Nos. 25-1703/25-1705/25-1754

United States Court of Appeals for the Sixth Circuit

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

Plaintiffs - Appellees (25-1703/25-1705)/Cross-Appellants (25-1754)

v.

TOWNSHIP OF PENINSULA, MI,

Defendant - Appellant (25-1703)/Cross-Appellee (25-1754)

PROTECT THE PENINSULA, INC.

Intervenor - Appellant (25-1705)/Cross-Appellee (25-1754)

Appeal from the United Stated District Court
Western District of Michigan, Southern Division
Honorable Paul L. Maloney

APPELLEES/CROSS-APPELLANTS' OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICUS CURIAE

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INTRODUCTION

A motion for leave to file an amicus brief must state "(A) the movant's interest; and (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3). The amicus also must disclose whether other parties or groups contributed to the brief. Fed. R. App. P. 29(a)(4)(E). Failure to make those disclosures requires that leave to file the briefs be denied. *Fharmacy Recs. v. Nassar*, 465 F. App'x 448, 451 n.1 (6th Cir. 2012).

Assuming the amicus passes this hurdle, the Court has discretion to accept an amicus brief where "the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice." *United States v. State of Mich.*, 940 F.2d 143, 165 (6th Cir. 1991) (citation omitted). "An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court," but an "*amicus curiae* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored." Fed. R. App. P. 29, Committee Notes on Rules—1998 Amendment (quoting Sup. Ct. R. 37.1). The Court need decide "whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in

chambers). That is more likely to happen where a party is "inadequately represented," where "the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case," or where "the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide." *Id.*

Absent those special circumstances, "leave to file an amicus curiae brief should be denied." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers). Leave should also be denied where amicus briefs are "used as a means of evading the page limitations on a party's briefs." *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003). And leave should be denied when "the proposed amicus briefs merely announce the 'vote' of the amici on the decision of the appeal." *Voices for Choices*, 339 F.3d at 545.

ARGUMENT

The Court should reject IMLA's amicus brief. To start, IMLA has arguably failed to meet its disclosure requirements under Rule 29(a)(4)(E). Regardless, IMLA's brief is not helpful. The record below is long, but IMLA ignores or misstates significant portions of it. And, ultimately, IMLA's brief is merely a recitation of Peninsula Township's arguments without a showing that Peninsula Township is inadequately represented, that IMLA has a direct interest in a similar case, or that IMLA has a unique perspective. Without any of these, the amicus brief

is just a way to expand the Township's word count and cast IMLA's vote in this case.

A. IMLA must clarify its disclosure statement.

To comply with Federal Rule of Appellate Procedure 29(a)(4)(E), IMLA certified "that party or party's counsel made a monetary contribution intended to fund the preparation of submission of this brief." (Doc. 36, page 9, n.1.) This was either a typo that should have said "that no party or party's counsel …" or it was an incomplete disclosure omitting which party or its counsel contributed to the brief. Appellees/Cross-Appellants assume it was the former, but IMLA should clarify or have its brief stricken for failure to comply with the disclosure requirements. *See Fharmacy Recs.*, 465 F. App'x at 451 n.1.

B. IMLA's proposed brief repeats existing arguments and is based on ignorance of the record.

Peninsula Township and PTP each filed nearly 18,000 word opening briefs. Those briefs, collectively, raise more than twenty issues and often argue the same point. As explained below, IMLA's brief rehashes those same arguments and even cites the Township's brief as authority on multiple occasions, which confirms that its proposed brief is a "mere conduit for the views of" Peninsula Township. *See* 16AA Charles A. Wright et al., Federal Practice and Procedure § 3975 (4th ed. 2008) ("an amicus ought to add something distinctive to the presentation of the issues, rather than serving as a mere conduit for the views of one of the parties.") Leave

should be denied because IMLA "essentially duplicates a party's brief." *Voices for Choices*, 339 F.3d at 544.

IMLA's brief also suggests that IMLA is serving as further mouthpiece for the Township. "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d, 1062, 1063 (7th Cir. 1997) (citing *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991)); *see also Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) ("amicus briefs are often used as a means of evading the page limitations on a party's briefs.").

1. IMLA repeats erroneous argument that the Constitution takes a back seat to zoning.

Mirroring PTP (Case 25-1705, Doc. 33, p. 28), IMLA's core argument is that a federal court has no authority to review local zoning. (Doc. 36, pp. 20-24.) But the suggestion that a local zoning ordinance is free to violate the Constitution "completely lacks merit." *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992). That argument "is so devoid of legal foundation as to be frivolous, and its attempt to exalt the [the local government's interests] over the [United States] Constitution is fatuous." *Id*. (quoting *Nobby Lobby, Inc. v. City of Dallas*, 767 F.

Supp. 801, 820 (N.D. Tex. 1991)). To suggest otherwise is a "constitutionally offensive argument …." *Nobby Lobby*, 767 F. Supp. at 820.

Avoiding those basic principles, IMLA selectively quotes various cases. For example, IMLA cites *Ferguson v. Skrupa*, 372 U.S. 726 (1963), to argue that a federal court should defer to local governments. (Doc 36, p. 22.) But IMLA fails to note that, just three sentences after the language IMLA cites, the Court clarified: "It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'" *Ferguson*, 372 U.S. at 730-31. *Ferguson* does not hold that zoning ordinances are not subject to constitutional review.

Similarly, IMLA cites *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985), to assert that the "trial court improperly presided over this case as a 'super-zoning board' despite the strong admonition in caselaw not to do so." (Doc 36, p. 12.) But *Raskiewicz* did not scrutinize whether a local ordinance was unconstitutional. Instead, a developer sued after being denied a permit and claimed the planning commission was biased and acted in bad faith. *Raskiewicz*, 754 F.2d at 44. That is not what happened here.

IMLA cites other, similar run-of-the-mill zoning cases like *Schenck v. City of Hudson*, 114 F.3d 590 (6th Cir. 1997), *Laurel Hill Cemetery v. City and County of*

San Francisco, 216 U.S. 358 (1910)[1] and *Brae Burn, Inc. v. City of Bloomfield Hills*, 86 N.W.2d 166 (Mich. 1957), where a developer challenged zoning decisions as arbitrary and unreasonable. (Doc. 36, pp. 20-21.) These are not Section 1983 civil rights cases. Yet even those cases recognize that local ordinances are inferior to the Constitution. *See, e.g.*, *Brae Burn*, 86 N.W.2d at 170 ("This is not to say, of course, that a local body may with impunity abrogate constitutional restraints.").

At bottom, federal courts have authority to review a local zoning ordinance to determine whether it violates the Constitution. IMLA's suggestion to the contrary is wrong and unhelpful.

2. IMLA misrepresents the District Court's vagueness ruling.

Like Peninsula Township (Case No. 25-1703, Doc. 54, pp. 37-50) and PTP (Case No. 25-1705, Doc. 33, pp. 53-62), IMLA contends that the District Court got its vagueness ruling wrong. (Doc. 36, pp. 28-31.) IMLA even says it is "deeply troubled" by the District Court's ruling and that Peninsula Township should not be liable merely "because public officials hold differing views about the meaning of words or phrases in a zoning ordinance in effect for thirty years." (Doc. 36, p. 30.) Although IMLA announces its "vote" on this issue, *Voices for Choices*, 339 F.3d at 545, IMLA is wrong.

[1] *Laural Hill* was decided 116 years ago, well before civil rights jurisprudence developed.

The District Court unequivocally did not rest its decision on deposition testimony (although the deposition testimony certainly confirmed that no one knew what a Guest Activity Use was). Below, the Township argued the District Court "should have *only* looked at the text of the Ordinance on its face, rather than the depositions of the Township representatives who testified about the interpretation of 'Guest Activity Use.'" (R. 211, Page ID # 7812 (emphasis in original).) The District Court responded: "First, the Court finds that it correctly reviewed the deposition testimony of the Township representatives as a tool of statutory interpretation because their testimony established the Township's varying interpretations of the definition of 'Guest Activity Use.'" (*Id.*) The District Court, however, then found that it need not have reviewed deposition testimony because the ordinance was vague on its face:

> even if the Court only reviewed the text of the Ordinance on its face, the term is clearly vague. "Guest Activity Use" is defined as "Activities by persons who may or may not be registered guests." See § 8.7.3(10)(u)(2). It is not necessary for the Court to utilize tools of statutory interpretation to find that this definition, which encompasses quite literally all activities (activities that do involve registered guests as well as activities that do not involve registered guests), is vague. And although the Township asserts that the activities listed—wine and food classes, cooking classes, meetings of non-profit groups, and meetings of agricultural groups—are the only permissible Guest Activity Uses, the Township Ordinances fail to state that this list of Guest Activity Uses is exhaustive. The Court thus rejects the Township's arguments regarding the vagueness of the term "Guest Activity Use."

Id. And if there were any doubt, the District Court reiterated its ruling when PTP asked to set the ruling aside; "[l]ooking at the Township Ordinances on their face, the term 'Guest Activity Use' is vague and it is unconstitutional for the reasons that the Court has previously articulated[.]" (R. 301, Page ID # 10698.)

IMLA does not reference R. 211 or R. 301 because it apparently did not read the entire record. That lack of context again proves why IMLA's brief will not help the Court and why leave should be denied.

3. IMLA duplicates the Township's damages arguments about net profits, misrepresents the record on a COVID-19 reduction, and makes an inappropriate reference to the Township's ability to pay.

Like the Township (Case 25-1703, Doc. 54, pp. 51-78) and PTP (Case 25-1705, Doc. 33, pp. 62-67), IMLA contests the District Court's award of damages. Its arguments either rehash the arguments already made in the combined 32 pages of primary briefing on the topic, ignore the record, or misstate Michigan law.

a. The District Court properly understood and applied net profits.

IMLA's primary argument—identical to the Township's argument—is that Eric Larson should have used net profits instead of gross profits. IMLA asserts that the District Court should have followed *J&B Entertainment v. City of Jackson, Mississippi*, 720 F. Supp. 2d 757 (S.D. Miss. 2010), to determine lost profits. (Doc. 36, pp. 31-32.) While a Mississippi case has questionable value here, its holding

does not dictate a contrary result. The *J&B* court explained what must be deducted to calculate recoverable profits:

> Variable costs related to lost business opportunities (e.g., labor, utilities, etc.) must be deducted from a gross profit estimate. Fixed overhead costs that would have been incurred under any circumstance (e.g., depreciation, rent, etc.) need not be.

Id. at 765. Larson's explanation mirrored *J&B*:

> Net profit includes all income and all expenses. So in this particular case, there are all sorts of expenses that are in what we call SGNA or operating expenses, such as rent of land or chemicals or netting or property taxes that are essentially fixed costs that have already taken place. These activities in here, these elements of damages, are ancillary to that. So I'm really looking at understanding is the incremental profit and the incremental costs, so profit and variable costs.

(R. 609, Page ID # 25187.) In other words, the Wineries already owned the land and had the buildings and the infrastructure necessary to host events. The actual cost of the event was not a significant increment. The District Court heard testimony from Winery witnesses on the issue, found them credible and found it was "easily conceivable that the Wineries could host small and large events without an increase in overhead costs." (R. 623, Page ID # 31475-76.) The District Court also found that Larson's testimony "was subject to cross-examination and pretrial scrutiny. Larson and the Winery representatives explained at trial why the gross profit figures make sense: there would be no change in overhead costs, or the costs would be baked into the event pricing." (*Id.*, Page ID ## 31477-78.)

Ultimately, the flaw in IMLA's "objection is easily exposed." *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 474 (6th Cir. 1996). The method IMLA "appears to advocate contemplates calculating net profits based on [the Wineries'] overall economic performance instead of on the basis of the transactions lost to [the Wineries]." *Id.* That theory of damages "would not place [the Wineries] in as good a position as [they] would have been if the alleged tort had not occurred." *Id.*[2] That rationale aligns with the general purpose of damages under Section 1983, to "compensate persons for injuries caused by the deprivation of constitutional rights." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992).

b. The District Court properly understood and accounted for COVID-19 reductions.

IMLA also errantly asserts the District Court did not consider the effects of COVID-19 in calculating damages. (Doc 36, p. 26.) Yet the District Court cited Larson's trial testimony and recognized that he had already applied a COVID-19 discount. *See* R. 618, Page ID # 21071 ("he applied a 55% reduction for 2020 to

[2] *See also Northwoods Mfg., Inc. v. Linsmeyer*, No. 326551, 2016 WL 3004419, at *6 (Mich. Ct. App. May 24, 2016) (affirming damages where "the expert testified that Northwoods' historical net profits were akin to its gross profits because the company did not have a lot of 'below the line' expenses"); *Davidson v. Gen. Motors Corp.*, 357 N.W.2d 59, 61 (Mich. Ct. App. 1984) ("Defendant also claims that the use of 'variable gross profit' figures to calculate damages was improper. In his opinion granting remittitur, the trial judge stated that this loss figure 'was equated to a loss of net profit'. We agree that this equation can be drawn without substantially overstating net profit.").

account for lost sales due to COVID" (citing R. 609, Page ID # 25065)). Again, IMLA appears to not have studied the record, further demonstrating why its brief offers no help.

c. The Township's ability to pay is irrelevant.

IMLA also asks that the damage award should be set aside because otherwise the Township will need to sell assets, cut services, and reduce staff salaries. (Doc. 36, p. 27.) That argument is irrelevant to this appeal of a compensatory damages award. "A Defendant's financial status may generally be considered by a jury in determining a level of punitive damages if such are potentially due, but if unrelated to this point such evidence would be irrelevant and should be excluded." *Sullivan v. Detroit Police Dep't*, No. 08-CV-12731, 2009 WL 1689643, at *3 (E.D. Mich. June 17, 2009) (citing *Johnson v. Howard*, 24 F. App'x 480, 488 (6th Cir. 2001)).

Yet even if the Township's ability to pay was relevant, IMLA's assertions are simply wrong. The "sole remedy" to collect any money judgment against a Michigan township is to place the judgment on the tax rolls, not empty the Township's bank accounts. *Payton v. City of Highland Park*, 536 N.W.2d 285, 286 (Mich. App. 1995) (citing Mich. Comp. Laws § 600.6093). The Township could also issue a judgment bond. *See* Mich. Comp. Laws Ann. § 600.6097. In either case, IMLA's arguments about Michigan law are wrong and do not help this Court.

4. IMLA duplicates commercial speech arguments.

Like Peninsula Township (Case 25-1703, Doc. 54, pp. 85-86) and PTP (Case 25-1705, Doc. 33, pp. 34-49), IMLA also attacks the commercial speech rulings. IMLA's main objection is the District Court's criticism of the deposition testimony by Township officials. Yet IMLA ignores that it was the Township's burden of proof on the *Central Hudson* factors: "'a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will alleviate them to a material degree.'" *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)). "[T]he government must come forward with some quantum of evidence, beyond its own belief in the necessity for regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals." *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007).

Defendants did not call a single fact witness or introduce any "studies, empirical data or professional literature" necessary to link their proffered interest to the challenged ordinance language. *See Interstate Outdoor Advertising v. Zoning Bd. of the Tp. Of Cherry Hill*, 672 F. Supp. 2d 675, 679 (D.N.J. 2009). IMLA's brief is not helpful because it is not making any arguments tied to the legal standard.

IMLA also misrepresents Supervisor Manigold's testimony, as he admitted that he had no idea how the PTZO advanced the Township's identified interests:

Ordinance	**Testimony**
8.7.3(12)(j): Winery logo requirement.	Q: "[W]hat is the harm of selling a packaged food, for example, mustard, without the winery's logo on it? What is the harm to the Township? A. "I don't see any." Manigold Transcript, R. 611-154, Page ID.27934.
8.7.3(12)(k): Sign/advertising prohibition.	Q: [C]an you think of any way that this promotes a government interest of Peninsula Township? A. No. … Q. [T]here's no harm you can think of to the government that…this is trying to prevent, right? A. Right. R. 611-154, Page ID.27937-38.
6.7.2(19)(a): Restaurant prohibition.	Q: [H]ow is one of those four government interests…furthered by not allowing a farm processing facility to have a restaurant? A. I don't know that it's furthered by not having a restaurant. Q: How does this further one of your governmental interests, and you said, "I don't see how it does." Is that right? A. Yeah, I don't. We just don't want, and it's very clear, restaurants or bars. … Q. [W]hich of these four interests that you have identified does it further? How does not having a restaurant prevent ag land from becoming houses? A. Ag land from becoming houses, I don't think that's comparable. Q. Because it doesn't, right? A. Right. Q. Is there any other harm you can think of? A. No. R. 611-154, PageID.27941-44.
6.7.2(19)(b)(1)(iv): Food restriction.	Q. I'm assuming you can't tell me … how this furthers the government's interest? A. No, I don't. … Q How does this remedy a harm…?

	A. I don't know. R. 611-154, PageID.27956.
6.7.2(19)(b)(1)(v): Merchandise restriction.	Q: [H]ow does limiting the sale of merchandise to logoed items that relate to fresh or processed agriculture … further one of these four governmental interests? A. I don't know. … Q: do you know what the harm is the government was trying to prevent by having this ordinance? A. No. R. 611-154, PageID.27957-58.
6.7.2(19)(b)(6): Facility size restriction.	Q. [Y]ou're limiting the size of the retail space there, right? A. Yes. Q. Why? A. It's designed to sell the person's product from the peninsula, and that, that's been determined to be their logoed items. Was that number too high or too low? We can always change …. Q. Is this just a number they picked out of a hat? A. I believe it. Q. Okay. There's no basis for that number? A. I couldn't point it to you. R. 611-154, PageID.27962-63.
8.7.3(10)(u)(1)(b): Required promotion of Peninsula agriculture.	Q. [H]ow does this ordinance further one of the four governmental interests…? A. … I can't relate it to the four. Q. … you can't tell me the harm it was trying to prevent? A. No. R. 611-154, PageID.27965.
8.7.3(10)(u)(1)(d): Guest Activities restriction.	Q. [D]o you know what it means? A. No. Q. … I'm assuming you can't tell me how this furthers -- A. Nope, nope. Q. -- a government interest? A. No. Q. And you can't tell me what harm this is intended to prevent? A. No, I can't. R. 611-154, PageID.27965.

8.7.3(10)(u)(2)(b): 501(c)(3) meeting restriction.	Q. [How does] preventing 501(c)(3)s from out of Grand Traverse County from holding meetings … further any of those four governmental interests? A. I don't know. … Q. What is the harm of … a meeting at a Peninsula Township winery chateau? … A. I don't know that there is a harm. R. 611-154, PageID.27976-98.
8.7.3(10)(u)(2)(c): Meeting prohibition.	Q. [H]ow does limiting who can use meeting rooms to just ag groups … further any of these four governmental interests? A. I guess my answer would be "I don't know" all the way through. … Q. [Y]ou don't know on interest, you don't know on the harm to be prevented, you don't know on what less-restrictive means? A. Hmmm-mmm. R. 611-154, PageID.27979.
8.7.3(10)(u)(5)(g): Amplified music prohibition.	Q. [T]he prohibition on amplified instrumental music has nothing to do with the four governmental interests …? A. I can't, I can't say that it does. R. 611-154, PageID.28007.

The Township and PTP could have called witnesses or introduced evidence on the *Central Hudson* factors, but did not. IMLA's brief does not change the evidentiary record, and its desire to change the outcome is not relevant. *See Sony Corp of Am. v Universal City Studios, Inc.*, 464 U.S. 417, 434 n. 16 (1984) ("The stated desire of amici concerning the outcome of this or any litigation ... are not evidence in the case, and do not influence our decision[.]").

C. The remainder of IMLA's brief is riddled with mistakes that ignore the record, improperly argue credibility findings, and impermissibly attempt to introduce new evidence and make new arguments.

Again trying to voice its "vote," IMLA resorts to attacking the District Court's impartiality. These assertions again misconstrue the record and are unhelpful.

For instance, IMLA contends that the District Court "infused its own parochial views into this litigation" when [the court] determined that the intent of the PTZO was not to preserve farmland or agricultural character, but that the "provisions were designed to keep land prices lower so the Township could purchase more development rights, which would again, protect NIMBY landowners." (Doc 36, p. 22.) But that finding came directly from the record. PTP's expert witness, Dr. Thomas Daniels, testified that the value of agricultural land should be kept low so that Peninsula Township could acquire it through its PDR program. (Daniels Testimony, R. 604, Page ID # 23974.) Gary McDowell, the retired Executive Director of Michigan's Department of Agricultural and Rural Development, criticized Dr. Daniel's testimony: "[a]nd the one part I was really surprised at is when he talked about trying to reduce the price of farmland. I've just never heard of that before." (R. 609, Page ID # 25231.) McDowell continued: "we're always trying to increase land values, that's so important for a farmer, of course, when you retire, that's your retirement." (*Id.*)

IMLA also ignores the next sentence in the Bench Opinion where the District Court stated, "Mr. McDowell testified that to preserve agricultural, farms need to be profitable and have the opportunity to engage in typical accessory uses and marketing." (R. 623, Page ID # 31463.) The District Court then concluded that "[t]he record does not show that the regulations directly advance the Township's purported interest." (*Id*.) In sum, there was nothing "parochial" about the District Court's analysis—it was a direct response to the evidence.

Next, IMLA complains the District Court "veered far beyond impartially evaluating the facts and applying the law …[r]evealing an obvious disdain for the Township and its zoning decisions." (Doc. 36, p. 12.) But this was a bench trial, and the District Court was the finder of fact. It is supposed to make credibility determinations. As the Supreme Court noted:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.

Liteky v. U.S., 510 U.S. 540, 550-51 (1994). The District Court was not biased because it heard the evidence and reached a decision. "If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." *Id*.

Finally, IMLA spends five pages of argument discussing winery economics. (Doc 36, p. 15-20.) IMLA is not an organization focused on the wine industry nor does it claim to have expertise therein. Instead, IMLA found some articles that it seeks to pass off as expert testimony. This is merely an attempt to supplement the record and make a new argument to critique the District Court's damages reasoning. IMLA cannot, however, supplement the record because "the trial on the merits should be the 'main event' … rather than a 'tryout on the road."' *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). *See also Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 501 (6th Cir. 2017) (en banc) ("Now the defendants and *amici* urge reversal based in part upon facts that the defendants could have presented to the district court, but chose not to. They are not entitled to burnish the record on appeal." (citations omitted)). Nor can IMLA make new arguments not raised below. *Cellnet Commc'ns, Inc. v. F.C.C.*, 149 F.3d 429, 443 (6th Cir. 1998) ("While an amicus may offer assistance in resolving issues properly before a court, it may not raise additional issues or arguments not raised by the parties."). IMLA's attempt to introduce new evidence is not allowed.

CONCLUSION

Clearly, IMLA wants to support Peninsula Township. That desire, however, is not justification to participate as an *amicus curiae*. This Court should deny IMLA's motion because IMLA's proposed brief does not meet the standard under

Federal Rule of Appellate Procedure 29 to be "useful" or "necessary to the administration of justice." *State of Michigan.*, 940 F.2d at 165.

Respectfully submitted,

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Dated: February 20, 2026

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CERTIFICATE OF COMPLIANCE

I certify that this 4,559-word brief complies with the Court's type-volume limitations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 20, 2026, I electronically filed this document with the Clerk of the Court using the ECF system, which will send notification of the filing to all ECF filing participants.

Respectfully submitted,

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