NOS. 20-1447, 20-1466

IN THE COURT OF APPEALS
FOR THE SIXTH JUDICIAL CIRCUIT
CINCINNATI, OHIO

F.P. DEVELOPMENT, LLC, a Michigan Corporation,
Plaintiff-Appellee/Cross-Appellant,

v.

CHARTER TOWNSHIP OF CANTON, MICHIGAN,
a Michigan Municipal Corporation,
***Defendant-Appellant/Cross-Appellee*.**

On Appeal from the Eastern District of Michigan
Cause No. 2:18-cv-13690

CORRECTED SECOND BRIEF OF APPELLEE/CROSS-APPELLANT F.P. DEVELOPMENT, LLC

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

F.P. Development, LLC is not a publicly held corporation and does not have a parent corporation that is a publicly held corporation that owns 10% or more of its stock.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case involves multi-faceted arguments on multiple constitutional claims where the parties disagree on the controlling tests. Accordingly, oral argument would assist the court in resolving the case.

STATEMENT OF ISSUES

1. Did the district court correctly hold that the mitigation requirements of Canton's Tree Ordinance constitute an unconstitutional exaction under *Dolan v. City of Tigard*, 512 U.S. 374 (1994)?

2. Did the district court correctly hold that Canton's Tree Ordinance as applied to F.P. Development's property was an unconstitutional regulatory taking under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)?

3. Did the district court err in holding that Canton's Tree Ordinance was not a *per se* regulatory taking under *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015)?

4. Did the district court err in holding that Canton's Tree Ordinance was not a *per se* regulatory taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)?

5. Did the district court err in holding that Canton's Tree Ordinance does not violate the unreasonable seizure protections of the Fourth Amendment?

6. Did the district court err in holding that the payments demanded by Canton under the Tree Ordinance are not fines subject to review under the Eighth Amendment?

STATEMENT OF THE CASE

This case involves several facial and as-applied constitutional challenges to Canton Code of Ordinances, Art. 5A (the "Tree Ordinance" or the "Ordinance")[1]. In 2018, F.P. Development ("F.P.") cleared a narrow strip of vegetation on its industrially zoned property to access a drainage ditch that had become clogged and was causing flooding. Declaration of Frank Powelson, ECF No. 35-4, PageID.766. Canton admits that it has no evidence that this generally permissible property maintenance adversely impacted F.P.'s neighbors or anyone else. Dep. of L. Thurston, ECF No. 35-10, Page ID 797-799. Nonetheless, Canton sought $47,898 in mitigation penalties from F.P. under its Tree Ordinance, which requires that private property owners pay set mitigation to Canton for removing trees from their own private properties, regardless of impact.F.P. filed a civil rights suit in district court alleging that the Tree Ordinance, both on its face and as applied (1) was an unconstitutional exaction under *Dolan v. City of Tigard*, 512 U.S. 374 (1994), (2) constituted a regulatory taking in violation of the Fifth Amendment, (3) amounted to an unconstitutional seizure under the Fourth Amendment, and (4) mandated excessive fines in violation of the Eighth Amendment.

[1] A copy of the ordinance can be found in the record at ECF No. 13-8 Page ID 127-132.

The district court entered a final judgment on cross motions for summary judgment holding that F.P.'s claims were ripe and that the Tree Ordinance (1) was an unconstitutional exaction under *Dolan*, both on its face and as applied, and (2) constituted a regulatory taking as applied under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *See F.P. Dev., LLC v. Charter Twp. of Canton*, 456 F.Supp.3d 879, 897 (E.D. Mich. 2020). The court also held that the Fourth and Eighth Amendments were inapplicable under the facts of the case and dismissed those claims. *Id*. Canton appealed the district court's judgment and F.P. cross appealed.

A. The Challenged Tree Ordinance

The Tree Ordinance requires that certain private property owners apply for and receive a permit from Canton before removing any "tree"[2] from their properties. "Tree" is broadly defined to include "any woody plant with at least one well-defined stem and having a minimum [diameter at breast-height] ("DBH") of three inches." Canton Code of Ordinances, Art. 5A.01.

If the targeted tree happens to be in a "forest," restrictions are even greater. Canton prohibits not only removal, but also damage to any tree within a forest. Canton Code of Ordinances, Art. 5A.05 (A). Even removing undergrowth or brush

[2] The Tree Ordinance distinguishes between trees in a "forest" and trees not in a "forest." If the tree is not in a "forest," a permit is required only if the tree is 6 inches DBH or greater. *See* Art. 5A.05(A).

in a forest requires Canton's approval. *Id.*; Dep. of J. Goulet ECF No. 26-3, Page ID 366-67.

"Forest" is defined as "any treed area of one-half acre or more, containing at least 28 trees with DBH of six inches or more." Canton Code of Ordinances, Art. 5A.01. Canton asserted in the district court that the tree removal in this case occurred in a "forest." *See* Dep. of J. Goulet, ECF No. 35-3, Page ID 748-49.

A tree removal permit will only be granted if the property owner agrees to either (1) replace any removed tree with up to three trees of Canton's choosing, or (2) pay a designated amount (currently between $300 and $450 per tree) into Canton's tree fund. Canton Code of Ordinances, Art. 5A.08. These requirements are mandatory and apply regardless of the impact or benefit that may accrue from the tree removal. *Id.*; Dep. of J. Goulet, Dep. of J. Goulet, ECF No. 35-3, Page ID 749-52. Indeed, Canton's official was asked numerous hypotheticals and *repeatedly* confirmed that site specific impacts have no relevance to the amount of mitigation required. Dep. of J. Goulet, Dep. of J. Goulet, ECF No. 35-3, Page ID 749-52, 753-755. Canton's other designated witness likewise confirmed that site-specific factors have no bearing on the mitigation amounts. Dep. of L. Thurston, ECF No. 35-10, Page ID 801-02.[3]

[3] "Q: Do trees produce different benefits, and when I say benefits I'm talking about the benefits we talked about earlier, you know, storm water mitigation, carbon, things like that, based on the type of tree?

Under the Ordinance, property owners who remove trees from their properties without a permit are required to pay the same mitigation they would have paid if they had applied for a permit. *See* Dep of L. Thurston ECF No. 26-4, Page ID 372. Additionally, a property owner may be subject to criminal penalties of up to $500 and 90-days imprisonment. Dep. of J. Goulet, ECF No. 35-3, Page ID 761.

The Ordinance exempts occupied residential lots under two acres, farms, and licensed nurseries from its mitigation requirements. Canton Code of Ordinances, Art. 5A.05(B).

B. F.P. Removes Trees from Its Property to Prevent Flooding

F.P. is a real estate holding company that exists primarily to manage property owned by Frank Powelson. Dec. of F. Powelson, ECF No. 35-4, Page ID 765. Mr. Powelson's primary business is known as POCO, a business he took over from his father. *Id*. POCO builds, stores, leases, transports, and sells signs for traffic control. *Id*. at 766. The business is headquartered on the lot adjacent to the Property at issue in this case. *Id*. at 766.The Property at issue is an approximately 24-acre parcel located west of Sheldon Road and South of Michigan Avenue in Canton Township,

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A: Yes.
Q: Do they provide different benefits based on where the tree is located?
A: It could.
Q: But the tree ordinance seems to assign the value just based on, you know, its diameter regardless; is that correct?
MS. McLAUGHLIN: Objection to the form.
THE WITNESS: Yes…"

Michigan (the "Property"). *Id*. at 765. The Property was purchased from Canton as a replacement property for a developed lot that F.P. had sold to Sysco, at Canton's urging, to convince Sysco to keep its business in Canton. *Id*. at 766. The two F.P. parcels are bisected by a drainage ditch that was originally dug in the 1800's and by law must be maintained by Wayne County. *Id*.

Over the years, the drainage ditch became clogged by fallen trees, scrub brush, and other debris. *Id*. These obstructions caused the drain to back up and resulted in flooding on the Property and a neighboring property owned by another company. *Id*. This flooding was killing trees, increasing mosquitos, and making it more difficult to navigate and use the properties. *Id*. at 767.

Mr. Powelson reached out to the County Drain Commissioner's office to ask the County to perform the required maintenance of the drain. *Id*. He was informed that the County would not do so. *Id*. Accordingly, in the Spring of 2018, F.P. entered into an agreement with Fodor Timber to clean the fallen trees and other debris from the drain located on its Property. *Id*.

In order to reach the drain with heavy equipment, some[4] tree removal was necessary. *Id*. As part of its agreement with Fodor Timber, F.P. offered Fodor the

[4] In an effort to confuse this Court and reframe the equities of this case, Canton consistently refers to the clear cutting of sixteen-acres that occurred on a different property by parties that are not involved in this case. There was no clear-cutting involved here.

rights to any trees that had to be removed to access the ditch as well as any fallen trees removed from the ditch. *Id*. In exchange, Fodor agreed to clean the ditch. *Id*.

C. Canton Enforces the Tree Ordinance Against F.P.

Before the work was completed, Canton issued F.P. a Notice of Violation and Stop Work Order alleging violations of the Tree Ordinance and seeking an undisclosed amount in penalties. Notice of Violation, ECF No. 35-6, Page ID 779-81. Contrary to Canton's assertions in its opening brief, Mr. Powelson immediately stopped the work.[5] Dec. of F. Powelson, ECF No. 35-4, Page ID 767.

There is no administrative appeals process for challenging the constitutional validity of a notice of violation or fine assessed under the Tree Ordinance. Dep. of J. Goulet, ECF No. 35-3, Page ID 759-760, 762. Once a notice of violation has been issued, Canton may, at its discretion, initiate civil or criminal proceedings. *Id*. at 757. Indeed, just weeks before F.P. filed the lawsuit, Canton initiated civil proceedings against F.P.'s neighbors seeking nearly $450,000 for violation of the Ordinance. Fearing the possibility of such enormous penalties, F.P. filed suit for declaratory and injunctive relief under 42 U.S.C. §1983. Complaint, ECF No. 1.

[5] In an attempt to besmirch the character of Mr. Powelson, Canton falsely claimed that Canton was repeatedly denied access to the Property. In fact, Canton initially was caught on F.P.'s Property without notice and without a warrant. Dep. of F. Powelson, ECF 34-3, Page ID 677. Despite this unlawful and dangerous entry onto an active industrial site, F.P. worked immediately to schedule inspection times that would be mutually agreeable. *Id*. Access was never denied. *Id*.

Canton countersued for $47,898 in penalties for alleged violations of the Tree Ordinance. Canton's Counter-Complaint, ECF No. 13, Page ID 95. Both sides moved for summary judgment.

D. Judgment of the District Court

On April 23, 2020, the district court entered a final judgment. First, the court held that F.P.'s facial and as applied claims were ripe. *F.P. Dev., LLC*, 456 F.Supp.3d at 888. Second, the court concluded that the tree mitigation mandated under the ordinance was an unconstitutional exaction under *Dolan v. City of Tigard*, 512 U.S. 374 (1994) both on its face and as applied, because the Tree Ordinance does not allow for an individualized assessment of impact. *Id*. at 895. Third, the court held that Tree Ordinance was not a *per se* taking under *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015) or *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), but was an as applied taking under the *ad hoc* balancing approach of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Id*. at 891. The court also held that the Fourth and Eighth Amendments were not applicable to the facts of the case and dismissed those claims. In particular, the court held that the Fourth Amendment's protection against unreasonable seizures does not apply to open fields (*Id*. at 895) and that the Eighth Amendment's prohibition on excessive fines did not apply because the tree payments were designed for mitigation. *Id*. at

897. Canton appealed the district court's judgment on the *Penn Central* and *Dolan* claims and F.P. cross appealed on the Fourth, Fifth, and Eighth Amendment claims.

SUMMARY OF ARGUMENT

The district court's judgment striking down the Tree Ordinance as unconstitutional should be affirmed for three independent reasons. First, the district court rightly found that F.P.'s facial and as-applied claims are ripe. Facial challenges to land use ordinances are ripe the moment the ordinance is passed, while as-applied challenges to land use regulations become ripe as soon as the application of the ordinance to the property becomes reasonably clear. Those criteria have been met here. With regard to the facial challenge, the terms of the Ordinance applied immediately upon adoption in all instances and Canton lacks discretion to depart from them. With regard to the as-applied challenge, Canton issued a notice of violation to F.P. for violating the Tree Ordinance before this lawsuit was filed, and there was no administrative appeal that could have granted F.P. relief. F.P. is not required to file futile administrative appeals or await prosecution before bringing a constitutional challenge under 42 U.S.C. 1983. Accordingly, F.P.'s claims are ripe.

Second, the district court rightly concluded that mitigation mandated by the Tree Ordinance is an unconstitutional exaction. Under *Dolan*, when mitigation is required for a land-use permit, there must be a sufficient "'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed

land use." This analysis cannot be based in the abstract but must be based on an "individualized determination" that the required mitigation "is related both in nature and extent to the impact of the proposed development." The Tree Ordinance forbids such a site-specific approach by requiring that property owners seeking a permit to remove trees either replace the trees on a 1-1 or 1-3 ratio, or pay the market value of the trees to Canton, without any individualized determination that mitigation is necessary and regardless of the impact of the tree removal. The district court rightly joined other courts that have addressed this issue in holding that such an ordinance violates *Dolan*.

Canton and its amici argue that (1) *Dolan* only applies to mitigation demanded in an *ad hoc* administrative process, not to mitigation mandated legislatively in ordinances; (2) *Dolan* only applies to actual transfers of property or money; and (3) that rough proportionality is met because the ordinance requires either a 1-1 or 1-3 replacement ratio for trees. But neither the Supreme Court nor this Court have limited *Dolan* to administrative exactions. To the contrary, the Supreme Court has repeatedly cited cases striking down local legislative exactions of the type at issue here as examples of the proper application of *Dolan*. Nor has the Supreme Court limited *Dolan* to demands for transfers of real property or money. Rather the Court has held that *Dolan* applies any time mitigation implicates any right in property. Further, Canton's tree-for-tree argument fundamentally misunderstands *Dolan* and

has been rejected by other courts. *Dolan* requires that mitigation be based on an individualized assessment of *the impacts* of the property use on neighbors. Because the removal of a given tree will have a significantly different impact based on the unique features of a given property—in some cases even improving neighboring properties—Canton's mandatory tree-for-tree approach is not sufficient to satisfy the site-specific rough proportionality standard of *Dolan*.

Third, the district court rightly held that the Tree Ordinance, as applied against F.P., constituted a regulatory taking under the *ad hoc* balancing approach of *Penn Central*. Under *Penn Central*, courts weigh three factors: (1) the economic impact of the regulation; (2) the owner's reasonable investment backed expectations to use the property; and (3) the character of the government action. The district court found that all three factors counseled in favor of finding a taking. First, the economic impact of the regulation was significant because the tree mitigation requirements likely exceeded the purchase price of the property. Second, the regulation undercut reasonable investment backed expectations, because F.P. reasonably believed that he would be able to put the industrially zoned property to some use without suffering ruinous penalties. And third, the character of the government action was that of a taking because it forces F.P. to bear the burden of an undeveloped parcel, including the burdens associated with flooding caused by a drain obstructed by untamed overgrowth, in order to provide the public benefit of having more trees in the area.

Canton and its amici object that (1) F.P. failed to show economic impact because it did not prove that it had been denied all value or use of the property; (2) F.P. had no reasonable expectation to use the property because the Tree Ordinance was in effect at the time of purchase; and (3) the character of the government action makes it not a taking, because it is a zoning regulation and therefore ubiquitous. But these arguments run afoul of well-established takings jurisprudence and rely in large part on non-takings cases, as well as the dissenting opinion in *Penn Central*. First, the *threshold* for applying the *Penn Central* test is that some value still exists in the property not that the property lacks all economic value. Second, Canton's reasonable expectations argument is contradicted by *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), which makes clear that purchasing property after the adoption of a challenged regulation does not preclude a takings claim. Finally, Canton's objection that the Ordinance distributes burdens evenly and is therefore not a taking is contradicted by the text of the Ordinance, is based on the standard proposed by the dissent in *Penn Central*, and would render all zoning ordinances *ipso facto* constitutional under *Penn Central*—an approach contrary to the last forty-years of precedent.

Accordingly, this Court should affirm the district court's judgment that the Tree Ordinance is an unconstitutional exaction under *Dolan* and an unconstitutional taking under *Penn Central*.

On the other hand, the district court wrongly determined that the Tree Ordinance does not constitute a *per se* taking, an unconstitutional seizure or an excessive fine, and this Court should reverse the district court on those claims.

First, the Tree Ordinance is a *per se* taking of F.P.'s trees under *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015). In that case the Supreme Court held that a regulation requiring farmers to set aside a portion of their raisins or to pay the federal government the "market value" of those raisins was a *per se* taking because it granted the government constructive possession of the raisins. Just so here, the Tree Ordinance is a taking because it grants Canton constructive possession of F.P.'s trees by requiring F.P. to keep the trees on the property or pay Canton the "market value" for any trees used. The district court below wrongly distinguished *Horne* because the statute in that case allowed the government to take actual title to the raisins. But the Court's opinion in *Horne* was not based on title transfer—it was based on constructive possession. Accordingly, *Horne* provides an independent basis to find the Tree Ordinance unconstitutional.

Second, the Tree Ordinance is a *per se* taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) because it mandates physical occupation of F.P.'s property by unwanted objects—*i.e.*, trees. In *Loretto*, the court held that a law forbidding a property owner from removing a pre-existing cable box from her building was effectively a government mandated occupation by an

unwanted object and therefore a taking. Similarly, the Tree Ordinance here requires that F.P. maintain numerous unwanted trees on its property. The ordinance therefore mandates a physical occupation of F.P.'s property in violation of *Loretto*. The district court rejected this approach by holding that *Loretto* claims are limited to physical occupations by government agents. But that narrow reading conflicts with *Loretto* itself, which did not involve government agents, and subsequent treatment of *Loretto* by this Court. Accordingly, *Loretto* provides another distinct basis to find the Tree Ordinance unconstitutional.

Third, the Tree Ordinance is an unconstitutional seizure under cases like *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006) and *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009), because it is a meaningful interference with F.P.'s possessory interest in its property that is not justified by the facts and is uncompensated. The district court refused to apply those cases, holding instead that the Fourth Amendment's seizure protections do not apply outside of the curtilage of the home. But such a narrow reading would radically and impermissibly restrict the scope of the Fourth Amendment. Accordingly, the Fourth Amendment serves as a third, discrete basis to find the Tree Ordinance unconstitutional.

Fourth, the penalties sought by Canton in this case violate the Eighth Amendment because they are grossly disproportional to any harm caused by the property maintenance at issue. The district court rejected F.P.'s Eighth Amendment

claim solely because it found that the tree replacement payments were intended as mitigation and not as penalties. However, if this Court finds that the penalties under the Tree Ordinance are not mitigation for the purposes of *Dolan*, it should consider them as fines under the Eighth Amendment.

ARGUMENT

In 1722, British Authorities of the Crown in the American Colonies adopted a law almost identical to the one at issue here. Steven L. Danver, *Revolts, Protests, Demonstrations, and Rebellions in American History: An Encyclopedia* (2010), p. 183-185. Under that law, it was illegal for colonists to cut down any white pine trees on their properties that were greater than 12 inches diameter. Violators were fined £5 for any tree cut. *Id.*

The law went largely unenforced for fifty years, until 1772 when the Royal Governor sent representatives to Weare, New Hampshire, to enforce the Crown's tree mandate. *Id.* The Colonists were so enraged that they captured the governor's representatives, subjected them to lashing (one lash for every tree the Crown claimed), shaved their horses, and ran them out of town. *Id.* In honor of that act of rebellion, the "Pine Tree Flag" became a symbol of independence and was one of

the first flags authorized by George Washington to fly from the Colonial Navy's warships.[6]

Faced with an almost identical law, F.P.'s response was less violent—it filed a lawsuit. Applying well-established principles of exaction and takings jurisprudence, the district court concluded that Canton's reimagining of the Crown's tree edict was unconstitutional. That judgment is consistent with other courts which have evaluated similar constitutional challenges to tree ordinances. *See, e.g., Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. App—Dallas, 2013).

Canton and its amici ask this Court to overturn that judgment by adopting unprecedented standards for both exactions and takings that would effectively relegate constitutionally protected property rights to second-class status. There is no basis for such a radical reimagining of our constitutional principles. The district court's judgment that the Tree Ordinance is unconstitutional should be affirmed.

I. STANDARD OF REVIEW

The parties agree that a grant of summary judgment is reviewed *de novo*. *Hunt v. Sycamore Community School Dist. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008).

[6] *https://web.archive.org/web/20180503220610/https://www.arboretum.harvard.edu/pinus-strobus-pine-tree-riot/* (last viewed 12/3/2020).

II. THE DISTRICT COURT RIGHTLY HELD THAT F.P.'S CONSTITUTIONAL CLAIMS ARE RIPE FOR REVIEW[7]

At the district court, Canton argued that F.P.'s takings and exaction claims were not ripe under *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), because F.P. did not file a futile administrative appeal with the Zoning Board of Appeals before filing this lawsuit. The district court rightly rejected these claims and Canton does not raise them again here. *F.P. Dev., LLC*, 456 F.Supp.3d at 888. Amicus, the Michigan Township Association, nonetheless attempts to resuscitate Canton's abandoned prudential ripeness arguments. Doc. 44 Page: 10-16. These arguments should be rejected for four reasons.

First, any *Williamson County* arguments have been waived. *Williamson County's* finality rule is prudential rather than jurisdictional in nature. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1013 (1992); *Lilly Invs. v. City of Rochester*, 674 Fed. Appx. 523, 526 (6th Cir. 2017). Unlike jurisdictional questions that may be raised at any time, prudential ripeness considerations are generally waived if not raised in appellant's opening brief. *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 89 (5th Cir. 2011) (*Williamson County* issue waived

[7] As explained below, Canton's prudential ripeness arguments from the district court are not raised as a question presented by any party in this case and are therefore waived. However, because the specter of ripeness was raised by Canton's Amici, it is addressed here out of an abundance of caution.

because not raised).[8] Here, Canton did not raise prudential ripeness as a basis for appeal in its opening brief. Accordingly, any prudential ripeness arguments are waived and cannot be resuscitated by amici. *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 893 (6th Cir. 2006) ("issues are waived when 'not raised in the appellant's opening brief.'")

Second, even if prudential ripeness could be raised, it would not be grounds to overturn the judgment below. As the district court noted, prudential ripeness is relevant only to as-applied takings claims. *F.P. Dev., LLC*, 456 F.Supp.3d at 886 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987)). Here, the district court held that the Tree Ordinance violates *Dolan* both on its face and as applied. *Id*. at 895 (noting that the ordinance is invalid in all circumstances). As such, even if F.P.'s as-applied claims were not ripe, the judgment below would stand because the facial claims are dispositive.

[8] Indeed, the Supreme Court and this Court have both recently questioned whether prudential ripeness is a constitutionally valid means to dismiss a case and whether it should continue to apply its prudential ripeness precedents at all. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014); *see also Miller v. City of Wickliffe*, 852 F.3d 497, 503 n.2 (6th Cir. 2017) ("Although the concurrence recommends disposing of this case on prudential-ripeness grounds, we need not reach that issue here. Given the Supreme Court's questioning of the continued vitality of the prudential-standing doctrine and the doubt that has been cast upon it by our own decisions, we are hesitant to ground our decision in prudential-standing principles.") (citations omitted).

Third, contrary to amici's assertion, *Williamson County's* prudential ripeness standard does not categorically require an administrative appeal, or any other form of administrative exhaustion before challenging a land use regulation. *See*, *Williamson County*, 473 U.S. at 193-94 ("respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals" to ripen its claims.); *id*. at 192-93; *Patsy v. Bd. of Regents*, 457 U.S. 496, 500-01 (1982) ("this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983."). A decision is final and ripe for *Williamson County* purposes once the application of the challenged ordinance to the property is reasonably clear. *Palazzolo v. Rhode Island*, 533 U.S. 606, 619 (2001). When, as in this case, the government's discretion is limited by the text of the ordinance, *Williamson County's* prudential ripeness standard is satisfied. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997).

Moreover, the application of the Tree Ordinance to F.P.'s tree removal is not only reasonably clear; it is crystal clear. The challenged prohibitions and mitigation requirements of the Tree Ordinance apply to F.P. on their face and are not discretionary. Canton Code of Ordinances, Art. 5A.05; *id.* Art. 5A.08 (A), (B), (D), (E) (stating that the pre-set mitigation amounts "shall" be required for any permit); *SAS Inst., Inc. v. Iancu*, 138 S.Ct. 1348, 1354 (2018) (the word "shall" means "must" because it "generally imposes a nondiscretionary duty"). Indeed, Canton's

designated witnesses testified that there was *no circumstance* where the prohibition and mitigation requirements would not apply. Dep. of J. Goulet, ECF No. 35-3, Page ID 749-50, 753-55; Dep. of L. Thurston, ECF No. 35-10, Page ID 800. Furthermore, Canton issued F.P. a notice of violation for violating the Tree Ordinance, which Canton admits is unappealable. Dep. of J. Goulet, ECF No. 35-3, Page ID 758-62. Canton also stated with specificity both the number of trees allegedly removed and the amount of mitigation owed. Canton's Counter Complaint, ECF 13, Page ID 89. The next step, according to Canton, would have been a lawsuit by Canton in state court. Dep. of J. Goulet, ECF No. 35-3, Page ID 759. F.P. need not await prosecution before bringing claims under 42 U.S.C. § 1983. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). (a party need not "expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.")

Fourth, as the district court rightly recognized, any appeal to the Zoning Board of Appeals would be futile because the ZBA "is not authorized to grant variances related to the use of land." Art. 27.05(D)(2). Amici try to weave together snippets of various state statutes with miscellaneous bits of Canton's ordinances in a strained effort to argue that Canton's Zoning Board of Appeals hypothetically could have granted some sort of variance that would have allowed the removal of some trees without the mandatory mitigation payments. But that awkward interpretation

contradicts the text of the Tree Ordinance (discussed *supra*) and Canton's own testimony regarding how the Tree Ordinance and the Zoning Appeals process work. Canton's representative testified that appeals to the ZBA do not and cannot involve constitutional questions. *See*, Dep. of J. Goulet, ECF No. 35-3 Page ID 762. But those are the only types of questions raised here. As the district court rightly recognized, F.P. need not file a futile administrative appeal simply "for its own sake" in order to ripen its claims. *F.P. Dev., LLC*, 456 F.Supp.3d at 886 (quoting *Palazzolo*, 533 U.S. at 622.)

III. THE DISTRICT COURT RIGHTLY HELD THAT THE TREE ORDINANCE IS AN UNCONSTITUTIONAL EXACTION

Both on its face and as applied in this case, the Tree Ordinance requires a permit from Canton before F.P. may remove trees from its property. Canton Code of Ordinances, Art. 5A.05. And a permit will only be granted if F.P. agrees to mitigate for the removal by planting a pre-set number of replacement trees or paying a pre-set sum of money for each tree removed. *Id.* Art. 5A.08 (A), (B), (D), (E).

When, as in this case, the government requires mitigation as a condition for a permit to use property, there must be a sufficient "'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013). Importantly, the analysis of rough proportionality must not be made in the abstract but must be based on "individualized determination that the required dedication is

related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391.

In practice, this sets up three requirements for mitigation demands: (1) the mitigation must have a sufficient nexus to a legitimate government interest; (2) the mitigation must be roughly proportional to the impact on that interest created by a proposed property use, and (3) the rough proportionality analysis must be based on an individualized, quantifiable, and site-specific assessment of both the impact created by the property use and the mitigation's ability to address that impact in a roughly proportional way. *See Dolan*, 512 U.S. at 391.

In *Dolan*, the city required the plaintiff to construct a bike path on its property as a condition of granting a construction permit. *Id.* at 380. The city argued the mitigation requirement was justified because the proposed construction would increase traffic and parking problems, which the bike path could offset. *Id*. at 381-82. The city produced evidence that the proposed construction would increase traffic, but provided no site-specific evidence as to the actual effect that the proposed bike-path would have on the traffic in the area. *Id*. at 395. Instead, the city's official findings relied on what it characterized as common knowledge that, in general, a bike path "could offset some of the traffic demand . . . and lessen the increase in traffic congestion." *Id*. The Court rejected this unsubstantiated approach to exactions, noting that "findings of fact that the bicycle pathway system '*could* offset

some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely* to, offset some of the traffic demand." *Id*. at 395-96. As the Court explained, "the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated." *Id*. Because the city failed to engage in a site-specific analysis, *Dolan* held that the proposed mitigation requirement was unconstitutional. *Id*.

Following *Dolan's* teaching, the district court held that Canton's Tree Ordinance is unconstitutional on its face and as applied because the mitigation required under the Ordinance is not based on *any* individualized assessment of the impact of tree removal. *F.P. Dev., LLC*, 456 F.Supp.3d at 894-95. In fact, the Tree Ordinance *forbids* the individualized assessment of impact mandated by *Dolan*. Under the Tree Ordinance, mitigation is determined solely by the size and number of trees removed, regardless of impact. Canton Code of Ordinances, Art. 5A.05; *id.* Art. 5A.08 (A), (B), (D), (E) (noting that the pre-set mitigation amounts set forth in the Ordinance "shall" be required for any permit). This mitigation is set forth on the face of the ordinance and is non-discretionary. *Id*.; see also *SAS Inst., Inc. v. Iancu*, 138 S.Ct. 1348, 1354 (2018) (the word "shall" means "must" because it "generally imposes a nondiscretionary duty").

As the district court noted, this is particularly problematic for a tree ordinance under *Dolan*, because the costs and benefits of both tree removal and tree replacement can vary based on site-specific factors. *F.P. Dev., LLC*, 456 F.Supp.3d at 895. Yet the Ordinance explicitly and categorically forbids consideration of such factors under its tree-for-tree approach. *Id*. at 894-95. The Tree Ordinance therefore violates *Dolan* because mitigation under the Ordinance is wholly disconnected from any individualized assessment of the impacts of tree removal or the ability of the required mitigation to address those impacts. *Id*. The district court's judgment on this issue is in accord with other courts addressing *Dolan's* individualized assessment requirement. *See, e.g., Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. App—Dallas, 2013) (discussed *infra*); *Goss v. City of Little Rock*, 151 F.3d 861, 863 (8th Cir. 1998) (local traffic mitigation requirements failed to satisfy *Dolan* because they were based on pre-set assumptions about potential traffic increases, rather than site-specific quantified assessments of the actual impact of the proposed project).

In their briefing, Canton and its amici raise a grab bag of forced and unconvincing arguments, each of which fails to pass muster under *Dolan* and its progeny, for the following reasons.

A. Canton's attempts to evade review under the *Dolan* standard are contrary to precedent

Dolan review is triggered when the government mandates mitigation as a condition of issuing a land use permit. *Koontz*, 570 U.S. at 599. Despite *Dolan's* obvious application to the mitigation demanded under the Tree Ordinance, Canton and its amici raise two arguments that *Dolan* does not apply, both of which fail.

First, Amici argue that *Dolan* does not apply because the mitigation here is mandated legislatively by an ordinance and not by an *ad hoc* administrative process. But neither the Supreme Court nor the Sixth Circuit have ever sanctioned such a distinction. To the contrary, in support of its judgement *Dolan* itself approvingly cited *College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 807 (Tex. 1984), which was a challenge to mitigation requirements built into a local land-use ordinance, not an administrative exaction. *See Dolan*, 512 U.S. at 391. Indeed, it would be irrational to hold that a mitigation requirement that is unconstitutional when applied by a zoning board becomes wholly acceptable and unreviewable if adopted by a city council. Accordingly, Amici's suggestion that this Court make new law on this issue should be rejected.

Second, Canton and its amici argue that *Dolan* only applies when the government seeks a full appropriation of property (like an easement) or a monetary exaction in lieu of property. But neither the Supreme Court nor the Sixth Circuit have limited *Dolan* to easements or monetary exactions. Rather, *Dolan* is a

particular application of the broader "unconstitutional conditions doctrine," which generally applies when the government demands the surrender of a constitutional right in exchange for a permit. *Koontz*, 570 U.S. at 604; *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 625 (Tex. 2004) (noting that "any requirement that a developer provide[s] or do[es] something as a condition to receiving municipal approval is an exaction" subject to *Dolan*).[9]

Tellingly, the limitation of *Dolan* proposed by Canton here was raised by the dissent in *Koontz* but was not adopted by the majority. In *Koontz*, the Court reviewed a law which required that property owners apply for a permit in order to develop private property containing wetlands. Koontz applied for a permit to develop several acres of his property. *Koontz*, 570 U.S. at 602. The government refused to grant the permit unless Koontz agreed to leave 13.9 acres of his property undeveloped or agreed to pay money to have contractors enhance government owned wetlands elsewhere. *Id*. The Court held that either condition—leaving the land fallow *or* paying money—would be an exaction triggering evaluation under *Dolan*. *Id*. at 619. The dissent disagreed, raising the exact argument raised by Canton here—*i.e.*, that *Dolan* only applies to formal transfers of property. *See Koontz*, 570 U.S. at 622 (Kagan, J., dissenting). In the dissent's view, *neither* the demand to leave the land

[9] While *Flower Mound* is a Texas Supreme Court case and therefore not binding, the United States Supreme Court has cited *Flower Mound* favorably for its application of *Dolan*. *See, Koontz,* 570 U.S. at 618.

fallow *or* the demand to pay money were exactions, because neither involved a direct transfer of property. *Id*. That dissenting approach was not adopted by the majority. Instead, the majority concluded that *Dolan* applies when the mitigation involves the relinquishment of any "interest in real property" or other "constitutional interest." *Id*. at 606, 613-14.

That low burden is met here. Canton concedes that F.P. would have the right at common law to fell and utilize the trees on the property. Indeed, the right to fell and utilize trees is so important in Michigan that it has been treated as a separate interest in property for calculating just compensation in takings cases. *See e.g.*, *State Highway Comm'r v. Green*, 5 Mich. App. 583, 589-90 (1967). As such, had Canton simply prohibited the removal of any tree from F.P.'s property, such an absolute prohibition would constitute a taking of F.P.'s severable interest in its trees and perhaps even the property as a whole. *See Id*.; *see, also*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (taking occurs when regulation denies all economically beneficial use of land). Indeed, it is telling that Canton does not assert a right to simply prohibit all tree removal on F.P.'s industrially zoned property, as it is aware that such a flat prohibition on developing an industrially zoned property would be a taking. *See Id.* If *Nolan* and *Dolan* stand for anything, it is that the government may not avoid its duty to pay compensation for a taking by crafting its regulation as a permit condition.

B. The District Court rightly held that simply counting the number of trees removed does not meet the individualized assessment requirement of *Dolan*

Canton's primary merits argument is that its 1-1 or 1-3 nondiscretionary tree replacement requirement is, by definition, roughly proportional. But this fundamentally misunderstands *Dolan*. Mitigation under Dolan must be roughly proportional to *the impact* of the property use on others. *See Koontz*, 570 U.S. 595, 605-06 (explaining that mitigation under *Dolan* is tied to "negative externalities"). In the case of tree removal from private property, the impact on the public to be mitigated is not "a lost tree," because the public never owned the tree. Instead, the impact consists of any "negative externalities" that removing the tree might create, like flooding, erosion, etc. Because these externalities vary depending on where the tree was located, topography, species of tree, and local climate, site-specific analysis is required to determine a "roughly proportional" response. Canton's blanket 1-1 or 1-3 replacement policy does not meet that standard.

In *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. App.—Dallas, 2013), the court struck down the application of a tree ordinance almost identical to the one at issue here. Like Canton's Tree Ordinance, the ordinance in *Mira Mar* required developers removing a tree to pay a "mitigation fee" that would be used to plant replacement trees elsewhere. As in this case, the mitigation was set solely by the number and size of trees removed, as opposed to a

site-specific analysis of the actual impact of tree removal. The court found this lack of individualized assessment of impact to be fatal to the ordinance under *Dolan*. *Id*. at 96. The court noted that the city's tree-for-tree approach was unconstitutional because it did not require the city to establish that the "removal of trees in the development would harm the air quality, increase noise and glare, remove ecosystems, bring down property values, or reduce the other benefits of trees described in the ordinance" nor did it require "evidence that the removal of trees from appellant's private property would increase the need for trees on public property or for the other programs beyond what already existed before appellant removed the trees on its property." *Id*. "With no evidence of any projected impact caused by the removal of trees during the development, the City did not raise a genuine issue of material fact that any amount of tree retribution fees would be roughly proportional." *Id.*

Canton's amici claim that *Mira Mar's* demand for some site-specific assessment of impact is irrelevant because *Mira Mar* allegedly applied the "specific and uniquely attributable test" rejected in *Dolan*. But Canton's Amici does not quote *Mira Mar* or any case discussing *Mira Mar* for this proposition. Nor could it—*Mira Mar* expressly relied on the "rough proportionality" standard of *Dolan* by name. And *Mira Mar's* demand for site-specific evidence of impact is in accord with *Dolan* (which explicitly requires "an individualized assessment") as well as other courts

applying *Dolan* across the country. *See, e.g., Goss*, 151 F.3d at 863 (local traffic mitigation requirements failed to satisfy *Dolan* because they were based on pre-set assumptions about potential traffic increases, rather than site-specific quantified assessments of the actual impact of the proposed project).

Indeed, Texas courts have never applied the "specific and uniquely attributable test." To the contrary, in *Dolan*, the Supreme Court pointed to Texas courts as an example of the intermediate level of scrutiny adopted in *Dolan* in opposition to the "specific and uniquely attributable test." *See Dolan*, 512 U.S. at 391(*citing Turtle Rock*, discussed *supra*). And the Supreme Court has continued to cite to Texas courts as examples of how *Dolan* should work in practice. *See Koontz*, 570 U.S. at 618 (*citing Flower Mound*, discussed *supra*). Amici's *ipse dixit* that *Mira Mar* was secretly applying a different standard does not hold water. The district court's judgment on this issue should be affirmed.

C. The Tree Ordinance is also unconstitutional as applied in this case

Because the district court held that the tree-for-tree approach mandated by the Ordinance could not satisfy *Dolan* under any circumstance and is therefore facially defective, it did not evaluate whether the tree ordinance has a sufficient nexus to a legitimate government interest, or if the mitigation demanded in this case was

roughly proportional to any impact on that interest.[10] This Court likewise does not have to reach these questions. However, should the Court wish to evaluate the Tree Ordinance under the as-applied standard, the mitigation required by Canton in this case also fails the *Dolan* test as applied.

F.P.'s tree removal occurred on an industrially zoned property in an area that is not visible from the street. Canton admits that there is no evidence that the removal created a nuisance or negatively impacted F.P.'s neighbors in any way. Dep. of L. Thurston, ECF No. 35-10, Page ID 797-799. Accordingly, Canton's demand that F.P. plant over 100 new trees, or pay $47,898 to Canton in mitigation fees lacks a sufficient nexus and rough proportionality to any legitimate government interest.

Aware of this evidentiary problem, Canton now pivots and claims that the legitimate government interest served by the mitigation requirement is aesthetics. For three reasons, Canton's pivot does not help its position. First, *Dolan* requires the government to "quantify" the impact of the property use. *Dolan*, 512 U.S. at 395. But "because aesthetic concerns are subjective, [they are] extremely difficult to quantify." *Citizens United for Free Speech II v. Long Beach Twp. Bd. of Comm'rs,*

[10] Canton strangely claims that the district court "focused on" the $47,898 amount actually charged. But the proportionality of the mitigation required was never discussed. The district court's judgment was based on the fact that the ordinance itself did not allow for individualized assessments of impact, thus any amount of mitigation would have violated *Dolan*.

802 F. Supp. 1223, 1235 (D.N.J. 1992). Moreover, it is at least unclear how payment into the tree fund, or tree replacement offsite, potentially miles away, could have any remedial effect on the aesthetic impacts of tree removal on or near F.P.'s property.

Second, the structure of the Tree Ordinance undermines Canton's claims that the mitigation required under the Tree Ordinance has any nexus to a government interest in aesthetics. Residential lots of less than two-acres—arguably, where the aesthetic interest in trees would be the highest—are exempt from the Tree Ordinance. Canton Code of Ordinances, Art. 5A.05 (B). Yet, the Tree Ordinance applies with full force to industrially zoned property, like F.P.'s., where aesthetic interests are at the lowest. *Id*.

Third, even if aesthetics were a legitimate interest given the facts of this case, Canton would still need to establish under *Dolan* that the actual mitigation demanded was roughly proportional to F.P.'s impact on that interest. *Goss*, 151 F.3d at 863 ("Little Rock argues that it had a legitimate reason for demanding the dedication. This is true, but it does not prove that the legitimate reason was proportionate to the demand.") Canton cannot meet that burden. The narrow strip of vegetation removed to access the ditch in this case occurred on a portion of industrially zoned property that is not visible from the street. Any impacts on aesthetics are therefore minimal and do not justify the penalties sought. The district court's judgment that the Tree Ordinance is an unconstitutional exaction should be affirmed.

IV. THE DISTRICT COURT RIGHTLY HELD THAT THE TREE ORDINANCE, AS APPLIED TO F.P., IS A REGULATORY TAKING UNDER *PENN CENTRAL*

A government regulation that deprives a property owner of some—but not all—of a property's economic value may be a taking if the regulation "goes too far." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). To determine whether the regulation goes too far, courts look at three factors: 1) "the economic impact of the regulation on the claimant;" 2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and 3) "the character of the governmental action." *Palazzolo*, 533 U.S. at 633-34 (quoting *Penn Central*, 438 U.S. at 124). These factors, commonly referred to as the "*Penn Central* test," are not "mathematically precise variables, but instead provide[] important guideposts that lead to the ultimate determination whether just compensation is required." *Palazzolo*, 533 U.S. at 634.

Here, the district court carefully considered each of these factors and found that the Tree Ordinance, as applied to F.P.'s property, went too far and therefore was a taking. In seeking reversal, Canton and its amici propose radical new tests for the *Penn Central* factors, import tests from cases where *Penn Central* was not at issue, or rely on the reasoning from the *Penn Central* dissent. If taken seriously, these arguments would convert *Penn Central* into an empty formality where the

government always wins. Accordingly, the careful judgment of the district court, which is based on the actual *Penn Central* test should be affirmed.

A. The economic impact of the Tree Ordinance on F.P.'s property is significant

The first category in *Penn Central* requires the Court to evaluate the "economic impact" of the challenged regulation on the property. *Penn Central*, 438 U.S. at 124. The district court held that the Tree Ordinance would have a significant economic impact on the property because, based on the facts in the record, the penalties under the ordinance for clearing the property likely exceeded the value of the property itself. *F.P. Dev., LLC*, 456 F.Supp.3d at 889-90. Canton and amici raise arguments in response, but each falls of its own weight.

First, Canton and amici argue that the district court erred by finding a significant economic impact under *Penn Central* because some value or some possibility of use allegedly remains in the property. In support of this argument amici cite two cases—neither of which involved regulatory takings claims and one of which predates the regulatory takings doctrine all together. Brief of Michigan Townships Association, Doc. 44, Page 21 (citing, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (substantive due process challenge to zoning regulation); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (substantive due process challenge to a law regulating the manufacture of bricks in certain areas as falling outside the

police power)[11]. Assuming arguendo, that the cases say what amici suggests—they do not[12]—they would have no precedential value here because they are not takings cases.

Just as importantly, this objection is fatally flawed because it wrongly conflates the first factor of *Penn Central* with a total taking under *Lucas*, under which the property owner must show that the regulation denies him "all economically beneficial use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). *Penn Central*, by contrast, applies only in those circumstances where a *Lucas* taking has not occurred—*i.e.*, when the regulation has taken some, but not all, of the value and use of the property. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (distinguishing *Lucas* and *Penn Central*). As such, *Penn Central* assumes, as its initial premise, that there is some value or use left in the regulated property. *Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017) (noting that *Penn Central* applies only when "a regulation impedes the use of property without depriving the owner of all economically beneficial use.") The district court therefore did not err

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[11] Tellingly, *Hadacheck*, which predates the first regulatory takings case by several years, noted in dicta that had the law prohibited the removal of clay from the property as opposed to merely regulating the nuisance caused by the manufacture of bricks, the law "could not be upheld." *Hadacheck*, 239 U.S. at 413. Accordingly, the very case amici cites could be read to hold that Canton's ban on the removal of trees is unconstitutional.

[12] Amici tellingly does not provide a pin cite from either case to support its proposition and F.P. cannot find anything in those cases supporting the proposition for which they are cited.

by holding that a regulation requiring F.P. to spend hundreds of thousands of dollars if it wanted to clear its industrially zoned property of trees has a significant economic impact under *Penn Central*. *See F.P. Dev., LLC*, 456 F.Supp.3d at 890.

Second, both Canton and amici argue that F.P.'s economic impact is self-inflicted, and therefore should not be considered, because F.P. removed trees without a permit. But this argument ignores the fact that the tree mitigation payments are the same under the Tree Ordinance whether F.P. applies for a permit before removing the trees or pays the penalties after removing the trees. And Canton's designated witness testified that there is *no circumstance* where F.P. could have removed trees from this property without making the same mitigation payments. Dep. of J. Goulet, ECF No. 35-3, Page ID 749-50, 753-55; Dep. of L. Thurston, ECF No. 35-10, Page ID 800. The ongoing burden on F.P.'s property is therefore a necessary result of the Tree Ordinance, not a result of anything done by F.P.

Third, both Canton and amici argue the district court erred by finding any economic impact from the Tree Ordinance because F.P. did not submit additional evidence such as a current appraisal of the property with the trees removed. But neither Canton nor amici point to a single case holding that such evidence is required to prove an economic impact.

In any event, the proper comparison for impact analysis is not the value of the property with or without the trees; it is the value of the property with or without the

Tree Ordinance. *Penn Central*, 438 U.S. at 124 (emphasis added) (measuring "the economic impact *of the regulation* on the claimant.") Here mitigation payments are pre-set and mandatory. Canton Code of Ordinances, Art. 5A.08. Accordingly, based on the undisputed facts in the record regarding the property and Canton's prior application of the Tree Ordinance, the district court concluded that clearing the property of trees entirely would trigger hundreds of thousands of dollars in mitigation requirements under the Ordinance, likely exceeding the purchase price of the property. *See F.P. Dev., LLC*, 456 F.Supp.3d at 890. Even if F.P.'s property value has gone up since purchase—a new allegation for which Canton provides no evidence—it is disingenuous for Canton to argue that any such increase would mean that hundreds of thousands of dollars in mitigation would not rise to the level of a significant economic impact.

B. F.P. had a reasonable expectation that it would be able to develop industrially zoned property to expand its business without facing ruinous penalties

The district court also rightly held that the Tree Ordinance interfered with F.P.'s reasonable investment backed expectations. *F.P. Dev., LLC*, 456 F.Supp.3d at 890. F.P. purchased the industrially zoned property as a replacement property for a fully developed lot that it sold at Canton's urging. *Id*.; ECF No. 26-5, Page ID 388. F.P. thus had every reason to believe that it would be able to develop the

property for industrial use without facing ruinous penalties exceeding the value of the property as a whole. *Id*.

Canton objects that the Tree Ordinance was already in effect at the time the property was purchased, but the Supreme Court has repeatedly made clear that a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 630, 121 S.Ct. 2448, 2464 (2001) (*citing Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, n. 2 (1987)).

Canton objects that *Palazzolo* also held that the pre-existence of a law might play some role in determining reasonable expectations in some cases. But that caveat does not apply here. Although *Palazzolo* pointed to the holding in *Lucas* that a regulation is not a taking when it merely enforces those "restrictions that background principles of the State's law of property and nuisance already place upon land ownership," it explained further that such limitations are confined to those background principles of property that "inhere in the title itself" such as common law nuisance restrictions that prevent harm to neighboring properties. *Palazzolo*, 533 U.S. at 629-30. *Palazzolo* flatly rejected the argument that "any new regulation, once enacted, becomes a background principle of property law" which falls into this narrow category of pre-existing law worthy of consideration. *Id* at 629. To hold otherwise, would allow the government to redefine what it means to own property

by simply passing regulations. *Id*. at 627. As the Court put it, the government "may not put so potent a Hobbesian stick into the Lockean bundle." *Id*. Accordingly, the Tree Ordinance does not fall into the narrow class of pre-existing nuisance-based laws that warrant consideration under *Palazzolo.*[13]

Canton admits that the removal of trees from private property is not a nuisance at common law (Dep. of L. Thurston, ECF No. 35-10, Page ID 796), and admits that it has no evidence that the tree removal in this case caused any public injury. *Id*. at 797-99. Nevertheless, Canton argues that Michigan law holds that *any* violation of a zoning ordinance is a nuisance *per se*. But the district court rightly observed[14] that Canton does "not have the unfettered authority to shape and define property rights…" by simply declaring something a nuisance which is not so in fact. *See, Murr v. Wisconsin*, 137 S.Ct. 1933, 1944–45 (2017); *see also Yates v. Milwaukee*, 77 U.S. 497, 505 (1870) ("the mere declaration by the city council…that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character."). If Canton's

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[13] The only justice to provide a potentially broader conception of what pre-existing laws might count for this analysis in *Palazzolo* was Justice O'Connor. *See Palazzolo*, 533 U.S. at 632 (O'Connor concurring). But her opinion was not joined by any other justice, and was expressly attacked in a separate concurrence by Justice Scalia. Moreover, even Justice O'Connor's broader conception of reasonable expectations rejected any notion that the pre-existence of an ordinance was controlling. *Id*. She merely suggested that it might be considered to some degree—which is precisely what the district court did here. *Id*.

[14] *F.P. Dev., LLC*, 456 F.Supp.3d at 891.

approach were to be adopted, then all cities could simply immunize their local zoning codes from constitutional challenge by declaring, *ipse dixit*, that any violation of the zoning code is a public nuisance *per se*. Michigan courts have wisely rejected that approach. *See*, *Ypsilanti Charter Twp. v. Kircher*, 281 Mich. App. 251, 277-78 (2008) ("the mere fact that a condition constitutes a violation of a local ordinance does not make that condition a public nuisance.")

C. The Tree Ordinance impermissibly requires F.P. to provide a public benefit

When evaluating the third *Penn Central* factor, courts consider the "character of the governmental action." If the character of the regulation is more akin to traditional nuisance abatement, no compensation is generally required. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488, 492 (1987). By contrast, if the regulation is designed to merely generate public benefits, "fairness and justice" often demand that the cost of that burden "should be borne by the public as a whole." *See Bowen v. Gilliard*, 483 U.S. 587, 608-09 (1987).

Canton admits that the removal of trees from private property is not a nuisance at common law, (Dep. of L. Thurston, ECF No. 35-10, Page ID 796), and admits that it has no evidence that the tree removal in this case caused any public injury. *Id*. at 797-99. Indeed, Canton's representative was quite clear that the purpose of the tree ordinance is to provide "public benefits"—not to remedy an actual injury. *Id*. at 800. But government may not acquire a public benefit at a property owners'

expense without paying the property owner for it. *See Mahon*, 260 U.S. at 416 ("a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

Canton argues that the Tree Ordinance is not a taking because it is part of Canton's zoning code and therefore applies to everyone. But this argument, which is allegedly based on Justice Rehnquist's dissent in *Penn Central*, was not adopted by the majority in that case nor by any other court since, and for good reason. Under Canton's theory, government could always take property without compensation, so long as it took enough of it from enough people. But a regulation that eradicates the property rights of one thousand township residents is no less a taking than a regulation that eradicates the property rights of one. Imagine an ordinance in the Township Zoning Code that required each individual who purchases land to dedicate one-third of his property for exclusive government use. Such a "zoning" ordinance would certainly be "ubiquitous" and burden all property owners equally. It would nonetheless be a taking because it acquires private property for public use without compensation.

Furthermore, the Tree Ordinance, in fact, is not the ubiquitous regulation Canton suggests because it is riddled with exceptions for most of the voting public—*e.g.*, farms, nurseries, and residential lots of less than two acres. Canton Code of

Ordinances, Art. 5A.05(B). The sting of the Ordinance is reserved for those with sufficiently deep pockets, but less numbers at the ballot box—large property owners, developers, and industrially zoned properties. That is hardly the even distribution of benefits and burdens Canton asserts. The district court therefore did not err in holding that the Tree Ordinance is a taking.

V. THE DISTRICT COURT'S ORDER ON F.P.'S *PER SE* TAKINGS, FOURTH AMENDMENT SEIZURE, AND EIGHTH AMENDMENT EXCESSIVE FINES CLAIMS SHOULD BE REVERSED

Having concluded that the Tree Ordinance was an unconstitutional exaction and taking, there was no reason for the district court to reach F.P.'s other claims. However, because the district court ruled on these separate claims and addressed them separately on the face of its judgment and order, cross appeal is necessary to avoid any *res judicata* effects, and to provide an alternative ground to uphold the court's judgment.

A. The Tree Ordinance is a *Per Se* Taking Under *Horne*, Because it Grants Canton Constructive Possession of F.P.'s Trees

Next to the exaction claims, the most straightforward way the district court could have decided this case was to find a *per se* taking of F.P.'s trees under *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015). Unlike the multi-factor balancing required under *Penn Central*, *per se* takings trigger relief without regard to the claimed public benefit or the economic impact on the owner. *Id*. at 360.

The Tree Ordinance is remarkably similar to the statute the Supreme Court found to be a *per se* taking in *Horne*. The plaintiffs in that case successfully challenged a federal statute that required them to set aside a portion of their raisins for the government to control as a means of restricting the supply of raisins in the national raisin market. The set-aside raisins remained on the plaintiffs' property, 576 U.S. at 361, but the plaintiffs' could not sell, use, or destroy the raisins without being fined their "fair market value." *Id*. at 370. The plaintiffs sold a portion of their set aside raisins and the government fined them the "market value" of the raisins sold. The Court held that this was a *per se* taking. As the Court explained, "[r]aisin growers subject to the reserve requirement thus lose the entire 'bundle' of property rights in the appropriated raisins—'the rights to possess, use and dispose' of them" and that this "gives rise to a taking as clearly 'as if the Government held full title and ownership.'" *Id*. at 362.

In Michigan, trees are a separate property interest that is severable from the underlying estate in the same manner as crops. *See e.g., Groth v. Stillson*, 20 Mich. App. 704, 707 (1969) (trees are severable interests); *State Highway Comm'r v. Green*, 5 Mich. App. 583, 589-90 (1967) (trees separate interest for takings analysis). Just as the statute in *Horne* forbade the property owners from exercising any property right with regard to their raisins, the Tree Ordinance forbids F.P. from exercising any property right with regard to its trees. Like the raisins in *Horne*, the trees remain

on F.P.'s property, but F.P. may not sell, use, or destroy them without paying Canton the "current market value" of the trees. Canton Code of Ordinances, Art. 5A.08(E). And like the plaintiffs in *Horne,* F.P. sold a portion of his trees and the government demanded their "market value." Accordingly, Canton's tree ordinance effectively takes possession of F.P.'s trees without compensation just as the statute in *Horne* effectively took control of raisins. Accordingly, it is a *per se* regulatory taking.

The district court rejected this argument because the government in *Horne* could have taken actual title to the raisins. *F.P. Dev., LLC*, 456 F.Supp.3d at 889. But the possibility of a title transfer of the raisins was not the dispositive fact that created a taking in *Horne*. In fact, the government never took actual possession of the raisins at issue. Rather, *Horne* held that the inability to consume or sell the raisins without paying the government compensation "gives rise to a taking as clearly '***as if*** the Government held full title and ownership.'" *Horne*, 576 U.S. at 362 (emphasis added). In other words, the denial of the ability to consume or sell the raisins without compensating the government would have given rise to a taking whether title was transferred or not. Accordingly, this Court should reverse the district court's impermissibly narrow reading of *Horne*.

B. The Tree Ordinance is a *Per Se* Taking Under *Loretto* Because it Forces F.P. to Maintain Unwanted Objects on its Property

The Tree Ordinance constitutes a *per se* taking of portions of the underlying Property by requiring that F.P. maintain unwanted objects—trees—on the Property. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), the Court held that a state law requiring landlords to allow cable boxes to remain attached to their buildings constituted a *per se* taking. The Court explained that forbidding the removal of the cable boxes was tantamount to "physical occupation authorized by government [and] is a taking without regard to the public interests that it may serve." *Id*. at 426. This remains true, even if the occupation involves "relatively insubstantial amounts of space and do[es] not seriously interfere with the landowner's use of the rest of his land." *Id*. at 430.

Similarly, in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) the EPA drilled testing wells on private property in order to monitor groundwater contamination. The court recognized that those wells served an important government interest, but nonetheless held that the physical occupation of private property by an unwanted object constituted a *per se* taking warranting compensation. *Id*. at 137. As that court explained, once a permanent physical occupation is established "…nothing more needed to be shown [to establish a taking]." *Id.*

Here, the physical invasion is far more extensive than the cable box recognized as a taking in *Loretto* or the test wells in *Hendler*. Under the Tree

Ordinance, property owners must maintain potentially thousands of unwanted trees on their property. As these trees inevitably grow and spread over time, the extent of this legally mandated physical occupation increases. Accordingly, the ordinance is a *per se* taking under *Loretto*.

The district court rejected this argument in summary fashion by holding that *Loretto* was not relevant because Canton's agents had not physically invaded the property. *F.P. Dev., LLC*, 456 F.Supp.3d at 889. But there is no support—and the district court cited none—for such a narrow reading of *Loretto*. To the contrary, in *Loretto*, no government agent physically invaded the property—the law simply forbade the owner from altering or removing a cable box that was already on the property when she purchased it. It was the occupation by the cable box, not by a government agent, that created the taking. Similarly, this Court has rejected narrow interpretations of *Loretto* that require "agents" of the government to be "literally occupying" the property. *Montgomery v. Carter Cty.*, 226 F.3d 758, 766 (6th Cir. 2000). This Court should therefore overturn the district court's impermissibly narrow reading of *Loretto*.

C. The Tree Ordinance is an Unreasonable Seizure of F.P.'s Interest in its Trees Because it is a Meaningful Interference with Property Rights that is Neither Justified Nor Compensated

Canton's enforcement of its Tree Ordinance is unconstitutional under the Fourth Amendment because it constitutes a meaningful interference with F.P.'s possessory interests in its trees without justification or compensation. *See Severance v. Patterson*, 566 F.3d 490, 503–04 (5th Cir. 2009). The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits "unreasonable seizures" of private property. *Ker v. California*, 374 U.S. 23, 30 (1963). While this prohibition is most often encountered in the criminal context, multiple courts have held that it applies with equal force in the civil context to land use regulations that interfere with the possession or use of private property. *See e.g. Severance*, 566 F.3d at 503–04 (government mandated easement); *Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006) (anti-fencing ordinance). A property regulation violates the Fourth Amendment if it is "(a) a meaningful interference with [a Plaintiff's] possessory interests in [its] property, which is (b) unreasonable because the interference is unjustified by law or, if justified, then uncompensated." *Severance*, 566 F.3d at 502.

To determine whether a seizure is "justified" under the Fourth Amendment, courts "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests

alleged to justify the intrusion." *United States v. Jacobsen*, 466 U.S. 109, 125 (1984). In balancing these interests, a government "allegation that a seizure was for a public purpose does not somehow eliminate Fourth Amendment scrutiny." *Presley*, 464 F.3d at 487. Instead, the alleged government purpose must be examined and balanced against the real-world effects of the seizure. *Id.*

Here, the Tree Ordinance constitutes a meaningful interference with F.P.'s property interest in its trees. Under the Ordinance, F.P. may not alter, destroy, move, or sell its trees without permission from, and compensation to, Canton. Accordingly, it is a meaningful interference with F.P.'s property rights for Fourth Amendment purposes, even if it would not rise to the level of a taking. *See e.g.*, *United States v. Gray*, 484 F.2d 352, 356 (6th Cir. 1973) (holding that temporarily removing rifles from a closet to copy down their serial numbers was a seizure.)

This interference violates the Fourth Amendment because it is neither justified nor compensated. Applying the balancing test from *Jacobsen*, 466 U.S. at 125, the significant interference with F.P.'s property interest cannot be justified by any alleged harm to the public. Canton concedes that tree removal does not, of itself, constitute a nuisance at common law and that it has no evidence that tree removal from F.P.'s property has caused an actual nuisance or injured anyone. Dep. of L. Thurston, ECF No. 35-10, Page ID 796-99. Indeed, neither Canton nor the district court put forward any argument that the seizure in this case was justified or

compensated. Rather, all of the discussion in the district court was based on whether the Fourth Amendment applied at all.

The district court ultimately held that F.P.'s Fourth Amendment claims were precluded by the "open fields" doctrine, because any seizure involved property outside the curtilage of a home. But the open fields doctrine addresses searches, not seizures. *United States v. Rapanos*, 115 F.3d 367, 373-74 (6th Cir. 1997)). The doctrine is derived from *Katz's* "reasonable expectation of privacy" standard, which addresses whether a Fourth Amendment *search* has occurred. *See Oliver v. United States*, 466 U.S. 170, 181 (1984) (holding no expectation of privacy in open fields). But unlike searches, the existence of a seizure does not turn on whether privacy has been invaded, but on whether there has been a "meaningful interference" with an interest in property. *Soldal v. Cook Cty.*, 506 U.S. 56, 63 (1992); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1028 (9th Cir. 2012). Thus, this Court has repeatedly made clear that the open fields doctrine "permits only visual inspections (as opposed to seizures) of property." *Rapanos*, 115 F.3d at 373 (*citing Allinder v. Ohio*, 808 F.2d 1180, 1185 (6th Cir. 1987)).

Of course, a law that expanded the "reasonable expectation of privacy" standard to seizures would have disastrous unintended consequences. *See Soldal*, 506 U.S. at 65-66 (providing examples.) For example, examination of items in plain view are usually not considered "searches" for Fourth Amendment purposes because

there is no expectation of privacy. *Id*. If this were applied to seizures, it would give the government carte blanch to permanently seize any item visible to authorities—*e.g.*, tractors left in the field during lunch, backpacks left temporarily on the sidewalk in front of an individual's house after school—without even implicating the Fourth Amendment. *See id.* This Court should therefore overturn the district court's impermissibly narrow interpretation of the Fourth Amendment.

D. The Payment Under the Tree Ordinance Constitutes an Excessive Fine Under the Eighth Amendment

Finally, this Court should find that the fines levied in this case are excessive under the Eighth Amendment. The district court refused to engage in the Eighth Amendment analysis because it held that the payments in this case were mitigation, and therefore not fines. *F.P. Dev., LLC*, 456 F.Supp.3d at 897. However, this Court is free to independently address F.P.'s Eighth Amendment claim in the alternative if it finds that the Tree Ordinance mitigation payments are not, in fact, mitigation for *Dolan* purposes.

1. The Tree Payments are Fines for Eighth Amendment Purposes

The Eighth Amendment's prohibition on excessive fines applies to any payment, whether in cash or in kind, designed at least in part to serve "either retributive or deterrent purposes." *Austin v. United States*, 509 U.S. 602, 610, (1993). The facts in this case indicate that the tree payments are fines, because they are designed, at least in part, for "retributive or deterrent purposes." *See Austin v.*

United States, 509 U.S. at 610. At deposition, Canton's representative conceded that the purpose of requiring after-the-fact payments was to ensure compliance with the Tree Ordinance and to deter individuals from removing trees. Dep. of J. Goulet, ECF 29-2, Page ID 548-49 (compliance); *id.*, at 523 (deterrence). The required payments are therefore punitive in nature. *See WCI, Inc. v. Ohio Dep't of Pub. Safety*, 774 Fed. Appx. 959, 967 (6th Cir. 2019) ("even if only intended partially as a punishment, and partially for other reasons—the protections of the Eighth Amendment apply.").

Canton argues that they are fees, similar to those required of a business who obtains a permit to tap into a municipal water supply or sewer system. But tree fines and tap-fees are fundamentally different. A "fee" is generally understood as a payment "exchanged for a service rendered or a benefit conferred…." *Bolt v. City of Lansing*, 459 Mich. 152, 161 (1998); *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974) (same). A charge for connecting to the water system is a "fee," because it does nothing more than require owners to pay the rates for receiving the benefit of "water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water." *Id*. at 162.

F.P. does not receive any benefit or service in exchange for its tree payments. They are penalties that F.P. must pay for exercising its common law right to remove its own trees from its property.

2. The Tree Payments are Excessive

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The "amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Madison*, 226 Fed. Appx. 535, 548 (6th Cir. 2011).

In determining proportionality, courts look at several factors—two of which are dispositive here. First, courts look at the actual "harm that respondent caused." *Bajakajian*, 524 U.S. 321. In *Bajakajian*, the Court held that a seizure of $357,144 was "grossly disproportional" to the crime of not reporting the amount of currency leaving the country to federal authorities, because "[t]he harm that respondent caused was …minimal." *Id*. at 339. As the Court explained, the respondent's failure "to report his currency affected only one party, the Government, and in a relatively minor way." *Id*. "There was no fraud on the United States, and respondent caused no loss to the public fisc." *Id*. Given these minimal injuries, the forfeiture of thousands of dollars was excessive. *Id*.

Second, courts compare the civil fine to the criminal penalties for the same offense. For example, in *Bajakajian*, the court compared the $357,144 seizure with the criminal penalty for the same offense, which was $5,000. *Id*. The Supreme Court held that the civil penalty was grossly disproportional because it was "many orders of magnitude" greater than the criminal penalty. *Id*. at 340.

The fines assessed under the Tree Ordinance in this case fail both tests. First, there is no public harm at issue in this case. Canton concedes that removing trees from private property does not, of itself, constitute a nuisance and that there is no evidence that the tree removal in this case harmed or otherwise injure F.P.'s neighbors. Dep. of L. Thurston, ECF No. 35-10, Page ID 796. The only harm that Canton argues in this case is that violation of a zoning ordinance is a *per se* public injury. But such an abstract injury cannot justify $47,898 in fines. *See Bajakajian*, 524 U.S. at 339 (government's inherent offense in having its laws violated not sufficient).

Second, the fine in this case is grossly excessive in comparison to the maximum criminal penalties available for the same offense. In *Bajakajian*, a forfeiture of $357,144 was considered "grossly" excessive because it was seventy times larger than the maximum criminal penalty. *Bajakajian*, 524 U.S. at 339. Here, the maximum criminal penalty for violating the Tree Ordinance is $500, but the civil fines sought against F.P. under that same ordinance for removal of only a fraction of

trees on the property are $47,898 - nearly 100-times greater than the maximum criminal penalty. Accordingly, such a level of disproportionality cannot pass under *Bajakajian*.

CONCLUSION

For the foregoing reasons, this Court should (1) affirm the district court's judgment that the Tree Ordinance is an unconstitutional exaction; (2) affirm the district court's judgment that the Tree Ordinance is a regulatory taking under *Penn Central*; (3) reverse the district court's judgment that the Tree Ordinance is not a *per se* taking under *Horne*; (4) reverse the district court's judgment that the Tree Ordinance is not *per se* taking under *Loretto*; (5) reverse the district court's judgment that the Tree Ordinance is not an unreasonable seizure under the Fourth Amendment; and (6) reverse the district court's judgment that payments sought by Canton were not excessive fines under the Eighth Amendment.

In the alternative, should this Court simply affirm on the regulatory takings or exactions claims without reaching F.P.'s cross-claims, this Court should nonetheless vacate the district court's judgment on the *per se* takings, seizure, and Eighth Amendment claims to prevent those unnecessary judgments from having *res judicata* effects. *See Camreta v. Greene*, 563 U.S. 692, 715, (2011) (Breyer and Sotomayor, concurring); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 335 (1980) (noting past practice of finding jurisdiction for the limited purpose of

vacating prejudicial portions of a lower court judgment when the appellant is otherwise a prevailing party)*; Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939) (same).

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), the undersigned hereby certifies that this brief complies with the type-volume limitation found at Fed. R. App. P. 32(a)(7)(B). It contains 13,214 words and has been prepared in Microsoft Word, using a proportionally spaced type-face using Times New Roman in 14-point font.

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NOS. 20-1447, 20-1466

IN THE COURT OF APPEALS
FOR THE SIXTH JUDICIAL CIRCUIT
CINCINNATI, OHIO

F.P. DEVELOPMENT, LLC, a Michigan Corporation,
Plaintiff-Appellee/Cross-Appellant,

v.

CHARTER TOWNSHIP OF CANTON, MICHIGAN,
a Michigan Municipal Corporation,
***Defendant-Appellant/Cross-Appellee*.**

On Appeal from the Eastern District of Michigan
Cause No. 2:18-cv-13690

APPENDIX
APPELLEE/CROSS-APPELLANT'S
DESIGNATION OF THE RECORD ON APPEAL

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Pursuant to 6 Cir. R 28(b)(1)(A)(i), Appellee/Cross-Appellant hereby designates the following filings in the district court's record as items being part of the pertinent Record on Appeal:

Document Description	Record Number	Page IDs
Complaint	1	1-35
Counter-Complaint	13	89, 95, 127-132
Plaintiff/Counter-Defendant's Motion for Summary Judgment	26	366-367, 372, 388
Motion to Dismiss, for Judgment on the Pleadings and for Summary Judgment of Defendant Canton	29	523-549
Defendant/Counter-Plaintiff's Response to Plaintiff/Counter-Defendant's Motion for Summary Judgment	34	677
Plaintiff's Response Brief in Opposition to Defendant's Motion to Dismiss and Motion for Summary Judgment	35	748-802

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed on December 10, 2020, with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the CM/ECF system.

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