No. 22-5952

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARYVILLE BAPTIST CHURCH; DOCTOR JACK ROBERTS

Plaintiffs–Appellants

v.

ANDY BESHEAR,
in his official capacity as Governor of the Commonwealth of Kentucky

Defendant–Appellee

On Appeal from the United States District Court
for the Western District of Kentucky
In Case No. 3:20-cv-00278 before The Honorable David J. Hale

REPLY BRIEF OF PLAINTIFFS–APPELLANTS

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DISCLOSURE STATEMENT

Neither Plaintiff–Appellant is a subsidiary or affiliate of a publicly owned corporation, nor is there any publicly owned corporation, not a party to the appeal, that has a financial interest in its outcome.

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ARGUMENT

Since the Governor filed his brief in this case, the Court issued its attorney's fee decision in the related case *Roberts v. Neace*, No. 22-5985, 2023 WL 2857250 (6th Cir. Apr. 10, 2023). There, the Court disposed of all the arguments the Governor makes here in opposition to the Maryville Plaintiffs' fee claim. The *Roberts* decision is binding,[1] is based on the same material facts, and fully resolves this case. Like the *Roberts* plaintiffs, the Court should hold the Maryville Plaintiffs to be prevailing parties and reverse the district court's denial of the Maryville Plaintiffs' fee claim.

I. The Maryville Plaintiffs are prevailing parties because they obtained the same court-ordered, material, enduring relief as the prevailing *Roberts* plaintiffs.

As the Court explained in a previous decision, the Maryville Plaintiffs' claims and the *Roberts* plaintiffs' claims arose from the same facts. *See Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 563 (6th Cir. 2020) ("Maryville's Easter service produced two lawsuits, one brought by Maryville Baptist Church and its pastor [the Maryville Plaintiffs], the other brought by congregants of the same

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[1] *See Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019) ("Like most circuits, this circuit follows the rule that the holding of a published panel opinion binds all later panels unless overruled or abrogated en banc or by the Supreme Court.").

church [the *Roberts* plaintiffs].") And both sets of plaintiffs obtained court-ordered relief enjoining the Governor's orders against Maryville Baptist Church's indoor and outdoor (drive-in) worship services. For the *Roberts* plaintiffs, this Court granted an injunction pending appeal (IPA) enjoining the Governor's orders as to indoor worship services. *See Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) [*Roberts IPA*]. For the Maryville Plaintiffs, however, this Court the week before had enjoined the Governor's orders as to the church's outdoor, drive-in worship services, *see Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020) [*Maryville IPA*], and the district court further enjoined the Governor's orders as to the church's indoor worship services in a preliminary injunction (PI) order entered the day before the *Roberts IPA*, *see Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH-RSE, 2020 WL 2393359, at *3 (W.D. Ky. May 8, 2020) (*Maryville PI)*. (Br. 3–7.)

The Court has already concluded that the Governor ended his worship ban because of the injunctions obtained by the Maryville Plaintiffs, the *Roberts* plaintiffs, and the plaintiffs in another, unrelated case. *See Maryville Baptist Church*, 977 F.3d at 564; *see also Roberts*, 2023 WL 2857250, at *3 ("A defendant may not fairly claim that he voluntarily amended his behavior *after* a court enjoins his old ways."). And the Court has already concluded that, for the *Roberts* plaintiffs, their preliminary injunctive relief was sufficient to make them prevailing parties

because "it mainly turn[ed] on the likelihood-of-success inquiry and change[d] the parties' relationship in a material and enduring way." *Roberts*, 2023 WL 2857250, at *2 ("Gauged by these principles, the congregants prevailed."). Thus, because the Maryville Plaintiffs obtained the same injunctive relief as the *Roberts* plaintiffs, protecting their worship at Maryville Baptist Church, the Maryville Plaintiffs are on the same prevailing party footing as the *Roberts* plaintiffs.

II. The Court must reject the Governor's arguments that Maryville Plaintiffs' relief was not court-ordered, material, and enduring, just as it rejected the same arguments in *Roberts*.

The Maryville Plaintiffs demonstrated in their brief that the injunctions obtained from this Court and the district court satisfy the prevailing party requirements for court-ordered, material, and enduring relief. (Br. 20–28.) All of the Governor's arguments to the contrary (Gov. Br. 8–20) were rejected by the Court in *Roberts*, and the Court must similarly reject them here.

A. The injunctions provided the Maryville Plaintiffs court-ordered, material relief.

Like the injunctions in *Roberts*, the injunctions obtained by the Maryville Plaintiffs "changed the legal relationship between the congregants and Governor Beshear because they stopped the Governor from enforcing his orders and allowed the congregants to act in ways that he had previously resisted. That is assuredly a material, court-ordered change." *Roberts*, 2023 WL 2857250, at *2.

The Governor's argument that the injunctions provided no court-ordered, material relief because he voluntarily changed his ways (Gov. Br. 11–15) has no merit.

To be sure, the Governor twice misrepresents that the district court concluded his "voluntary" actions mooted the case below. On page 7, the Governor states, "Importantly, District Court [sic] dismissed Appellants' claims as moot as a result of voluntary state action by the Governor and the General Assembly." Then, on page 13, the Governor goes further: "No party here disputes that the District Court dismissed Appellants' claims because the Governor's actions and the legislative changes to the emergency response statutes mooted the case." But the district court's dismissal order cited only the General Assembly's legislative action as mooting the case, not Governor Beshear's "voluntary" action. (*See* Order, R.68 (dismissing action as moot "[i]n light of the Kentucky Supreme Court's decisions in *Cameron v. Beshear*, No. 2021-SC- 0107-I, 2021 Ky. LEXIS 240 (Ky. Aug. 21, 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" (emphasis added).)

It does not matter, in any event, because the Governor cannot point to any "voluntary" action that makes the relief obtained by the Maryville Plaintiffs' injunctions somehow not court-ordered or material. As the Court explained in

Roberts, rejecting the same argument, "A defendant may not fairly claim that he voluntarily amended his behavior *after* a court enjoins his old ways. An immediately enforceable preliminary injunction compelled him to." 2023 WL 2857250, at *3 (cleaned up).

Nor do the Maryville Plaintiffs' injunctions fail court-ordered materiality because, as the Governor argues, they did not get "all the relief they requested." (Gov. Br. 11.) The Court also rejected this argument in *Roberts*:

> To prevail, however, they need not win every issue, or receive all requested relief. They must simply achieve some of the benefit they sought in bringing suit. The injunctions here certainly gave the [plaintiffs] "some" of what they sought, including the removal of any threat of prosecution.

2023 WL 2857250, at *3 (cleaned up).

B. The injunctions provided the Maryville Plaintiffs enduring relief.

Also contrary to the Governor's arguments (Gov. Br. 15–20), the Maryville Plaintiffs' injunctions were also, like the *Roberts* plaintiffs' injunctions, enduring. The Court made several points on this issue in its *Roberts* opinion, and they are all equally applicable here:

- The Maryville Plaintiffs' injunctions "were not fleeting or hasty opinions that merely preserved the status quo until time allowed for a closer look. Instead, the injunctions, entered after briefing and argument, focused on

the legal reality that the congregants would likely succeed on the merits. We have labeled similar preliminary injunctions as final in all but name." 2023 WL 2857250, at *2 (cleaned up).

- "Time also looked favorably on the [Maryville Plaintiffs'] preliminary injunctions. No later decision reversed or vacated the injunctions." *Id.*, at *3.
- Because the rationale of the Court's *Roberts IPA* was essentially the same as the prior *Maryville IPA*, *see Roberts IPA*, 958 F.3d at 412 ("This is not our first look at the issues. . . . In assessing today's motion for emergency relief, we incorporate some of the reasoning (and language) from our earlier decision."), "the view expressed in the Sixth Circuit injunction informed the analysis of other COVID-19 restrictions, both in this circuit and beyond," and "it guided other cases addressing Governor Beshear's orders," and "[t]he rationale in that case remains the law of the circuit, now indeed the law of the nation." 2023 WL 2857250, at *3.
- "The longevity of the relief points the same way. The Sixth Circuit's injunction held for six months, and the district court's injunction lasted for over a year. During those periods, the [the Maryville Plaintiffs] could attend faith-based gatherings . . . without the threat of enforcement. Those benefits qualify as enduring." *Id.*

- "The injunctions prevented Governor Beshear and other officials from prosecuting [the Maryville Plaintiffs] for violating the mass-gatherings order when they attended church on April 12, 2020.[2] By precluding prosecution, the injunctions materially altered [their] relationship with Kentucky. And that alteration endured because the statute of limitations expired while the injunctions tied Kentucky's hands. [Their] freedom from prosecution irrevocably changed their legal relationship with the Bluegrass State." *Id.*
- "[W]hatever room the Governor had to maneuver, he could not continue to do what he had done before or prosecute the [Maryville Plaintiffs] for what they had already done. The preliminary injunctions limited him in ways that he could not ignore." *Id.*, at *4.

The Court's conclusions in *Roberts* require the same conclusions here. The Maryville Plaintiffs are the prevailing parties because they obtained court-ordered, material, enduring relief.

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[2] The Maryville Plaintiffs argued that the permanent legal bar to enforcement of the Easter Sunday citations, due to the running of the statute of limitations, also made their injunctive relief enduring. (Br. 25–26.) The Governor did not respond to this argument in his brief here. But the Governor did argue in *Roberts* that "relief from prosecution may not support a fee award" because the Governor does not prosecute misdemeanors. 2023 WL 2857250, at *4. The Court rejected the argument there, *see id.*, so it cannot help the Governor here in any event.

III. On remand, the Maryville Plaintiffs are entitled to fees for all work performed in the case.

Although the magistrate's report and recommendation that the district court adopted below did not decide the reasonableness of the Maryville Plaintiffs' fees because of the adverse prevailing party determination (Report & Recommendation, R.87, at 9 n.5; Order, R.92, at 6), the Governor attacked the reasonableness of the Maryville Plaintiffs' fees at the very beginning of his brief here. (Gov. Br. 2.) That gratuitous argument, however, is insufficient to put the issue of reasonableness before the Court.

To be sure, as the Maryville Plaintiffs showed below, the Governor failed to carry his burden to show that any of the Maryville Plaintiffs' fees were unreasonable. (Reply, R.85 at 5–10.) Thus, on remand, the Maryville Plaintiffs are entitled to recover "a fully compensatory fee." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("Normally this will encompass *all hours reasonably expended on the litigation* . . . . [T]he fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." (emphasis added)); *see also Beta Upsilon Chi v. Machen*, 601 F. App'x 917, 917 (11th Cir. 2015) ("[W]ith respect to Appellants' challenge to fees for work performed after the injunction pending appeal was granted, Appellees would be entitled to fees for work reasonably related to sustaining the injunction which had been obtained.").

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's denial of prevailing party attorney's fees and costs and remand to the district court for a fully compensatory award of attorney's fees and costs in accordance with the evidence submitted by Plaintiffs–Appellants, as supplemented by their evidence of attorney's fees and costs on appeal.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 1,845 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Calisto MT font.

DATED this April 20, 2023.

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically using the Court's Electronic Case Filing (ECF) system which will effect service by sending a Notice of Docket Activity (NDA) to all registered attorneys in the case.

DATED this April 20, 2023.

/s/ Roger K. Gannam
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