No. 21-1744

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WINERIES OF THE OLD MISSION PENINSULA (WOMP) ASSOC., ET AL.
Plaintiffs-Appellees,

v.

TOWHSHIP OF PENINSULA , MI
Defendant,

and

PROTECT THE PENINSULA
Proposed Intervenor-Appellant.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Paul L. Maloney
Case No. 1:20-CV-01008-PLM

APPELLEES' BRIEF ON APPEAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1744 Case Name: WOMP v Peninsula Township, et al.

Name of counsel: Joseph M. Infante

Pursuant to 6th Cir. R. 26.1, Chateau Grand Traverse LTD
Name of Party
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No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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s/ Joseph M. Infante

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1744 Case Name: WOMP v Peninsula Township, et al.

Name of counsel: Joseph M. Infante

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makes the following disclosure:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1744 Case Name: WOMP v Peninsula Township, et al.

Name of counsel: Joseph M. Infante

Pursuant to 6th Cir. R. 26.1, Tabone Vineyards, LLC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1744 Case Name: WOMP v Peninsula Township, et al.

Name of counsel: Joseph M. Infante

Pursuant to 6th Cir. R. 26.1, Two Lads, LLC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1744 Case Name: WOMP v Peninsula Township, et al.

Name of counsel: Joseph M. Infante

Pursuant to 6th Cir. R. 26.1, Villa Mari, LLC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1744 Case Name: WOMP v Peninsula Township, et al.

Name of counsel: Joseph M. Infante

Pursuant to 6th Cir. R. 26.1, Bowers Harbor Vineyard & Winery, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1744 Case Name: WOMP v Peninsula Township, et al.

Name of counsel: Joseph M. Infante

Pursuant to 6th Cir. R. 26.1, Wineries of the Old Mission Peninsula (WOMP) Assoc.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1744 Case Name: WOMP v Peninsula Township, et al.

Name of counsel: Joseph M. Infante

Pursuant to 6th Cir. R. 26.1, Brys Winery, LC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1744 Case Name: WOMP v Peninsula Township, et al.

Name of counsel: Joseph M. Infante

Pursuant to 6th Cir. R. 26.1, Grape Harbor, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1744 Case Name: WOMP v Peninsula Township, et al.

Name of counsel: Joseph M. Infante

Pursuant to 6th Cir. R. 26.1, Montague Development, LLC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1744 Case Name: WOMP v Peninsula Township, et al.

Name of counsel: Joseph M. Infante

Pursuant to 6th Cir. R. 26.1, OV The Farm, LLC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1744 Case Name: WOMP v Peninsula Township, et al.

Name of counsel: Joseph M. Infante

Pursuant to 6th Cir. R. 26.1, Winery at Black Star Farms, LLC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

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STATEMENT REGARDING ORAL ARGUMENT

The District Court's opinion correctly followed binding Sixth Circuit precedent, including *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007), *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007), and *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309 (6th Cir. 2005). Plaintiffs-Appellees submit that every panel will be bound by these decisions such that oral argument is unnecessary, but Plaintiffs-Appellees will participate if the Court grants oral argument.

JURISDICTIONAL STATEMENT

This case asks whether sections of the Peninsula Township Zoning Ordinance violate the dormant Commerce Clause, First Amendment, and Fourteenth Amendment to the United States Constitution. The District Court has federal question jurisdiction over those claims under 28 U.S.C. § 1331. The District Court exercised supplemental jurisdiction over Plaintiffs-Appellees' state law preemption claims under 28 U.S.C. § 1367.

Plaintiffs-Appellees agree with Proposed Intervenor-Appellant's statement of jurisdiction with respect to this appeal.

STATEMENT OF ISSUES

1. Whether the District Court correctly applied this Court's decisions in *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007), *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007), and *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309 (6th Cir. 2005), among others, to conclude that Proposed-Intervenor-Appellant Protect the Peninsula could not intervene as of right under Federal Rule of Civil Procedure 24(a)(2) where it and its members are not regulated by the specific portions of Peninsula Township's Zoning Ordinance challenged by Plaintiffs-Appellees, where any interest Protect the Peninsula may have would not be affected by Plaintiffs'-Appellees' challenge, and where Peninsula Township has vigorously defended its Ordinance against the challenge by Plaintiffs-Appellees.
2. Whether the District Court correctly rejected Protect the Peninsula's attempt to file a dispositive motion disguised as a "motion for leave to supplement pending motion to intervene with proposed motion to dismiss plaintiffs' state law claims" after Protect the Peninsula already had filed a proposed answer and after concluding that Protect the Peninsula lacked standing to file a dispositive motion because it was not allowed to intervene as of right under Federal Rule of Civil Procedure 24(a).

STATEMENT OF THE CASE

Plaintiffs-Appellees, along with their trade association, Wineries of Old Mission Peninsula Association, represent every winery within Peninsula Township, just north of Traverse City, Michigan. Collectively, Plaintiffs-Appellants refer to themselves as the Wineries.

A. The Wineries Challenge Peninsula Township's Zoning Ordinance

The underlying lawsuit involves a facial challenge to portions of Defendant Peninsula Township's zoning ordinances (the "Winery Ordinances") which the Wineries allege are in violation of the rights to freedom of speech, expression, and exercise of religion; freedom of association; due process; and the dormant commerce clause. [First Amended Complaint, R. 29, Page ID ## 1116–24.] The Wineries also allege that the Winery Ordinances amount to a regulatory taking, are preempted by the Michigan Liquor Control Code and violate the Michigan Zoning Enabling Act. [*Id.* at Page ID ## 1124–27.]

The Winery Ordinances go to almost absurd lengths to control the Wineries' operations while economically protecting other local industries; namely tree fruit and grape farmers located within Peninsula Township. For example, the Winery Ordinances state that three of the Wineries may only produce wine made from at least eighty-five percent grapes which have been grown within Peninsula Township and fifty-one percent of those grapes must be grown on the property where the winery is located. See 6.7.2(19)(b)(1)(ii). The Winery Ordinances limit use of the

Wineries for meetings and events to only non-profits groups located within the local county or agriculturally related groups. See 8.7.3(10)(u)(2)(b)-(c). These meetings are also subject to pre-approval of the Township where the groups are vetted to ensure they have, for example, an agricultural purpose. *Id.* If a Winery is pre-approved by Peninsula Township to have an event, the Winery Ordinances require the Winery to purchased 1.25 tons of grapes from a Peninsula Township grape grower for each person who is to attend the event. See 8.7.3(10)(u)(3). Section 8.7.3(12)(k), as enforced by Peninsula Township, prohibits one type of Winery from advertising in the local newspaper, for example. Finally, for years Peninsula Township prohibited the Wineries from hosting weddings and wedding receptions. During discovery in this lawsuit, Peninsula Township has finally admitted that the Winery Ordinances do not, in fact, prohibit weddings and wedding receptions. These are just a few examples of the ways the Winery Ordinances infringe upon the Wineries' constitutional rights.

Defendant Peninsula Township has vigorously opposed the Wineries' claims, including defeating the Wineries' motion for preliminary injunction. [Motion for Preliminary Injunction, R. 2; Response to Motion for Preliminary Injunction, R. 24; Township's Motion for Leave to File Sur-Reply, R. 32; Order Denying Motion for Preliminary Injunction, R. 34.]

B. The District Court Denied Protect the Peninsula Intervention.

Appellant-Proposed Intervenor Protect the Peninsula, Inc. ("PTP") is a small, but very vocal, group of citizens who believe they are the saviors of Peninsula Township. PTP moved to intervene on February 16, 2021. [Motion to Intervene, R. 40, Page ID # 1965.] Concurrent with its motion to intervene, PTP filed a proposed answer and forty-three affirmative defenses. [PTP's Proposed Answer, R. 41-1, Page ID ## 1985–2065.] PTP requested intervention by right, under Federal Rule of Civil Procedure 24(a), and by permission, under Rule 24(b). [PTP's Brief in Support of Motion to Intervene, R. 41, Page ID ## 1970–82 (intervention by right); Page ID # 1982–83 (permissive intervention).]

In support of its motion, PTP explained that it is a non-profit corporation with the mission "[t]o foster and promote the benefits of life on Old Mission Peninsula to the members of PTP and the Old Mission Peninsula." [R. 41-2, Page ID # 2069, ¶ 12.] PTP has led voter referendums against zoning decisions. [*Id.*, Page ID ## 2070–71, ¶¶ 16–17, 21.] It has also filed a lawsuit to challenge zoning decisions and intervened in a state court lawsuit to challenge winery expansion. [*Id.*, Page ID # 2070, ¶¶ 19–20.] And, according to PTP, following the referendum and lawsuit, it negotiated an ordinance rewrite which became the current Winery Ordinance. [R. 41, PageID.1976.]

PTP believes its "has a continuing interest in preserving its historic litigation and referendum successes rejecting outcomes comparable to what Plaintiffs seek in this case (increased commercial-type retail, food services, and other activities at wineries in the agricultural district.)" [*Id.*, Page ID # 1977.] But neither PTP nor its members own or operate a winery. PTP is not directly affected by the Winery Ordinance but instead seeks to enforce ordinance that affect the Wineries—no matter how illegal or unconstitutional they may be. [*Id.*, Page ID # 2074, ¶ 28.]

The Wineries opposed PTP's motion to intervene and filed a responsive brief on March 3, 2021. [R. 46.] The Wineries assert that PTP is not entitled to party status for several reasons: (1) because non-party PTP is not regulated by the sections of the Peninsula Township Ordinance at issue, it lacks the necessary substantial interest in the case; (2) because even if the Wineries prevail on every claim, Peninsula Township will be required to legislate any changes where PTP and its members shall be heard; and (3) because Peninsula Township's presence as Defendant adequately represents PTP's interests. [*Id*, Page ID ## 2138–2147.]

C. After the Wineries and Peninsula Township File Cross-Motions for Partial Summary Judgment, PTP Also Tried to File a Dispositive Motion

On April 14, 2021, the Wineries moved for partial summary judgment on their state law preemption claims, asking the District Court to declare that nine sections of Peninsula Township's ordinance are preempted by Michigan law. [Wineries'

Motion for Partial Summary Judgment, R. 53, Page ID # 2271.] Peninsula Township opposed the Wineries' motion and filed its own cross-motion for partial summary judgment on the same issues. [Township's Response and Cross-Motion for Partial Summary Judgment, R. 62, 63.]

On April 22, 2021, with its Motion to Intervene still pending, PTP sought concurrence from the Wineries' counsel to supplement its motion to intervene with a proposed motion to dismiss. The same day, the Wineries' counsel replied that not only did the Wineries oppose PTP's request, but that PTP "has no standing to file any motions in this case" and if PTP proceeded to file its motion anyway that the Wineries "will seek sanctions." [Request for Concurrence, R. 60-1, Page ID # 2734]. This response was intended to underscore the frivolity of a non-party's insistence to comment on the merits and file further motions before the resolution of its motion to intervene.

Undeterred, PTP filed its Motion to Supplement (which had nothing to do with the merits of its motion to intervene) and attempted put before the Court a dispositive motion to dismiss the Wineries' state law preemption claims. [PTP's Motion for Leave to Supplement, R. 56.] PTP, under Rule 12(b)(1), asserted that "Plaintiffs' preemption claim is beyond the supplemental subject matter jurisdiction of federal courts as provided in 28 U.S.C. § 1367." [*Id.*, Page ID # 2554.] PTP also requested dismissal of the Wineries' claims of state law preemption and violation of

the Michigan Zoning Enabling Act for failure to state a claim under Rule 12(b)(6). [*Id.*, Page ID # 2555.] Because PTP improperly attempted to file a dispositive motion before it had been allowed into the case, the Wineries requested that PTP's Motion for Leave to Supplement be stricken from the record and requested that the District Court impose sanctions on PTP under 28 U.S.C. § 1927. [Wineries' Motion to Strike, R. 59.]

D. The District Court Denied PTP's Motions

The District Court denied PTP's motion to intervene. [Order Denying Motion to Intervene, R. 108.] Consistent with well-established Sixth Circuit precedent governing intervention by right, the District Court evaluated four factors: the "(1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (citation omitted). While the Wineries did not contest the timeliness of PTP's motion, the District Court analyzed the remaining three factors and found that PTP failed to satisfy each one. [R. 108, Page ID ## 4169–4171.]

First, the District Court found that "PTP does not have a substantial interest in this litigation." [*Id.*, Page ID # 4169.] The District Court reasoned that "PTP is not regulated by the ordinances at issue because it is not a winery or a farm" and that

"PTP does not claim to be regulated by the ordinances[.]" [*Id.*, Page ID ## 4169–70.] Rather, the District Court found that PTP "has a general interest in this lawsuit because it seeks to maintain the current ordinances, and such an interest is not enough to establish the requisite 'substantial legal interest.'" [*Id.*, Page ID # 4170.] If PTP were allowed to intervene under that logic, then "every resident of Peninsula Township could intervene." [*Id.*]

Second, the District Court found that PTP "cannot show that this case impairs PTP's ability to protect its interests[.]" [*Id.*, Page ID # 4170.] The District Court stated that "because PTP is not regulated by the zoning ordinances, there is no effect on PTP if the zoning ordinances are amended." [*Id.*, Page ID # 4171.]

Third, the District Court found that Peninsula Township would adequately represent PTP's interests because "both PTP and Peninsula Township want the zoning ordinances to remain, and Plaintiffs want the zoning ordinances to be amended. Because PTP and Peninsula Township seek the same relief, there is no need for PTP to intervene." [*Id.*, Page ID ## 4170–71.][1]

Finally, the District Court denied PTP's proposed supplemental motion to dismiss for two independent reasons. The District Court first explained that "PTP has not shown the Court that it had the authority to file this motion in the first place."

[1] The District Court also denied PTP's motion for permissive intervention. [R. 108, Page ID # 4171–72.] PTP has not appealed that decision.

[*Id.*, Page ID # 4173.] The District Court also noted that PTP's self-styled "motion for leave to supplement" was really a "misnomer" because it "has nothing to do with intervention and fails to make any supporting arguments supplementing the motion to intervene." [*Id.*] Ultimately, the District Court concluded that because it was denying PTP's motion to intervene, "PTP does not have standing to seek dismissal of any of Plaintiffs' claims." [*Id.*]

E. PTP appeals.

PTP appealed the District Court's decision to deny intervention by right. PTP also appealed on the issue of whether it may file a supplemental dispositive motion before intervention has been granted. [Notice of Appeal, R. 121.]

PTP's Brief on Appeal contains a hodge-podge of unsupported factual allegations with no record citations and conclusory statements which also find no support in the records, facts or law.[2] This Court should summarily disregard these statements. The recitation above of the procedural background of PTP's attempt to intervene is the only relevant background.

[2] The actual parties to this lawsuit, the Wineries and Peninsula Township, have engaged in discovery and developed a complete record which does not include many of the assertions made by PTP.

SUMMARY OF THE ARGUMENT

The District Court got it right on both fronts, and this Court should affirm. With respect to intervention by right, the District Court correctly applied binding Sixth Circuit precedent and concluded that PTP failed to satisfy three of four factors necessary to intervene by right. This Court has repeatedly rejected attempts to intervene when the proposed intervenors would not be regulated by a challenged statute. The District Court correctly determined that PTP is not a winery and is not regulated by the Peninsula Township Winery Ordinance. That conclusion was directly on point with this Court's conclusions in *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007), *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007), and *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309 (6th Cir. 2005). Any other result would require this Court to overrule at least three of its previously published decisions.

On the mislabeled "motion to supplement," the District Court correctly determined that PTP could not file an additional dispositive motion in a faithful application of the text of Rules 12 and 24. Rule 24(c) requires that a motion to intervene be accompanied by "a pleading that sets out the claim or defense for which intervention is sought." Rule 24(c) allows a pleading—singular—and makes no mention of supplementing the motion with an additional dispositive motion. Relatedly, Rule 12(b) requires that "[a] motion asserting any of these defenses must

be made before pleading if a responsive pleading is allowed." PTP already had filed a proposed answer, so its attempt to later file a Rule 12(b) motion was improper. Further, PTP's motion was really a request for the District Court to decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367 of Plaintiffs'-Appellees' state law claims. That decision was wholly within the District Court's discretion. And at bottom, the District Court correctly concluded that PTP lacked standing to file *anything* before it was allowed to intervene, so even if it committed an error by faithfully applying the text of the Federal Rules, any error was harmless.

ARGUMENT

A. The District Court Correctly Denied PTP's Motion to Intervene

A party may intervene when the proposed intervenor "(1) is given an unconditional right to intervene by a federal statute" or "(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(1)–(2). PTP does not allege a statutory right to intervene. A proposed intervenor as of right under Rule 24(a)(2) must prove that (1) its motion is timely; (2) it has a substantial legal interest in the subject matter of the case; (3) its "ability to protect that interest may be impaired in the absence of intervention;" and (4) "the parties already before the court may not adequately represent the proposed intervenor's interest." *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005) (citing *Grutter v. Bollinger*, 188 F.3d 394, 397–98 (6th Cir. 1999)). PTP, as the proposed intervenor, must prove all four elements; "failure to meet one of the criteria will require that the motion to intervene be denied." *Id.* (quoting *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)).

The District Court's decision on the timeliness element is reviewed for an abuse of discretion, and the remaining three elements are reviewed de novo. *Id.* The Wineries did not contest the timeliness of PTP's motion. [Opposition to Motion to Intervene, R. 46, Page ID # 2137; Order, R. 108, Page ID # 4169.]

1. The District Court Correctly Determined that PTP Lacks a Substantial Legal Interest in this Case

PTP "must show that [it has] a substantial interest in the subject matter of this litigation." *Grutter*, 188 F.3d at 398 (citation omitted). This is a fact-specific inquiry, *Miller*, 103 F.3d at 1245, that asks whether the proposed intervenor has a "direct, significant legally protectable interest" in the proceedings, *United States v. Detroit International Bridge Co.*, 7 F.3d 497, 501 (6th Cir. 1993).

A proposed intervenor must show it will be directly affected or regulated by the subject matter of the litigation. For example, when the United States government and Detroit International Bridge Company entered into a settlement agreement for the condemnation of land, an adjacent landowner to the Ambassador Bridge was allowed to intervene because the settlement agreement clearly contemplated condemnation of the adjacent landowner's property as well. *Detroit Int'l Bridge Co.*, 7 F.3d at 501. In another case, the Michigan Chamber of Commerce could intervene when it was "also regulated by at least three of the four statutory provisions challenged by the plaintiffs." *Miller*, 103 F.3d at 1247. Finally, a group of prospective African-American and Latino/a applicants to the University of Michigan had a substantial interest in a lawsuit challenging the University's affirmative action policy because they planned to apply to the University themselves and would be directly impacted if the affirmative action policy were terminated. *Grutter*, 188 F.3d at 399.

Following *Miller* and *Grutter*, this Court emphasized that intervention as of right applies to proposed intervenors who are or would be directly affected by the challenged statutes, whose interests are not too attenuated, and who would not impede the government's autonomy to enforce its own laws. For instance, when a church raised a constitutional challenge to a local government's zoning ordinance, this Court rejected a motion to intervene by a committee of interested citizens. *Providence Baptist*, 425 F.3d 309. There, the church had applied for rezoning of a parcel, which the city council approved by drafting new ordinances. *Id.* at 311. Subsequently, the citizens' committee worked to obtain a referendum which required that the new zoning ordinance be placed on the ballot for an upcoming election. *Id.* at 311–12. Voters then struck down the new ordinance. *Id.* The church, in turn, filed suit against the local government. *Id*. at 312. Like PTP in this case, the citizens' committee sought to intervene as of right and "described itself as 'the duly authorized committee which circulated the referendum petitions.'" *Id*. The citizens' committee also alleged that "its interest in opposing the rezoning, and that the right of the voters to vote on the ordinances . . . could be threatened or nullified by a proposed settlement." *Id*. The district court denied intervention and the church and local government thereafter entered a consent judgment which determined that the current ordinance "was unconstitutional as applied." *Id.*

On appeal, this Court held that the citizens' committee lacked a substantial legal interest because the referendum election had already happened, and because "concerns for state autonomy . . . deny private individuals the right to compel a state to enforce its laws." *Id.* at 317 (quoting *Diamond v. Charles*, 476 U.S. 54, 65 (1986)). In essence, *Providence Baptist* held that once an ordinance is on the books, any group involved in getting the ordinance passed loses its standing. *Id.* ("Hillandale Committee's alleged advocacy in getting the zoning ordinance on the November 2004 ballot does not suffice to make it a 'real party in interest in the transaction which is the subject of the proceeding . . . .'").

After *Providence Baptist*, this Court returned to intervention in *Northland Family Planning*, 487 F.3d at 343. An anti-abortion advocacy group had worked to put the Legal Birth Definition Act on the ballot for a citizen initiative petition. *Id.* at 327. When a group of health-care facilities and physicians sued to challenge the Act, the advocacy group moved to intervene, stating it was a "ballot-question committee . . . which was formed to promote the passage of the Act." *Id.* at 328. The district court denied intervention. This Court affirmed, noting intervention was improper because of two factors. First, it was "particularly significant" that the proposed intervenor "is not itself regulated by any of the statutory provisions at issue here." *Id.* at 345. Second, this Court further emphasized that cases allowing intervention "all involved challenges by a public interest group to the procedure

required to pass a particular rule, as opposed to the government's subsequent enforcement of the rule after its enactment." *Id.* This distinction was "compelling" because "the public at large—including public interest groups—has an interest in the procedure by which a given legal requirement is enacted as a matter of democratic legislative process." *Id.* However, "in a challenge to the constitutionality of an already-enacted statute, as opposed to the process by which it is enacted, the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant." *Id.*

This Court concluded by distinguishing *Grutter*, stating that "[i]f the statute in this case regulated [the anti-abortion group] or its members, [the anti-abortion group] would likely have a legal interest, much like the intervenors in *Grutter* who were applicants to the University of Michigan." *Id.* This Court emphasized that "[a]fter the Act's passage, however, [the anti-abortion group's] interest in the enforcement of the statute is greatly diminished due to the state's responsibilities in enforcing and defending it as it is written." *Id.* at 346. Because the law already passed, the anti-abortion group's "interest in this case simply pertains to the enforceability of the statute in general, which we do not believe to be cognizable as a substantial legal interest sufficient to require intervention as of right." *Id.*

This holding was reiterated in *Granholm*, 501 F.3d 775. Michigan passed Proposal 2, which generally barred affirmative action in public employment, education and contracting. *Id.* at 777. When an opposition group filed suit, two groups who helped get Proposal 2 on the ballot moved to intervene. *Id.* at 778. The district court rejected the motion. *Id.* at 783. Relying on the rationale from *Northland Family Planning*, this Court affirmed and emphasized that while a group may have an interest in the legislative or political process to enact a law, it has no substantial legal interest in enforcing the law unless it is directly regulated by it. The Sixth Circuit explained that in *Northland Family Planning*, "we held that an organization involved in the process leading to the adoption of a challenged law, does not have a substantial legal interest in the subject matter of the lawsuit challenged the legality of the already-enacted law, unless the challenged law regulates the organization or its members." *Id.* at 781. The *Granholm* opinion continued:

> Where, however, an organization has only a general ideological interest in the lawsuit—like seeing that the government zealously enforces some piece of legislation that it supports—and the lawsuit does not involve the regulation of the organization's conduct, without more, such an organization's interest in the lawsuit cannot be deemed substantial.

Id. at 782. Even where a few members were Michigan residents and could say to be naturally affected by Proposal 2, the proposed intervenor had "only a generic interest shared by the entire Michigan citizenry." *Id.*

Here, PTP generally claims that this lawsuit implicates its mission—namely, to "maintain the rural and agricultural character of the peninsula." [R. 41, Page ID # 1972.] PTP claims that it helped draft the Winery Ordinance and that it wants to see continued enforcement because there will be generalized harms such as more guests, bigger parking lots, increased traffic, increased noise and longer hours of operation. [*Id.*, Page ID ## 1973–78.][3] These generalized arguments were rejected in *Providence Baptist*, *Northland Family Planning*, and *Granholm*. Notably, PTP does not claim that it is regulated by the Winery Ordinance. Instead, it presents the sort of "general ideological interest in the lawsuit—like seeing that the government zealously enforces some piece of legislation that it supports"—that does not rise to the level of a substantial legal interest. *Granholm*, 501 F.3d at 782. If it did, every resident of Peninsula Township could intervene. The District Court correctly followed that reasoning and should be affirmed.

PTP's scattershot arguments do not change that conclusion. Instead, it redirects this Court by alleging that three of its members live near the regulated Wineries which PTP believes give it an interest in this case.[4] PTP relies on three

[3] Discovery is now closed, yet there is no evidence that any of these things will occur.

[4] There is no evidence in the record regarding the size of PTP's membership outside of the affidavits of five members. These five people were not elected to speak on behalf of the approximately six thousand citizens in Peninsula Township. That responsibility falls to Peninsula Township's Board, which has been making decisions on behalf of the Township in this case.

cases to argue that neighboring property owners may intervene to challenge unfavorable zoning decisions. [PTP Brief on Appeal at 34.] Respectfully, the Court should reject that argument out of hand because this is not a zoning case. The Wineries are raising constitutional and state-law challenges to Peninsula Township's zoning ordinance. This is not a case where a neighboring property owner wants to appear before a local planning commission to raise concerns about a proposed site plan. Regardless, the cases relied upon by PTP do not move the needle.

In one case, the Zoning Commission of the District of Columbia chose not to appeal a trial court's decision that its zoning order was "arbitrary, capricious and void." *Wolpe v. Poretsky*, 144 F.2d 505, 506 (D.C. Cir. 1944). When the Zoning Commission chose not to appeal the trial court's decision, neighboring property owners moved to intervene. The D.C. Circuit held that the property owners had a specific right to intervene because Section 5-422 of the D.C. Code gave them "the direct right to enjoin the unlawful construction of a building." *Id.* at 507.

PTP's citation to *Joseph Skillken & Co. v. City of Toledo*, 528 F.2d 867 (6th Cir. 1975) fares no better. There, property owners adjacent to a proposed development moved to intervene under a specific right of authority granted by Revised Code of Ohio § 713.13, which stated that "the owner of any contiguous or neighboring property who would be especially damaged by such violation, in addition to any other remedies provided by law, may institute a suit for injunction to

prevent or terminate such violation." *Id.* at 874. Unlike PTP, the property owners in *Joseph Skillken* were regulated by the challenged ordinance, and there was evidence that the value of the adjoining properties would be decreased if houses on smaller lots were allowed when those neighboring owners were required to build on larger lots. That evidence is not present here. Moreover, in addition to the specific grant of a right to intervene under Ohio law, the *Joseph Skillken* decision was vacated by the Supreme Court. *See* 429 U.S. 1068 (1977).

PTP also cites *Midwest Realty Management Co. v. City of Beavercreek*, 93 F. App'x 782, 784 (6th Cir. 2004). There, neighbors to a 30-acre property about to be conditionally rezoned from agricultural into residential use tried to intervene after the city negotiated a settlement agreement with the property owner. *Id.* at 783–84. The district court denied the neighbors' motion to intervene as untimely, and this Court reversed. *Id.* at 786–88. Notably, the *Midwest Realty* opinion assumed that the neighbors had a substantial interest. *Id.* at 787 n.4.

These cases are not applicable to PTP's situation. Unlike the intervenors in *Wolpe* and *Joseph Skillken*, PTP has not identified a statute giving it a right to intervene on behalf of an unconstitutional law. PTP does reference MCL 125.3306(1)–(2), MCL 125.3401(2), and MCL 125.3502(2)–(3). [PTP Brief on Appeal 38–39.] However, those sections from the Michigan Zoning Enabling Act require a public hearing upon changes to a zoning designation or special use permit.

They do not grant a statutory right to intervene, nor do they immunize a local government's law from a facial constitutional challenge. In short, they do not apply.

Further, unlike *Midwest Realty*, the District Court's decision was not based on the timeliness of PTP's motion to intervene. And unlike all three of the cases PTP cites, the Wineries are not asking Peninsula Township to change their zoning designation; rather, the Wineries are facially challenging the zoning ordinance itself. Notably, these cases were all decided before *Providence Baptist*, *Northland Family Planning*, and *Granholm*. The District Court correctly applied that precedent to determine PTP does not have a substantial interest in this case.

Finally, if PTP is raising zoning concerns because it wants a seat at the settlement table, that attempt must also fail. [PTP Brief on Appeal at 56.] The Sixth Circuit dismissed this same argument in *Providence Baptist*, 425 F.3d at 312. The *Providence Baptist* court concluded that the committee lacked an interest to challenge a negotiated settlement with a local government "because 'concerns for state autonomy . . . deny private individuals the right to compel a state to enforce its laws.'" *Id.* at 317 (quoting *Diamond v. Charles*, 476 U.S. 54, 65 (1986)). The same is true here. PTP does not get to dictate how or why the Township may defend its ordinances.

Ultimately, PTP's "interest in maintaining a policy" is, at best, a generalized grievance that does not permit intervention in this lawsuit. PTP's desire to defend an unconstitutional and illegal ordinance is a desire they may share other members of the general public. However, only the Wineries are regulated by the Winery Ordinance. *Northland Family Planning* and *Granholm* are clear that if PTP is not actually regulated by the Winery Ordinance, it lacks a substantial interest in this litigation. PTP failed to make that showing, and that failure was fatal to PTP's motion to intervene. *Grubbs*, 870 F.2d at 345. The District Court's order should be affirmed.

2. The District Court Correctly Found That PTP's Interests are Protected Without Intervention.

Even if PTP had a substantial interest in this case, it fails to explain how this interest might be impaired. The question is not whether this case might impair PTP's interests, but whether PTP's lack of intervention might impair those interests. *See, e.g.*, *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011) (describing this factor as "the applicant's ability to protect its interest will be impaired without intervention"). This is necessarily tied to the underlying substantial interest. For example, in *Grutter*, "access to the University for African-American and Latino/a students will be impaired to some extent and that a substantial decline in the enrollment of these students may well result if the University is precluded from considering race as a factor in admissions." *Grutter*, 188 F.3d at 400.

PTP has no substantial interest here and misunderstands this factor when it claims that it is concerned that its "ability to participate in the zoning process through the traditional methods provided for public participation" may be impaired. [R. 41-2, Page ID #2074, ¶ 29.] The Wineries are not challenging the Michigan Zoning Enabling Act or the ability for the citizens of Peninsula Township to participate in the traditional processes there.

The real issue is whether PTP's interest are protected without intervention. If, for example, the Wineries may sell logoed merchandise, how is PTP affected? And even if there is increased traffic—one of PTP's big concerns—it is unclear how PTP will truly be affected. The Wineries are not challenging the speed limit or road appropriations in Peninsula Township. PTP remains fully able to petition the Township, Grand Traverse County, and State of Michigan to change laws related to those concerns. PTP's interests are incidental to the Winery Ordinances, and it remains fully able to petition the relevant entities if other concerns arise.

The District Court correctly found that "because PTP is not regulated by the zoning ordinances, there is no effect on PTP if the zoning ordinances are amended." [Id., Page ID # 4171.] The District Court's decision should be affirmed.

3. The District Court Correctly Found that Peninsula Township Adequately Represents PTP's Interests.

"[A]pplicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit." *United States v. Michigan*, 424 F.3d 438, 443–44 (6th Cir. 2005) (citing *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987)). A proposed intervenor "fails to meet his burden of demonstrating inadequate representation when 1) no collusion is shown between the existing party and the opposition; 2) the existing party does not have any interests adverse to the intervener; and 3) the existing party has not failed in the fulfillment of its duty." *Jordan v. Michigan Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000).

In *Miller*, the Secretary of State and Attorney General did not adequately represent the Chamber's interests for two reasons. First, "the Chamber, as a target of the statutes' regulations, would harbor an approach and reasoning for upholding the statutes that will differ markedly from those of the state, which is cast by the statutes in the role of regulator." *Miller*, 103 F.3d at 1247. Second, the Secretary of State failed to pursue an interlocutory appeal of the preliminary injunction temporarily invalidating provisions of the statute at issue. *Id.* at 1248. Neither rationale applies here. PTP is not a "target" of the Township's Winery Ordinances; rather, its members are trying to see those Ordinances enforced against another party. In addition, the Township has not failed to appeal from an order—the Township

prevailed on the Wineries' preliminary injunction motion after thoroughly briefing the issues. [R. 24, 32, 34.]

In *Grutter*, this Court found inadequate representation where there was the possibility that the University of Michigan was "unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria." *Grutter*, 188 F.3d at 400–01. In essence, the University was unlikely to present evidence that its own admissions practices, absent affirmative action, discriminated against Black and Latino students. *Id.* That rationale does not apply here.

In this case, the District Court correctly found that Peninsula Township and PTP want the exact same thing—continued enforcement of the Winery Ordinance. [R. 108, Page ID # 4171.]

a. PTP Raised Some Interests Before the District Court

Before the District Court, PTP raised several reasons why its interest might be inadequately protected. [R. 41, Page ID ## 1981–82.] For example, PTP claimed that "[t]he Township's general governmental interests are not as acute as those of the PTP members residing close to wineries." [*Id.*, Page ID # 1981.] It is unclear what this even means. PTP's members are not the only persons residing near the Wineries and presumably members of the Peninsula Township Town Board live near the wineries.

PTP also claimed that "[t]he Township does not have an interest in protecting the right to referendum, which belongs to registered voters, including PTP members." [*Id.*, Page ID # 1981.] Nothing in this lawsuit is designed to strip the right of referendum from the voters. If the Winery Ordinances are unconstitutional, they are unenforceable, no matter what the voters say.

PTP further claimed that it "may seek to preserve the rights of referendum or appeal if this case resolved by consent, even if the Township did not." [*Id.*, Page ID # 1981.] *Providence Baptist* squarely rejected a motion to intervene and challenge a consent judgment because it would impede state autonomy.

Next, PTP claimed that "[t]he Township has been sued for monetary damages, so its interests and priorities may diverge from PTP's in preserving zoning provisions." [*Id.*, Page ID # 1982.] The Township has not given any indication that its constitutional positions are tempered by the possibility of money damages. Regardless, differences over the finer points of constitutional theory do not constitute inadequate representation. *E.g.*, *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 491 (6th Cir. 2012) (overruled on other grounds) ("Any mere disagreement over litigation strategy ... does not, in and of itself, establish inadequacy of representation.") (internal quotation marks omitted); *Geier v. Sundquist*, No. 95-5844, 94 F.3d 644, at *2 (6th Cir. Aug. 14, 1996)

(explaining that disagreements over litigation strategy "are inadequate to form the basis of a right to intervene.") (unpub. table decision).

Finally, PTP claimed that "Plaintiffs rely on statements from the township attorney indicating that some of Plaintiffs' claims may be valid. While the Township has renounced this position, this context raises the potential that PTP may view the facts and law differently than the township." [*Id.*, Page ID # 1982.] PTP also claimed that "[p]rior to Plaintiffs' litigation, a township subcommittee was tasked with finding a suitable resolution to claims that some wineries' provisions were invalid." [*Id.*] The Township has distanced itself from its attorney's statements, [*See* R. 24, Page ID ## 960–62], and the subcommittee never adopted a resolution to the Wineries' claims.

Taken together, these interests are insufficient to overcome the general presumption of adequate representation. *First*, PTP has not alleged any collusion between the Wineries and the Township. This is not a case where the Township has abandoned its position. The Township fully briefed and opposed the Wineries' motion for a preliminary injunction. [R. 24, 32.] The Township was successful in defeating the Wineries' motion for preliminary injunction. [R. 34.] And the Township's advocacy has been so contentious that the District Court sanctioned the Township for backing out of a settlement agreement. [Order Regarding Sanctions, R. 127.] *Second*, PTP has not demonstrated how its interests differ from the

Township. The Township has always vigorously maintained the constitutionality of the Winery Ordinance. *Third*, PTP has not shown how the Township has failed in its duty. As stated above, the Township has filed a comprehensive answer and substantial briefing to oppose the Wineries' preliminary injunction motion.

Ultimately, PTP's interest boils down to keeping the Winery Ordinances on the books. This general interest in enforcing a duly-enacted law is insufficient to intervene as of right. *Granholm*, 501 F.3d at 782. PTP has not overcome the presumption of adequate representation by the Township. *Jordan*, 207 F.3d at 863. The District Court agreed and its order denying intervention should be affirmed.

b. PTP Claims New Interests on Appeal

In its Appeal Brief, PTP raises new interests not presented to the District Court. [Compare R. 41, Page ID ## 1981–82 with PTP's Appeal Brief at 54–57.] PTP forfeited these additional arguments when it did not present them to the District Court. *See Sheet Metal Workers' Health & Welfare Fund of N. Carolina v. L. Off. of Michael A. DeMayo, LLP*, 21 F.4th 350, 355 (6th Cir. 2021) ("We adhere to this practice so that both the parties and this Court have the benefit of the district court's assessment of the issue when the case is taken up on appeal. We likewise do so out of respect for the district court, as it would surely seem unfair to that court for a party to ask us to assign error to the district court on an issue the party never presented to the district court in the first instance." (internal citation omitted)).

Regardless, PTP's previously unarticulated arguments change nothing. PTP alleges that the Township may prefer the economic benefit from increased commercial operations and increased tax base from commercial wineries. [PTP Brief on Appeal at 53.] This argument is wrong. The Wineries are already taxed as commercial, rather than agricultural, so there will be no increased taxes to the Township. Further, the Township has not conceded to the Wineries and continues to fight the underlying case despite the clear unconstitutionality and preemption of the Winery Ordinances. [*E.g.*, R. 24, 32, 62, 63.]

PTP also alleges that the Township may wish to receive the benefit of additional local jobs which would be felt should the Wineries be allowed to fully use their winery licenses and property. [PTP Brief on Appeal at 53.] But the record shows that Peninsula Township is not interested in creating local jobs and that it continues to fight to restrict the Wineries' use of their licenses and property.

These alleged interests are tangential to the real issue—that PTP is not regulated by the Winery Ordinances and cannot overcome the fact that a generalized interest in continued enforcement of a law is not sufficient to intervene under this Court's binding precedent. *See Granholm*, 501 F.3d at 782.

4. Intervention at This Late Stage is Improper

Finally, prudence strongly suggests that intervention be denied at this late stage. Courts have found progression of the suit to weigh against intervention where discovery has been substantially completed, dispositive motions deadlines are looming or have already passed, and/or the district court has issued one or more significant rulings. *J4 Promotions, Inc. v. Splash Dogs, LLC*, 2010 WL 1839036, at *3 (S.D. Ohio May 3, 2010) (finding case had "progressed well beyond threshold issues" when motion to intervene was filed prior to deadline for discovery and dispositive motions, but motions to dismiss had been ruled upon, discovery was underway, pretrial conference had been held, and case schedule established).

Here, discovery has been competed in the underlying litigation with nearly twenty depositions having been taken. The Wineries and Peninsula Township have engaged in nearly twenty-five hours of mediation and one settlement conference before Magistrate Judge Kent. On December 30, 2021, the Wineries moved for summary judgment with Peninsula Township also moving for summary judgment on January 18, 2022. The case is in the very late stages with only summary judgment briefing needed to be completed and, if those motions are not successful, the parties will proceed to a trial scheduled for August 2022. If PTP were to intervene at this late stage it would significantly delay the resolution of the case.

B. The District Court Correctly Denied PTP's Mislabeled "Motion for Leave to Supplement"

PTP also appeals the District Court's decision to reject its proposed "motion for leave to supplement." The District Court faithfully applied the Federal Rules of Civil Procedure when it refused to accept this motion and should be affirmed.

1. Rule 24(c) only allows a proposed-intervenor to file a single responsive pleading.

PTP attempted to exceed the Federal Rules of Civil Procedure with its improperly labeled "motion for leave to supplement." The rules on intervention are clear: "The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). Rule 24(c) states that the motion must be accompanied by **a** pleading—singular—and says nothing about amendments or supplemental pleadings. An answer is a pleading. Fed. R. Civ. P. 7(a)(2). Here, PTP filed a proposed answer along with its motion to intervene. [R. 41-1, Page ID ## 1985–2065.] Under the plain text of Rules 7 and 24, PTP was not entitled to anything more.

PTP's attempt to file a motion asserting defenses under Rules 12(b)(1) and 12(b)(6) was flawed for another reason. Even if such a motion were allowed under Rule 24(c), it was untimely because "[a] motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b).

Because PTP already had filed a proposed answer, it was not allowed to file a Rule 12(b) motion. *See, e.g.*, *Anchor v. Hartford Pub. Sch. Dist.*, 2015 WL 12591752, at *1 (W.D. Mich. Jan. 13, 2015) ("Because defendants filed an Answer to the Complaint, rather than a motion under Rule 12(b), they have lost the right to proceed on a preliminary motion because Rule 12(b) states that '[a] motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.'").

Ultimately, the District Court correctly recognized that "PTP has not shown the Court that it had the authority to file this motion in the first place." [R. 108, Page ID # 4173.] That reasoning is correct. PTP is not a party in the case. It is, at most, a proposed intervenor. [R. 56, Page ID ## 2553–2554.] A proposed intervenor is not a party, and it enjoys no more rights to invoke this court's authority than an *amicus curiae*. *See Int'l Union v. Scofield*, 382 U.S. 205, 209 (1965) (contrasting "an intervenor with an amicus [who] is not a 'party' to the case"). "Intervention is the admission, by leave of the court, of a person not an original party, into the proceeding, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by the proceeding." *In re Willacy Cty. Water Control & Improvement Dist. No. 1*, 36 F. Supp. 36, 40 (S.D. Tex. 1940); *see also New York News Inc. v. Newspaper and Mail Deliverers' Union*, 139 F.R.D. 291, 292–293 (S.D.N.Y. 1991), *aff'd* 972 F.2d 482 (2nd Cir. 1992). ("[O]nce a motion for intervention has been granted, intervenor is treated as if he or she were an original

party."). Only after intervention has been granted is an intervenor "entitled to litigate fully on the merits and be considered a party for all purposes." *In re Oceana Intern., Inc*, 49 F.R.D. 329, 333–34 (S.D.N.Y. 1969) (citations omitted)). Said another way, while a motion for intervention is pending, the proposed intervenor is not entitled to comment on the merits, much less file dispositive motions.

Additionally, the District Court explained that PTP's self-styled "motion for leave to supplement" was really a "misnomer" because it "has nothing to do with intervention and fails to make any supporting arguments supplementing the motion to intervene." [R. 108, Page ID # 4173.] This was a faithful application of the Federal Rules, and the District Court's decision should be affirmed.

2. Any error was harmless because the District Court has discretion to exercise jurisdiction over pendent state law claims and because it denied PTP's motion to intervene.

Even if the District Court erred by denying PTP's mislabeled "motion for leave to supplement," any error was harmless. PTP's proposed motion was a motion to dismiss under Rule 12, asking the District Court to decline supplemental jurisdiction over the Wineries' state law preemption claims. But that decision was wholly within the District Court's discretion and, thus, PTP's motion was unlikely to be granted.

The District Court had discretion to accept or decline supplemental jurisdiction over Plaintiffs'-Appellees' state law claims. 28 U.S.C. § 1367(c) ("The district court may decline to exercise supplemental jurisdiction" in four circumstances."). *See also Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) ("With respect to supplemental jurisdiction in particular, a federal court has subject-matter jurisdiction over specified state-law claims, which it may (or may not) choose to exercise."). The District Court could have declined supplemental jurisdiction when the Wineries moved for a preliminary injunction, but it did not. Instead, the Wineries and Peninsula Township, the only current parties to this action, agreed that the District Court had jurisdiction over this case when filing their Rule 26(f) Report. [Rule 26(f) Report, R. 37, Page ID # 1959.] The District Court subsequently allowed the Wineries and Peninsula Township to file cross-motions for partial summary judgment on those state law preemption claims. Those motions have been fully briefed for almost a year. At this point, it is safe to say the District Court is retaining jurisdiction over the state law claims.

Second, as the District Court correctly found, PTP did not have a right to intervene. [R. 108, Page ID # 4173.] Therefore, PTP has no standing in the case and had no right to file a dispositive motion before intervention was granted. *See, e.g.*, *In re Oceana*, 49 F.R.D. at 333 ("Once intervention as of right has been granted, an intervenor should be entitled to litigate fully on the merits[.]"). So even if the

District Court should have allowed PTP to file its motion for leave to supplement, the District Court never would have considered that supplemental motion because PTP had no right to intervene.

CONCLUSION

The District Court faithfully applied this Court's precedent. The Wineries request that this Court affirm the District Court's order denying PTP's motion to intervene and PTP's "motion for leave to supplement pending motion to intervene with proposed motion to dismiss plaintiffs' state law claims." [R. 108.] The Wineries also request that the Court award the Wineries their costs and attorneys' fees incurred in defending this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this 8,209-word brief complies with the Court's type-volume limitations.

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CERTIFICATE OF SERVICE

I certify that on February 7, 2022, I electronically filed this document with the Clerk of the Court using the ECF system, which will send notification of the filing to all ECF filing participants.

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ADDENDUM

Designation of Relevant District Court Documents

Record Entry No.	Description of Entry	Page ID
2	Motion for Preliminary Injunction	435–437
24	Township's Response to Motion for Preliminary Injunction	936–990
29	First Amended Complaint	1116–1127
32	Township's Motion for Leave to File Sur-Reply	1615–1616
34	Order Denying Motion for Preliminary Injunction	1864–1877
37	Rule 26(f) Report	1959
40	PTP's Motion to Intervene	1965
41	PTP's Brief in Support of Motion to Intervene	1970–1983
41-1	PTP's Proposed Answer and Affirmative Defenses	1985–2065
41-2	Affidavit of Mark Nadolski	2069–2071
53	Wineries' Motion for Partial Summary Judgment	2271
56	PTP's Motion for Leave to Supplement	2254–2255
59	Wineries' Motion to Strike	2719–2720
60	Wineries' Brief in Support of Motion to Strike Proposed Motion for Leave to Supplement	2721–2732
60-1	Request for Concurrence	2734
62	Township's Response to Wineries' Motion for Partial Summary Judgment	2737–2738
63	Township's Cross-Motion for Partial Summary Judgment	2739–2771

Record Entry No.	Description of Entry	Page ID
108	Order Denying Motion to Intervene	4167–4175
121	Notice of Appeal	4343
127	Order Regarding Sanctions	4389–4390