixth Circuit has found sufficient at the pleading stage and which questions should be resolved by the trier of fact. Thus, the Township’s motion to dismiss the retaliation claim must be denied.

4. Bonobo has stated a Due Process claim in Count IV based on this Court’s findings of fact in the WOMP case.

Last, the Township attacks Plaintiffs’ Due Process claim. Plaintiffs’ claim is that the Township is enforcing zoning regulations that do not exist related to food and events. (E.g., ECF

No. 14, PageID.126–128, ¶¶ 118–135.) “Bonobo, Bowers Harbor, and every other WOMP member have a liberty interest, via the Due Process Clause of the Fourteenth Amendment, in operating their respective business free from arbitrary governmental interference.” (ECF No. 14, PageID.126, ¶ 118 (citing *Sanderson v. Village of Greenhills*, 726 F.2d 284 (6th Cir. 1984); *Chalmers v. City of Los Angeles*, 762 F.2d 753 (9th Cir. 1985); *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969); and *Small v. United States*, 333 F.2d 702, 704 (3d. Cir. 1964).) And as part of that claim, Plaintiffs argue that Peninsula Township is acting arbitrarily by ignoring the findings of fact from the *WOMP* case that Bonobo “was approved for Guest Activity Uses.” (ECF No. 14, PageID.111–12, 126–27, ¶¶ 21–22, 123–125.) The Township is therefore barred by res judicata and/or collateral estoppel from relitigating issues that have already been decided. (*Id.*, PageID.126–127, ¶¶ 124, 128.)

Peninsula Township moves to dismiss on the sole grounds that this Court’s findings of fact are nothing more than “dicta” and “simply a summation of evidence that had been introduced during that litigation, not a ruling by the court.” (ECF No. 23, PageID.318–19.) Therefore, according to the Township, it is not barred by res judicata or collateral estoppel. (*Id.*, PageID.319.)

The relevant language was not “simply a summation of evidence.” It was one of this Court’s findings of fact made under Federal Rule of Civil Procedure 52(a). If there were any doubt, the quoted language comes under the heading “II. Findings of Fact” and the sub-headings, “4. Winery Specific Findings” and “e. Bonobo.” (*WOMP*, Case No. 1:20-cv-1008, ECF No. 623, PageID.31416, 31444, 31448–49.) The issue was litigated after the Township and PTP asserted Bonobo lacked standing because it was never approved for Guest Activity Uses. (*See id.* at PageID.31423 n.6.) Because that issue was fully and fairly litigated between the parties and was relevant to this Court’s decision, Peninsula Township is collaterally estopped from disclaiming it.

Unsurprisingly, the Township does not address when something becomes barred by collateral estoppel. Collateral estoppel requires “(1) [an issue] ‘essential to the judgment must have been actually litigated and determined by a valid and final judgment’; (2) ‘the same parties must have had a full [and fair] opportunity to litigate the issue’; and (3) ‘there must be mutuality of estoppel,’ ” unless estoppel is being asserted defensively. *Amerisure Mut. Ins. Co. v. Swiss Reinsurance Am. Corp.*, No. 24-1492, 2025 WL 3094132, at *2 (6th Cir. Nov. 4, 2025) (quoting *W.J. O’Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.*, 700 F. App’x 484, 490 (6th Cir. 2017) and *Monat v. State Farm Ins. Co.*, 677 N.W.2d 843, 845–46 (Mich. 2004)).

Every element is met here. First, the issue of whether Bonobo was approved for Guest Activity Uses was actually litigated and determined in this Court’s Bench Opinion. Second, the parties had a full and fair opportunity to litigate the issue. These same parties did so less than two years ago. And third, there is mutuality of estoppel, which “requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privity to a party, in the previous action.” *Monat*, 677 N.W.2d at 846. Stated another way, Bonobo can only claim mutuality of estoppel if it would have been bound by the earlier judgment “had it gone against him.” *Id.* at 846–47. The Bench Opinion governs both parties equally.

Regardless, Peninsula Township misunderstands the Wineries’ Due Process liberty interest claim as it does not rest solely on whether Bonobo had been granted the right to engage in Guest Activity Uses. Instead, as alleged in the First Amended Complaint, the claim also alleges that the Township is banning events (even though this Court found that events were allowed and awarded damages because the Township prohibited them) and food (even though the Michigan liquor control code allows Plaintiffs to serve food). The liberty interest here is the right to be free from the arbitrary enforcement of restrictions which do not exist. And because this is a liberty interest

claim under the Due Process Clause of the Fourteenth Amendment, heightened review is required.

A local government’s “zoning power is not infinite and unchallengeable; it ‘must be exercised within constitutional limits.’” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in judgment)). “[T]he standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.” *Id.* (citing *Thomas v. Collins*, 323 U.S. 516, 529–530 (1945.)) “Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property.” *Id.* (citations omitted.) But “as is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.” *Id.* “[W]hen the government intrudes on one of the liberties protected by the Due Process Clause of the Fourteenth Amendment, ‘this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.’” *Id.* at 71 (quoting *Moore*, 431 U.S. at 499).

Peninsula Township’s motion addresses only the findings of fact regarding Bonobo and Guest Activity Uses. Peninsula Township says nothing about events or food, nor does it address the contours of liberty interest claims. The Township’s motion should be denied.

IV. CONCLUSION

Peninsula Township’s threats are well-defined and applicable to every Plaintiff. This Court should deny the Township’s motion and allow the case to proceed with discovery.

Respectfully submitted,

By: /s/ Joseph M. Infante

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Dated: April 14, 2026

CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.2(b)(ii)

1. This Brief complies with the type-volume limitation of L. Civ. R. 7.2(b)(i) because this Brief contains 10,699 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2026, I filed the foregoing Response in Opposition to Motion to Dismiss First Amended Complaint via the Court's CM/ECF System, which will automatically provide notice of the filing to all registered participants in this matter.

/s/ Joseph M. Infante
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