

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 PENINSULA
TOWNSHIP'S THIRD BRIEF ON APPEAL**

Bogomir Rajsic, III
Thomas J. McGraw
Tracey R. DeVries
MCGRAW MORRIS MASUD
Attorneys for Defendant-Appellant/Cross-Appellee Peninsula Township
44 Cesar E. Chavez Avenue SW, Ste 200
Grand Rapids, MI 49503
(616) 288-3703
brajsic@mcgrawmorris.com

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SUMMARY OF THE ARGUMENT

Plaintiffs' Second Brief on Appeal tries to leave this Court with the impression that this entire case was tried on both liability and damages. Plaintiffs do so to avoid this Court reviewing the legal errors below, instead seeking shelter under inapplicable heightened standards of review. Plaintiffs are wrong, and this Court should not be misguided from what can be discerned from the record.

In reality, liability was determined – with the lone exception of two prongs of the *Central Hudson* commercial speech analysis – entirely on summary judgment. *De novo* review is axiomatic in these situations. Moreover, this appeal primarily focuses arguments on the District Court's erroneous legal analysis. While the District Court's factual findings are reviewed for clear error, application of the legal standards and the Court's legal conclusions remain subject to *de novo* review. *S.C. v. Metro. Gov't of Nashville*, 86 F.4th 707, 714 (6th Cir. 2023).

Focusing on Plaintiffs' legal arguments, they are not persuasive or supported by law.

Plaintiffs' finality argument doubled down on the notion that pre-suit negotiations and alleged enforcement of the PTZO means further efforts to obtain a final decision from the Township through additional administrative avenues that were plainly available would have been futile. Both the Supreme Court and this Court disagree.

The District Court erred when it concluded the GAU provisions of the PTZO were unconstitutionally vague without any textual interpretation of the ordinance. Plaintiffs invite this Court to commit the same error by ignoring the text of the challenged PTZO sections, failing to apply relaxed vagueness standards applicable to economic regulations, and improperly relying on testimony from former Township officials rather than the ordinance itself. But the vagueness inquiry turns on the language of the ordinance itself, not whether individual officials perfectly articulated it in testimony years later. The GAU provisions expressly describe the purpose, scope, limitations, and prohibited activities associated with GAUs and provide fair notice of what conduct is permitted.

Plaintiffs fail to meaningfully respond to the Township's argument that the District Court abused its discretion by striking the Township's rebuttal damages expert without conducting the mandatory substantial justification analysis required under *Howe v. City of Akron*, 801 F.3d 718 (6th Cir. 2015). Instead, Plaintiffs attempt to recast the issue as one involving "good cause" under Rule 16, ignoring that the operative ruling was a Rule 37(c) exclusion sanction. The District Court never analyzed substantial justification but nevertheless leapt to the most severe sanction of exclusion, leading directly to an unsubstantiated \$49.2 million damages award.

Next, Plaintiffs failed to establish causation for their damages. Plaintiffs assume that absent the challenged GAU provisions, they could freely engage in

commercial event hosting. To do so, Plaintiffs attempt to characterize commercial event hosting as an “accessory use”, but disregard the PTZO’s definitions and structure, which limit accessory uses to those customary and incidental to wine-making operations. Event hosting does not fit this framework – particularly the land use intensity to support a \$49.2 million damages award over just five years for eleven wineries. Likewise, Plaintiffs’ reliance on Michigan’s Right to Farm Act fails because the RTFA is a nuisance-defense statute and does not support damage awards or blanket immunity from local zoning regulations governing event centers.

Finally, the District Court’s damages award cannot stand. Plaintiffs recovered speculative lost-profit damages for principal event-hosting businesses the zoning ordinance never authorized in the agricultural zoning district and Plaintiffs never operated. Even if they did operate such uses, they failed to prove damages with reasonable certainty. The District Court compounded this error by awarding gross profits rather than net profits, despite recognizing elsewhere in its Opinion that net profits were the legally appropriate measure of damages.

The Court should reverse the District Court’s legal conclusions, vacate the unsubstantiated damages award, and direct judgment in favor of the Township.

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' failure to achieve finality on their regulatory takings and as-applied claims prior to filing this lawsuit deprives the Court of subject matter jurisdiction. The District Court's denial of the Township's motions on this issue should be reversed.

It is important to note from the start that Plaintiffs' response on this issue begins their pattern of misstating the relevant standard of review to insulate the District Court's errors from review by this Court. Plaintiffs claim the abuse of discretion standard applies because it involves a prudential inquiry. Plaintiffs' citations do not support Plaintiffs' legal assertion.

Plaintiffs first cite *Jackson v. City of Cleveland*, 925 F.3d 793 (6th Cir. 2019), which does not hold that a district court's decision on ripeness is reviewed for abuse of discretion as Plaintiffs claim. To the contrary, *Jackson* only discusses an abuse of discretion standard of review in the context of a district court's denial of a motion to amend under Rule 15(c). *Id.* at 806. Second, Plaintiffs cite *Brown v. Ferro Corp.*, 763 F.2d 798 (6th Cir. 1985). While *Brown* does address ripeness, it does not explicitly hold that prudential standing is subject to an abuse of discretion standard. Instead, the only mention of "abuse of discretion" in the opinion is that "[i]n

resolving the ripeness issue, we cannot conclude that the lower court abused its discretion in declining to adjudicate the validity of the severance agreement program.” *Id.* at 802.

If the Township’s opening brief on this issue was not sufficiently clear regarding the standard of review, this Court very recently concluded that “[w]e first review *de novo* the district court’s determination of ripeness.” *HRT Enterprises v. City of Detroit*, 163 F.4th 319, 327 (6th Cir. 2025). The Court in *HRT* was considering the appeal of a ripeness challenge on a motion to dismiss. The Township’s motion to dismiss for lack of subject matter jurisdiction is subject to *de novo* review.

A. Even Under Plaintiffs’ Favored *Pakdel* Test, They Failed to Achieve Finality Because Avenues Remained for the Township to Clarify or Change Its Position.

Plaintiffs overstate the effect of the Supreme Court’s decision in *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474 (2021). Plaintiffs rely on *Pakdel* for the proposition that once the Township is “committed” to a position, finality is achieved. This generalization of the finality requirement misses key factual dissimilarities in the factual background from *Pakdel* and overstates the Township’s alleged actions in this case.

In *Pakdel*, the City of San Francisco approved plaintiffs’ conversion of their property interest in a multiunit residential building after they agreed to offer their

tenant a lifetime lease. *Id.* at 475-476. The plaintiffs later “requested that the city either excuse them from executing the lifetime lease or compensate them for the lease.” *Id.* at 476. The city refused and informed plaintiffs that their failure to execute the lease could result in an enforcement action. *Id.* The plaintiffs filed a federal suit “alleg[ing] that the lifetime-lease requirement was an unconstitutional regulatory taking.” *Id.*

The Ninth Circuit found the plaintiffs’ claims were not ripe. *Id.* at 477. It reasoned the city’s denial of the plaintiffs’ requests for an exemption was not a final decision “because petitioners had made a belated request for an exemption at the end of the administrative process instead of timely seeking one ‘through the prescribed procedures.’” *Id.* at 477-478 (quoting *Pakdel v. City & Cnty. of San Francisco*, 952 F.3d 1157, 1163 (9th Cir. 2020)). The Supreme Court reversed, reasoning that a plaintiff need only show “that there is no question about how the regulations at issue apply to the particular land in question,” and in that case, there was “no question about the city’s position:” the plaintiffs had to execute a lifetime lease or face an enforcement action. *Id.* at 478. The *Pakdel* Court explained that by forcing the plaintiffs to seek an exemption through prescribed state procedures, the Ninth Circuit improperly required administrative exhaustion. *Id.* at 479.

However, even under *Pakdel*’s “relatively modest” finality requirement, Plaintiffs must still show “that there is no question about how the regulations at issue

apply to the particular land in question.” *Id.* at 478. Plaintiffs note that the Township must be committed to a final, conclusive position, but ignore that *Pakdel* reasoned that when “avenues still remain for the government to clarify or change its decision,” there is no finality. *Id.* at 479-480.

Pakdel supports the Township’s position that the District Court erred in denying the motions to dismiss. Here, unlike in *Pakdel*, there were still avenues before filing suit where the Township could have clarified or changed its position. Indeed, the Farm Processing Facility Plaintiffs – those operating as a use by right – had multiple avenues remaining where the Township could have clarified or changed its decision: they could have appealed enforcement decisions to the ZBA, sought interpretations of the Ordinance, or sought variances from the ZBA. **RE 29-1, PageID ##1163-1164.** Those Plaintiffs operating under SUPs similarly could have sought amendments to their SUPs via a hearing before the Planning Commission and final decision of the Township Board. Plaintiffs did none of those things. Glaringly, Plaintiffs do not dispute this in their response.

The District Court recognized that 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.** However, at this point, the District Court and Plaintiffs break with

binding precedent and rely on an unsound theory: alleged “enforcement” and pre-suit negotiations can constitute finality.

This Court just recently revisited the finality requirement in *Grand v. City of Univ. Heights*, 159 F.4th 507 (6th Cir. 2025), and concluded that informal attempts to achieve finality were insufficient. In *Grand*, the plaintiff began hosting small prayer gatherings in his home. *Id.* at 509-510. The City issued a cease-and-desist letter asserting that Grand’s residence could not be used as house of worship in his zoning district without a SUP. *Id.* at 510. The letter warned Grand that continued violations could result in enforcement action and citations. *Id.* Upon receiving the letter, Grand cancelled future gatherings and subsequently applied for a SUP. *Id.*

Grand withdrew the application before the City made a decision. *Id.* Subsequently, City officials warned Grand against operating a house of worship without a permit and investigated potential housing code violations. *Id.* at 511. Approximately eighteen months later, Grand filed a federal lawsuit against the City and several officials, asserting multiple statutory and state and federal constitutional claims. *Id.* The district court dismissed several of Grand’s constitutional claims as unripe. *Id.*

Affirming, this Court found the “relevant local agencies never reached a final decision about the application of the City’s zoning rules to Grand.” *Id.* Neither the Planning Commission, the City Council, nor the ZBA ever determined whether the

relevant section of the zoning ordinance applied to the kind of gatherings Grand had planned. *Id.* This Court noted the “government body ‘charged with implementing the regulations,’ in short, has not ‘reached a final decision regarding the application of the regulations to the property at issue.’” *Id.* (quoting *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-187, 105 S.Ct. 3108 (1985)). As such, “Grand’s claims thus never ripened into a dispute suitable for federal review.” *Id.*

Like Plaintiffs, Grand claimed informal communications from the City constituted a final decision. The Court disagreed:

To ripen his claims, Grand needed a final decision from the agency with authority over the challenged regulations. That final decision would come from the Board of Zoning Appeals. McConville, the University Heights Law Director who sent the zoning-violation letter, has no role in the relevant agencies. And Mayor Brennan neither controls the Planning Commission nor sits on the Board of Zoning Appeals. Grand's case, at bottom, turns on whether his proposed gatherings would render his home a “house[] of worship” under the ordinance. UHCO § 1274.01(b)(1). Only the zoning board, not Brennan or McConville, can answer that question.

Id. at 513. While Grand did not need to exhaust any local remedies, he “need[ed] to obtain a final decision.” *Id.*

Plaintiffs should be held to the same standard. However, Plaintiffs ignore *Grand* and fail to demonstrate finality under *Pakdel*, choosing instead to double down on the District Court’s errors. Plaintiffs’ response relies on three factors to support their finality theory: (1) the record showed pervasive enforcement of the

PTZO; (2) the wineries operating under an SUP sought and received a definitive position from the Township; and (3) pre-suit negotiations between the parties. (Plaintiffs' Brief at 22). None of these are sufficient under *Pakdel* and this Court's long history of guidance in the finality context.

First, Plaintiffs offer no argument regarding the alleged pervasive enforcement, instead merely quoting from the District Court's opinion. The Township in its first brief addressed the District Court's errors in concluding the Township's alleged enforcement could constitute finality. None of the three instances of "enforcement" relied upon by the District Court reflect a final determination by the Township as further clarified by the Court's decision in *Grand* and the Supreme Court's decision in *Pakdel*. Further administrative avenues remained for Plaintiffs to seek clarification regarding the scope of their land use approvals from the land-use authority. Information correspondence, under *Grand*'s reasoning, is categorically insufficient to establish finality. Plaintiffs' narrow reading of *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp.*, 82 F.4th 442, 448 (6th Cir. 2023) does not change this fact.

Second, Plaintiffs' argument that the wineries operating under an SUP received a final determination when the Township granted their SUP is perplexing. The SUP holders received an *approval* for a land use followed up by no further administrative clarification from the Township and no categorical challenges to the

PTZO or their individual SUP approvals. Instead of seeking clarification from the ZBA, Plaintiffs elected to proceed in federal court with a challenge only to the text of the PTZO. Neither *Pakdel* nor its progeny in this Court made administrative review optional prior to filing suit.

Third, Plaintiffs' continued reliance on pre-suit negotiations between the parties walks directly into the teeth of the Court's decision in *Grand*. The District Court concluding that the memo "was not a formal attempt to amend any SUPs or seek variances, the Township did have the ability to weigh in and remedy the Wineries' grievances well before this action was filed," **RE 518, PageID #20736**, misapprehends both *Pakdel* and its progeny. The burden is not on the Township to achieve finality or extend a hand to Plaintiffs. Instead, these informal attempts to communicate – rather than seeking a final position from either the Township Board or ZBA – are categorically insufficient to qualify as a final decision from the relevant land-use agency.

B. The District Court's Application of a "Futility" Model and Decision to Exercise Prudential Standing was in Error.

As an initial matter, the Township did challenge the District Court's decision to exercise prudential standing. Indeed, the Township's response was replete with discussion that the District Court's decision to adopt a futility model, **RE 518, PageID #20733**, was in stark contrast with the land-use history of each of the Plaintiffs. Even the District Court acknowledged that none of the Plaintiffs obtained

a final decision regarding the application of the challenged PTZO provisions. **Opinion, RE 518, PageID #20733.** The District Court’s error in adopting a futility requirement is further highlighted by *Grand*, where the Court reasoned that “‘futility’ is not an exception to finality; it’s another way to state the rule.” *Grand*, 159 F.4th at 513 (internal citation omitted). As in *Grand*, it is impossible to say that the Township had “dug in its heels” because Plaintiffs – as the District Court conceded – never actually “appealed or sought the proper amendments or variances before suing.” **RE 518, PageID #20733.**

The Township explained at length the zoning history for each Plaintiff that was replete with land-use approvals and expanded uses when formal processes were utilized (e.g., application to the Planning Commission and progressing to the Township Board). Contrary to the District Court’s judgement that it was “not at all convinced” that requiring Plaintiffs to follow the procedures to obtain a final decision would resolve the issues between the parties, **RE 518, PageID #20736**, the record supports that formal efforts were successful.

The finality requirement has a clear underlying rationale: it “responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer.” *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725, 738 (1997). While the District Court and Plaintiffs assumed how the Township would respond to an actual attempt to achieve finality

(e.g., seeking to effect change through official avenues, not by relying on informal communications in a negotiation process or through vaguely labeled “enforcement”), the record demonstrates that when Plaintiffs relied on formal processes, the Township routinely expanded permitted uses. This comports with the Supreme Court’s guidance in *Suitum*: the Township has a high degree of discretion in administering its zoning ordinance, but it needs to be presented with an actual opportunity to render a final decision.

The District Court’s decision to proclaim that additional efforts to achieve finality would have been futile carried substantial effects. The possibility remains that the Township, when presented with an application, may have approved the uses Plaintiffs seek. This case may never have reached the stage of a federal court sweeping away large swaths of the Township’s zoning ordinance and entering an award of nearly \$50 million in compensatory damages had Plaintiffs simply worked through avenues to get a final decision from the Township.

II. THE GUEST ACTIVITY USE SECTION OF THE PTZO IS NOT UNCONSTITUTIONALLY VAGUE.

The vagueness analysis begins and ends with the actual text of the ordinance. However, Plaintiffs and the District Court go to great lengths to avoid actually analyzing the text of the GAU provision. Upon review of the text of the ordinance, which is an economic regulation not subject to the highest degree of scrutiny, it is beyond dispute that the ordinance provides people of ordinary intelligence a

reasonable opportunity to understand what conduct is prohibited and it does not authorize or encourage arbitrary or discriminatory harassment.

A. Liability for the Vagueness Claim was Established on Summary Judgment, and the District Court’s Reconsideration of *Standing* After Trial Does Not Alter This.

Liability for Plaintiffs’ vagueness claim was fully resolved in 2022. The pleaded theory was a facial vagueness challenge for which the District Court granted summary judgment to Plaintiffs. **Plaintiffs’ First Amended Complaint, RE 29, Page ID ##1121-1122; Opinion, RE 162, Page ID ##6016-6019.** Vagueness, from a liability perspective, was not an issue “live” for trial. Before, during, and after trial, Plaintiffs consistently agreed liability on their vagueness claim was definitively resolved. **Joint Final Pre-Trial Order, RE 567, Page ID ##22110-22111; Plaintiffs’ Trial Brief, RE 580, Page ID ##22592-22593, 22595-22626 (discussing issues live for trial and those resolved prior to trial); Plaintiffs’ Post-Trial Brief, RE 618, Page ID ##30969-30970.** During Plaintiffs’ opening statement, Plaintiffs’ counsel was unequivocal that liability for vagueness was resolved:

First, on the issue of due process, the Court has determined that in the winery-chateau section of the winery ordinances, the term guest activities is unconstitutionally vague. The Wineries at trial will show that this caused them to incur damages and they’ll request and we’ll put on evidence of compensatory damages.

The District Court also agreed that vagueness was an “issue[] resolved prior to trial,” noting “[t]his Court ruled that any subsection of Section 8.7.3(10) that uses the term

‘Guest Activity’ is unconstitutionally vague and must be stricken from the Township Ordinances.” **Opinion, RE 623, Page ID #31414.**

Now, in an attempt to insulate their claims from appellate review, Plaintiffs posit that, despite all parties’ and the District Court’s understanding of the issues being tried on liability, there was actually a shadow liability trial ongoing unbeknownst to all participants. Plaintiffs are wrong in suggesting this Court ignore their own counsel’s statements from trial explaining what trial involved.

Plaintiffs assert the District Court made an as-applied ruling. Plaintiffs conflate standing with liability in terms of whether the GAU provisions had been “applied” to the wineries. Initially, Plaintiffs cite to a footnote in the District Court’s Bench Opinion, where the District Court backtracked on its previous grant of summary judgment on standing. **See RE 623, Page ID #31423 n.6.** Plaintiffs next point to the District Court’s damages analysis to bolster their conclusion that the District Court also established as-applied liability on the vagueness claim. **See id. at Page ID ##31475-31476.** But again, here, the District Court can analyze whether all of the Winery-Chateau Plaintiffs had standing (e.g., whether the PTZO had been applied to them) such that they could be awarded damages. The District Court did not manufacture an “as applied” vagueness claim.¹

¹ Additionally, had Plaintiffs pled an as-applied vagueness theory (or if the District Court unintentionally manufactured one) that as-applied claim would be subject to

B. The Nature of the PTZO – an Economic Regulation that Involves Civil, Not Criminal, Penalties – Invites a Higher Degree of Latitude in the Vagueness Review.

This Court need not engage in a fact-finding inquiry regarding whether the GAU provisions pass constitutional muster. This is not a credibility battle. The District Court simply applied the wrong legal framework, and Plaintiffs encourage the same legal errors.

The parties agree that the starting point for a vagueness analysis is whether 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 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).

However, Plaintiffs attempt to house the vagueness analysis under a more strict approach utilized in the context of ordinances involving criminal penalties should be rejected. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Skilling v. United States*, 561 U.S. 358 (2010). There is no dispute that the GAU provisions and, indeed, the broader Winery-Chateau section of the PTZO does not invoke the specter of criminal penalties. Rather, the PTZO is a civil zoning ordinance enforced

the same finality requirement as all of Plaintiffs’ other applied land-use claims. For the reasons discussed above, this non-existent as-applied claim is not ripe.

through permit conditions, administrative hearings, and, at most, civil penalties. The degree of scrutiny applied to the challenged sections of the PTZO should be relaxed.

But “[e]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.” *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489 (1982). Moreover, businesses “may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.” *Id.* Finally, as the Supreme Court noted in *Flipside*, “The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *Flipside*, 455 U.S. at 498-499.

Thus, while not agreeing that the GAU provisions affect a substantial amount of constitutionally protected activity, even if the First Amendment was implicated, the degree of scrutiny should be concomitantly relaxed given the nature of the regulation as economic and involving civil as opposed to criminal penalties. *See Platt v. Bd. of Comm’rs on Grievances & Discipline of Ohio Supreme Ct.*, 894 F.3d 235, 246 (6th Cir. 2018) (reasoning that “[w]hile ‘a more stringent vagueness test should apply’ to laws abridging the freedom of speech, that standard is relaxed

somewhat by the fact that the Code imposes civil rather than criminal penalties and includes an implicit scienter requirement.”).

C. Reviewing the Actual Text of the GAU Provisions Demonstrates the PTZO Provided Fair Notice and Did Not Encourage Arbitrary or Discriminatory Enforcement.

Plaintiffs still refuse to substantively grapple with the actual language of the ordinance they claim is vague. This mirrors the District Court’s error in granting summary judgment to Plaintiffs. The actual text of the GAU provisions of the PTZO is simple. It provides in relevant part:

- The intent of the section (8.7.3(10)(u)(1));
- A description of what is and is not a GAU (8.7.3(10)(u)(2));
- A description of how GAUs need to relate to agricultural production (8.7.3(10)(u)(3));
- Guidance regarding how many people are allowed to participate in GAUs; (8.7.3(10)(u)(4)); and
- A description of the requirements for the GAUs themselves (8.7.3(10)(u)(5))

Plaintiffs, and the District Court, ignore the text of the PTZO and feign confusion regarding what is and is not a GAU.

1. Plaintiffs present no argument that the actual text of the GAU provisions fails to provide fair notice.

While the GAU section of the PTZO may not represent perfect draftsmanship, the Supreme Court does not require anything approaching perfection. *Grayned*, 408 U.S. at 111. The PTZO provides more than fair notice of what a GAU is and what it is not. Indeed, when reviewed in its entirety, the GAU provisions begin by describing

what it is attempting to accomplish (the intent provision) before offering a list of what constitutes a GAU and what does not constitute a GAU. In response, Plaintiffs claim confusion, arguing there is no consistency in the ordinance, merely because the ordinance clarifies what GAUs “do not include” in two subsections. Plaintiffs do not argue substantively that a person of reasonable intelligence could not understand what conduct was prohibited and what was permitted by the ordinance section. They largely ignore the substantial portions of the Township’s and PTP’s briefs devoted to discussing the contours of the GAU provisions and addressing the entirety of the ordinance scheme.

Plaintiffs elect to skirmish around the exterior and avoid the actual text of the GAU provision. In so doing, they fail to respond to the Township’s argument that when an ordinance defines the conduct that falls both in and outside the scope of a term, the failure to offer a further definition does not render the term void for vagueness. *See Brown v. City of Albion*, 136 F.4th 331, 345 (6th Cir. 2025).

2. Plaintiffs do not argue that the text of the GAU provisions authorizes or encourages arbitrary and discriminatory enforcement.

Plaintiffs’ response does not substantively address a glaring weakness: that the GAU provision itself does not invite arbitrary and discriminatory enforcement. The second *Hill* prong requires a showing that the GAU provision itself “authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill*, 530 U.S. at 732.

Plaintiffs do not contend that the language of the GAU provisions does this. Instead, Plaintiffs simply contend that the “ordinance lacked standards” without identifying any portions of the ordinance or text.

Plaintiffs essentially blindly wander into the Township’s critique of the District Court’s largest issue with the GAU provision: perceived inconsistency in the Township’s application of the terms of the GAU provision. Plaintiffs do not substantively address the Township’s argument that the District Court erred when it eschewed the clear language of the GAU provisions in favor of testimony from Township representatives claiming the representatives were confused about the language of the ordinance.

Plaintiffs’ argument conflates former Township representatives’ failure to understand a clear ordinance with vagueness. Plaintiffs do not contend that the ordinance itself is vague. Plaintiffs’ meager attempts to wave away this Court’s decision in *600 Marshall Entertainment Concepts, LLC v. City of Memphis*, 705 F.3d 576 (2013) in a footnote are unconvincing. Plaintiffs contend that *600 Marshall* is not applicable because the plaintiff had “not pointed to any term or provision in the Ordinance that it believes is vague.” (Plaintiffs’ Brief at 42 n.4).

Plaintiffs’ own response likewise fails to point to any language in the GAU provisions that invite arbitrary or discriminatory enforcement. Instead, as in *600 Marshall*, Plaintiffs “essentially argue that since [the Township representatives] did

not understand the Ordinance and bungled its implementation, it must be vague.”
600 Marshall, 705 F.3d at 587.

The District Court resolved liability for Plaintiffs’ due process vagueness claim in 2022, nearly two years before trial. The District Court did not make a separate liability finding regarding vagueness after trial. The Court should reject Plaintiffs’ arguments, reverse the District Court’s grant of summary judgment to Plaintiffs, vacate all damages flowing from the vagueness theory, and enter summary judgment in favor of the Township.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY STRIKING THE TOWNSHIP’S DAMAGES EXPERT WITHOUT APPLYING THE MANDATORY *HOWE* FACTORS – A DECISION IT ACKNOWLEDGED LED TO THE \$49.2 MILLION AWARD.

Plaintiffs’ response selectively and creatively interprets the record regarding the District Court’s decision to strike the Township’s rebuttal damages expert and asks this Court to apply the wrong legal standard. Plaintiffs’ argument is meritless and fails to respond in any way to the appropriate legal standard elicited by this Court in *Howe v. City of Akron*, 801 F.3d 718 (6th Cir. 2015) that was addressed at length in the Township’s opening brief.²

² The Township’s plenary brief addressed in detail each of the *Howe* factors and why they lead to the unmistakable conclusion that the District Court erred by refusing the Township’s request for its rebuttal expert. (Township First Brief at 44-48). Plaintiffs, like the District Court, completely ignores them.

A. The Township Did Not “Waive” Its Argument that Rule 37 Sanctions Were Inappropriate When Addressed Twice Below and Substantively Argued on Appeal.

It is as if Plaintiffs did not even read the Township’s brief before responding, illogically claiming the “district court ruled the objection ‘completely meritless,’ finding that the Township missed the disclosure deadline and ‘never moved to amend the Case Management Order’ . . . The Township does not challenge these findings.” (Plaintiffs’ Second Brief at 68). Plaintiffs must have missed the entirety of the Township’s brief where it argued the District Court abused its discretion in arriving at this exact conclusion. (Township First Brief at 41-48).

Plaintiffs double down by contending the Township “waived” its Rule 37 argument “because it was not raised below.” (Plaintiffs’ Second Brief at 69). The record demonstrates precisely the opposite. It was *Plaintiffs* who invoked Rule 37 when they moved to strike the Township’s rebuttal damages expert. It is absurd that Plaintiffs prompted the District Court to utilize Rule 37 sanctions to strike the Township’s rebuttal damages expert and then take the contrary position that the Township “waived” this issue.

Compounding the problem for Plaintiffs is the fact that they first raised *Howe* and sought relief under it. Within days of the Township’s rebuttal expert disclosure, Plaintiffs moved to strike the Township expert’s report under Rule 37(c) – specifically arguing, among other things, that the Township was not substantially

justified in its disclosures and citing *Howe* in support of its position. **Motion, RE 219; Brief, RE 222, Page ID ##8393-8398.** Plaintiffs' citation to *Howe* was an early acknowledgment that it should direct the District Court's decision. But Magistrate Judge Kent granted Plaintiffs' Rule 37 motion for sanctions without giving the Township time to respond and apply the *Howe* factors. **Order, RE 222.** This was the first in a litany of errors by the District Court – striking an expert without the benefit of a response from the non-moving party. *Koon v United States*, 518 U.S. 81, 100 (1996) (“A district court by definition abuses its discretion when it makes an error of law.”).

The Township filed a timely objection and argued that its delay in disclosing its rebuttal expert was substantially justified. **Objection, RE 238, PageID ##8652-8658.** The Township analyzed in detail the *Howe* factors, taking the opportunity that it had previously been denied. Nevertheless, the District Court did not cite or analyze the *Howe* factors in overruling the Township's objections. **See Order, RE 284, PageID ##10193-10195.** This was the second error of law committed by the District Court when addressing this issue.

Quickly after the District Court overruled the Township's objection, the Township itself moved for leave to disclose Mr. Kahaian. **Motion, RE 292.** In doing so, the Township *again* argued to the District Court that it was substantially justified in presenting Mr. Kahaian as an expert under *Howe*. ***Id.* at Page ID ##10350-10355.**

Inexplicably, the District Court again failed to consider or analyze the *Howe* factors. **Order, RE 303**. Instead, the District Court refused to “entertain” the *Howe* analysis, claiming that it considered and “rejected” the substantial justification test before. *Id.* **at Page ID #10842 n.6**. But the District Court never addressed substantial justification or *Howe* in its previous decision overruling the Township’s objections. **RE 284, Page ID ##10193-10195**. This was the third error of law committed by the District Court when deciding this issue.

B. Because the District Court Sanctioned the Township Under Rule 37, the Appropriate Test is Substantial Justification. The Township Met Its Burden on This Issue as the Late Disclosure was Harmless.

Plaintiffs do not confront the Township’s *Howe* analysis or the standard for substantial compliance. Instead, they reframe the standard as “good cause,” pigeonholing the Township’s arguments as seeking leave to amend the Case Management Order under Rule 16(b). (Plaintiffs’ Brief at 68-69). But the Township did not seek relief under Rule 16(b). The Township sought relief from the District Court’s Case Management Order pursuant to Rule 60(b) based on the extraordinary circumstances involved with PTP’s intervention in the case and the subsequent upheaval in the ongoing litigation. The Township then reiterated its substantial justification argument under *Howe*. The District Court incorrectly reframed the issue as being guided by Rule 16(b). In other words, the District Court misapprehended the nature of the Township’s argument as seeking relief under Rule 16(b).

Regardless, Plaintiffs have the issue backwards. The operative “sanction” from which the Township seeks relief is the District Court’s initial decision to strike Mr. Kahaian’s expert report – unmistakably a Rule 37 sanction. The later motion was yet another attempt by the Township to focus the District Court to the correct standard – substantial justification. But by the time the Township’s Rule 60(b) motion was denied, the prejudice was already complete through the initial abuse of discretion in the decision to grant Plaintiffs’ Rule 37 motion. **Motion, RE 219; Order, RE 222.**

The relevant test that neither the District Court below nor Plaintiffs on appeal elected to address is substantial justification. The Township was substantially justified because its late disclosure was harmless. Glaringly, the result of the District Court’s abuse of discretion was anything but harmless.

The District Court’s decision to utilize the harshest possible sanction directly led to the imbalance of proofs at trial, the very imbalance that fueled the District Court’s \$49.2 million damages award. As the District Court noted in its Bench Opinion after trial, “Only the Plaintiffs retained a damages expert. So naturally, the proofs are lopsided in their favor.” **RE 623, Page ID #31468.** And, “The Court does not have another damages expert to credit, however.” **Id. at Page ID #31471.** “[C]rucially, the court does not have the benefit of proofs to the contrary. The Township did not retain a damages expert.” **Id. at Page ID ##31477-31478.** The

District Court did have contrary proofs available to it, but instead of allowing them, it struck the report and opinions.

The District Court's rush to the most severe sanction is all the more troubling because lesser alternatives were readily available. Rather than completely striking Mr. Kahaian's report and opinions, the District Court could have imposed a brief continuance to allow Plaintiffs additional time to prepare, limited the scope of Mr. Kahaian's testimony, or awarded Plaintiffs their reasonable costs associated with the late disclosure. Any of these alternatives would have addressed whatever minimal prejudice Plaintiffs may have suffered while preserving the Township's ability to present rebuttal damages testimony in a case where \$49.2 million was at stake. This Court has consistently held that district courts should consider less drastic sanctions before resorting to exclusion. *See Howe*, 801 F.3d at 747-748. The District Court's failure to even consider these alternatives – let alone explain why they were insufficient –independently constitutes an abuse of discretion. *Koon*, 518 U.S. at 100.

The District Court abused its discretion. The late disclosure of Mr. Kahaian was harmless, and the District Court erred when it struck him as a Rule 37(c) sanction. The only appropriate remedy is reversal of the District Court's damages award and, if necessary, a remand for a new trial at which the Township may present Mr. Kahaian's rebuttal testimony.

IV. THE DISTRICT COURT IGNORED CAUSATION FOR DAMAGES PURPOSES, AND PLAINTIFFS’ CLAIM THAT EVENT HOSTING IS AN “ACCESSORY USE” OR IS PERMITTED BY THE RIGHT TO FARM ACT DOES NOT SAVE THE DAY.

To assert, as Plaintiffs do, that the District Court carefully addressed causation strains the District Court’s Bench Opinion to the breaking point. Indeed, the District Court identified a “Damages Standard,” but did not devote even a single sentence to the necessary causation standard to award damages in the Section 1983 context. **Bench Opinion, RE 623, PageID ##31466-31468.**

Plaintiffs point to language in the opinion that “Plaintiffs suffered actual injuries—lost profits—stemming from an impossible to understand ordinance and arbitrary enforcement of the same.” *Id.* at **PageID #31468**. But in this portion of the Opinion, the District Court is discussing the viability of damages in the context of a vagueness claim in light of the Supreme Court’s decision in *Carey v. Piphus*, 438 U.S. 247 (1978). *Id.* Additionally, Plaintiffs posit that the District Court discussed causation when it concluded, “It was abundantly clear at trial that the confusion stemming from the PTZO caused a great many issues for the Wineries.” *Id.* at **PageID #31475**.

Making sweeping generalizations that “the PTZO caused a great many issues”, *id.*, and that that PTZO was “[t]he only barrier” to Plaintiffs’ damages, *id.* at **PageID #31474**, does not address both cause in fact and proximate cause for causation purposes under Section 1983. *See Powers v. Hamilton Cty. Pub. Def.*

Comm'n, 501 F.3d 592, 608 (6th Cir. 2007). This is particularly the case where the Township argued that there were independent barriers that broke the causal chain.

Here, Plaintiffs' agricultural zoning status remains a separate and independent barrier that cuts the causal chain. The A-1 District is 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**. Plaintiffs do not oppose the Township's argument that unfettered commercial activity like for-profit event hosting is not a permitted use in the A-1 District. However, they assert that event hosting should be considered an accessory use under the PTZO and claim Michigan's Right to Farm Act permits event hosting.

A. Event Hosting is Not an Accessory Use to a Winery Under the PTZO.

Plaintiffs claim that the causal chain is not broken because in the absence of the GAU provisions they would have been able to host events as accessory uses.

Plaintiffs piece together random sentences from the District Court's Bench Opinion to try and create "accessory uses" out of thin air. Plaintiffs first point to the District Court's statement that "[m]any of the activities the Wineries wish to engage in are accessory uses at wineries and farms in Michigan." **RE 623, PageID #31425**. But this single sentence does not indicate that *event hosting* constitutes an accessory use. Second, Plaintiffs point to the District Court's review of the testimony of Gary

McDowell in the District Court’s *Central Hudson* commercial speech analysis, noting that “Mr. McDowell testified that to preserve agriculture, farms need to be profitable and have the opportunity to engage in typical accessory uses and marketing.” *Id.* at **PageID #31463**. Finally, Plaintiffs finish the syllogism by tying the previous two premises together, claiming the District Court concluded that event hosting is an accessory use: “Holding more events, advertising, or more retail space [are] typical Winery accessory uses (based in agriculture)” (Plaintiffs’ Second Brief at 56) (quoting **RE 623, Page ID #31464**). But that citation is a significant misrepresentation of what the District Court reasoned: “Holding more events, advertising, or more retail space does not unilaterally convert the typical Winery accessory uses (based on agriculture) into purely commercial activity.” **RE 623, Page ID #31464**. The District Court did not conclude that event hosting is an accessory use.

Even had the District Court considered whether commercial event hosting constitutes an accessory use, it erred in failing to consider whether the PTZO would permit commercial event hosting as an “accessory use” in the agricultural district. These are all defined terms from the ordinance; Plaintiffs cannot simply generate out of thin air an ad hoc analysis from three sentences lifted from three different sections of the District Court’s Bench Opinion.

Plaintiffs’ invitation to proclaim that the causation problem can be avoided by declaring their event-hosting businesses are accessory uses also glosses over the District Court’s broad-brush approach to causation. Damages in the context of Section 1983 require a plaintiff-by-plaintiff evaluation of causation. Questions on *how* the challenged provisions of the PTZO caused Plaintiffs’ alleged damages go unanswered.

The PTZO defines an accessory use as “[a] use customarily incidental and subordinate to the principal use or building located on the same lot as the principal use or building.” **PTZO, RE 29-1, PageID #1143.** A principal use, however, is defined as “[t]he main use to which the premises are devoted and the principal purpose for which the premises exists.” ***Id.* at PageID # 1153.**

Regarding specific zoning districts, the PTZO states that: “[N]o 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.” ***Id.*, Section 6.1.4, at PageID #1169.**

In the A-1 District, the Farm Processing Facility section specifically excludes commercial event hosting as a permitted use:

The Farm Processing Facility use includes retail and wholesale sales of fresh and processed agricultural produce but is not intended to allow a bar or restaurant on agricultural properties and the Township shall not approve such a license . . . Activities such as weddings, receptions and other social functions for hire are not allowed, however, participation in approved township wide events is allowed.

***Id.*, Section 6.7.2(19)(a), PageID #1183.**

If the principal use explicitly excludes event hosting, there can be no argument that events are an accessory use. Accessory uses must be “customarily incidental and subordinate to the principal use”. Commercial event hosting is none of these things when the PTZO specifically forbids “social functions for hire” such as weddings, receptions, etc.

Plaintiffs’ argument is equally flawed when it comes to the PTZO’s Winery-Chateau provisions. The PTZO provides that the principal use of a Winery-Chateau “shall be a winery.” ***Id.*, Section 8.7.3(10)(d), PageID ##1268-1269.** The PTZO defines a winery as a facility where “agricultural fruit production is maintained, juice is processed into wine, stored in bulk, packaged, and sold at retail or wholesale to the public with or without the use of a wine tasting facility. The site and buildings are used principally for the production of wine.” ***Id.*, Section 3.2, PageID #1158.** Thus, unless the PTZO provides for other specific uses, only wine production and uses accessory to wine production are permitted at a Winery Chateau.

Commercial event hosting, in order to qualify as an accessory use, must remain subordinate to a winery, must be dependent on or pertain to a winery, and must further or enhance that primary use. *See Lerner v. Bloomfield Twp.*, 106 Mich. App. 809, 811-12; 308 N.W.2d 701 (1981) (finding that accessory uses are those that are subordinate to, depend on, or pertain to a principal use). A winery is intended

to take fruit, process it into wine, and sell it. It can include a place to taste wine. Creating an event center is not dependent on nor does it pertain to a facility used to create wine. It does not further or enhance the primary use of a building to turn fruit into wine. Event hosting is not dependent upon nor does it pertain to farming, which is the overarching use considered in the A-1 District.

The Plaintiffs find no relief in the GAU provisions of the PTZO either. The PTZO specifies that “Guest rooms, manager’s residence, and single-family residences” are “support uses” of a Winery Chateau. *Id.*, **Section 8.7.3(10)(d), PageID ##1268-1269**. However, Section 8.7.3(10)(m) confines accessory uses such as facilities, meeting rooms, and food and beverage services for registered guests only. In 2004, when the Township adopted Amendment 141 to the PTZO and added Guest Activity Uses, it specified that the GAUs were a carve out from the prohibition on accessory uses for non-registered guests, stating that certain events were allowable “notwithstanding Section 8.7.3(10)(m).” After Amendment 141, the PTZO further noted that GAUs were “in addition to accessory uses for guests that are otherwise allowed.” *Id.*, **Section 8.7.3(10)(d), PageID ##1270-1272**. Thus, the limited promotional events that were allowed under the GAUs were not conceived of as an already allowable accessory use that were customary and incidental to a winery. They expanded the Winery Chateau’s permissions beyond what would otherwise be allowed.

Further, as noted in the Township’s principal brief, Plaintiffs successfully challenged the GAU scheme and induced the District Court to take a judicial Sharpie and strike the GAU provisions from the PTZO as unconstitutional. Plaintiffs are now left with the remainder of the Winery-Chateau section of the PTZO without the GAU provision. Plaintiffs errantly believe commercial event hosting is now, *et voilà*, an accessory use to a winery. This is incorrect.

Plaintiffs’ argument that event hosting can be considered an accessory use to the winery (or principal use) also exposes a fundamental thematic mischaracterization that Plaintiffs are nothing more than poor farmers who simply, as the District Court described, “want to farm, produce wine, and run profitable business ventures.” **RE 623, PageID #31411**. It is axiomatic in zoning law that “traditional” (as Plaintiffs describe them) accessory uses are customarily incidental to the principal use of the property. In other words, the “traditional” accessory uses (e.g., event hosting) cannot exceed the principal revenue of the winery or they are not accessory. Plaintiffs are therefore tacitly admitting that their principal use – operating a winery – generates revenues of more than \$49.2 million. For event hosting to be “customary” and “incidental” to the principal “winery” use, the actual winery use (growing grapes, processing into wine, and selling/tasting that wine) must have revenues equal to or greater than \$49.2 million.

Event hosting is not an accessory use and does not demonstrate causation.

B. The Right to Farm Act Does Not Save Plaintiffs' Causation Failures.

Second, Plaintiffs proclaim that even if their uses are not accessory uses under the PTZO, Michigan law “allows these uses.” (Plaintiffs’ Brief at 57).³ Plaintiffs’ argument is distilled as follows: (1) Michigan’s Right to Farm Act (“RTFA”) authorizes the Michigan Department of Agriculture and Rural Development (“MDARD”) to promulgate Generally Accepted Agricultural and Management Practices (“GAAMPs”); (2) the GAAMPs allow farm markets to offer agritourism and marketing; (3) Wineries “are farms which grow and produce agricultural products”; (4) Wineries conform to the GAAMPs; (5) Wineries are therefore “exempt from contrary local regulations”; (6) event hosting is agritourism; and (7) Plaintiffs can operate event centers without local regulation so long as they claim to be a farm.

Plaintiffs reasoning relies on several fallacies. First, the RTFA is a nuisance defense statute. It protects farm operators from nuisance suits. MCL 286.474(6) prohibits local governments from using ordinances to impede GAAMP-compliant farm operations. Notably, Plaintiffs did not plead the RTFA as a separate preemption

³ Plaintiffs assert that the Township’s position is that the PTZO “outlaw[s] accessory uses,” but this is a gross mischaracterization of the Township’s position and the PTZO. The PTZO does not “outlaw[.]” accessory uses, but instead *defines* what accessory uses are.

claim in their Amended Complaint; they raise it for the first time on appeal as a causation alternative in the damages context.

Second, Plaintiffs swiftly jump from conclusion to conclusion, claiming they are farms that conform to the GAAMPs, the GAAMPs allow a farm to offer agritourism, and event hosting is agritourism that is free from regulation under the GAAMPs.

Plaintiffs are wrong. Under the RTFA, a “farm operation” means activities conducted “in connection with the commercial production, harvesting, and storage of farm products”. MCL 286.472(b). By definition under the RTFA, commercial weddings, entertainment events, and receptions are not activities conducted in connection with the commercial production, harvesting, or storage of farm products.

Plaintiffs’ improper understanding of the GAAMPs is further demonstrated by the fact that the GAAMPs are evolving and subject to revision by MDARD. Indeed, in 2026, MDARD promulgated new GAAMPs for “farm markets”.⁴ The 2026 Farm Market GAAMPs note “changing economic conditions may require necessary revision of the practices.” (2026 GAAMPs at iii). Plaintiffs’ post hoc

⁴ The 2026 Farm Market GAAMPs are accessible through MDARD. <https://www.michigan.gov/mdard/-/media/Project/Websites/mdard/documents/environment/rtf/2026-GAAMPs/Farm-Markets-GAAMPs-2026.pdf?rev=3f274512977749ed87df83120dd14dcf&hash=4FA2E2342CEE2E72BB3C723E47FF5864>

damages analysis errantly relies on the 2024 Farm Market GAAMPs that Gary McDowell testified on at trial to support their proposition that the GAAMPs authorize event hosting. (Plaintiffs' Brief at 57). But the shifting nature of the recommended practices has moved away from Plaintiffs' claims and is not directly contradicted by the 2026 Farm Market GAAMPs.

The 2026 GAAMPs offers a broad definition of the term "Farm Market". (2026 GAAMPs at 2). Marketing is also defined by the GAAMPs: "Promotional and educational activities at the farm market incidental to farm products with the intention of selling more farm products. These activities include, but are not limited to, farm tours (walking or motorized), demonstrations, cooking and other classes utilizing farm products, and farm-to-table dinners." (*Id.*).

Tellingly, the 2026 GAAMPs clarify that not all activities at a farm market conform with the GAAMPs and that other state and local regulations may still apply. (*Id.*). The RTFA provides nuisance protection for farms operating in conformance with the GAAMPs, but "[t]his protection may not extend to sales of nonfarm products (e.g., hats, t-shirts, jewelry, etc.), on-site processing of farm products (e.g., baking pies, brewing hard cider, etc.) or other on-farm activities (e.g., wedding or event barns, bed and breakfast/lodging, restaurants, glamping, etc.)." (*Id.*). Further, a "GAAMPs-conformant farm market operation may still be subject to other local, state and/or federal regulations." (*Id.*).

Finally, the notion that the GAAMPs permit agritourism without regulation was rejected by MDARD: “‘Agritourism’ currently has no legal definition or recognition in Michigan law. Activities commonly identified as, and/or associated with, agritourism may or may not comply with GAAMPs. These activities must be assessed on a case-by-case basis and may be subject to additional local, state and/or federal regulations.” (*Id.*)

In sum, the GAU provisions are not the cause of Plaintiffs’ alleged damages. Plaintiffs’ agricultural zoning, not the GAU provisions, bars commercial event hosting. Removing the GAU provisions would not eliminate Plaintiffs’ alleged injury; Plaintiffs would still be barred from unfettered for-profit event hosting by their A-1 zoning designation, their individual zoning approvals, and the application of conservation easement restrictions that were purchased by the Township.

The District Court’s award of compensatory damages must be reversed.

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

In reviewing the District Court’s damages Opinion post-trial, the standard of review is critical. In an appeal taken from a bench trial, the District Court’s factual findings are reviewed for clear error, but the legal conclusions are reviewed de novo. *S.C. v. Metro. Gov’t of Nashville*, 86 F.4th 707, 714 (6th Cir. 2023).

A. Plaintiffs Ignored Critical Errors Raised By the Township in the District Court’s Decision to Award Compensatory Damages.

Plaintiffs' response ignored the Township's argument that the District Court erred when it sustained an objection to the relevance of event-hosting damages at trial yet awarded \$49.2 million in damages on that exact issue. Every penny the Wineries extract from the Township's residents originates from the District Court's conclusion that the "Guest Activity Use" provision was vague. **RE 623, PageID #31475**. This post-trial award contradicts the District Court's trial ruling that damages evidence related to "event hosting" was irrelevant – even within the context of vagueness. **RE 600, Page ID ##23090-23103**. The District Court's inclusion of these damages despite its trial ruling requires reversal.

Additionally, Plaintiffs ignore the Township's argument that the District Court erred when it awarded damages under Schedule 6 to all Plaintiffs. (Township First Brief on Appeal at 54-56). The District Court's decision awarding event-hosting damages to the Farm Processing Facility and Remote Wine Tasting Room Plaintiffs must be reversed.

B. Plaintiffs Brush Aside *Fredonia Farms* on the False Premise that Their Non-Existent Event-Hosting Businesses were Existing Businesses.

Plaintiffs hastily dispose of the Township's discussion of *Fredonia Farms, LLC v Enbridge Energy Partners, L.P.*, 1:12-cv-1005, 2014 WL 3573723 (W.D. Mich., July 18, 2014), asserting it is not applicable because the "Wineries were existing businesses." (Plaintiffs' Second Brief at 63). But Plaintiffs were decidedly *not* existing event-hosting businesses. They operated wineries. Days of trial and

hours of testimony made clear Plaintiffs felt aggrieved they could not operate event-hosting businesses. Ironically, and only when it suits them on appeal, Plaintiffs claim they were existing businesses.

Plaintiffs' misrepresentation on this issue highlights a consistent theme throughout their brief on appeal: manufacture a strawman and crush it to avoid addressing the real issue. Here, Plaintiffs misrepresent their status as "existing" event-hosting businesses to avoid the real issue identified on appeal: their complete failure to present evidence that lost profits for a new business venture must be established with "reasonable certainty." *Id.* (citing *Fera v. Vill. Plaza, Inc.*, 396 Mich. 639, 644, 242 N.W.2d 372, 374 (1976)). That level of proof requires the presentation of "legal permitted, market driven, financed, demanded, realistic business[es] supported by expert reports and market analyses." *Id.* Plaintiffs presented no such evidence at trial and now offer no rebuke on appeal other than falsely claiming their event-hosting businesses were ongoing enterprises.

Plaintiffs are not entitled to damages in the form of lost profits for business ventures they never operated and for which they failed to present proofs with reasonable certainty.

C. Plaintiffs Have No Answer for the District Court's Internal Inconsistency Regarding Gross Versus Net Profits.

The theme of Plaintiffs' brief was more about what they chose not to address than what they did. Notably absent is any response to the District Court's internal

inconsistency on the gross-versus-net profits question. The District Court itself recognized the problem with awarding gross profits when it refused to award Plaintiffs damages for increased grape costs or 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**. The Court noted “Mr. Larson’s calculations are not a proper fit or reasonable under Schedules 1 and 5” and that “[t]hese calculations should have been based upon net profits.” *Id.* Yet, pages later, the District Court adopted gross profits for event hosting damages despite these damages presenting identical issues. ***Id.* at PageID ##31474-31478**.

Oddly, Plaintiffs favorably cite *DXS, Inc. v. Siemens Medical Systems, Inc.*, 100 F.3d 462 (6th Cir. 1996), which only bolsters the Township’s position that the District Court erred in awarding gross profits. *DXS* clearly provides that the correct measure of damages is net profits: “Damages for lost profits must be based on the loss of net profits rather than gross profits.” *Id.* at 473 (citing *Lawton v. Gorman Furniture Corp.*, 90 Mich. App. 258; 282 N.W.2d 797 (1979); *Getman v. Matthews*, 125 Mich. App. 245; 125 N.W.2d 671 (1983)).

To be clear, Mr. Larson could have calculated net profit. He simply chose not to. Under controlling law, eschewing net profits for the windfall of gross profits is clearly erroneous. Not only did Mr. Larson forego a net profits analysis, but he did not investigate, evaluate, or reach an opinion regarding them. **RE 609, PageID**

##25148-25149. Arguably, he had the data to calculate net profits since the RMA guidelines he obtained contain data for both gross and net profits. Mr. Larson chose not to perform the industry-accepted calculations and instead invited the District Court to commit error by focusing on gross profits, *Id.* at PageID #25097, which are substantially higher than net profits:

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.

VI. THE CONTINUING VIOLATIONS DOCTRINE DOES NOT SAVE PLAINTIFFS' CLAIMS FROM APPLICATION OF THE STATUTE OF LIMITATIONS.

The District Court erred when it granted Plaintiffs summary judgment on the Township's statute of limitations affirmative defense. Again, the Township was prevented from presenting its defense at trial – a defense that should have barred Plaintiffs' claims in nearly all respects. The statute of limitations is not a close call where Plaintiffs missed the deadline by weeks or days. Many of Plaintiffs' claims accrued years before suit was filed. Granting summary judgment to Plaintiffs on the affirmative defense prevented the Township from presenting evidence on this issue at trial. **Opinion, RE 528, PageID ##21254-21255.**

This error goes beyond the Township. The District Court granted summary judgment on PTP's statute of limitations affirmative defense while a separate motion for summary judgment filed by PTP on this issue was pending. In other words, had the District Court correctly analyzed this issue and granted summary judgment to PTP, Plaintiffs' stale claims would have been dismissed before trial. **Opinion, RE 559, PageID #21915.**

Plaintiffs' response boils down to two points, neither of which are compelling: (1) the continuing violations doctrine adopted by this Court in *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997) revives Plaintiffs' stale claims; and (2) the continuing violations doctrine is appropriately applied in this land-use case because had the Township ceased its conduct, further harms to Plaintiffs would have been prevented.

A. Plaintiffs' Reading of *Kuhnle* is Far Too Broad and Ignores Case-Specific Factors that are Absent in this Case.

Plaintiffs' superficial analysis of *Kuhnle* fails to devote the level of attention necessary to understand the Court's conclusions in *Kuhnle*. Applying the continuing violations doctrine turns on whether the Township's alleged violations can be characterized as continuing or whether Plaintiffs are simply experiencing ongoing or continuing ill effects from an action taken long ago. In *Kuhnle*, a trucking company asserted various legal claims against the county after it passed a resolution barring through truck traffic on a specific road, including claims for violations of

due process in relation to property and liberty interests. *Kuhnle*, 103 F.3d at 518, 521-522.

This Court in *Kuhnle* examined the exact nature of each of the claims asserted before determining whether the continuing violations doctrine applied. It did not apply the continuing violations theory across the board to all claims because the application is far more nuanced.

This Court held that the plaintiff's takings claim and substantive due process claim for deprivation of property began to accrue on the date the resolution was enacted and, therefore, were time-barred. *Id.* at 521. However, the Court held that the plaintiff's substantive due process claim for deprivation of liberty was "another matter." *Id.* Because the plaintiff claimed it had been deprived of a liberty interest "assertedly created by a fundamental constitutional right to intrastate travel," the Court held that "if such liberty interests do in fact exist . . . then each day that the invalid resolution remained in effect, it inflicted continuing and accumulating harm." *Id.* at 522. Therefore, the Court concluded that the plaintiff's substantive due process claim for deprivation of liberty asserted a "continuing violation" and was not time-barred. *Id.*

Here, Plaintiffs' pleaded counts involve First Amendment theories, due process vagueness, regulatory takings, and preemption. Plaintiffs' claims, unlike in *Kuhnle*, do not involve allegations of substantive due process liberty interest claims.

Amended Complaint, RE 29. Rather, Plaintiffs attempted to pivot to an unpleaded liberty interest claim at trial, asserting the Township’s “enforcement” of the PTZO violated their proclaimed liberty interest in operating their business free from “erroneous enforcement of local ordinances.” **Bench Opinion, RE 623, PageID #31453** (quoting *Sanderson v. Village of Greenhills*, 726 F.2d 284, 285 (6th Cir. 1984)).

Plaintiffs’ exceptionally vague analysis of *Kuhnle* asserts simply that “the ordinances worked a continuing violation.” (Plaintiffs’ Second Brief at 33). But Plaintiffs’ claims do not fall under the construct of *Kuhnle* as a continuing violation because they involve claims for the deprivation of property. Plaintiffs’ claims involve applying the PTZO to their properties through distinct, concrete actions with clear triggering actions (e.g., obtaining an SUP or the issuance of a land-use permit) that crystallized the relationship of the PTZO to Plaintiffs’ individual properties. For example, Chateau Chantal was authorized for GAUs – the permissive support use that allegedly triggered the entirety of Plaintiffs’ \$49.2 million in damages – in December 2004. This SUP approval finalized the PTZO, and the GAU provision’s application to Chateau Chantal’s property. Yet Chateau Chantal took no action for nearly 16 years – from December 2004 to October 2020 – to address its alleged concerns. Similarly, Brys obtained its first amended SUP in April 2012 authorizing GAUs. Suit was not filed for more than eight years after this approval.

Plaintiffs, except for Hawthorne and Bowers Harbor, obtained land use approvals that represent discrete, identifiable regulations of the use of their property far more than three years before suit. Plaintiffs are, at most, experiencing continuing ill effects from the alleged injurious actions from years ago.

B. The Continuing Violations Doctrine Does Not Apply in This Case Because Plaintiffs' Alleged Injuries Would Not Have Been Redressed if the Township Simply Stopped Enforcing the Challenged Sections of the PTZO.

Even if the continuing violations doctrine was appropriate in this case, it does not apply based on this Court's ruling in *Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631 (6th Cir. 2007). 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. *Id.* at 635 (quoting *Tolbert v. State of Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999)).

Plaintiffs do not credibly challenge the Township's analysis of the third prong of the *Eidson* test. Instead, Plaintiffs merely claim "if the Township had ceased enforcing the unconstitutional ordinances, the resulting damages would have been avoided." (Plaintiffs' Second Brief at 34). This ignores the Township's argument that even if it had stopped "enforcing" the subject provisions of the PTZO, the proclaimed damages would not have been avoided. Plaintiffs' proposed commercial

uses would still not be permitted in the A-1 District for the same reasons explained at length above.

More bluntly, had the Township voted to repeal the Winery-Chateau, Farm Processing, and Remote Winery Tasting Room sections of the PTZO after Plaintiffs claimed those sections violated their constitutional rights, Plaintiffs would be in no better position; their alleged injuries would not “have been avoidable”. *Eidson*, 510 F.3d at 635 (internal quotation omitted). Instead, they would be left with the uses permitted in the A-1 District, which do not include commercial event hosting.

The District Court erred by granting summary judgment on the statute of limitations defense and barring the Township from presenting the issue at trial and its decision should be reversed. Moreover, while the Township was precluded from raising this defense on summary judgment in the second round of litigation, PTP was not. Instead, PTP moved for summary judgment on this issue, which was denied. The Court should reverse the District Court’s denial of summary judgment to PTP on the statute of limitations and enter judgment in favor of the Defendants.

VII. CROSS APPEAL

Pursuant to Fed. R. App. P. 28(i), the Township adopts by reference Section III(A)-(E) of PTP’s Third Brief on Appeal responding to Plaintiffs’ Cross-Appeal. The arguments adopted from PTP’s Third Brief on Appeal are readily transferable

from PTP's case to the Township's case. *See United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996).

A. The District Court Correctly Refused to Allow Plaintiffs to Assert for the First Time at Trial an Unpled Liberty Interest Claim.

The Township writes separately to address Plaintiffs' cross appeal of the District Court's proper decision that Plaintiffs should not be allowed to proceed for the first time at trial with an unpled liberty interest claim.

For the first time at trial, Plaintiffs desperately attempted to house their failed hours of operation theory under a brand new, never asserted liberty interest claim predicated on this Court's decision in *Sanderson v. Village of Green Hills*, 726 F.2d 284 (6th Cir. 1984). **RE 601, PageID #23311-23314**. The District Court's denial of Plaintiffs' attempt to shoehorn in a new claim at trial under Rule 54(c) is reviewed for abuse of discretion. *See Versatile Helicopters, Inc. v. City of Columbus*, 548 Fed. Appx. 337, 343 (6th Cir. 2013) (utilizing abuse of discretion standard when reviewing district court's decision on request to conform the proofs under Rules 15 and 54). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an[] erroneous legal standard." *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995) (citation omitted). The Court may reverse only if it is "firmly convinced that a mistake has been made, i.e., when we are left with a definite and firm conviction that the trial

court committed a clear error of judgment.” *United States v. Heavrin*, 330 F.3d 723, 727 (6th Cir. 2003) (citation omitted).

After trial, the District Court correctly refused to permit Plaintiffs to present a new liberty interest theory. The District Court did not abuse its discretion in doing so.

During trial, the Township objected to testimony regarding Plaintiffs’ claim for lost profits related to closing time as this issue was not live for trial. In response, Plaintiffs argued for the first time in more than three years of litigation that “[t]hese wineries have a constitutional right to engage in their businesses under life and liberty, there is a business right to operate, which is a constitutional right which cannot be taken away by the government by enforcement of ordinances that do not exist.” **RE 601, PageID #23312**. Plaintiffs argue the Township “enforces” a 9:30 pm closing time that is not contained in the PTZO. Accordingly, Plaintiffs contend they are entitled to damages in the form of profits they claim they would have made by staying open until a preferred closing time of 11:00 pm.

The District Court overruled the Township’s objection. Nevertheless, after trial, based on the parties’ post-trial briefing, the District Court – while “sidestep[ing] *Sanderson*” – concluded Plaintiffs’ liberty interest claim was newly announced during trial, so Plaintiffs would not be permitted to a “third bite at the

apple after two rounds of summary judgment” because doing so “would be extremely prejudicial to Defendants.” **RE 623, PageID ##31453-31454.**

It is critical to review *how* the parties arrived at this point and the basis for Plaintiffs’ newly announced theory at trial. During trial, when a corporate representative for Villa Mari was testifying regarding closing times, the Township objected that such testimony was no longer relevant. **RE 601, PageID #23311-23312.** In response, Plaintiffs’ counsel argued:

[T]he Township has admitted and PTP have admitted the ordinances do not contain an actual closing time, yet they enforced a closing time against these wineries anyway in violation of the due process rights. These wineries have a constitutional right to engage in their businesses under life and liberty, these is a business right to operate, which is a constitutional right which cannot be taken away by the government by enforcement of ordinances that do not exist. If your Honor would like, I have a Sixth Circuit case on point on that issue,

***Id.* at PageID #23312.** Plaintiffs’ theory was not and could not be vagueness – they argue no ordinance exists. Plaintiffs’ counsel immediately offered *Sanderson* and conceded this theory was not pleaded in Plaintiffs’ complaint:

It’s *Sanderson v. Village of Green Hills*, 726 F.2d 284. It’s out of the Sixth Circuit in 1984. This is a due process case where the Sixth Circuit determined that a business had a Constitutional right to engage in a business without governmental interference. So, due process enforcing an ordinance that wasn’t on the books.

***Id.* at PageID #23313.**

Plaintiffs' counsel conceded this liberty interest claim had not been pleaded and was a new theory; it was not even based on the text of the ordinance.⁵ Plaintiffs' Amended Complaint did not contain a substantive due process liberty interest claim.

At trial, Plaintiffs attempted to articulate a Rule 54(c) argument that even if the claim had not been pled in the Amended Complaint, Plaintiffs should be granted the requested relief. Fed. R. Civ. P. 54(c) does instruct district courts to “grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” The District Court addressed Plaintiffs' Rule 54(c) argument and rejected it. However, Plaintiffs do not substantively address Rule 54(c) or its requirements on appeal, instead simply vaguely asserting that the hours of operation claim entitles them to damages.

This Court is not so vague about the requirements of Rule 54(c). Under Rule 54(c), “a plaintiff may obtain relief on an unpleaded theory of recovery only if he proves that theory, he bases it on the wrongful act alleged in the complaint, and the defendant receives fair notice of the theory.” *Yoder v. Univ. of Louisville*, 417 Fed. Appx. 529, 530 (6th Cir. 2011) (citing *Bluegrass Ctr., LLC v. U.S. Intec, Inc.*, 49 Fed. Appx. 25, 31 (6th Cir.2002) (per curiam) and *Evans Prods. Co. v. W. Am. Ins.*

⁵ To the extent Plaintiffs attempt to claim this theory is predicated on due process void for vagueness, it strains credulity to argue the claim is based on the vagueness of the ordinance text and not based on the ordinance text in the same breath. Plaintiffs' should be held to their concessions that this was a new legal theory.

Co., 736 F.2d 920, 923 (3d Cir.1984) (“[Rule 54(c)] permits relief based on a particular theory of relief only if that theory was squarely presented and litigated by the parties at some stage or other of the proceedings.”)).

Plaintiffs should not be afforded the opportunity to obtain relief on an unpled hours of operation theory based on an alleged due process liberty interest claim. First, Plaintiffs’ unpled liberty interest claim in the operation of their business fails as a matter of law because at no point have Plaintiffs been prevented from operating. Second, this liberty interest claim was not squarely presented during the litigation and the Township did not receive fair notice of the theory.

1. Plaintiffs failed to prove their unpled liberty interest claim because at no point were Plaintiffs denied the ability to operate their businesses or enter into their chosen profession.

Sanderson and other Sixth Circuit precedent in the same vein does not support Plaintiffs’ position that the Township’s actions state a liberty interest claim.⁶ The plaintiff in *Sanderson* met resistance from the city council after opening a poolroom. *Id.* at 285. City officials told the plaintiff he must apply for a license under a local ordinance requiring approval for “amusement devices,” even though it was not clear whether the planned pool tables were within the scope of the ordinance. *Id.* The plaintiff opened the business and approximately three hours later the police chief

⁶ *Sanderson* also involves a procedural due process claim for the denial of a first-time applicant for a pool hall license. *Sanderson*, 726 F.2d at 286. Plaintiffs do not assert such a claim as all Plaintiffs are ongoing business operations.

entered the establishment and ordered it to be shut down. *Id.* One city council member noted the poolroom would never receive the appropriate license; the plaintiff was given the choice of “voluntarily” closing the business and applying for the unobtainable license or incurring a criminal penalty for violating the ordinance. *Id.*

Contrary to Plaintiffs’ position, in *Sanderson*, the Court reasoned that:

Although the defendants, and the court below, are quite correct in asserting that there can be no *unfettered* freedom to engage in a business which may be properly regulated pursuant to a municipality's general police power, such an assertion does not resolve the issue of whether the clear freedom, or liberty, to engage in even a potentially regulated business was *properly* circumscribed in this case.

Sanderson, 726 F.2d at 286-287. The Sixth Circuit concluded that allegations of this nature (e.g., where a municipality acted without the basis of an ordinance and solely upon “unmotivated and unreasonable” opinions of that business to shut the business down) was sufficient to state a liberty interest claim. *Id.* at 287.

However, the Court in *Parate v. Isibor*, 868 F.3d 821 (6th Cir. 1989) clarified the scope of this liberty interest claim, explaining that in order to prove such a claim, a plaintiff must show that the defendant denied the plaintiff the “freedom to choose and pursue a career, ‘to engage in any of the common occupations of life.’” *Parate*, 868 F.2d at 831 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). *Parate* explained that a plaintiff was required to demonstrate state action that precluded the

plaintiff from engaging in his chosen profession anywhere in the state. *See id.* at 831-832. The Sixth Circuit reasoned:

On appeal, Parate argues that the district court erred by concluding that Parate has no substantive due process right in the pursuit of his chosen occupation. To support this contention, Parate relies on *Wilkerson*, 699 F.2d 325. In that case the plaintiff applicants were denied an opportunity to enter the barbering profession by operation of state law. *See id.* at 326–27. *Wilkerson*, however, did not involve the application of rules and regulations to individuals presently engaged in their chosen profession. *See id.* at 327. *Wilkerson* precluded individuals from *entering a profession*, and thus, may be distinguished from the present appeal, which involves the regulation of an individual's conduct while *engaged in the profession*. In addition, the *Wilkerson* plaintiff applicants could not practice as barbers anywhere in the state. *See id.* By contrast, Parate has only been discharged from one state university.

Parate, 868 F.3d at 831-832 (emphasis in original).

The Court's decision in *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983), stands in contrast to *Parate* and provides further contours to the nature of this subject liberty interest claim. *Wilkerson* involved state action that prevented the plaintiffs from engaging in their chosen barbering profession statewide. *Id.* at 327. The plaintiffs sued the state agency that regulated barber shops alleging they had “conspired to harass and deprive them of the right to pursue their occupations in order to eliminate competition.” *Id.* The defendants refused to let the plaintiffs sit for the state's licensing exam and demanded the plaintiffs repair their shops to a standard above and beyond what law required. *Id.* at 326-327. The Court determined that the defendants had violated the plaintiffs' liberty interests.

Here, as in *Parate* and unlike *Wilkerson*, Plaintiffs were “not denied the choice of [their] career[.]” but instead “remain free to pursue [their] chosen profession.” *Id.* There is no dispute that Plaintiffs not only remain free to operate their businesses, but are currently operating their wineries every day earning significant income. Like *Parate*, Plaintiffs are still engaged in their profession, which precludes a liberty interest claim in their business operations. Plaintiffs’ claims, at most, relate to how late a winery may stay open – they otherwise continue to operate as they have for years.

The hours of operation are a single stick in a larger bundle of rights. Unlike *Sanderson*, where the police chief arrived at the plaintiff’s place of business and physically shut it down, Plaintiffs offered no evidence that anyone ever marched to their wineries and forced operations to cease or put chains on the doors. Similarly, unlike the plaintiff in *Wilkerson*, Plaintiffs were not prevented from operating their businesses anywhere in Michigan by operation of state law.

Sanderson is wholly inapplicable and there should be no award of damages for this new liberty interest theory that was asserted for the first time at trial.

2. Plaintiffs’ argument regarding damages distorts the irrelevant damages testimony presented at trial.

Plaintiffs assert the Township did not rebut their proofs at trial regarding alleged damages related to hours of operation. This is false. At trial Plaintiffs offered no evidence that the Township ever enforced a 9:30pm closing time. Instead,

Plaintiffs testified they never maintained regular business hours as late as 9:30pm; many of them close much earlier. *See, e.g.*, RE 600, PageID ##23134-23135; RE 601, PageID ##23319, 23355; RE 602, PageID #23571. Some representatives testified at trial that various Township officials (albeit without any corresponding evidence that these individuals were responsible for administering the zoning ordinance) told them the wineries should close at various times before 9:30pm. Others testified that they heard through the grapevine that they should close by 9:30pm. But there was no evidence presented at trial that any Plaintiff received a letter from the Township, violation notice, or any communication that instructed a winery to close by 9:30pm. There were no citations issued, fines levied, civil infractions initiated, or any other conceivable penalty related to the hours the wineries were open.

CONCLUSION

On its appeal, 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.

With respect to the Cross Appeal, the Township requests that this Court affirm the District Court's decision.

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

Dated: May 18, 2026

BY: /s/ Bogomir Rajsic, III
Bogomir Rajsic, III (P79191)
44 Cesar E. Chavez Avenue SW, Ste 200
Grand Rapids, MI 49503
(616) 288-3703
brajsic@mcgrawmorris.com

CERTIFICATE OF COMPLIANCE FRAP 32(g)

The undersigned certifies that Appellant/Cross-Appellee's Third Appeal Brief consists of 12,997 words in compliance with the Court's Order ECF #29 and was created using Microsoft Word 2016.

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

Dated: May 18, 2026

BY: /s/ Bogomir Rajsic, III

CERTIFICATE OF SERVICE FRAP 25(d)

I certify that on May 18, 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: May 18, 2026

BY: /s/ Bogomir Rajsic, III