UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, Michigan Municipal Corporation,

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

Case No: 1:20-cv-01008

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

ORAL ARGUMENT REQUESTED

PLAINTIFFS' REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT ON PENINSULA TOWNSHIP'S AFFIRMATIVE DEFENSES

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I. INTRODUCTION

The Township concedes it will not pursue some affirmative defenses, agrees that others are not affirmative defenses at all, and fails to meet its burden under Rule 56 on its remaining affirmative defenses. Accordingly, this Court should grant summary judgment to the Wineries on the Township's affirmative defenses to narrow the issues for trial.

II. ANALYSIS

The party asserting an affirmative defense bears the burden of proof. *Buntin v. Breathitt Cnty. Bd. of Educ.*, 134 F.3d 796, 799 (6th Cir. 1998). As the moving parties, the Wineries have "the initial burden of proving that no genuine issue of material fact exists and that [they are] entitled to judgment as a matter of law." *Cox v. Ky. Dep't of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995). By doing so, the Wineries "challenge the opposing party to put up or shut up on a critical issue." *Id.* (internal quotations omitted). The Township, in response, "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The Township must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. *See* Fed. R. Civ. P. 56(c), (e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

The Township suggests the Wineries should have moved to strike its affirmative defenses rather than for summary judgment. However, the better time to attack affirmative defenses is after the Township has had the chance to develop the record. *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) ("the movant could challenge the opposing party to 'put up or shup up' on a critical issue. After being afforded sufficient time for discovery, as required by Fed. R. Civ. P. 56(f), if the respondent did not 'put up,' summary judgment was proper.").

Finally, when a party mislabels an element of proof as an affirmative defense, summary judgment is appropriate. *See Design Basics, LLC v. Ashford Homes, LLC*, 2018 WL 6620438, at *9 (S.D. Ohio Dec. 18, 2018).

A. The Township conceded several of its affirmative defenses.

The Township admits that several affirmative defenses are moot or conceded. (ECF No. 466, PageID.16858. 16858-9, 16863 and 16866.) This Court should grant Plaintiffs' motion with respect to Township affirmative defenses E, K, V, X, Z, AA, EE, and GG.

B. The Wineries are entitled to summary judgment on the Township's laches and statute of limitations defenses.

The Township's laches argument is like a bad penny; no matter how many times this Court rejects the argument the Township keeps making it. Here, the Township alleges "laches is a defense to [the Wineries] claim for injunctive relief", ECF No. 466, PageID.16846, after this Court denied reconsideration finding it an improper "defense at trial [] because laches is not an absolute defense, nor is it a defense to injunctive relief." (ECF No. 211, PageID.7807.)[1] The Township improperly seeks a second reconsideration on this issue.

Similarly, despite this Court repeatedly ruling that the Wineries' claims are not time-barred, Peninsula Township keeps making the argument. For example, when PTP challenged the Wineries' Commerce Clause claims as time-barred, this Court held that "for claims brought via § 1983 for alleged 'ongoing' constitutional violations from an unconstitutional statute, a new claim arises and a new statute of limitations period commences with each new injury." (ECF No. 319, PageID.11888 (citing *Kuhnle Bros. Inc. v. Cty. Of Geauga*, 103 F.3d 516, 522-23 (6th Cir. 1997) and *Flynt v. Shimazu*, 940 F.3d 457, 462-63 (9th Cir. 2019)).) The Township now raises the same

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[1] The Township cites the same inapplicable cases as PTP and the Wineries incorporate their argument as to PTP's cases here.

argument though it did not raise it before this Court granted the Wineries summary judgment on their Commerce Clause and Vagueness claims. Thus, the defense has been waived.

The cases cited by the Township are distinguishable. For example, *Epcon Homestead, LLC v. Town of Chapel Hill*, 62 F. 4th 882 (4th Cir. 2023) did not involve the continued enforcement of a zoning ordinance. Instead, the plaintiff claimed a fee imposed by a permit constituted a taking and the Fourth Circuit concluded that the plaintiff's claim accrued when it knew it would have to pay the fee. *Id.* at 887-888. There was no continuing violation because it was not continued enforcement of an ordinance, but instead a singular effect imposed by a permit. *Id.* at 888.

Goldsmith v. Sharrett, 614 F. App'x 824 (6th Cir. 2015) is similarly inapplicable. There a prisoner claimed a continuing violation because the DOC allegedly imposed a "continuing and permanent ban on his [sexually explicit and criminal] writing." *Id.* at 827. The Sixth Circuit refused to apply the continuing violations doctrine because the prisoner could write generally but "would not be permitted to write about criminal behavior." *Id.* at 828. Therefore, there was a singular violation when his writings were seized. *Id.* at 828-29. Further, there was no continuing violation because "prison administrators are afforded great latitude in the execution of practices and policies that 'are needed to preserve internal order and discipline and to maintain institutional security.'" *Id.* at 829 (quoting *Bell v. Wolfish*, 441 U.S. 520 (1979)).

Unlike *Epcon*, the ordinance, not the special use permits, is the source of the Wineries' claims. And unlike *Goldsmith*, the Wineries are not limited to discrete violations. Instead, each time the Wineries could not fully engage in their Constitutional rights a claim accrued.[2]

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[2] The Township also cites to *A to Z, Inc. v. City of Cleveland*, 281 F. App'x 458 (6th Cir. 2008) but that case did not even involve the continuing violation doctrine. There, the plaintiff was denied a permit and waited more than two years to bring a lawsuit.

Finally, the Township alleges that "the Township was not taking any ongoing actions against Plaintiffs." (ECF No.466, PageID.16842.) This is an egregiously false statement. During this case a Township witness testified that the Township was currently enforcing each challenged ordinance section. (*See* Deeren Dep., ECF No. 469-2, PageID.16994-17013.) Just this month the Township announced an enforcement action against Plaintiff Bonobo for hosting a private event. (*See* https://www.youtube.com/watch?v=nPWaY5ibfjw, beginning at 30:00.)

C. The Township agrees some defenses are not Affirmative Defenses.

Because the Township concedes affirmative defenses A, F, G, K-U, W and DD-FF are "not *affirmative* defenses, but rather *negative* defenses," (ECF No. 466, PageID.16862), summary judgment is warranted. *Design Basics*, 2018 WL 6620438 at *9.

The Township's argument is the same argument the court in *Navarro v. Procter & Gamble Company*, 515 F. Supp. 3d. 718 (S.D. Oh. 2021) found insufficient to avoid summary judgment. Like here, the defendant conceded its negative defenses were not affirmative defenses but defenses that the plaintiff had not satisfied an element of its claim. *Id*. at 775. The court granted the motion for summary judgment but noted that in doing so "the Court is not precluding Defendants from arguing at trial that Navarro has failed to establish an element of her claim." *Id*. at 776.

The Township's citation to two California federal court cases do not help their argument. *Kohler v. Islands Restaurants, LP*, 280 F.R.D. 560 (S.D. Cal. 2012) involved a motion brought at the pleading stage with neither party having conducted discovery but the court still struck the defenses without prejudice. *Id*. at 567. *Hilsley v. Ocean Spray Cranberries, Inc.*, 2019 WL 13198721 (S.D. Cal. July 3, 2019) similarly determined that negative defenses were not properly pled affirmative defenses. However, the court imposed a prejudice standard that is not found within the Sixth Circuit when it determined it would not strike the defense. *Id*. at *7-8.

D. The Township agrees certain affirmative defenses are evidentiary issues.

Peninsula Township agrees that affirmative defenses I and J are not affirmative defenses, but evidentiary issues. This Court should grant the Wineries summary judgment to the extent that these defenses are not affirmative defenses but without prejudice to the Township bringing a motion in limine or objection at trial. *Design Basics*, 2018 WL 6620438 at *9.

E. Summary judgment should be granted on affirmative defense D.

This affirmative defense states: "Some or all of Plaintiffs' claims are barred because of their failure to exhaust administrative or other remedies or to satisfy jurisdictional requirements." (ECF No. 35, PageID.1950.) At no time did the Township allege that the Wineries' claims were not ripe or that they were required to obtain some form of finality from Peninsula Township. Even if the Township had alleged such a defense, it is incorrect as a matter of law.

First, "this argument suggests there is an exhaustion-of-remedies requirement to § 1983 claims, which Supreme Court precedent has expressly rejected." *Kanuszewski v. Michigan Department of Health and Human Services*, 927 F.3d 396, 409 n. 5 (6th Cir. 2019). While the Township is quick to walk away from its exhaustion defense, it attempts to reframe the defense as one of finality/ripeness.

To do that, the Township's cites to *Williamson County Reg. Planning Com. v. Hamilton Bank of Johnson County*, 473 U.S. 172 (1985), a case based on the "Court's since-disavowed prudential rule that certain takings actions are not 'ripe' for federal resolution until the plaintiff 'seek[s] compensation through the procedures the State has provided for doing so.'" *Pakdel v. City and County of San Francisco, California*, 141 S. Ct. 2226, 2229 (2021). That rule "conflict[ed] with [t]he general rule ... that plaintiffs may bring constitutional claims under § 1983 without first bringing any sort of state lawsuit." *Id.* (internal quotation omitted). Understanding this, the Township again pivots to claim that when the Supreme Court rejected the *Williamson*

County rule in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) it left in place a finality requirement. (ECF No. 466, PageID.16849.) This is also incorrect.

In *Pakdel*, the Supreme Court rejected the position that "*Knick* left untouched *Williamson County's* alternative holding that plaintiffs may challenge only 'final' government decisions" and that "petitioners' regulatory takings claim remain[ed] unripe." 141 S. Ct. at 2229-2230 (internal quotations omitted). Instead, "[t]he finality requirement is relatively modest. All a plaintiff must show is that there [is] no question ... about how the regulations at issue apply to the particular land in question." *Id*. at 2230 (internal quotation omitted). "The rationales for the finality requirement underscore that nothing more than *de facto* finality is necessary. This requirement ensures that a plaintiff has actually been injured by the Government's action and is not prematurely suing over a hypothetical harm." *Id*. (internal quotation omitted). "Once the government is committed to a position, however, these potential ambiguities evaporate and the dispute is ripe for judicial resolution." *Id*.

An approach "that a conclusive decision is not 'final' unless the plaintiff also complied with administrative processes in obtaining that decision—is inconsistent with the ordinary operation of civil-rights suits." *Id.* Section 1983 "guarantees a federal forum for claims of unconstitutional treatment at the hands of state officials." *Id.* (quoting *Knick*, 139 S.Ct. at 2167). "That guarantee includes 'the settled rule' that 'exhaustion of state remedies is not a prerequisite to an action under...§ 1983.'" *Id*. "In fact, one of the reasons *Knick* gave for rejecting *Williamson County's* state-compensation requirement is that this rule had 'effectively established an exhaustion requirement for § 1983 takings claims.'" *Id*. A "demand that a plaintiff seek an exemption through the prescribed [state] procedures [] plainly requires exhaustion." *Id*. (internal citation omitted). The *Pakdel* holding is clear that "once the government has adopted its final

position," a § 1983 claim becomes ripe and "ordinary finality is sufficient." *Id*. at 2231.

Last month, the Sixth Circuit issued its opinion in *Catholic Healthcare International, Inc. v. Genoa Charter Township, Michigan*, 82 F.4th 442 (2023) wherein it rejected the position the Township advocates here. The court noted:

> The district court's mistake was to conflate ripeness (sometimes called "finality" in this context) and exhaustion. Specifically, the court reasoned that "only if the local regulatory process was exhausted will a court know precisely how a regulation will be applied to a particular parcel or use." Op. at ——. That was the same mistake the Ninth Circuit made in *Pakdel*. Ripeness, in the land-use context, requires only a "relatively modest" showing that the "government is committed to a position" as to the strictures its zoning ordinance imposes on a plaintiff's proposed land use. 141 S. Ct. at 2230. Ripeness does not require a showing that "the plaintiff also complied with administrative process in obtaining that decision." *Id*. Yet that was the showing the district court demanded here.

Id.[3] Here, Peninsula Township is certainly committed to the position that the Winery Ordinances apply to each Winery and that the restrictions imposed in those ordinances should be enforced against the Wineries.

Finally, the Township's reliance on the pre-*Knick* and *Pakdel* case *Insomnia Inc. v. City of Memphis Tennessee*, 278 F. App'x. 609 (6th Cir. 2008) is misplaced as that court's entire ripeness decision rested on its application of the disavowed rules set out in *Williamson County* and other cases that *Knick* overruled. *Id*. at 612-16. Further, the application of *Insomnia* is likely limited to First Amendment retaliation cases. *See Lockridge Outdoor Advertising, LLC v. Lexington-Fayette Urban County Government*, 2022 WL 2400045, *3 (E.D. Ky. July 1, 2022.) (It is "uncertain whether the Sixth Circuit would further extend the finality requirement [as discussed in *Insomnia*] in the First Amendment context unrelated to retaliation." *Id.*

[3] The court also noted that the government's reliance on *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 553 (6th Cir. 2010) was misplaced as the plaintiff had not even applied for a land use permit before filing suit. *Id*. The Township similarly cited to this pre-*Knick* and pre-*Pakdel* decisions.

Lamar Co., LLC v. Lexington-Fayette Urban Cty. Gov't, 2021 WL 2697127, at *5 (E.D. Ky. June 30, 2021) is instructive. There, the government argued that an ordinance challenge was not ripe because the plaintiff could have sought a text amendment. The *Lamar* court disagreed and rejected the government's framing of the case as a "land use dispute." *Id.* Instead, "at its core, this lawsuit is not a regulatory takings challenge involving other, incidental constitutional claims—it is a direct challenge of the constitutionality of the ordinance under the First and Fourteenth Amendments [and the cases cited by the government] challenged the procedure or application of a law, not the law's substance." *Id.* (distinguishing *Insomnia*). The court continued, "Lamar has not brought these types of 'constitutional claims arising out of land use disputes,' so the finality requirement [from *Insomnia*] is inapplicable here." *Id.* Thus, the court determined the claims "ripe for review" even though the plaintiff could have sought a text amendment.

Here, the Township alleges the Wineries could have sought an interpretation. This contradicts the Township's prior position that the Ordinances "are clear and require no interpretation whatsoever…and fully informs those of what is proscribed." (ECF No. 142, PageID.4994 (arguing § 8.7.3(10)(u)(4)(a) was not vague).) Additionally, Township counsel advised the ordinances were unconstitutional and preempted yet the Township continued to enforce them. (ECF No. 29-16, PageID.1384-1400.) What more should the Wineries have done?

This is not a case where the Wineries applied for a permit and were denied. Permits were issued under the challenged ordinances and the Township has enforced those ordinances. Thus, there is finality as to the Township's position and the claims are certainly ripe.

F. Plaintiffs' declaratory and injunctive relief claims are not mooted by Amendment 201.

Peninsula Township's mootness argument fails for several reasons.

First, Amendment #201 is unlawful because it was not passed in compliance with the MZEA. When a township passes a zoning ordinance or amendment that does not "fully comply with the mandatory proceedings" set forth in its zoning authorization statute, that zoning ordinance is "void." *Krajenke Buick Sales v. Kopkowski*, 33 N.W.2d 781, 783 (Mich. 1948). The Wineries incorporate by reference their briefing on Peninsula Township's procedural failings in passing Amendment #201. (ECF No. 473, PageID.17999-18001.)

Second, Amendment #201 creates three new classifications of potential wineries with differing rights. Some may have tasting rooms indoors only; others may offer tastings outside; others may not offer tasting at all. Each classification comes with different acreage requirements. The Township, however, does not say which Wineries are in which classification. If the Township intended for Amendment #201 to apply, it should have said *how* it applies to the Wineries. Without more, the Township is merely asserting a position and hoping the Court does the heavy lifting for it. *See McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to ... put flesh on its bones." (citations omitted)).

Third, the "general rule" that "if a zoning ordinance has been amended after suit was filed, a court will give effect to the amendment" does not apply (1) if "the amendment would destroy a vested property interest acquired before its enactment;" or (2) if "the amendment was enacted in bad faith and with unjustified delay." *Grand/Sakwa of Northfield, LLC v. Northfield Twp.*, 851 N.W.2d 574, 578 (Mich. Ct. App. 2014) (citation omitted, cleaned up)).

Here, the Wineries have a vested property interest—their permits issued by the Michigan Liquor Control Commission. This Court already determined that the Wineries possessed these permits before the Township passed Amendment #201. (ECF No. 162, PageID.5987.)[4] It would be a curious result if the Township could deny that the Wineries had a vested right based solely on a zoning ordinance that this Court has determined is unlawful.

Although the Township has not argued the *Grand/Sakwa* line of cases in this motion, to the extent the Township is relying on them for its mootness argument, the Wineries incorporate by reference their argument that Amendment #201 was passed in bad faith and was designed to manufacture a defense to this lawsuit. (*Id.*, PageID.18003.)

Fourth, because Peninsula Township issued the Wineries' SUPs which parrot the restrictions contained within the challenged ordinances, the claims are not moot. *See Crown Media, LLC v. Gwinnett County, Ga.*, 380 F.3d 1317 (11th Cir. 2004.) In *Crown Media*, the plaintiff was issued a permit based on an ordinance. After the plaintiff challenged the constitutionality of the ordinance, the ordinance was altered "to address constitutional concerns." *Id*. at 1322. The plaintiff did not challenge the constitutionality of the new ordinance and the defendant claimed that the new ordinance made the claims moot. *Id*. at 1323. The court disagreed:

> [I]f the 1990 ordinance is unconstitutional and if, as Crown Media claims, the restrictions in Crown Media's sign and building permits stem from and depend on that 1990 ordinance, then under Georgia law the restrictions in Crown Media's permits would be void and unenforceable as well. This observation illustrates that the existence and scope of Crown Media's property rights in its permits and erected sign under state law and the extent to which they vested prior to the enactment of the 2001 ordinance cannot be fully ascertained until the constitutionality of the 1990 ordinance is determined. Therefore, we conclude that Crown Media's challenge to the constitutionality of the 1990 ordinance is not moot.

[4] The Wineries also have special use permits and use by right permissions from the Township.

Id. at 1330. Here, the same is true. The SUPs parrot the language of the ordinance in stating what restrictions are placed upon the Wineries. The Township Planner has said that the SUPs are still in effect and that they will seek to drive the Wineries into the new ordinance over time:

> [A]nother thing I want to make very clear: if this zoning ordinance is adopted, all of the wineries with existing special use permits will be considered legally non-conforming. All of the uses approved with the special use permit would still stand. **Any changes to those uses would come through a process and be under the new zoning ordinance**.

(ECF No. 473-9, PageID.18141 (emphasis added).)

Fifth, the Wineries are seeking damages from the unconstitutional ordinance sections, and "[c]laims for damages are largely able to avoid mootness challenges." *Ermold v. Davis*, 855 F.3d 715, 719 (6th Cir. 2017). Even where "the repeal or amendment of a law moots challenges to the original law," the "existence of [a] damages claim preserves the plaintiff's backward-looking right to challenge the original law and to preserve a live case or controversy over that dispute." *Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456, 460–61 (6th Cir. 2007).

Sixth, even if Amendment #201 did apply, the same restrictions are still at issue. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways." *Id.* at 289 n.10 (cleaned up).

Amendment #201 reinstates the ordinance sections this Court already ruled violate the Dormant Commerce Clause. *See* §§ 6.7.2(19)(a), 6.7.2(19)(b)(1)(ii), 6.7.2(19)(b)(2)(ii), 8.7.3(10)(a), 8.7.3(10)(b)(2)(ii), 8.7.3(10)(a), 8.7.3(10)(b)(16), 8.7.3(11)(a), 8.7.3(11)(b)(2)(ii), 8.7.3(11)(b)(17). (ECF No. 444-2, PageID.15907-15930.) Additionally, the Township Planner said that the "zoning ordinance is intended to be a living document" that can be "changed." (ECF

No. 473-7, PageID.18114.) The Township is signaling that it will pass an additional ordinance on these activities (hours, restaurants, music, catering, etc.). (*See id.*) Thus, the declaratory and injunctive relief claims are not moot given that the Township has reinstated the prior unconstitutional restrictions.

G. The Wineries are entitled to summary judgment on affirmative defense H.

The Township admits its defense that Plaintiff should have sought an amendment under the MZEA is not actually an affirmative defense but argues it should not be dismissed because the Township plans to challenge the Court's authority to "sit as a super-zoning commission" and provide "equitable relief that is broader than the PTZO or those terms in Plaintiffs' land-use permits." (ECF No. 466, PageID.16863.) In other words, the Township argues this Court's authority to declare the Winery Ordinances unconstitutional and enjoin their enforcement is constrained by the Ordinance and SUPs issued by Peninsula Township. That argument is absurd. Federal courts do not obtain their authority from local ordinances.

H. The Wineries are entitled to summary judgment on affirmative defenses C, BB and CC.

The Township concedes that Affirmative Defenses C, BB and CC were conditionally pleaded. A party must have a good faith basis to assert an affirmative defense. *See Greenspan v. Platinum Healthcare Grp., LLC*, 2021 WL 978899, at *1 (E.D. Pa. Mar. 16, 2021) (striking affirmative defenses where defendant conditionally pleaded them without performing good faith investigation into relative facts and law). Now that discovery is closed, the Township has all the facts and law in hand to articulate the basis for its defenses. It cannot continue to wait for trial in the "hope" that the basis for its defenses will materialize. *J.C. Bradford*, 886 F.2d at 1479.

Affirmative defense C relates to mitigation of damages, which the Township continues to conditionally plead: "The Township certainly intends to attack Plaintiff's failure to mitigate at

trial. However, its arguments are wholly dependent on the case the Plaintiffs put forth." (ECF No. 466, PageID.16859.) But, in discovery, the Wineries asked what "steps and measures" the Township believes the Wineries should have taken to mitigate their damages and Township failed to answer. (ECF No. 440-1, PageID.15571-15572.) Again, the Township needs to "put up or shut up" on this issue.

The Township response related to Affirmative defense BB, abstention, is odd as it alleges "the Township is not even on notice regarding *which* abstention doctrine(s) Plaintiffs believe could not apply." (ECF No. 466, PageID.16864.) The Wineries are not making an abstention argument, the Township is, and the Township clearly has no idea if abstention is applicable: "Once Plaintiff's present their claims and defenses at trial, it is entirely possible that abstention would be appropriate under sever potential variables. It is also possible that before trial abstention would be appropriate." (*Id.*) Now was the time for the Township to put up on abstention and it did not. This Court also rejected the supplemental jurisdiction argument already. (ECF No. 301.)

On affirmative defense CC, waiver, the Township states that it "certainly intends to attack Plaintiff's waiver at trial. But its arguments are dependent [on] Plaintiff's case in chief." (ECF No. 466, PageID.16866.) Again, this conditional pleading must be rejected. And, in response to the Wineries cases standing for the proposition that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences," *Brady v. United States*, 397 U.S. 742, 748 (1970), the Township cites to a case applying laches and a case involving a "procedural challenge" to the validity of an ordinance. *See Thatcher Enterprises v. Cache Cnty. Corp.*, 902 F.2d 1472, 1474 (10th Cir. 1990) (applying laches to claim that county zoning ordinance was void because it was not published in the county's ordinance book 17 years prior). Cases involving whether a

procedural challenge is time barred are simply inapplicable.

III. CONCLUSION

The Wineries request this Court grant their motion for summary judgment on the Township's affirmative defenses.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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Dated: October 20, 2023

CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.2(B)(I)

1. This Brief complies with the type-volume limitation of L. Civ. R. 7.2(b)(i) because this Brief contains 4,255 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2023, I filed the foregoing Reply in Support of its Motion for Partial Summary Judgment on Peninsula Township's Affirmative Defenses via the Court's CM/ECF System, which will automatically provide notice of the filing to all registered participants in this matter.

/s/ Joseph M. Infante
Joseph M. Infante