UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

MARYVILLE BAPTIST CHURCH, INC., and DR. JACK ROBERTS, Plaintiffs, v. ANDY BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky, Defendant.	)	CASE NO. 3:20-cv-00278-DJH

PLAINTIFFS' MOTION FOR ATTORNEY'S FEES AND NONTAXABLE EXPENSES

Plaintiffs, Maryville Baptist Church, Inc. and Dr. Jack Roberts, pursuant to 42 U.S.C. § 1988, Federal Rule of Civil Procedure 54(d)(2), and Local Rules 7.1 and 54.4, move the Court for an order awarding Plaintiffs $390,556.88 as and for reasonable attorney's fees and $1,554.84 in nontaxable expenses.[1] By virtue of the injunctive relief Plaintiffs obtained in both this Court and the Sixth Circuit, Plaintiffs prevailed in their challenge of the restrictions on their assembly for religious worship imposed by the COVID-19 executive orders and guidances issued by Defendant Governor Beshear and his administration. As prevailing parties, Plaintiffs are entitled to recover their costs, attorney's fees, and nontaxable expenses from Governor Beshear under 42 U.S.C. § 1988. Plaintiffs additionally state as follows in support of this motion:

RELEVANT FACTS

Plaintiffs have sincerely held religious beliefs, rooted in Scripture's commands (e.g., *Hebrews* 10:25), that followers of Jesus Christ have a divine obligation to assemble themselves

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[1] Contemporaneously herewith Plaintiffs file their Bill of Costs seeking $2,332.00 in taxable costs.

together weekly to worship God, and that the essential purpose of their church (in Greek "ekklesia," meaning "assembly") is to assemble with other Christians to worship God in obedience to Scripture. (V. Compl., Doc. 1, ¶¶ 122–123.) Beginning with his Executive Order 2020-15 issued March 6, 2020, declaring a state of emergency in Kentucky, Governor Beshear and his cabinet issued a series of executive orders and guidances in response to COVID-19 (the "Orders"), extensively restricting when, where, and how Kentuckians may exercise their liberties, including assembling for religious worship according to conscience, while exempting myriad businesses and non-religious activities from gathering restrictions. (Stipulation of Facts Not in Dispute ("Stipulation"), Doc. 29, ¶¶ 1–2.) The Orders included the March 19, 2020 Order of the Cabinet for Health and Family Services (the "Gatherings Order"), prohibiting "mass gatherings," which was defined to include religious worship services.

On Good Friday, April 10, 2020, Governor Beshear held a press conference to announce that he had instructed the Kentucky State Police to collect the license plate information of all people who attended church on Easter Sunday in violation of the Orders and that the identifying information would be forwarded to local health departments to impose mandatory quarantines on the attendees. (V. Compl., Doc. 1, ¶ 39.) The same day, Governor Beshear issued a press release advising that Easter Sunday church attendees would receive notices that their church attendance is a misdemeanor violation of the Orders. (V. Compl. ¶¶ 40–41; Doc. 1-9.)

On the morning of Easter Sunday, April 12, pursuant to the Orders and Governor's press statements, Kentucky State Police Troopers stationed themselves at Plaintiffs' Maryville Baptist Church, recorded the license plates of vehicles in the parking lot, and placed copies of an official notice of violation on both occupied and unoccupied vehicles, including the vehicle of Plaintiff Dr. Jack Roberts, and including the vehicles of those attending the worship service only by "drive-

in"—staying in their cars while the service was broadcast to the parking lot by loudspeaker. (Stip., ¶ 4; V. Compl. ¶¶ 43–44, 47–48.) The notice advised the vehicles' owners and occupants of their criminal violation of the Orders by being present in the parking lot; the requirement for mandatory self-quarantine of their entire households for 14 days on pain of further enforcement; and that their attendance at church would be subject to public disclosure under Kentucky's open records laws. (V. Compl., ¶¶ 44–46; Doc. 1-11.)

Pursuant to the notice, on April 15 Dr. Roberts received a letter and mandatory self-quarantine agreement on the letterhead of the Kentucky Cabinet for Health and Family Services Department for Public Health, requiring him and his household to quarantine in their home for 14 days, solely because Dr. Roberts' car was parked at the church during its Easter service. (Stip. ¶ 5; V. Compl. ¶ 52; Doc. 1-12.) The quarantine letter purported to require each member of the household to sign an acknowledgement of the requirements of the quarantine, including reporting a daily temperature reading to the Bullitt County Health Department, not going to work, school, church, or any public place, and not traveling outside Kentucky or Bullitt County without government approval—all on pain of further enforcement actions by "public health authorities." (V. Compl. ¶¶ 54–55; Doc. 1-12.)

The Governor's Orders prohibiting assembly for worship and the enforcement of his Orders against Plaintiffs, *inter alia*, burdened Plaintiffs' exercise of their religion every Sunday the Orders were in effect by subjecting Plaintiffs and congregants of Plaintiffs' church to criminal and other sanctions for assembling for worship according to the dictates of their consciences. (V. Compl., ¶¶ 124–136.)

CASE PROCEEDINGS

On April 17, 2020, Plaintiffs commenced this action by filing their Verified Complaint (Doc. 1), challenging the Orders' restrictions on religious worship, and moved the Court for a

temporary restraining order (TRO) and preliminary injunction against enforcement of the Orders' worship restrictions (Doc. 3). On April 18, the Court issued an Order denying Plaintiffs' motion for TRO and preliminary injunction (Doc. 9, the "TRO/PI Order"). On April 24, Plaintiffs appealed the TRO/PI Order to the Sixth Circuit. (Doc. 16.) On May 2, the Sixth Circuit granted Plaintiffs an emergency injunction pending appeal (IPA), finding Plaintiffs were "likely to succeed on [their] state and federal claims, especially with respect to the [worship] ban's application to drive-in services." (Doc. 23, PageID# 288.) On May 8, after remand from the Sixth Circuit, this Court granted Plaintiffs an IPA and preliminary injunction (Doc. 35, the "IPA/PI Order"), likewise finding that "Plaintiffs have a strong likelihood of success on the merits of their [state] KRFRA claim" (PageID# 578), and that "Plaintiffs are likely to succeed on the merits of their constitutional claims," because the Governor's orders could not survive the required strict scrutiny. (PageID## 578–580.) On May 9, the Cabinet for Health and Family Services issued an order amending its Gatherings Order to permit gathering for religious worship. (Doc. 36-1.) On May 10, the Governor filed the new order with the Court and asserted that it mooted Plaintiffs' case. (Doc. 36.)

On October 19, 2020, the Sixth Circuit dismissed Plaintiffs' appeal of the TRO/PI Order as moot, finding this Court's IPA/PI Order gave Plaintiffs what they sought in the appeal (Doc. 57-1, PageID# 752), and suggested that this Court consider whether Plaintiffs' case was moot. (PageID# 754.) This Court ordered briefing on the mootness issue. (Doc. 58.) After briefing (Docs. 60–63), the Court entered an order dismissing the case as moot "[i]n light of the Kentucky Supreme Court's decisions in *Cameron v. Beshear*, [628 S.W.3d 61 (Ky. 2021)], and *Beshear v. Goodwood Brewing Co.*, No. 2021-SC-0126-I, 2021 Ky. LEXIS 239 (Ky. Aug. 21, 2021), and the legislation addressed therein." (Doc. 68.) The referenced legislation was a series of four enactments by the Kentucky General Assembly during the 2021 regular session restricting the Governor's emergency

powers under the Kentucky Revised Statutes (KRS), including KRS Chapter 39A on which the Governor's March 6, 2020 emergency declaration and subsequent Orders were ostensibly based. *See Cameron*, 628 S.W.3d at 66. Three of the four enactments took effect on February 2, 2021. Assuming these enactments prohibit the challenged worship restrictions in the Governor's Orders as of February 2, 2021, Plaintiffs enjoyed 40 consecutive Sundays free of the Orders' worship restrictions under the Sixth Circuit's May 2, 2020 IPA and this Court's May 8, 2020 IPA/PI Order (collectively, the "Injunctions").

ARGUMENT

I. Plaintiffs are prevailing parties because the Injunctions provided Plaintiffs court-ordered, material, and enduring relief.

Under 42 U.S.C. § 1988, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). While the entitlement to fees is couched in discretionary terms, "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (cleaned up). And as recently as 2010 the Sixth Circuit observed, "we have never (to our knowledge) found a 'special circumstance' justifying the denial of fees," and that "[i]t is 'extremely rare' to deny fees based on special circumstances in other circuits as well." *McQueary v. Conway*, 614 F.3d 591, 604 (6th Cir. 2010).

A plaintiff may be considered a prevailing party if he obtains a "court-ordered change in the legal relationship between the plaintiff and the defendant." *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (cleaned up). "Plaintiffs may be considered prevailing parties for attorney's fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the party sought in bringing suit." *Hensley*, 461 U.S. at 433. Thus, "[a] plaintiff crosses the threshold to 'prevailing party' status by

succeeding on a single claim, even if he loses on several others and even if that limited success does not grant him the 'primary relief' he sought." *McQueary*, 614 F.3d at 603. Where a plaintiff obtains only preliminary injunctive relief on a claim before a case is dismissed as moot, courts in the Sixth Circuit are to "apply a case-specific inquiry" to the prevailing party question, and "look for a court-ordered, material, enduring change in the legal relationship between the parties." *Miller v. Caudill*, 936 F.3d 442, 448 (6th Cir. 2019). The relief provided to Plaintiffs by the Injunctions render them prevailing parties.

A. The Injunctions effected a court-ordered change in the legal relationship between Plaintiffs and the Governor.

"[F]or the change to have been *court ordered*, the preliminary injunction must have caused it; it can't stem from [the Governor's] voluntary modification of [his] conduct." *Miller*, 936 F.3d at 448. The Injunctions effected a court-ordered change in the legal relationship between Plaintiffs and the Governor because the Injunctions prohibited the Governor (and all Commonwealth officials) from enforcing the Orders' worship restrictions. Prior to filing suit against the Governor, Plaintiffs were subject to the Orders' prohibitions on any gathering for religious worship and were subjected to actual enforcement of the worship ban against them and their congregants on Easter Sunday, resulting in ongoing obligations to public health officials on pain of criminal or other sanctions. The Sixth Circuit changed the legal relationship by issuing its IPA, in which it ordered: "The Governor and all other Commonwealth officials are hereby enjoined, during the pendency of this appeal, from enforcing orders prohibiting drive-in services at the Maryville Baptist Church if the Church, its ministers, and its congregants adhere to the public health requirements mandated for 'life-sustaining' entities." (Doc. 23, PageID #: 295.) Less than a week later, this Court ordered, in its IPA/PI Order: "The Governor and other Commonwealth officials are **ENJOINED** from enforcing the ban on mass gatherings as to in-person services at Maryville Baptist Church so long

as the church, its ministers, and its congregants adhere to public health requirements set by state officials." (Doc. 35 PageID # 580.) The Injunctions restrained the Governor; he did not restrain himself. Thus, the Injunctions provided Plaintiffs court-ordered relief.

B. The Injunctions provided material relief to Plaintiffs.

The Injunctions provided Plaintiffs material relief because the Injunctions directly benefitted Plaintiffs by altering how the Governor treated them. *See Miller*, 936 F.3d at 448. The Injunctions effectively terminated the pending Easter Sunday enforcement actions against them and their congregants and removed the specter of further enforcement actions on Sundays following the Injunction.

C. The Injunctions provided enduring relief to Plaintiffs.

1. The Injunctions ensured the Governor would never impose the *same* worship restriction scheme again.

The Injunctions provided enduring relief to Plaintiffs because the change effected by the Injunctions is irrevocable. *See Miller*, 936 F.3d at 448. The Governor has conceded that the Orders' gathering restrictions, as applied to places of worship, ended with the May 9, 2020 amendment to the Gatherings Order (issued the day after this Court's IPA/PI Order), and the Governor advised the Court that he abandoned the Gatherings Order altogether on December 13, 2020. (Doc. 62 at 1; Doc. 67 at 2–4.) Moreover, the Governor has represented to the Court that "it seems highly unlikely, and 'utterly bizarre' that the exact same restrictions under the same circumstances will be reimposed on worship centers, even if there is a spike in COVID-19 cases." (Doc. 62 at 2 (repeated in Doc. 67 at 4).) Thus, the change in the Orders' worship restrictions effected by the Injunctions is lasting and irrevocable, and Plaintiffs obtained all the relief they sought with respect to prohibiting enforcement of the Order's worship restrictions. (V. Compl. 48–49 (Prayer for Relief pts. A, B.i, ii, iii, v, vii).)

Plaintiffs' arguments to the Court that their *case* was not moot in no way undermines the enduring relief that makes them prevailing parties under § 1988. Plaintiffs' Prayer for Relief sought not only to prohibit the Governor's enforcement of worship restrictions under his existing Orders (V. Compl. 48–49 (Prayer for Relief pts. A, B.i, ii, iii, v, vii)), which the Injunctions provided, but also to prohibit enforcement of any future worship restrictions effected by "any future modification, revision, or amendment" of the Orders. (Prayer for Relief pts. A, B.iv.) Plaintiffs' arguments against mootness were primarily concerned with potential new or modified worship restrictions, as well as ambiguously mandatory language in the worship guidelines that replaced the worship restrictions in the Gathering Order (*see* Doc. 36-1 ("Faith-based organizations that have in-person services *must* implement and follow the Guidelines . . . ." (emphasis added))), and their nominal damages claim. (Doc. 61 at 5–15.) But the Governor, in his last word to the Court on mootness, stated unequivocally that the only remaining restrictions on worship after May 9, 2020, were merely "recommendations." (Doc. 67 at 2, 4.) Thus, in arguing that the enduring nature of the change from mandatory worship restrictions to mere recommendations mooted Plaintiffs' case, the Governor admitted Plaintiffs' prevailing party status.

2. The Injunctions effectively terminated the enforcement action already begun against Plaintiff Dr. Roberts and his congregants for attending worship on Easter Sunday.

At the Easter Sunday service at Plaintiffs' church, prior to the Injunctions, Plaintiff Dr. Roberts and other congregants were notified of official enforcement action against them under the authority of the Orders, threatening criminal liability and mandating continuing obligations to public health officials on pain of further enforcement actions. The Injunctions effectively terminated those enforcement actions by prohibiting any such enforcement based on gathering for religious worship, such that the one-year statute of limitations for prosecuting Plaintiff Dr. Roberts

or his church's congregants for violating the worship restrictions imposed by the Orders ran prior to the dismissal of this case for mootness. *See Roberts v. Beshear*, No. 20-cv-00054-WOB-CJS, 2021 WL 3827128, at *4 (E.D. Ky. Aug. 26, 2021) (concluding one-year statute of limitations applies to same Easter Sunday notices of enforcement against Plaintiffs' congregants in separate case brought by congregants). Moreover, given the Court's dismissal of this case on October 6, 2021, and the one-year statute of limitations for prosecuting a violation of the worship restrictions in the Orders, any risk of prosecution for violating the Orders for 26 Sundays—from Easter Sunday through October 4, 2020—has been conclusively defeated by the Injunctions and the passage of time. *Cf. McQueary*, 614 F.3d at 599. This protection from enforcement for 26 Sundays is legally irrevocable, and therefore enduring.

3. The Injunctions irrevocably secured 40 unique Sunday worship services from unconstitutional interference by the Governor.

The nature of Plaintiffs' Sunday worship is another case-specific dimension of Plaintiffs' victory secured by the Injunctions that demonstrates Plaintiffs prevailed under § 1988. Prior to the Orders, Plaintiffs engaged in weekly Sunday worship services as fulfillment of a divine obligation in Scripture, and in obedience to conscience, including the Easter Sunday service where the Governor launched his enforcement of the Orders against Plaintiffs. By virtue of the Injunctions, however, Plaintiffs enjoyed the completion of 40 weekly Sunday worship services (prior to the 2021 legislation the Court held mooted their claims) free from any specter of enforcement of the Orders' worship restrictions. The specific, spiritual benefit Plaintiffs and each of their congregants received from gathering for each unique, weekly Sunday worship service can never be undone, whether by the enactment of legislation, dissolution of the Injunctions, or dismissal of the case, or by any other event or circumstance. To be sure, in granting the IPA, the Sixth Circuit already

recognized the immeasurable benefit to Plaintiffs' congregants of assembling for in-person worship:

> Sure, the Church might use Zoom services or the like, as so many places of worship have decided to do over the last two months. But who is to say that every member of the congregation has access to the necessary technology to make that work? Or to say that every member of the congregation must see it as an adequate substitute for what it means when "two or three gather in my Name." Matthew 18:20 . . . . And it's exactly what the federal courts are not to judge—how individuals comply with their own faith as they see it.

Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 615 (6th Cir. 2020). For Plaintiffs, the obligation and desire to assemble for worship is regular, continuing, and certain. Each approaching Sunday presents a specific obligation to fulfill, and each completed worship service is of immeasurably enduring benefit.[2]

Thus, this case is not like *McQueary v. Conway*, where an individual who had protested at three military funerals in the past, and wanted to protest at more funerals—at some point—"in the future," obtained a preliminary injunction against enforcement of new Kentucky statutes that he claimed prohibited the kind of protest he desired to engage in. *See* 634 F. Supp. 2d 821, 822–824 (E.D. Ky. 2009). His case was mooted by the General Assembly's repeal of the statutes prior to his obtaining permanent relief. *Id.* at 824–830. Following an appeal and remand back to the district court to determine whether the protester prevailed by virtue of the preliminary injunction alone, *see* 614 F.3d 591 (6th Cir. 2010), the district court held he did not prevail because "the Plaintiff did not seek a preliminary injunction that would permit him to protest at a specific funeral or at a specific time and place," and, "[t]hus, the Plaintiff's claim for permanent relief did not become

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[2] *Cf.* R.C. Sproul, *Right Now Counts Forever* (May 1, 2007), https://www.ligonier.org/learn/articles/right-now-counts-forever ("[B]ecause God reigns, everything that happens today has consequences that last well into eternity.").

moot when a particular event occurred." 2012 WL 3149344, at *2 (E.D. Ky. Aug. 1, 2012), *aff'd*, 508 Fed. App'x 522 (6ht Cir. 2012). In contrast to a preliminary injunction temporarily securing an abstract right to protest funerals at some point in the future, the Injunctions Plaintiffs obtained here secured their concrete right to assemble for certain, scheduled worship, *every* Sunday, as soon as possible; and Plaintiffs, in fact, exercised that right *every* Sunday under the protection of the Injunctions. The immeasurable spiritual benefits Plaintiffs and their congregants received from each protected Sunday service is enduring.

II. The hours worked, hourly rates, and expenses incurred are reasonable.

A. Plaintiffs' attorney's fees are calculated using the lodestar method and are therefore presumed reasonable.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. The product of this multiplication constitutes the "lodestar" amount. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1985). "A 'strong presumption' exists that the lodestar figure represents a 'reasonable fee.'" *Id.* at 351 (quoting *Delaware Valley Citizens*, 478 U.S. at 351). Here, Plaintiffs have based their requested attorney's fees on the lodestar method, and they are therefore presumed reasonable as calculated.

In support of their requested fees, Plaintiffs have provided detailed time entries, personally and contemporaneously recorded by their attorneys and legal staff, which detail the specific tasks performed by each timekeeper. That detailed record (the "Time Report") is attached as Exhibit A to the Declaration of Horatio G. Mihet in Support of Plaintiffs' Motion for Attorney's Fees and Nontaxable Expenses ("Mihet Declaration"), filed contemporaneously herewith. Plaintiffs' requested lodestar fees can be summarized as follows:

SUMMARY OF TIME REPORT				
ATTORNEY		**HOURS**	**RATE**	**AMOUNT**
Horatio G. Mihet	HGM	114.30	$450.00	$51,435.00
Roger K. Gannam	RKG	309.40	$450.00	$139,230.00
Richard L. Mast	RLM	27.70	$375.00	$10,387.50
Daniel J. Schmid	DJS	193.30	$375.00	$72,487.50
Mathew D. Staver	MDS	68.30	$525.00	$35,857.50
Legal Asst	LGA	25.40	$120.00	$3,048.00
	TOTALS:	**738.40**		**$312,445.50**

(Mihet Decl. ¶ 26.)

B. The hourly rates requested are reasonable in the relevant market.

"A trial court, in calculating the 'reasonable hourly rate' component of the lodestar computation, should initially assess the 'prevailing market rate in the relevant community.'" *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 350 (6th Cir. 2000) (quoting *Blum v. Stenson*, 465 U.S. 886, 895 (1984)). According to the Sixth Circuit, this Court "should deem the 'relevant community for fee purposes to constitute the legal community within [the Court's] territorial jurisdiction; thus the 'prevailing market rate' is that rate which lawyers of comparable skill and experience can reasonably expect to command within the venue of [this Court]." *Adcock-Ladd*, 227 F.3d at 350.

As shown in the Mihet Declaration, the hourly rates requested by Plaintiffs' counsel are reasonable for attorneys of comparable qualifications and experience and are commensurate with the prevailing market rates for attorneys practicing complex constitutional litigation in the Western District of Kentucky. These rates are also consistent with rates awarded to attorneys in similar or similarly complex cases in Kentucky federal district courts and other district courts within the Sixth Circuit. *See, e.g.*, *Caudill Seed & Warehouse Co. v. Jarrow Formulas, Inc.*, No. 3:13-CV-

82-CRS, 2021 WL 863203, at *19 (W.D. Ky. Mar. 8, 2021) (recognizing reasonableness of partner rates ranging from $425 to $465 per hour for work in 2016 and 2917); *Hart v. Thomas*, No. 3:16-cv-00092-GFVT-EBA, 2020 WL 708449, at *2 (E.D. Ky. Feb. 10, 2020) (approving $375 per hour for ACLU attorney with 15 years' experience as of 2019); *Broad. Music, Inc. v. Lockhart*, No. 5:18-215-DCR, 2019 WL 1560873, at *2 (E.D. Ky. Apr. 10, 2019) (approving $393 per hour for partners in 2019); *Bourke v. Beshear*, No. 3:13-CV-00750-CRS, 2016 WL 164626, at *5–6 (W.D. Ky. Jan. 13, 2016) (approving rates from $325 to $750 per hour for ACLU attorneys, for work performed in 2013–2015); *Doe v. Ohio*, 2020 U.S. Dist. LEXIS 24826 (S.D. Ohio 2020) (approving rates for attorneys with comparable experience of $447.60 to $544.00 per hour); *Backpage.com, LLC v. Cooper*, No. 3:12-cv-00654, 2014 WL 12774231, at *2–3 (M.D. Tenn. May 22, 2014) (approving rates of $425 to $435 per hour for partner level work); *Hunter v. Hamilton County Bd. of Elections*, No. 1:10cv820, 2013 WL 5467751, at *16–17 (S.D. Ohio Sept. 30, 2013) (approving hourly rates of $250, $300, $400, and $420 for work performed in 2011–2012).

The reasonableness of the hourly rates requested is reinforced by Plaintiffs' disinterested and second declarant, Kentucky attorney Jason Nemes, who declares:

> Based on my experience as a lawyer who handles civil rights litigation, it is my opinion that these hourly rates are reasonable and in line with rates charged by other comparable Plaintiffs' attorneys in this legal market based on their respective years of experience, and are comparable to, and well within the range of fees charged by, lawyers of comparable experience and skill who have been licensed for the period of time that they were when the work in this matter was performed.

(Declaration of Jason Nemes in Support of Plaintiffs' Motion for Attorney's Fees and Nontaxable Expenses ("Nemes Declaration"), ¶ 6.)

Mr. Mihet's Declaration also establishes the reasonableness of the hourly rates requested based on the skill and experience of Plaintiffs' legal team, and also on the undesirability of taking on contingency fee litigation on behalf of political and cultural dissenters. (Mihet Decl. ¶¶ 19–24.) On this point, Mr. Nemes declares:

> I also take note of the importance of the issues raised by the Plaintiffs and advocated for by their attorneys in this litigation to all the citizens of the Commonwealth of Kentucky. And I recognize that not many attorneys were willing to take a case such as this during the middle of a pandemic, and that some of the very few other attorneys willing to engage in similar litigation in Kentucky were personally criticized and belittled by the Governor in public statements from his podium in the Capitol Building.

(Nemes Decl. ¶ 11.) Thus, both of Plaintiffs' declarants, and court decisions from Kentucky district courts and other district courts within the Sixth Circuit, establish that Plaintiffs' requested rates are reasonable in the relevant market.

C. The time expended by Plaintiffs' counsel was reasonable and reflects the exercise of billing judgment.

"Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434. But, "where a [l]itigant has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 434. Recovery for all hours is particularly appropriate where, as here, a party has obtained an excellent result concerning the relief he sought. *See, e.g.*, *id.* at 436 ("the most critical factor . . . is the degree of success obtained"); *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (same).

Here, the time expended by Plaintiffs' counsel is reasonable and reflects the exercise of billing judgment. As explained in the Mihet Declaration, this case was actively and vigorously

litigated, but Plaintiffs' counsel nonetheless took care to keep fees and costs down. (Mihet Decl. ¶¶ 10–11.) Furthermore, Plaintiffs' requested fees reflect the exercise of billing judgment. (Mihet Decl. ¶ 16.) Given the excellent results achieved by Plaintiffs and the quality of advocacy performed by Plaintiffs' counsel, the amount of time invested by Plaintiffs' counsel was reasonable and necessary, and is fully compensable. (Mihet Decl. ¶ 15; Nemes Decl. ¶¶ 10, 12, 14.)

D. The nontaxable expenses incurred are reasonable.

Section 1988 allows the recovery of all reasonable litigation expenses except routine overhead. *See Dowdell v. City of* Apopka, 698 F.2d 1181, 1192 (11th Cir. 1983). And the standard for reasonableness "is to be given a liberal interpretation." *Id.* As shown in the Mihet Declaration, all expenses incurred by Plaintiffs are reasonable under this standard. (Mihet Decl. ¶¶ 27–28.)

III. Plaintiffs are entitled to a fee multiplier of 1.25.

An enhancement of the lodestar calculation is permissible and warranted where, as here, "the lodestar does not adequately take into account a factor that may be properly considered in determining a reasonable fee." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010). "Fee enhancements are permissible in rare cases of 'exceptional success'" based on "twelve factors that a court may consider in determining whether a reasonable fee ought to include an augmentation." *Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 621 (6th Cir. 2007). These factors include, *inter alia*, the novelty of the questions presented, the undesirability of the case, and the preclusion of other employment. *See generally Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 717–18 (5th Cir. 1974). These factors alone support enhancement of Plaintiffs' fee in this case.

To say this case was undesirable is an understatement. Over the past year, Plaintiffs and their counsel have incurred the ridicule of numerous misguided people and groups who, like the Governor, believed that fundamental First Amendment rights are negotiable or expendable. Time limitations and preclusion of other employment were also significant factors, where seemingly

every procedural step had to be taken on an emergency basis. Plaintiffs' legal team worked literally around the clock at times, sacrificing not only other employment, but also sleep, weekends, holidays, vacations, and time with their families. (Mihet Decl. ¶ 22; Nemes Decl. ¶ 11.)

Based on these factors and others, the Court would be justified in applying a significant lodestar multiplier of 2 or more. Plaintiffs, however, seek a modest multiplier of 1.25, which is more than reasonable under all the circumstances. When applied to Plaintiffs' lodestar fee amount of $312,445.50, the 1.25 multiplier results in a total fee of $390,556.88.

CONCLUSION

For all of the foregoing reasons, the Court should grant Plaintiffs' motion and award Plaintiffs $390,556.88 for attorney's fees and $1,554.84 in nontaxable expenses, together with $2,332.00 in taxable costs as separately submitted to the Court in Plaintiffs' Bill of Costs.

Respectfully submitted,

s/ Roger K. Gannam
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF system which will effect service upon all counsel or parties of record.

DATED this December 14, 2021.

s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs