Case No. 22-1534

United States Court of Appeals for the Sixth Circuit

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION, et al,
Plaintiffs-Appellees,

v.

TOWNSHIP OF PENINSULA, MI,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Michigan

APPELLEE'S RESPONSE TO APPELLANT'S MOTION TO STAY INJUNCTION PENDING APPEAL

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I. INTRODUCTION

Appellees (the "Wineries") moved to dismiss this appeal because it was filed before an injunction was entered. (Dkt. 18.) This Court has not ruled on that motion, but it has directed an expedited briefing scheduled on Appellant Peninsula Township's motion to stay. The Wineries submit that because the motion to dismiss remains pending, the Township's motion to stay is premature.

Regardless, the District Court issued a well-reasoned opinion denying the Township's motion in which it rejected Peninsula Township's arguments as to likelihood of success and concluded that its other arguments were either unpreserved, underdeveloped, or simply wrong. It also correctly concluded that the Wineries, not the Township, would be irreparably harmed if an unconstitutional ordinance remains in effect. If this Court is inclined to rule on the motion to stay before ruling on the motion to dismiss, it should deny the motion to stay and leave the injunction in place.

II. BACKGROUND

The Wineries challenged dozens of individual sections of Peninsula Township's Winery Ordinances as unconstitutional or preempted by Michigan law.

A. The Wineries prevailed at summary judgment.

The District Court issued an opinion granting in part and denying in part summary judgment. (Opinion Regarding Summary Judgment Motions, R. 162.) Most of the findings were in favor of the Wineries. The District Court determined

that the Township's ban on off-site catering and prohibition of amplified music were preempted by the Michigan Liquor Control Code. (*Id.*, Page ID # 5991–5993.) It determined that the Township's mandate to use local produce instead of non-Peninsula Township produce violated the dormant Commerce Clause. (*Id.*, Page ID # 5995–6001.) It concluded that the Township's regulations of commercial speech—including a ban on advertising in the newspaper, posting signs with products for sale, and the sale of logoed merchandise—could not satisfy the *Central Hudson*[1] test. (*Id.*, Page ID # 6001–6008.) It struck down unconstitutional prior restraints. (*Id.*, Page ID # 6010–6014.) It invalidated requirements that the Wineries promote Peninsula Township as unconstitutionally compelled speech. (*Id.*, Page ID # 6014–6016.) It declared unconstitutionally vague the term "Guest Activity Use," which governed one class of Wineries. (*Id.*, Page ID # 6016–6019.) And it determined that the Township could not enforce its ban on weddings and its 9:30 p.m. closing time because its officials conceded that the Ordinances did not contain language to that effect and because the Township failed to respond to the Wineries' argument altogether. (*Id.*, Page ID # 6019–6021.)[2]

The District Court also rejected the Township's defense of laches. It found

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[1] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York*, 447 U.S. 557 (1980).

[2] The argument was waived. *Est. of Barnwell v. Grigsby*, 801 F. App'x 354, 366 (6th Cir. 2020).

that the Township "failed to establish evidence of the second element (prejudice)" because it could not identify individuals who would not be able to testify and because the Wineries "'have been trying for decades' to change the Township Ordinances, and when it was clear that negotiation was unsuccessful, the Wineries brought this lawsuit." (*Id.*, Page ID # 6022.) Additionally, "five of the Plaintiff-Wineries were established within the last eight years, and some of the older Wineries have recently been passed down to a second generation." (*Id.*)

At the end of the District Court's opinion, it stated it "will enjoin the Township from enforcing all of the sections of the Township Ordinances that the Court has found unconstitutional or contrary to law." (*Id.*, Page ID # 6029.)

B. The Township filed a series of post summary judgment motions.

Post summary judgment, the Township filed a series of motions in the District Court asking to stay the preliminary injunction, (R. 169), certify questions for interlocutory appeal, (R. 172), and alter or amend the summary judgment ruling, (R. 173).

C. The District Court denied the Township's motion for stay.

The District Court denied the Township's motion to stay, finding that "none of the four factors articulated above weigh in favor of a stay." (Order Denying motion to Stay Injunction, R. 207, Page ID # 7797.)

As to irreparable harm, the District Court rejected the Township's argument

that *Maryland v. King*, 567 U.S. 1301, 1303 (2012), requires a presumption that the Township suffered irreparable harm when its ordinances were enjoined. The District Court explained that "States and municipalities only face irreparable harm in this scenario if the court enjoins a *constitutional* statute." (*Id.* at Page ID # 7798 (citing *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020).) "[B]ecause the Court only enjoined the sections of the Ordinances that it found unconstitutional and contrary to law, the Township is not facing an irreparable harm, and this factor weighs in favor of denying a stay." (*Id.*)

Turning to the likelihood of success, the District Court rejected the Township's arguments related to laches and preemption. (*Id.*, Page ID # 7799.) On laches, the District Court reiterated its conclusions at summary judgment that the Township failed to meet its burden of proof. (*Id.*) It further reasoned that laches is not an "absolute defense" under *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 412 (6th Cir. 2002), which states that "[l]aches only bars damages that occurred before the filing date of the lawsuit . . . It does not prevent a plaintiff from obtaining injunctive relief or post-filing damages." (*Id.*) And with respect to preemption, the Court explained that "[t]he Township then makes the broad assertion that the Court incorrectly found preemption, yet it fails to raise any substantive argument on this issue, nor does it compare any Michigan statute or regulation to the Township Ordinances. Given this complete lack of conducting a true preemption analysis, the

Township has failed to show that it will succeed on the merits of a preemption claim." (*Id.*, Page ID # 7800.)

The District Court analyzed harm to the public and others (the Wineries) together. (*Id.*) The Court found the cases the Wineries cited persuasive. (*Id.* (citing *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001).) These cases stand for the proposition that no harm results from preventing unconstitutional conduct. The District Court denied the request for stay. (*Id.*, Page ID # 7801.)

D. The District Court denied the Township's motion to alter or amend judgment on the same arguments the Township makes here and refused to certify questions for appeal.

The Township sought to alter or amend the judgment related to eight issues. The District Court denied the Township's motion all eight issues. (R. 211.)

Laches. The District Court ruled that laches did not bar the Wineries' claim because "laches is not an absolute defense, nor is it a defense to injunctive relief." (*Id.*, Page ID # 7807 (citing *Nartron*, 305 F.3d at 412.).)

Preemption. The District Court rejected the Township's three preemption arguments. For amplified music, the Township simply raised the same arguments as its summary judgment briefing. (*Id.*, Page ID # 7807–7808.) For off-site catering, the District Court explained an MLCC catering license must include the ability to serve food given that "a catering license under the MLCC can only be issued to a

licensee 'that is also licensed as a food service establishment or retail food establishment." (*Id.*, Page ID # 7808.) Finally, the District Court rejected the Township's claim that the Michigan Liquor Control Code requires compliance with local zoning ordinances because "only zoning rules that are not contrary to law are enforceable." (*Id.*)

Dormant Commerce Clause. The District Court referenced "very persuasive Supreme Court precedent that Plaintiffs cite[d]" to confirm that local zoning ordinances may not discriminate against interstate commerce. The District Court nevertheless rejected the Township's argument seeking the court to engage in *Pike*[3] balancing because "the present motion is the first time that the Township has argued that the *Pike* balancing test should apply to the dormant Commerce Clause analysis. This argument is therefore effectively waived." (*Id.*, Page ID # 7809.)

Later, the District Court refused to certify the dormant Commerce Clause issue for interlocutory appeal because "the Township Ordinances are discriminatory on their face and are per se invalid. Thus, there is no need to reach the *Pike* balancing test." (*Id.*, Page ID # 7815.) The District Court reiterated that the Township was raising the *Pike* argument "for the first time in this litigation." (*Id.*, Page ID # 7816.)

Commercial Speech. The District Court rejected the Township's argument that the challenged ordinance sections regulated conduct, not speech. (*Id.*, Page ID

[3] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

7809-7810.)

> The Court rejects the Township's first argument because even though it may *now* believe that several of the stricken sections do not constitute regulations of commercial speech, in its response to the Wineries' motion for summary judgment, the Township previously challenged only two sections—those restricting weddings and large gatherings—as sections that do not regulate commercial speech. Thus, the Township effectively conceded that the remainder of the challenged sections under this claim do indeed regulate commercial speech and that the *Central Hudson* test is applicable.

(*Id.*) The District Court further explained:

> Even when the Court extensively questioned the Township's attorney, Mr. Gregory Meihn, about the *Central Hudson* test at the summary judgment motion hearing, he never argued that this test was not applicable. In fact, Mr. Meihn attempted to apply the *Central Hudson* test at the hearing. The Township cannot now assert that there is a "difference of opinion" on whether the *Central Hudson* test should apply, given that the Township agreed with its applicability until the Court ruled against the Township after conducting an analysis of the test.

(*Id.*, Page ID # 7816.)

Regulatory Taking. The District Court found this was an issue for trial.

Weddings. The District Court "found that the Township has conceded this argument, not based on Director Deeren's testimony, but based on the Township's failure to respond. . . . The Township failed to respond to this argument altogether." (*Id.*, Page ID # 7811.)

Closing Times. The District Court found that "[p]utting aside the fact that the present motion is the first time the Township is raising this argument, as with the

Wineries' wedding argument above, the Township also failed to respond to the Wineries' closing time argument. As such, the Court correctly found that the Township had conceded this issue." (*Id.*, Page ID # 7812.)

Vagueness of "Guest Activity Use". The District Court rejected the Township's argument that the court improperly relied on the testimony of the Township's director of zoning. "[T]he Court finds that it correctly reviewed the deposition testimony of the Township representatives as a tool of statutory interpretation because their testimony established the Township's varying interpretations of the definition of 'Guest Activity Use.' Moreover, even if the Court only reviewed the text of the Ordinance on its face, the term is clearly vague." (*Id.*)

E. The District Court issued an injunction.

When the Township filed this appeal, the Wineries moved to dismiss because the District Court did not issue its injunction in a separate document as required by Federal Rule of Civil Procedure 58. (Dkt. 18.) After this motion was filed, the District Court entered a preliminary injunction effective on July 20, 2022. (Preliminary Injunction, R. 206.)

F. The Township seeks a stay in the Sixth Circuit.

The Township has now moved to stay the injunction pending its appeal even though this Court has not resolved the Wineries' motion to dismiss.

III. ANALYSIS

A. Standard of Review

To stay an injunction pending appeal, the Court must evaluate four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926). The "heavy burden [for] such extraordinary relief rests on the moving party." *Kentucky v. Biden*, 23 F.4th 585, 593 (6th Cir. 2022) (internal quotations omitted). Because the district court already considered these stay factors, Appellant "must in essence show a likelihood of reversal." *George S. Hofmeister Family Tr. v. Trans Indus. of Indiana, Inc.*, 2007 WL 128932, at *1 (E.D. Mich. Jan. 12, 2007) (citation omitted). (Ex. 1.)

B. Peninsula Township is unlikely to prevail on the merits.

The Township asserts it will prevail on the merits of its laches defense. It also asserts it is likely to prevail on appeal of the preemption claims, the dormant Commerce Clause claims, the commercial speech claims, and the wedding issue. The Township makes no argument on the prior restraint claims, the compelled speech claims, the void for vagueness claim, or the 9:30 p.m. closing time claim.

Therefore, the Township has not asked to stay the Injunction on those issues.

1. The Township did not prove laches and laches does not apply to continuing constitutional violations.

The Township is unlikely to prevail on its laches defense because (1) the District Court already determined that the Township failed to meet its burden of proof and (2) laches does not apply to ongoing constitutional harms.

"A party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Nartron*, 305 F.3d at 408. The District Court determined that "the Township has failed to meet its burden in proving the affirmative defense of laches" because it could not show prejudice and delay was questionable, at best. (R. 162, Page ID # 6023.) The Township could not prove it was prejudiced before the District Court and it makes **zero** argument regarding prejudice before this Court in its motion to stay. Therefore, the Township is unlikely to prevail on the merits of its affirmative defense because it has failed to offer any evidence as to one of its essential elements.

Instead, the Township claims that Protect the Peninsula may have unspecified information to add regarding the history of the ordinances. First, this is not sufficient. *See Grant v. Gahanna-Jefferson Pub. Sch. Dist.*, 850 F. App'x 431, 434 (6th Cir. 2021) (an undeveloped argument raised in a perfunctory manner is waived.) At this point, the Township is just leaving the Court to speculate as to why it is likely to prevail on the merits.

Second, historical information related to the Winery Ordinances is wholly irrelevant. Laches does not apply to ongoing constitutional harms and does not prevent injunctive relief. *Nartron* explained that "[l]aches only bars damages that occurred before the filing date of the lawsuit." 305 F.3d at 408 (internal citation omitted). "It does not prevent plaintiff[s] from obtaining injunctive relief or post-filing damages." *Id*; *see also Kellogg Co. v. Exxon Corp.*, 209 F.3d 562, 568 (6th Cir. 2000) (holding that laches "does not bar injunctive relief") (citation omitted).

Laches does not apply to ongoing or recurring harms because while "[l]aches stems from prejudice to the defendant occasioned by the plaintiff's past delay . . . almost by definition, the plaintiff's past dilatoriness is unrelated to a defendant's ongoing behavior that threatens future harm." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 959–60 (9th Cir. 2001) (citation omitted); *see also Kuhnle Bros., Inc. v. Cty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) ("[A] law that works an ongoing violation of constitutional rights does not become immunized from legal challenge" merely because the plaintiff failed to sue within the applicable statute of limitations.).

A "continuing violation" is an exception to the bar posed by a statute of limitations to claims based on actions that occurred before the statute of limitations period. *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996). The "continuing violation" theory is applicable to Section 1983 claims. *Kuhnle*, 103 F.3d at 520. When a "continuing violation" is shown, the limitations period runs

from the "last occurrence" of wrongful conduct. *Varner*, 94 F.3d at 1214. Furthermore, the entire course of conduct creating the continuing violation is actionable. *Id.* at 1214. "[E]ach day that the invalid [ordinance] remained in effect, it inflicted 'continuing and accumulating harm.'" *Kuhnle*, 103 F.3d at 522. "A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment. [T]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations." *Id.* (citation omitted).

For example, every day the Wineries cannot buy grapes outside the Township or exercise their First Amendment rights is an ongoing violation. *See, e.g.*, *S. Glazer's Wine & Spirits, LLC v. Harrington*, 2022 WL 912032, at *5 (D. Minn. Mar. 29, 2022); *Flynt v. Shimazu*, 940 F.3d 457, 462–63 (9th Cir. 2019); *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1338 (M.D. Ala. 2019); *3570 E. Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268, 1278 (C.D. Cal. 1996).

Instead of addressing these serious flaws in its analysis, the Township cites three distinguishable cases. One case, *United States v. Elkhorn Mining Co.*, 553 U.S. 1, 9 (2008), does state that a constitutional claim may become time barred, but *Elkhorn Mining* involved a claim for a refund under the Internal Revenue Code; in other words, it was a one-time claim barred by a limitations period. *Elkhorn Mining* also involved the failure to exhaust administrative remedies.

Thatcher Enterprises v. Cache Cnty. Corp., 902 F.2d 1472 (10th Cir. 1990) and *Northville Area Non-Profit Hous. Corp. v. City of Walled Lake*, 204 N.W.2d 274 (Mich. App. 1972) also do not assist the Township. Those cases involved plaintiffs seeking to invalidate zoning ordinances years after their adoption because of alleged procedural defects in their enactment. Additionally, in *Thatcher*, the Tenth Circuit found that laches barred the procedural claim but took no position on the constitutional issues. 902 F.2d at 1476 ("Having affirmed the district court's decision that these claims are barred by laches, we do not address the merits of plaintiffs' equal protection, due process, or taking claims.") Because the Wineries do not allege a procedural defect, *Thatcher* and *Northville* are inapplicable.

In sum, the Township is very unlikely to prevail on its laches defense.

2. State law preemption claims.

The Township raises two arguments as to why it will prevail on the Wineries' preemption claims. First, it alleges that PTP is likely to prevail on its supplemental jurisdiction argument. This is the Township's motion, however, so it should be making arguments about why it is likely to succeed. That's especially true where the Township **agreed** that the District Court had jurisdiction over this case. (Joint Report of the Parties' Rule 26(f) Conference, R. 37, Page ID # 1959.) Regardless, PTP is unlikely to show that the District Court abused its discretion by exercising supplemental jurisdiction over state law claims that are completely intertwined with

constitutional questions. *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.").

Second, the Township argues the merits of its preemption claim. As to amplified music, the District Court correctly found that because MCL 436.1916(11) allows amplified music the Township could not ban it outright under Section 8.7.3(10)(u)(5)(b); it may regulate its levels. (R. 162, Page ID # 5991.) As to catering, the District Court correctly found that MCL 436.1547 allows the Wineries to use their kitchens to prepare food for service off premises. (*Id.*, Page ID # 5992.)

The District Court also ruled that Sections 8.7.3(10)(u)(5)(b) and 8.7.3(10)(u)(5)(i) were unconstitutionally vague because they include the "Guest Activity Use" term. Peninsula Township has not challenged that ruling. Therefore, even if Peninsula Township were to prevail on its preemption arguments, it has not shown that the enjoined sections are not vague and the Injunction would still prohibit the enforcement of these ordinance sections.

3. Dormant commerce clause claims.

The District Court correctly found that the Winery Ordinances, which impose a requirement that 85% of produce used in the Wineries' products must have been grown within Peninsula Township, facially discriminate against interstate

commerce. The Township raises three separate attacks against this conclusion.

First, the Township asserts that the Winery Ordinances discriminate against out-of-Township and out-of-state grapes equally. Therefore, according to the Township, the Ordinances are not discriminating against interstate commerce. The Supreme Court has rejected that argument for more than 130 years, and for the Township to raise it here is frivolous. For example, when St. Clair County, Michigan made the same argument, the Supreme Court responded that "our prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 361 (1992). *See also C&A Carbone, Inc. v. Town of Clarkston, N.Y.*, 511 U.S. 383, 391 (1994) ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 350 (1951) (same conclusion for local milk ordinance); *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891) (same conclusion for local meat ordinance).

Second, the Township argues the District Court should have applied *Pike* balancing. But as the District Court found, *Pike* balancing does not apply because the Winery Ordinances discriminate on their face and, in any event, the Township never raised the argument before its motion for reconsideration. (R. 211, Page ID #

7809, 7816.) Contrary to the Township's assertion that it will receive *de novo* review of this argument on appeal, that issue can never get to this Court. *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993) ("Issues not presented to the district court but raised for the first time on appeal are not properly before the court."). The Township is very unlikely to succeed on an issue not before the Court.

Last, the Township references federal labeling requirements for "American viticultural areas." These requirements simply say that if a winery wants to label its wine as coming from "Napa Valley" or "Old Mission Peninsula," then 85% of the grapes in that bottle must be grown in that region. They do not require that wineries produce only Napa or Old Mission Peninsula wine; instead, they just say that if a winery wants to use the appellation, it must follow those standards.[4] And the labeling regulations do not limit the labeling designations to only wineries who are physically located within a certain geographic region. In fact, a winery located within Michigan could label a particular wine as a "Napa Valley" wine so long as 85% of the grapes within that wine were grown within the Napa Valley and "[t]he wine is fully finished (except for cellar treatment and/or blending which does not alter the class and type of the wine) in the state or one of the states where the viticultural area is located."[5] In other words, a winery located in Detroit, Michigan,

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[4] See https://www.ttb.gov/appellations-of-origin#when_appelation_required

[5] See https://www.ttb.gov/appellations-of-origin#requirement

could label its wine with the Old Mission Peninsula appellation so long as 85% of the volume of wine is derived from grapes grown within the appellation.

The cases the Township cites deal with labeling standards, not grape origin standards. They do not give a local government an excuse to discriminate against interstate commerce. Therefore, they are inapplicable. The Township is very unlikely to succeed on the merits of the Wineries' Commerce Clause claim.

4. Commercial speech claims.

The Township argues that the District Court erred by applying *Central Hudson* to sections of the ordinance regulating conduct. The Township disputes that it "conceded [*Central Hudson*] applied to all the listed ordinances except those related to conducting weddings and similar social functions." (Dkt. 35-1, page 27.) The Township is wrong. The District Court explained that the Township argued *Central Hudson* for everything at the summary judgment hearing. (R. 211, Page ID # 7816.) As the District Court summarized, "[t]he Township cannot now assert that there is a 'difference of opinion' on whether the *Central Hudson* test should apply, given that the Township agreed with its applicability until the Court ruled against the Township after conducting an analysis of the test." (*Id.*) If something was inaccurate in the District Court's finding, it is the Township's obligation to point it out. *Grant*, 850 F. App'x at 434. It has not, so the Township is unlikely to succeed.

5. **Weddings**.

Last, the Township alleges it is likely to succeed on the weddings issue because the District Court erred in interpreting the Winery Ordinances. The Wineries and the District Court cited testimony from the Township's Director of Zoning that weddings are allowed by the Winery Ordinances. (R. 162, Page ID # 6020.) The Township contends that this testimony was based on a "misleading" question, but ignores the fact that its own attorney tried to rehabilitate the witness and the witness still testified that wedding were allowed. Even so, the District Court did not rely on that testimony because the Township completely failed to respond to the Wineries' argument on the issue. (*Id.*, Page ID # 6021; R. 211, Page ID # 7811.) The Township is unlikely to prevail on an issue that it waived below.

C. **Peninsula Township is not irreparably harmed when it is enjoined from enforcing unconstitutional ordinances.**

The Township references *Maryland v. King* and the oft-cited maxim that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." 567 U.S. at 1303. The District Court properly rejected the Township's overbroad invocation of that principle because it does not apply where "the statute is unconstitutional." *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020). (R. 207, Page ID # 7798.) The Township's citation to *Maryland* "is based on [the] misunderstanding[] that unconstitutional laws are nevertheless duly 'enacted.'" *Bongo Productions, LLC v.*

Lawrence, 548 F. Supp. 3d 666, 686 (M.D. Tenn. 2021.) "No legislature can enact a law it lacks the power to enact." *Id*. The *Maryland* "principle cannot really be as broad as it seems at first blush, or else these factors might cut against preliminarily enjoining all state laws, including unconstitutional ones. Instead, the Court understands that 'any time' actually appears to mean only when the statute at issue *is not unconstitutional*." *Doe #11 v. Lee*, -- F.Supp.3d --, 2022 WL 2181800, *27 (M.D. Tenn. June 16, 2022) (citation omitted). "Therefore, a state only suffers an irreparable injury when the Court enjoins a law that does not violate the Constitution." *Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, and Kentucky, Inc. v. Cameron*, 2022 WL 1698085, *13 (W.D. Ky. May 26, 2022). "Because [the Winery Ordinances] are unconstitutional, [Defendant] can suffer no harm from the Court's Order enjoining their enforcement against Plaintiffs." *Id*. "However, the harm suffered by Plaintiffs if the Court were to stay its Preliminary Injunction would be severe." *Id*.

Finally, the Township argues that a stay would maintain the status quo. But the relevant status quo is "the new status quo between the parties that the court's grant of the injunction creates." *Graveline v. Johnson*, 2018 WL 4184577, *3 (E.D. Mich. Aug. 30, 2018) (quoting *George S. Hofmeister*, 2007 WL 128932, *2 n. 1). "Under the status quo, Plaintiffs are judicially freed from infliction of further damages [from an unconstitutional ordinance]. Staying the injunction that is part of

the status quo would restart the damages clock, inflicting further injury . . . ." *Island Silver & Spice, Inc. v. Islamorada, Village of Islands*, 486 F. Supp. 2d 1347 (S.D. Fl. 2007).

D. The Wineries are harmed by continued enforcement of unconstitutional ordinances.

The Wineries will be irreparably harmed if the Injunction is stayed. The Township characterizes the Wineries' interests as monetary only, suggesting that "there is nothing substantial or irreparable about it." (Dkt. 35-1, page 31.) As it has been doing for years, the Township disregards constitutional harms.

"When constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). The Township has "no right to the unconstitutional application of [] laws." *Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 103 (6th Cir. 1989). "[E]ven a temporary infringement of First Amendment rights constitutes a serious and substantial injury, and the [government] has no legitimate interest in enforcing an unconstitutional ordinance." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

If the Injunction is stayed, the Wineries are again subject to laws that the District Court has determined violate the Constitution and Michigan law. Moreover, the Township is broadly asking for relief from the entire Injunction despite failing to make arguments as to all ordinances section the District Court enjoined. Because

of the obvious harm to the Wineries, the Township should not be given relief to which it has not demonstrated a right.

E. The public is harmed by unconstitutional ordinances.

Last, the Township makes some amorphous reference to the wishes of its citizens and suggests that the District Court erred by "ruling that local control should heed to judicial authority." (Dkt. 35-1, page 32.) Setting aside the Supremacy Clause and the entire structure of our legal system, the Township misses the point of this factor: "[I]t is always in the public interest to prevent violation of a party's constitutional rights." *Deja Vu*, 274 F.3d at 400. "[T]he public is certainly interested in the prevention of enforcement of ordinances which may be unconstitutional." *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987). "The public has no interest in enforcing an unconstitutional ordinance." *KH Outdoor*, 458 F.3d at 1272 (citation omitted).

F. If a stay does enter, the Township should be required to post a bond.

The Court "may condition relief on a party's filing a bond or other security in the district court." Fed. R. App. P. 8(a)(2)(E). "[N]ormally the party seeking a stay is required to post a bond sufficient to protect fully the prevailing party's interest in the judgement." *Lewis v. United Joint Venture*, 2009 WL 1654600, *1 (W.D. Mich. June 10, 2009) (citations omitted). "[T]here is a presumption in favor of requiring a bond, and the party seeking an unsecured stay bears the burden of showing why a

bond should not be required[.]" *Id*. If the Court is inclined to stay the injunction, it should direct the District Court to hold a hearing on the adequate bond necessary to secure the Wineries' rights while the stay is in effect.

IV. CONCLUSION

This motion is not a close call. The Court should deny the motion to stay the Injunction.

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Dated: August 9, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this 5,249-word brief complies with the Court's type-volume limitations.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2022, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification the filing to all ECF filing participants.

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